

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

ROBERT L. BOYER, SR.,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
DEBRA ANN BOYER,	:	
	:	
Appellee	:	No. 1758 MDA 2012

Appeal from the Order Entered September 19, 2012
In the Court of Common Pleas of Lebanon County
Civil Division No(s): 2003-20756

BEFORE: BENDER, SHOGAN, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.:

FILED MAY 23, 2013

Appellant, Robert L. Boyer, Sr. ("Husband"), appeals from an order entered in the Lebanon County Court of Common Pleas, setting forth his alimony obligation to Appellee, Debra Ann Boyer ("Wife").¹ Husband argues the trial court committed several abuses of discretion and errors of law in rendering its decision. We affirm.

The following history is derived from the trial court opinion and supplemental opinion. Husband and Wife married in September of 1976 and have two children, now adults. The parties separated in September of 2003.

* Former Justice specially assigned to the Superior Court.

¹ Wife indicated by letter to the Court that she would not file an appellee's brief.

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Husband filed a divorce complaint on October 3, 2003. Wife filed a counterclaim, seeking alimony and other economic relief. On May 10, 2006 Special Master Keith Kilgore recommended divorce and permanent alimony to Wife in the amount of \$900 per month. The trial court affirmed the recommendation of the Special Master on August 10, 2006, emphasizing Husband's greater earnings and better health and Wife's contribution as a homemaker throughout the relatively lengthy duration of the marriage.

On May 17, 2010, Husband filed a motion seeking modification of the alimony order. On November 17, 2010, Special Master Kilgore reduced Husband's alimony payment to \$600 per month based on the following evidence: (1) Husband's gross income decreased as a result of his inability to earn overtime; (2) he began cohabitating with his girlfriend, with whom he had a child and who earned \$3,000 per month; (3) they purchased a house together; (4) Wife spent all of the equitable distribution money she received, including more than \$100,000 in liquid assets; (5) Wife moved into her daughter's residence; and (6) Wife's medical condition deteriorated to the point she could no longer work on a full-time basis. Both parties filed exceptions that were denied by the trial court.

On February 17, 2012, Husband filed the instant motion to terminate alimony, citing his belief that Wife was cohabitating with another man, his paramour's decrease in income, and an increase in his household expenses. On March 14, 2012, Wife filed a counterclaim seeking an increase in

alimony. On June 22, 2012, the Special Master recommended an increase in alimony to \$775 per month. The Special Master did not find credible Husband's claim as to Wife living with a man. The Master's increase was based on Wife's need to find housing independent of her daughter and mother, her limited income potential, and Husband's increased income. Husband filed timely exceptions on July 5, 2012, raising thirteen arguments.

On September 19, 2012, the trial court reduced Husband's alimony to \$700 per month, noting the Special Master's determination that Husband will gross \$84,000 income during 2012 was "inappropriate and unfair." Trial Ct. Op., 9/19/12, at 12. We note the new \$700 monthly amount is \$100 more than his obligation under the prior alimony order. The trial court issued a detailed opinion in support of its order. Husband filed a timely notice of appeal and a statement of errors complained of on appeal on October 8, 2012, although the trial court did not order the filing of a Pa.R.A.P 1925(b) statement. The court issued a second opinion on October 12, 2012.

The argument section of Husband's brief raises the following issues:²

² The statement of questions involved section in Husband's brief raises twelve issues and spans three pages. However, he has consolidated these issues under five headings in his argument section. Although the statement of questions exceeds two pages and the argument section is not divided into sections corresponding to each question presented, we will not quash the appeal. **See** Pa.R.A.P. 2116(a) (amendment of March 27, 2013 to take effect May 26, 2013); Pa.R.A.P. 2119(a); **Universal Underwriters Ins. v. A. Richard Kacin, Inc.**, 916 A.2d 686, 689 n.6 (Pa. Super. 2007) (declining

1. The trial court [sic] erred and/or abused its [sic] discretion by failing to properly [sic] consider [Husband's] ability to pay alimony to [Wife], considering [Husband's] reduced household income and increased household expenses and the fact that [Husband] has gone into debt to the [sic] pay alimony over the past several years and will be forced to allow his own monthly bills to become delinquent.
2. The trial court erred and/or abused its [sic] discretion by failing to consider whether [Wife's] monthly expenses are reasonable, particularly her claimed housing expense, as she has the ability to live with her parents or daughter free of charge, and as she has not looked at all options.
3. The trial court erred and/or abused its [sic] discretion by failing to recognize alimony as a secondary remedy, and despite the fact that [Wife], who claims to be disabled, could qualify for supplemental security income ["SSI"] benefits in the amount of \$726.00 per month, and may qualify for other benefits to subsidize her living expenses, including housing, the trial court failed to take into account that [Wife] has not availed herself of these benefits, which she should be required to do before seeking alimony from [Husband].
4. The trial court erred and/or abused its [sic] discretion by failing to properly assign [Wife] with an increased earning capacity, due to her failure to look for any work or improve her financial position, and then failed to properly consider the earning capacity she was assigned by the Special Master and the court, with some requirement moving forward that [Wife] be required to provide regular and ongoing proof to the court and [Husband] of her efforts to find employment moving forward.

to quash appeal despite violations of Pa.R.A.P. 2116(a) and Pa.R.A.P. 2119(a) where brief was not so defective as to preclude effective appellate review).

5. The trial court erred and/or abused it's [sic] discretion by failing to exclude Exhibit 15 from evidence and consideration by the court, as it does not meet the medical records exception to the hearsay rule, and further, as it does not clearly state the work restrictions that would be placed upon [Wife] in any event, and whether or not she would still be able to work in a part-time capacity.

Husband's Brief at 26, 32, 37, 42, 45 (capitalization omitted).

When reviewing an order of alimony, this Court has stated:

Our standard of review regarding questions pertaining to the award of alimony is whether the trial court abused its discretion. We previously have explained that [t]he purpose of alimony is not to reward one party and to punish the other, but rather to ensure that the reasonable needs of the person who is unable to support himself or herself through appropriate employment, are met. Alimony is based upon reasonable needs in accordance with the lifestyle and standard of living established by the parties during the marriage, as well as the payor's ability to pay. Moreover, [a]limony following a divorce is a secondary remedy and is available only where economic justice and the reasonable needs of the parties cannot be achieved by way of an equitable distribution award and development of an appropriate employable skill.

Teodorski v. Teodorski, 857 A.2d 194, 200 (Pa. Super. 2004) (citation and quotation marks omitted).

Moreover,

[t]he role of an appellate court in reviewing alimony orders is limited; we review only to determine whether there has been an error of law or abuse of discretion by the trial court. Absent an abuse of discretion or insufficient evidence to sustain the support order, this Court will not interfere with the broad discretion afforded the trial court.

Smith v. Smith, 904 A.2d 15, 20 (Pa. Super. 2006) (citation omitted).

Pursuant to the Divorce Code, “in determining the nature, amount, duration and manner of payment of alimony, the court must consider numerous factors” set forth in 23 Pa.C.S. § 3701. **Anderson v. Anderson**, 822 A.2d 824, 830 (Pa. Super. 2003) (citations omitted). That statute provides:

(a) General rule.—Where a divorce decree has been entered, the court may allow alimony, as it deems reasonable, to either party only if it finds that alimony is necessary.

(b) Factors relevant.—In determining whether alimony is necessary and in determining the nature, amount, duration and manner of payment of alimony, the court shall consider all relevant factors, including:

(1) The relative earnings and earning capacities of the parties.

(2) The ages and the physical, mental and emotional conditions of the parties.

(3) The sources of income of both parties, including, but not limited to, medical, retirement, insurance or other benefits.

(4) The expectancies and inheritances of the parties.

(5) The duration of the marriage.

(6) The contribution by one party to the education, training or increased earning power of the other party.

(7) The extent to which the earning power, expenses or financial obligations of a party will be affected by reason of serving as the custodian of a minor child.

(8) The standard of living of the parties established during the marriage.

(9) The relative education of the parties and the time necessary to acquire sufficient education or training to enable the party seeking alimony to find appropriate employment.

(10) The relative assets and liabilities of the parties.

(11) The property brought to the marriage by either party.

(12) The contribution of a spouse as homemaker.

(13) The relative needs of the parties.

(14) The marital misconduct of either of the parties during the marriage. The marital misconduct of either of the parties from the date of final separation shall not be considered by the court in its determinations relative to alimony except that the court shall consider the abuse of one party by the other party. As used in this paragraph, "abuse" shall have the meaning given to it under section 6102 (relating to definitions).

(15) The Federal, State and local tax ramifications of the alimony award.

(16) Whether the party seeking alimony lacks sufficient property, including, but not limited to, property distributed under Chapter 35 (relating to property rights), to provide for the party's reasonable needs.

(17) Whether the party seeking alimony is incapable of self-support through appropriate employment.

(c) Duration.—The court in ordering alimony shall determine the duration of the order, which may be for a

definite or an indefinite period of time which is reasonable under the circumstances.

23 Pa.C.S. § 3701 (a)-(c). “An order entered pursuant to this section is subject to further order of the court upon changed circumstances of either party of a substantial and continuing nature whereupon the order may be modified, suspended, terminated or reinstated or a new order made.” 23 Pa.C.S. § 3701(e).

One purposes of the Divorce Code is

‘to effectuate economic justice between the **parties**’ [23 Pa.C.S. § 3102(a)(6)³] Just as spousal support is for the purpose of preventing a dependent spouse from becoming a public charge, so should permanent alimony be viewed in a similar light. The purpose of social welfare benefits is to subsidize whatever other resources a recipient may have or may be entitled to and should be a last resort, not a first one. We conclude that **the necessity and amount of permanent alimony should be determined without regard to whether the dependent spouse would be entitled to public assistance or other social welfare benefits absent the payment of alimony.**

Remick v. Remick, 456 A.2d 163, 168 (Pa. Super. 1983) (some citations and parenthetical omitted) (latter emphasis added).

In his first issue, Husband argues the trial court erred and abused its discretion in failing to calculate properly his ability to pay the alimony award. He contends “[t]he Trial Court did not calculate [his] net monthly household

³ **Remick** referred to 23 P.S. § 102(a)(6), which has since been renumbered as 23 Pa.C.S. § 3102(a)(6).

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income or expenses” and “did not give weight to [his] paramour’s income and expense issues . . . despite the fact that [he] and his paramour have established a household together, have a child together, and clearly have shared expenses for a number of years.” Husband’s Brief at 27. Husband contends that both he and his paramour anticipate a decrease in income, and his paramour has received notice that she will be laid off. **Id.** at 29. Finally, Husband argues that “in the near future . . . he will be forced to choose between paying his monthly bills and paying Wife her alimony.” **Id.** at 31. We find no relief is due.

The trial court determined that because “Husband earns well in excess of \$60,000 annually, the amount of [its] alimony award was well within [his] ability to pay.” Trial Ct. Op., 10/12/12, at 2. Additionally, the trial court did consider Husband’s income and the fact that his expenses were shared with his paramour, but did not find that his income was “reduced.” **Id.** Rather, the court “determined that Husband’s income during early 2012 actually exceeded his income in 2010.” **Id.** Further, his “paramour was only indirectly and peripherally involved in [its] analysis, as Husband’s current paramour does not owe any duty of support to [Wife].” **Id.** Finally, the trial court reasoned, “permanent alimony paid by Husband to Wife does not offend our sense of justice given the duration of the parties’ marriage, their respective health, and their starkly different economic circumstances.” Trial Ct. Op. 9/19/12, at 9.

We find the trial court properly evaluated the alimony factors set forth in 23 Pa.C.S. § 3701(b). Among those factors, the trial court considered Husband's ability to pay, his household income and expenses, the ages and the physical, mental and emotional conditions of the parties, and the duration of the marriage to ensure that the reasonable needs of Wife, who is partially disabled, are met. **See** 23 Pa.C.S. § 3701(b); **Teodorski**, 857 A.2d at 200.

In his second issue, Husband makes two arguments in support of this claim that Wife's purported expenses are not reasonable. First, he complains Wife "has not sought any fixed rent housing, low rent housing, public subsidized housing, [or] senior living housing . . . and has only looked at two homes in her parent's [sic] immediate neighborhood" Husband's Brief at 33. Second, he avers "the main reason to award Wife alimony in the first place was to compensate [her] for her COBRA medical insurance premiums and out-of-pocket medical expenses[; however,] Wife no longer pays COBRA insurance premiums, as she is covered by Gateway health insurance and her out of pocket medical expenses have been greatly reduced." **Id.** at 35. Therefore, Husband suggests, "the original basis for awarding Wife alimony no longer exists, as the COBRA insurance premiums, which were \$308.38 per month, have been eliminated, and the out-of-pocket costs have been reduced from \$358.98 to \$182.41 per month." **Id.** at 36. We find no relief is due.

The trial court determined that Wife's decision to procure an apartment for \$500 per month was reasonable and constitutes an additional need that she did not have at the last hearing. The trial court reasoned that Wife can no longer live with her daughter and her three small children because "Wife's grandchildren have grown older to the point where it was no longer practical for her to share a bedroom with them. Wife has attempted to live with her own parents but they are smokers and second-hand smoke would adversely affect her from a medical standpoint." Trial Ct. Op., 9/19/12, at 10. Second, there is no indication that the trial court continued to consider Wife's prior COBRA expenses.

We find the trial court did not abuse its discretion in determining Wife's decision to procure an apartment for \$500 per month was reasonable. **See Smith**, 904 A.2d at 20. While the Special Master considered Wife's COBRA payment in his initial alimony recommendation in 2006, there is no indication that the Special Master or trial court continued to calculate the prior COBRA premiums as a present expense.⁴

⁴ In fact, when asked about her medical insurance provider, Wife responded:

[Husband's Counsel]: How are your medical expenses being paid? What kind of medical insurance do you have?

[Wife]: I have Gateway.

N.T. Special Master Hr'g., 6/22/12, at 65-66.

In his third issue, Husband argues that trial court failed to consider properly alimony as a secondary remedy and take into account Wife's ability to collect government benefits. He posits that "if [his] alimony were to be reduced to approximately \$50.00 per month . . . [Wife] would receive \$726.00 per month from social security" Husband's Brief at 37. He suggests the trial court failed to take into consideration the myriad government benefits—not for legal reasons—but due to "moral, philosophical and political opposition." *Id.* at 39. We find no relief is due.

The trial court, referencing its earlier decision on February, 14, 2011, adopted the following argument in response to Husband's third issue:

Without question [Husband and Wife's] collective finances would be improved if we were to manipulate alimony in order to render Wife eligible for additional government benefits. However, those additional benefits would have to be paid by someone, and that "someone" is the taxpayers of today and tomorrow. This would be a result that we are just not willing to sanction.

* * *

[Husband's] duty transcends and takes precedence over the "duty" of taxpayers to provide financial benefits for [Wife].

Trial Ct. Op., 10/12/12, at 3 (incorporating Trial Ct. Op., 2/14/11, at 7-8).

Pursuant to *Remick*, Husband's argument that his alimony obligation should be reduced or terminated because Wife may be eligible for government assistance is without merit. *See Remick*, 456 A.2d at 168. Further, to the extent that Husband argues alimony is secondary to

government benefits, this Court has stated that alimony provides a secondary remedy where **equitable distribution** alone cannot achieve economic justice and meet the parties' reasonable needs. **Teodorski**, 857 A.2d at 200.

In his fourth issue, Husband complains the trial court "offer[ed] no discussion or analysis of Wife's earning capacity or ability to work at this time" Husband's Brief at 43. He also asserts the trial court should have "required Wife to apply for work within her earning capacity . . . or at the very least, take Wife's earning capacity into account in determining whether or not Wife would even require alimony in the first instance." **Id.** at 44. We find no relief is due.

The trial court noted, "The Special Master afforded Wife with an earning capacity and we adopted the Special Master's decision in this regard. Had we not afforded Wife with an earning capacity, our award of alimony would have been higher." Trial Ct. Op., 10/12/12, at 3-4 (footnote omitted). The trial court considered Wife's earning potential in calculating alimony, despite Husband's claim to the contrary. **See id.** at 4 n.2. Specifically, the court noted, "Wife is still limited to income potential of \$7.25 per hour of between 20 and 30 hours per week in calculating the amount of alimony."

Id. Finally, the trial court observed:

Husband's argument regarding lack of proof of Wife's disability to be disingenuous. For the past three years, Husband has argued that [the court] should reduce or terminate Wife's alimony based on the premise that she is

disabled and should be eligible for Social Security and other governmental benefits. **It is logically inconsistent for Husband to argue that Wife is disabled for purposes of obtaining governmental benefits but not disabled for purposes of receiving alimony.**

Id. at 4 (emphasis added).

In his fifth issue, Husband argues that Exhibit 15, an April 2, 2012 letter from Wife's physician's assistant that discussed Wife's inability to work, was inadmissible hearsay and should not have been considered by the court. Husband's Brief at 45-48.

The trial court observed:

[T]he DRM^[5] did not view Wife's deteriorating health as a significant factor, nor did he declare Wife to be medically disabled.²

² Because Wife's medical condition and resulting partial disability were determined in 2010, and because neither the Special Master nor this [c]ourt have declared Wife to be totally disabled, and because we declare today that Wife has been afforded an earning capacity, we find it unnecessary to address Husband's argument that insufficient evidence exists to support Wife's claim of disability.

Trial Ct. Op., 9/19/12, at 10 & n.2.

Moreover, the trial court reasoned

the Special Master determined that Wife was partially disabled predominately due to prior alimony hearings that were never appealed by Husband [W]e relied upon the Special Master's finding that **Wife's medical condition and partial disability had not material**

⁵ The trial court employs the acronym "DRM" without providing an explanation. We presume the use of "DRM" refers to the Special Master.

changed since prior hearings. It would be unfair to permit Husband to challenge prior decisions regarding Wife's medical disability within the context of this appeal, especially since Wife's medical condition had not materially changed and was not considered as a significant factor in our decision to increase Husband's alimony by \$100.00 per month.

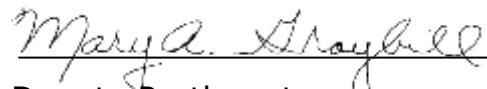
Trial Ct. Op., 12/12/12, at 4 (footnote omitted).

Although Husband raises evidentiary issues regarding Exhibit 15, his argument ignores the trial court's finding that Wife's medical condition had not materially changed and was not considered as a significant factor in its decision to increase Husband's alimony. **See id.** The trial court properly considered the alimony factors set forth in the Divorce Code and applied them to the facts presented. **See** 23 Pa.C.S. § 3701 (a)-(c).

We cannot conclude that these findings were an error of law or abuse of discretion; thus, the evidence presented is sufficient to sustain the alimony order. **See Smith**, 904 A.2d at 20.

Order affirmed.

Judgment Entered.


Deputy Prothonotary

Date: 5/23/2013