

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

ROGER C. WIEGAND, JR.,

Appellant

v.

MARTHA A. WIEGAND,

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 467 WDA 2015

Appeal from the Order Entered February 19, 2015
In the Court of Common Pleas of Allegheny County
Civil Division at No(s): Case No. FD 13-006450-008

BEFORE: BENDER, P.J.E., SHOGAN, and MUSMANN, JJ.

MEMORANDUM BY SHOGAN, J.:

FILED FEBRUARY 02, 2016

Appellant, Roger C. Wiegand, Jr. ("Husband"), appeals from the equitable distribution order entered on February 19, 2015, in the Allegheny County Court of Common Pleas. We affirm.

The relevant facts of this case were set forth by the trial court as follows:

At first blush, the issues presented in this appeal appear very complicated because of the nature of the gifts made and their significant value. Actually, they are quite simple, and the disposition of this case rests almost solely on my determination of the credibility of the witnesses who appeared before me.

Background

Husband and Wife, Martha [A. Wiegand] ("Wife") married in October of 2004 and separated in October of 2012. They have two children together, a 7 year old daughter and a son, 5[.]¹ Wife exercises primary custody of the two children in the marital

home. Husband, who now lives in Colorado, exercises custody on a very limited basis.

¹ Husband has a daughter, born July 1, 2014, with his fiancée with whom he lives in Boulder[,] Colorado[.]

Both Parties presented appraisals and expert testimony regarding the value of the marital home. I found Wife's appraiser, Charles Weisberg, more credible than Husband's expert and accepted his estimate of the property's value at \$880,000.00.

Wife comes from fairly modest means. Husband, on the other hand, comes from a very wealthy family. Much of the family wealth comes from oil and gas leases known as the "PC Exploration Limited Partnerships." Husband's parents gifted a number of these limited partnership interests, called "units" during the marriage[.]² The gifts of the units were accompanied by hand-written letters from Husband's parents addressed to both Husband and Wife, and written by Husband's Father, which included personal messages to both of them.

² Husband was gifted a number of units prior to the marriage which the Parties stipulate are non-marital.

The marital nature of these units was contested, with Wife asserting they were marital property and Husband claiming the gifts were only to him and therefore non-marital. Husband also asserted that the units which the Parties purchased during the marriage were purchased using only funds generated by the gifted units and should therefore also be non-marital. Wife testified they were purchased using funds from the units, as well as her and Husband's employment income.

In addition to the gifts of the partnership interests, on July 8, 2011[,] Husband's Father made a cash gift of \$1.5 million, and on October 11, 2012 a second gift of \$1.2 million. Again, these gifts were accompanied by personal letters, addressed to both Parties. The marital nature of these gifts was also contested.

I found the gifts made by Husband's family were to the Parties jointly. Husband's father (hereinafter "Father") testified

on behalf of Husband. He testified that his donative intent was for all of the gifts to be for Husband, only. Because I found Husband's Father's testimony not to be credible and found it contrary to all other evidence presented regarding the purpose of the gifts, I discounted it. I found the gifts to be marital.

I distributed the estate on a roughly 50/50 basis. This appeal followed.³

³ Husband also filed for supersedeas. As the funds in Husband's brokerage account were frozen by previous Order, I granted the supersedeas only as to the equalization payment to Wife of approximately \$925,000.00[.]

Trial Court Opinion, 6/17/15, at 1-4.

On appeal, Husband raises the following issues for this Court's consideration:

1. Did the Trial Court err and/or abuse its discretion in finding that the two (2) cash gifts from Husband's family totaling \$2.7 Million were marital property, as opposed to Husband's non-marital property acquired by gift from his parents?

a. Did the Trial Court err and/or abuse its discretion in failing to consider and give proper credit to Husband in its equitable distribution order for his payoff of the second mortgage on the parties' marital residence in the amount of \$247,658.39 on or about July 19, 2011 from the gifted funds referenced above?

b. Did the Trial Court err and/or abuse its discretion in failing to consider and give proper credit to Husband in its equitable distribution order for his payment in the amount of \$10,140 for the parties' jointly-filed Federal Income Tax return filed subsequent to the parties' separation, from the gifted funds referenced above?

2. Did the Trial Court err and/or abuse its discretion in finding that the assignments of limited partnership interests in the

1997, 1998 and 1999 PC Exploration Limited Partnerships were marital property, as opposed to Husband's non-marital property acquired by gift from his father?

a. Did the Trial Court err and/or abuse its discretion in finding that the post-separation distributions from the 1997, 1998 and 1999 PC Exploration Limited Partnerships were marital property, as opposed to Husband's non-marital property?

3. Did the Trial Court err in adopting the appraisal value of \$880,000 for the parties' marital residence as found by Wife's expert, Charles Weisburg?¹

4. **IN THE ALTERNATIVE:** Did the Trial Court err and/or abuse its discretion in failing to award a skewed distribution of the marital estate in favor of Husband - and in particular, an appropriately skewed distribution to Husband of the \$2.7 Million in cash gifts, as permitted by 23 Pa.C.S.A. §3502(a) in recognition of the source of these funds, i.e. Husband's parents, which contribution significantly enhanced the value of the marital estate?

a. In failing to order a skewed distribution in favor of Husband, did the Trial Court err and/or abuse its discretion in its analysis and consideration of the equitable distribution factors set forth in 23 Pa.C.S.A. §3502(a)?

Husband's Brief at 22-23.

We apply the following standard in reviewing an equitable distribution order:

A trial court has broad discretion when fashioning an award of equitable distribution. Our standard of review when assessing the propriety of an order effectuating the

¹ Husband has opted not to pursue his third issue on appeal. Accordingly, the issue is waived, and we need not address it further. Husband's Brief at 23.

equitable distribution of marital property is whether the trial court abused its discretion by a misapplication of the law or failure to follow proper legal procedure. We do not lightly find an abuse of discretion, which requires a showing of clear and convincing evidence. This Court will not find an abuse of discretion unless the law has been overridden or misapplied or the judgment exercised was manifestly unreasonable, or the result of partiality, prejudice, bias, or ill will, as shown by the evidence in the certified record. In determining the propriety of an equitable distribution award, courts must consider the distribution scheme as a whole. We measure the circumstances of the case against the objective of effectuating economic justice between the parties and achieving a just determination of their property rights.

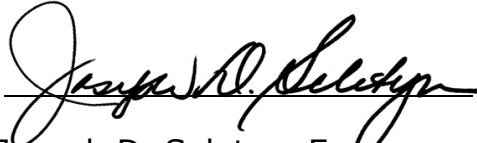
Childress v. Bogosian, 12 A.3d 448, 455 (Pa. Super. 2011) (internal citations and quotation marks omitted). Moreover, it is within the discretion of the trial court to weigh the evidence and make credibility determinations, and this Court will not reverse those determinations where they are supported by the evidence. ***Id.*** (citation omitted).

We have reviewed the record, the briefs of the parties, and the applicable legal authority, and we discern no abuse of discretion or error of law in this matter. We agree with the trial court that the issue at the heart of this matter is whether gifts from Husband's family were made to both parties, making them marital property, or to Husband alone, placing them outside of the marital estate. Furthermore, we agree that a determination of this issue rests primarily on the credibility of the witnesses. The trial court addressed Husband's claims of error and disposed of them in its well-

reasoned opinion. Accordingly, we affirm the February 19, 2015 order on the basis of the trial court's opinion.²

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style with a horizontal line underneath it.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 2/2/2016

² The parties are hereby directed to attach a copy of the trial court's June 17, 2015 opinion in the event of further proceedings in this matter.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
FAMILY DIVISION

Roger C. Wiegand, Jr.,

Plaintiff,

v.

Martha A. Wiegand,

Defendant,

467 WDA 2015

No: FD- 13-006450

Judge Cathleen Bubash

June 17, 2015

OPINION

Husband Roger Wiegand, Jr. ("Husband") appeals my February 18, 2015 Equitable Distribution Order. Husband finds fault with my determination that gifts made by his parents during the marriage were marital property. He also complains that I accepted Wife's appraiser's valuation of the marital residence. Alternatively, he posits that I should have skewed my distribution in his favor due to the increase in the value of the marital estate attributable to his parents' gifts. For the reasons set forth below, my decision should be affirmed.

At first blush, the issues presented in this appeal appear very complicated because of the nature of the gifts made and their significant value. Actually, they are quite simple, and the disposition of this case rests almost solely on my determination of the credibility of the witnesses who appeared before me.

Background

Husband and Wife, Martha ("Wife") married in October of 2004 and separated in October of 2012. They have two children together, a 7 year old

daughter and a son, 5¹. Wife exercises primary custody of the two children in the marital home. Husband, who now lives in Colorado, exercises custody on a very limited basis.

Both Parties presented appraisals and expert testimony regarding the value of the marital home. I found Wife's appraiser, Charles Weisberg, more credible than Husband's expert and accepted his estimate of the property's value at \$880,000.00.

Wife comes from fairly modest means. Husband, on the other hand, comes from a very wealthy family. Much of the family wealth comes from oil and gas leases known as the "PC Exploration Limited Partnerships." Husband's parents gifted a number of these limited partnership interests, called "units" during the marriage². The gifts of the units were accompanied by hand-written letters from Husband's parents addressed to both Husband and Wife, and written by Husband's Father, which included personal messages to both of them.

The marital nature of these units was contested, with Wife asserting they were marital property and Husband claiming the gifts were only to him and therefore non-marital. Husband also asserted that the units which the Parties purchased during the marriage were purchased using only funds generated by the gifted units and should therefore also be non-marital. Wife testified they were purchased using funds from the units, as well as her and Husband's employment income.

In addition to the gifts of the partnership interests, on July 8, 2011 Husband's Father made a cash gift of \$1.5 million, and on October 11, 2012 a second gift of \$1.2 million. Again, these gifts were accompanied by personal letters, addressed to both Parties. The marital nature of these gifts was also contested.

I found the gifts made by Husband's family were to the Parties jointly. Husband's father (hereinafter "Father") testified on behalf of Husband. He

¹ Husband has a daughter, born July 1, 2014, with his fiancée with whom he lives in Boulder Colorado

² Husband was gifted a number of units prior to the marriage which the Parties stipulate are non-marital.

testified that his donative intent was for all of the gifts to be for Husband, only. Because I found Husband's Father's testimony not to be credible and found it contrary to all other evidence presented regarding the purpose of the gifts, I discounted it. I found the gifts to be marital.

I distributed the estate on a roughly 50/50 basis. This appeal followed.³

Discussion

In Husband's 1925(b) Statement, he argues 1) that I erred in finding the major cash gifts to be marital property, consequently not giving Husband credit for marital debt paid from those funds; 2) that I erred in finding the units of 1997, 1998 and 1998 partnership interests to be marital property and consequently finding distributions from those units to be marital as well; and 3) that I erred in adopting Wife's appraisal value of the marital home. I will address these issues in reverse order.

Husband also sets forth an "Issue in the Alternative." There he argues that I erred in my analysis of the equitable distribution factors of 23 Pa. CSA §3502(a) by not skewing distribution in his favor since the gifts from his family were a contribution which "significantly enhanced the value of the marital estate." I will address this separately.

1. Value of the Marital Home:

Both Parties presented appraisal reports and expert testimony at trial. Husband's appraiser, Robert Gelman, valued the marital home at \$1.1 million dollars. Wife's appraiser valued the home at \$880,000.00. I found Wife's appraiser, Charles Weisberg, more credible for a number of reasons.

The house was purchased by the Parties four years prior to trial for \$829,000.00 and no substantial improvements were made which would suggest

³ Husband also filed for supersedeas. As the funds in Husband's brokerage account were frozen by previous Order I granted the supersedeas only as to the equalization payment to Wife of approximately \$925,000.00

the increase in value found by Gelman. The comparables used by Gelman were substantially larger than the marital home with more bedrooms. (10/27/2014 TR. p. 221-223). Wife's appraiser, on the other hand, acknowledged that larger homes in the area would have higher sales prices. (10/29/2014 TR. p.14-15). Husband's appraiser initially measured the home incorrectly, adding an additional 1800 square feet of living space. Upon discovering his error, he reduced the measurements, but not the value. (10/27/2014 TR. p. 216). Wife's appraiser was more cognizant of the undesirable nature of the dated kitchen and bathrooms which were clearly visible in photos on the reports. He also provided a more detailed and reasonable explanation of how he valued the below grade space in the home than did Gelman. All in all, I found Wife's appraiser's testimony more credible than Husband's appraiser.

Accordingly, my decision to accept the valuation of Wife's expert should not be disturbed.

2. Gifts from Husband's Family

The two remaining issues are both about gifts made by Husband's parents during the marriage - units of the family oil and gas partnership interests, and two large cash gifts. The controlling factor in determining whether or not the gifts were marital, is the donative intent of Husband's Father. The gifts were made by Husband's Father and Mother, but the amount and nature of the gifts and the method of delivery was clearly decided and directed by his Father.

The well settled law essential to the making of a valid gift are donative intent on the part of the donor and delivery of the subject matter to the donee. **Wagner v Wagner**, 353 A.2d 819 (PA. 1976), citations omitted. Here, it is clear that Father made gifts and delivered them; the only real question was what was his donative intent - was it to make a gift only to his son, or to the Parties jointly.

Since Father denied that the gifts were made to Wife and Husband jointly, it was Wife's burden to prove by clear, precise and convincing evidence that the gifts were also meant for her. "Once prima facie evidence of a gift is

established, a presumption of validity arises, and the burden shifts to the contestant to rebut this presumption by clear precise and convincing evidence." *Hera v McCormick*, 625 A.2d 682 (Pa.Super.1993).

Wife's testimony regarding these gifts was clear, precise, and consistent. She remembered the instances of the gifts being made with clarity. This type of generous giving was new and remarkable to her and, therefore, her having vivid recollections of the circumstances was credible. Her testimony regarding being the joint recipient of the gifts fit the very definition of "clear and convincing evidence" which has been set forth as follows:

"the witness must be found to be credible, that the facts to which they testify are distinctly remembered and the details thereof narrated exactly and in due order, and that their testimony is so clear, weighty, and convincing as to enable the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue" In *re Estate of Fickert*, 337 A.2d 592,594 (Pa. 1975).

It then became Husband's burden to rebut the presumption established by Wife's prima facie evidence of a joint gift. I found he did not meet this burden. Husband presented his Father's testimony to demonstrate his donative intent in making the gifts. As will be noted below, Father's testimony was contrary to every other outward manifestation of the purpose of the gifts. It was contradictory to his statements, written and oral, and his behavior, at the time the gifts were made and afterwards. He was clearly uncomfortable on the stand, and, in my judgment, did not testify credibly. I felt he was re-scripting the past to protect the financial interests of his son.

a. Oil and Gas Partnerships:

Father testified that the gifts of partnership units given during the marriage were to Husband alone and hence not marital property. For many reasons, I found this testimony not to be credible.

The units were historically given at Christmas time. Each time a gift of units was given, it was accompanied by a hand-written letter addressed to "R.J. and

Martha" and included personal familial messages to both Husband and Wife. The letters described the gifts and included messages to both Parties such as: "I love you both so much and look forward to many great times together." (10/28/2014 TR. p. 207; 10/27/2014 TR. p. 45-46). The letters were handed to Husband with Wife present. The letters included instructional messages to both Parties, such as directions to "keep the stock within your family." (10/27/2014 TR. p. 117; 12/11/2014 TR. p. 6-10, 16-21). Father also verbally told the couple how to treat the stock and included Wife in those discussions. (12/11/2014 TR. p. 23)

Husband's Father is a highly educated, competent lawyer with a sophisticated and detailed understanding of the tax ramifications of gift transactions. Father testified that he was aware of tax laws, including gift tax requirements and how to protect himself under the law. He referred to the IRS in some of the gift letters. Wife presented the expert testimony of Brandon Otis from BDO Consulting who testified that even using Father's method of discounting the value of the stock gifts due to their restricted nature, the only way the gifts of the units were arguably exempt from gift tax was for the gifts to be from both Mother and Father to both Husband and Wife as was set forth in the letters accompanying the gifts. (12/11/2014 TR. p. 207-218).

By any other interpretation, if given to only one donee as Father testified, these gifts were substantially over the exemption from gift tax. (12/11/2014 TR. p. 268). If the gifts were to Husband alone, they would have required the filing of gift tax returns.

It was evident that Father had purposely structured the gifts of the units so that no gift tax obligation would be triggered, and indeed, he filed no gift tax returns for the years in question. Father went to great lengths to protect these gifts from being subject to tax and the only way to do so was to make the gift to both Husband and Wife. Yet he testified that, although he was aware that he could double the amount of the gifts made by making them from he and his wife rather than just he alone, it "never crossed his mind" that he could double the gift yet again by doubling the recipients. I did not find this testimony credible.

It was not only Father's words, but also his actions when making the gifts that led me to find them marital. When Wife expressly thanked Husband's parents for the gifts, she was not corrected or told these gifts were for Husband alone. Additionally, Father made a point of discussing how the partnership interests worked with Wife and how she could use the proceeds to purchase more units. (10/27/2014 TR. p. 75-76). I do not find it conceivable that Father would tell Wife how to manage a gift if that gift was meant only for Husband.

What Husband's Father attempted to get this Court to believe through his testimony was belied by both his purposeful affirmative actions and the words of the letters he wrote to accompany the gifts. I found the witness's testimony was contrived to best benefit his son, rather than being forthright. Father's testimony that the gifts of the partnership units were for Husband alone was simply not so "clear and convincing" as to rebut the presumption that a joint gift was made. I came to the conclusion that Father was, instead, attempting to re-write history due to the Parties' divorce.

That the stock certificates were titled to Husband alone did not convince me that the gifts were not marital. The Parties themselves always treated the units and the income generated from them as marital property. They discussed jointly how to use the money, when to purchase other units, when to borrow money from Father to buy more units. (12/11/2014 TR. p. 24-27). While income generated from the units was deposited into Husband's titled account, those funds were moved and commingled with other marital funds regularly and income generated from Husband's occasional golf endeavors was also deposited in that same account.

This family behavior, both of Husband and of Father, viewed in combination with the fact that Husband's Father was acutely aware of the tax ramifications of each of these gifts, convinced me that these gifts were always meant to be to both Parties, as were the subsequent proceeds realized from those gifts.

b. Large Cash Gifts:

Father also made two cash gifts of over a million dollars each. He made the gifts to his family in contemplation of what he believed was the likely elimination of the lifetime exclusion in the tax code. (10/27/2014 TR. p. 19-20).

As were the partnership gifts, the two large cash gifts were accompanied by letters addressed to both Husband and Wife. (10/28/2014 TR. p. 223-224). That joint salutation, alone, is not what caused me to find these gifts to be marital. Father, prior to delivery of the gifts, wrote letters to all of his children and all of their spouses announcing the impending sale of the family business, the revision of his estate plan, and how that would bring great things "to all of you". Upon delivery of the gifts and again afterwards, Father wrote long, personal, and specific letters directing Wife, as well as Husband, as to how he wanted the money to be used for "your family." (10/29/2014 TR. p. 190). The letters included passages directed to each of the Parties.

Again, I did not find it credible that a donor would instruct someone how to utilize funds which were not gifted to them. On direct examination, Wife was asked why it was her understanding that the gift was a joint gift. Her answer coincides with my thinking on the matter:

"If someone wanted to give someone a separate gift, they would not write a letter to people jointly, and come to their home when they're both home, and make a production out of giving it to them, and tell them to save the money for their family for the future ... Mr. Weigand was very specific about what he meant to do; and he would have - this is not a way that he would have given a separate gift to R.J. The letter says to both of us. There is nothing indicating otherwise; and periodically, every Christmas, he gave us gifts that included me. I, also, am aware of instances that R.J.'s dad gave R.J. separate gifts, such as a car, and I was not involved at all, never saw any of the paperwork. A smart person who was making a gift to one person does not do it in this fashion." (12/11/2014 TR. p. 78-79).

As before, Wife's expressions of thanks were accepted and at no time was she told these gifts were for Husband alone. Father's testimony that the letters were for information only and that the spouses were included as the "equivalent of a CC on a letter" was not credible when viewed in context with all other evidence, including Father's outward behavior toward Wife. (10/27/2014 TR: p. 30).

Because I found Father's testimony regarding the gifting of the partnership units to be contrived, I found him to be an untrustworthy witness, and, accordingly, discredited his testimony regarding the two large cash gifts as well. The only way to determine Father's donative intent was to look at everything but his testimony, because I simply did not believe it. All the other evidence – the letters with their specific messages to both Parties, the tax considerations, the relationship of the Parties and their behavior regarding the gifts, point toward a joint gift.

As for Husband's complaint that he was not given credit for the payment of marital debt with the proceeds of the partnership units and the cash gifts, since I found both to be marital, the finding was appropriate. Payment of the marital debt with marital funds benefits both Parties equally and no credit is warranted.

c. Husband's Alternate Argument

Husband presents an "Issue in the Alternative". He states:

"The court erred in failing to award a skewed distribution of the marital estate in favor of Husband- and in particular, an appropriately skewed distribution to Husband of the \$2.7 Million in cash gifts, as permitted by 23 Pa. C.S.A. §3502(a) – in recognition of the source of these funds, i.e. Husband's parents, and which contribution significantly enhanced the value of the marital estate."

Husband argues, that in failing to skew the distribution of the estate, I erred in my analysis of the equitable distribution factors. After consideration of the evidence before me, and the factors set forth in the Divorce Code at 23

Pa.C.S.A. §3502, regarding equitable distribution, I determined a roughly 50/50 split of the marital estate to be appropriate. This does not mean that the value of the gifts to the marital estate did not factor into my analysis.

I did find that the gifts greatly contributed to the size of the marital estate. But I also found factors 3, 5, 8, and 11 strongly favored Wife, for the reasons set forth in my Order. Most importantly of these factors, is that since Husband has chosen to move thousands of miles from those children, Wife is and will be the primary custodian of the Parties' two very young children for many years, until the youngest child reaches the age of 18.

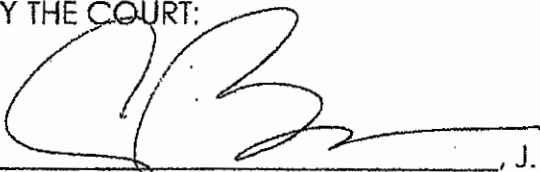
Contrary to Husband's assertion in his alternative argument, I did consider Husband's family's financial contribution to the marriage, and Husband benefited from that consideration in my analysis which resulted in a 50/50 distribution. In fact, were it not for the increase in the value of the marital estate resulting from gifts from his parents to the Parties, I would have skewed the estate significantly in Wife's favor as the other primary factors so strongly favored her..

Conclusion

My findings concerning the value and marital nature of the Parties' property was based squarely on the testimony and evidence presented and my reasonable findings regarding the credibility of the witnesses. My decision on how to distribute the marital estate was made after a thorough and reasoned review of the equitable distribution factors of 23 Pa.C.S.A. §3502. Accordingly, it should not be disturbed.

Date: 6/17/15

BY THE COURT:



Cathleen Bubash