

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

AARON B. KEMNITZ	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
MICHELLE A. KEMNITZ	:	No. 1568 MDA 2020

Appeal from the Order Entered November 2, 2020  
 In the Court of Common Pleas of Clinton County Civil Division at No(s):  
 2019-00142

BEFORE: PANELLA, P.J., MURRAY, J., and STEVENS, P.J.E.\*

MEMORANDUM BY PANELLA, P.J.: **FILED APRIL 08, 2022**

Aaron Kemnitz (“Husband”) appeals from the Order of November 2, 2020, dividing the marital estate following the divorce decree entered October 7, 2020. He claims the trial court erred and abused its discretion by giving Michelle Kemnitz (“Wife”) a net award of \$33,164.78 plus alimony and 70% of Husband’s pension while giving him a net award of -\$43,626.86. We conclude the trial court erred in its findings of fact and therefore did not consider the factors enumerated in 23 Pa.C.S.A. § 3502(a) equally for both parties. As a result, we reverse and remand.

Husband and Wife were married for 12 years before they separated on October 31, 2017. Wife initiated child support and spousal support proceedings and, later, custody proceedings. Husband initiated this divorce

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\* Former Justice specially assigned to the Superior Court.

proceeding on January 29, 2019. The issues to be determined in the divorce action included divorce, equitable distribution, alimony, and attorney's fees and costs.

The facts underlying this appeal are largely undisputed; the disputes focus mainly on the implications arising from those facts. At an evidentiary hearing, divorce was agreed upon and the marital estate was discussed at length. Wife and Husband separated in October of 2017 after approximately 12 years of marriage. **See** N.T. 9/22/20 at 13. Wife has primary physical custody of the couple's two children, who are twelve and nine years old. **See id.** and Trial Court Opinion and Order 11/2/20 at 2.

Wife has Tourette Syndrome which causes her to have involuntary full body motor "tics". **See** N.T. 9/22/20 at 14. Due to her Tourette Syndrome, Wife has received Social Security Disability payments in the amount of \$721 per month since 2014. **See id.** at 14 and 27. Wife's total income is \$2,306.13 a month, including Social Security, child support and spousal support. **See id.** at 33. Husband's total income per month, after paying child support and spousal support is about \$1,618. **See id.** at 79.

Husband and Wife went to college together. **See id.** at 67. Wife has a degree in child psychology and has worked various jobs over the years but has had trouble keeping jobs due to her Tourette Syndrome. **See id.** at 18-19. Her symptoms cause her to miss work and leave early frequently. **See id.** at 19. Husband has a Bachelor's degree in English and a master's degree in teaching and education and is a fourth-grade teacher. **See id.** at 79-80.

In 2018, after separating, Wife and Husband decided that they would transfer the family home to Wife, so that she could reside there with the children, and the family car to Husband, so that he could drive to work and drive the children around. **See id.** at 20-21.

The court ordered both parties to submit proposed findings of fact as related to equitable distribution and alimony. A decree in divorce was entered on October 7, 2020, and on November 2, 2020, the court entered its Order and Opinion setting forth the division of the marital estate. The trial court laid out thirty-three Findings of Fact. **See** Trial Court Opinion and Order 11/2/20. The trial court's Order distributes Husband and Wife's personal property and debts including assigning 70% of Husband's retirement accounts to Wife, award Wife's attorneys' fees and creates an indefinite alimony payment that is equal to the spousal support payment Husband has paid since separation. **See id.** at 17-18.

Husband appealed the trial court's Order and raises the following six claims on appeal:

1. The Court erred or committed reversible bias, arbitrariness, or abuse of discretion in finding that Appellee/Wife was "unable to sustain any type of gainful employment."
2. The Court erred or committed reversible bias, arbitrariness, or abuse of discretion in declaring that Appellant was able to meet all his needs while Appellee was not, and in thereby awarding no net assets to Appellant only extremely disproportionate debt.
3. The Court erred as a matter of law, or committed reversible bias, arbitrariness, or abuse of discretion [in] awarding all of

Appellee's claimed attorneys fees and costs, even though the claim included fees and costs for work on separate and distinct custody and support actions, actions for which award of attorneys fees are not authorized.

4. The Court erred or committed reversible bias, arbitrariness, or abuse of discretion in awarding Appellee 70% of Appellant's retirement accounts as valued about three years after final separation, with no coverture applied and with no determination of what amounts were the result of Appellant's own post-separation contribution of monies from his post-separation earnings.
5. The Court erred or committed reversible bias, arbitrariness, or abuse of discretion in finding that Appellant, not Appellee, had a capital asset, and publishing ability, that could produce income.
6. The Court erred or committed reversible bias, arbitrariness, or abuse of discretion in awarding Appellee lifetime alimony, which included a mortgage subsidy component.

Appellant's Brief at 7, 9, 11, 13, 15, 16.

Husband's claims on appeal all arise from the trial court's equitable distribution order. Our standard of review for a challenge to an equitable distribution is whether the trial court abused its discretion by either misapplying the law or failing to follow proper legal procedure. **See *Brubaker v. Brubaker***, 201 A.3d 180,184 (Pa. Super. 2018). We do not find such an abuse of discretion easily, rather we require a showing of clear and convincing evidence that the abuse occurred. **See *id.*** We will only find an abuse of discretion when the trial court has overridden or misapplied the law or exercised judgment that was manifestly unreasonable, or the result of partiality, prejudice, bias or ill will, as evidenced by the certified record. **See *id.*** When deciding whether to uphold an equitable distribution order we must

consider the distribution as an entire scheme in the context of the parties' situations, with the goal of achieving economic justice and a fair distribution of property. **See id.** We will not reverse the trial court's credibility and weight determinations if they are supported by the evidence. **See id.**

Importantly, an error on a single factor is not necessarily sufficient to overturn the trial court's decision. **See Conner v. Conner**, 217 A.3d 301, 309 (Pa. Super. 2019). Instead, we must "look at the distribution as a whole in light of the court's overall application of the 23 Pa.C.S.A. § 3502(a) factors for consideration in awarding equitable distribution." **Id.**

Husband's first argument on appeal claims the trial court erred in its findings regarding Wife's potential for employment. The trial court found that "Wife clearly is unable to sustain any type of gainful employment due to Wife's medical condition" while also finding that Wife has held several jobs and has a college degree. Trial Court Opinion and Order 11/2/20 at 4. Later in its opinion, the trial court contradicts this finding:

This Court has found that Wife is not able to be employed even if Wife is able to find employment. *Said employment will be limited in hours due to Wife's physical, mental and emotional health.* Further, Wife lacks any vocational skills that would permit wife to obtain higher paying employment.

**Id.** at 15 (emphasis added).

We must agree with Husband that the trial court abused its discretion by finding that Wife is entirely unable to be employed. Specifically, we conclude the court's finding that Wife can be employed for limited hours is

amply supported by the record. As this factual finding directly negates the court's conclusion Wife cannot work at all, the court abused its discretion.

Husband and Wife both testified to the many jobs Wife held over the years, as well as her education. **See** N.T. 9/22/20 at 18, 54, 67-68. Further, Wife testified that her condition has improved a bit over the years, and she has never been fired from a job, but has chosen to leave them due to her condition. **See id.** at 63. Wife is currently 39 years old. **See id.** at 12. This evidence supports the trial court's finding that Wife can obtain employment which is limited in hours. It therefore cannot be also true that Wife is completely unable to find any way to help contribute to her economic well-being.

In addition, the court abused its discretion in finding that Wife lacks any vocational skills. Wife testified that she has a degree in child psychology. **See id.** at 18. She spent a year as a preschool teacher. **See id.** at 57. She has also provided free babysitting for friends. **See id.** at 56.

Based on the number of mentions of Wife's inability to work in the trial court's opinion, this finding was a large factor in the equitable distribution. Essentially, the court decided that despite the divorce, Husband will be solely responsible for the economic well-being of Wife for the rest of her life. To be clear, we are not holding that Husband cannot be found to have some indefinite responsibility for Wife's standard of living going forward. Rather, it is the trial court's conclusion that, absent some unforeseen change in circumstances, Wife should have no responsibility for even attempting to

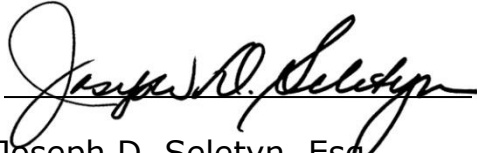
shoulder some economic responsibility or better her economic prospects that we find to be an abuse of discretion.

Viewed as a whole, the equitable distribution scheme employed by the trial court in this case disproportionately favors Wife to the financial detriment of Husband. The record before us indicates that neither party in this case will likely be able to achieve the standard of living they enjoyed while married. Under these circumstances and given that the court found Wife has an ability for limited employment and an education and employment history, it is inequitable to place the entire burden of providing for Wife's lifestyle on Husband.

Given this conclusion, we need not explicitly address Husband's other arguments on appeal. We merely observe that the current distribution, providing for Husband's net distribution to be -\$43,626.86 (equivalent to over two years of Husband's net income), only 30% of his pension, and an indefinite alimony payment to Wife, is inequitable. We therefore vacate and remand for an equitable distribution order that fairly applies the factors of 23 Pa.C.S.A. § 3502(a) without reliance on the conclusion that Wife is completely incapable of working.

Order vacated. Remanded for proceedings consistent with this memorandum. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 4/8/2022