

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

LOUISE JEAN CERASOLI KEPLER

Appellee

v.

ALAN EMORY KEPLER

Appellee

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 26 EDA 2012

Appeal from the Order Entered December 2, 2011  
In the Court of Common Pleas of Philadelphia County  
Domestic Relations at No(s): April Term, 1991 No. 02841

LOUISE JEAN CERASOLI KEPLER

Appellant

v.

ALAN EMORY KEPLER

Appellee

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 114 EDA 2012

Appeal from the Order Entered December 2, 2011  
In the Court of Common Pleas of Philadelphia County  
Domestic Relations at No(s): April Term, 1991 No. 02841

BEFORE: BOWES, J., LAZARUS, J., and PLATT, J.\*

MEMORANDUM BY LAZARUS, J.

Filed: January 10, 2013

The parties, Alan Emory Kepler ("Husband") and Louise Jean Cerasoli Kepler ("Wife") filed these cross appeals from the trial court's December 2,

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\* Retired Senior Judge assigned to the Superior Court.

2011 order granting in part Husband's petition to enforce the parties' March 4, 1994 property settlement agreement ("PSA"). The trial court determined that pursuant to the PSA, Husband was entitled to \$29,200.00 of Wife's pension benefit that accrued as an employee of PNC Bank. After our review, we find no error or abuse of discretion, ***Cioffi v. Cioffi***, 885 A.2d 45 (Pa. Super. 2005), and we affirm on the opinion authored by the Honorable Lisette Shirdan-Harris.

Wife raises the following issues on appeal:

1. The statute of limitations for contracts is 4 years, which begins to run at the time of the breach. A contract required that, within 10 days of execution of a qualified domestic relations order (QDRO), Wife deliver the QDRO to the pension plan administrator; the QDRO was executed in 1994, Wife did not deliver the QDRO, and husband sought to enforce the contract in 2011. Did husband act within the statute of limitations?
2. A contract cannot be altered; rather, a contract must be enforced according to its terms. Husband wants an amount of Wife's retirement benefits different from that amount in the parties' contract. Can the contract be altered to give Husband such different amount?
3. A statement in a petition is a judicial admission, which cannot be refuted; and in cases of a written contract, the intent of the parties is the contract. Husband admits, in his petition, that the parties' contract specifies Husband's benefits are \$29,200. Is the written contract the parties' intent?
4. A preliminary injunction cannot issue if the possible harm can be compensated with money damages. This case concerns the payment of money, and therefore any possible harm can be compensated by money damages. Can a preliminary injunction issue?
5. A contract states a non-breaching party is entitled to counsel fees if the contract is enforced. The non-breaching party

sought to enforce a breach more than 13 years after the statute of limitation had expired. Is the non-breaching party entitled to counsel fees?<sup>1</sup>

In his cross-appeal, Husband raises the following issues:

1. Did the court err in entering a lump [sum] award relative to distribution of a defined benefit pension?
2. Did the court err in refusing to take testimony, consider expert testimony and permit discovery for the purpose of interpreting, quantifying and implementing the terms of the parties' PSA in making its order?
3. Did the court err in refusing to issue an injunction to protect the rights of Husband?
4. Did the court err in failing to find a breach of the parties' PSA and refusing to award counsel fees pursuant to the said agreement?
5. Did the court rule correctly that the instant petition to enforce was not barred by any statute of limitations?

The parties were married in 1982 and separated in 1992. The parties' PSA, dated March 4, 1994, was incorporated into the parties' April 12, 1994 divorce decree. The PSA provided for entry of a qualified domestic relations order (QDRO) against Wife's pension in favor of Husband. As of April 4, 1992, Wife's defined benefit retirement plan<sup>2</sup> had a present value of

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<sup>1</sup> We note that Wife's Pa.R.A.P. 1925(b) Statement of Matters Complained of on Appeal presented a summary of facts that amounted to a statute of limitations claim. Wife's issue on appeal here, therefore, is limited to that claim, which is presented in her first issue. We find issues 2 through 5 are waived. **See *Childress v. Bogosian***, 12 A.3d 448 (Pa. Super. 2011); ***Balicki v. Balicki***, 4 A.3d 654 (Pa. Super. 2010).

<sup>2</sup> Prior to 2004, there was confusion as to the proper valuation method for the marital portion of a defined benefit plan. **Compare *Berrington v. Berrington***, 633 A.2d 589 (Pa. 1993) (finding spouse's share should be  
(Footnote Continued Next Page)

\$61,457; the PSA stated that Husband was entitled to \$29,200, or approximately 47.5%. The PSA reads, in relevant part:

It is agreed between the parties that Husband shall be entitled to \$29,200 of said pension benefit, payable to Husband at the time Wife commences to receive her benefits under the Plan. The benefits payable to Husband shall be paid to Husband in the manner of periodic payments from the Plan over Husband's then life expectancy. The periodic payments to Husband shall be the actuarial equivalent of the lump sum value of benefits due Husband as provided above. . . . It is intended by the parties hereto that this provision for pension benefits shall be approved by the Court of Common Pleas as a separate Order which shall constitute a Qualified Domestic Relations Order (QDRO) to the Plan Administrator of the Plan within ten (10) days of the execution of said QDRO.

PSA, 3/4/1994, at ¶13.5.

Wife was required to deliver a QDRO to the pension plan administrator within ten days of its execution. Wife prepared a draft QDRO, but it was not executed by the parties, and thus Wife never delivered it to her pension plan administrator. Wife began receiving benefits in June 2004. In June 2011,

*(Footnote Continued)* \_\_\_\_\_

calculated based upon the salary at the time of separation) **with Gordon v. Gordon**, 681 A.2d 732 (Pa. 1996) (coverture fraction should be used to determine spouse's share of enhancements from employee-spouse's election for early retirement) and **Holland v. Holland**, 588 A.2d 58 (Pa. Super. 1991) (former spouse entitled to share in increase of marital share which may occur by employee spouse's continued employment). The legislature addressed this in 2004, adding subsection (c) to section 3501 of the Divorce Code. 23 Pa.C.S. § 3501(c) (definition of "Defined benefit retirement plan"). In 2007, our Supreme Court examined section 3501(c) and concluded that the courts must "honor the legislature's unequivocal intention to utilize the coverture fraction to provide economic justice between the parties." **Smith v. Smith**, 938 A.2d 246, 258 (Pa. 2007).

Husband received a letter from PNC Bank indicating that the pension was in pay status. On August 11, 2011, Husband filed a petition to enforce the PSA.

The trial court held a hearing on October 6, 2011. Thereafter, the court requested briefs from the parties. On December 2, 2011, the court entered an order awarding Husband \$29,200 of Wife's pension benefit, specifying that the method and amount of payments to Husband "are to be determined through the Plan Administrator pursuant to the accepted QDRO submitted by the Parties and payable through the PNC Retirement Plan." **See** Order, 12/2/2011.

Wife's statute of limitations claim is clearly meritless. Despite her characterization of Husband's action as one for breach of contract, his action is simply one to enforce the parties' PSA. Under the Divorce Code, a court has power to effect compliance with an agreement "at any time." **See** 23 Pa.C.S. § 3502(e) (Powers of the court).<sup>3</sup>

With respect to Husband's claims, we also find no error or abuse of discretion. After a careful review of the parties' briefs, the record on appeal,

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<sup>3</sup> Section 3502(e) of the Divorce Code states: "*If, at any time*, a party has failed to comply with an order of equitable distribution, as provided for in this chapter, or with the terms of an agreement as entered into between the parties, after hearing, the court may, in addition to any other remedy available under this part, in order to effect compliance with the order: (1) enter judgment; . . . (7) award counsel fees and costs . . . . 23 Pa.C.S. § 3502(e) (emphasis added).

and the relevant law, we conclude that Judge Shirdan-Harris' opinion properly disposes of Husband's issues on appeal. Therefore, we rely upon Judge Sherdan-Harris' decision to affirm the trial court's order. We instruct the parties to attach that decision in the event of further proceedings in this matter.

Order affirmed.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FAMILY COURT DIVISION - DOMESTIC RELATIONS BRANCH

ALAN EMORY KEPLER

Appellant

v.

LOUISE JEAN CERASOLI KEPLER

Appellee

SUPERIOR COURT NO.:  
26 EDA 2012

DOCKET NO.: 9104D2841

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OPINION

This is a consolidated appeal by Alan Emory Kepler ("Husband") and Louise Jean Cerasoli Kepler ("Wife") of this Court's December 2, 2011 Order which found Husband entitled to \$29,200.00 of Wife's PNC Pension Benefit pursuant to the clear language contained in the original March 4, 1994 Property Settlement Agreement ("PSA").

FACTS AND PROCEDURAL HISTORY

Husband and Wife (the "parties") were married October 30, 1982 and separated April 4, 1992. Wife was employed by PNC Bank during the marriage. A PSA was entered into between the parties on or about March 4, 1994. The PSA provided in pertinent part that:

"It is agreed between the parties that Husband shall be entitled to \$29,200 of said pension benefit, payable to Husband at the time Wife commences to receive her benefits under the Plan." *See* PSA .

It later provided for entry of a Qualified Domestic Relations Order ("QDRO") against Wife's PNC pension in favor of Husband stating that:

"It shall be the duty of Wife to deliver the QDRO to the Plan Administrator of the Plan within ten (10) days of the execution of said QDRO." *Id.*

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The PSA was made an Order of the Court by incorporation into the divorce decree. See 4/12/1994 Divorce Decree; PSA 1.3 at p. 2. A draft QDRO was prepared by Wife's attorney but was never executed by either party or delivered to the Plan Administrator. See Draft QDRO.

In 2011, Husband gave Wife notice of a Subpoena to be served on PNC in an effort to determine his entitlement. See Brief in Support of Petition to Enforce Property Settlement Agreement at p. 8. In addition, Husband served Wife with a Notice to Attend and Produce. Wife responded by filing with this Court Objections to Subpoena on August 5, 2011. See Objections to Subpoena. Husband responded by filing a Petition to Enforce the Property Settlement Agreement. See 8/24/11 Petition to Enforce. On October 6, 2011, a hearing was held on both petitions and the matter was held in abeyance pending the attorneys' submission of briefs in support of their parties' positions. See Docket. Following receipt of the briefs, this Court issued a final order finding Husband entitled to \$29,200.00 of Wife's PNC Pension Benefit: See 12/2/11 Order. "The method and amount of payments to Husband are to be determined through the Plan Administrator pursuant to the accepted QDRO submitted by the Parties and payable through the PNC Retirement Plan". *Id.*

On January 3, 2012 Husband filed a timely notice of appeal to the Order followed by his January 19, 2012 Concise Statement of Errors Complained of on Appeal ("Statement of Errors"). Husband's Statement of Errors raised the following issues, stated verbatim below:

1. The Court erred in failing to rescind or reform the parties' agreement relative to division of [Wife's] pension on account of mutual mistake of fact and law and redistributing said asset under Divorce Code Section 3501(c).
2. The Court erred in failing to rescind or reform the parties' agreement relative to division of Appellee's pension on account of impossibility caused by Appellee's breach of the agreement and then redistributing said asset under Divorce Code Section 3501(c).
3. The Court's interpretation of the parties' agreement failed to include material terms



therefrom.

4. The court erred in failing to set forth with specificity the decision of the Court regarding each element of a QDRO effectuating the division of Appellee's pension.
5. The Court erred in failing to take testimony regarding the intent of the parties and from the expert regarding the technical issues attendant upon division of the pension.
6. The Court erred in failing to quash the Appellee's objections to Appellant's subpoena.
7. The Court erred in failing to enter interim relief to protect the entitlement of the Appellant.
8. The Court erred in failing to enforce the parties' agreement for provision of counsel fees.

On January 12, 2012, Wife filed a timely cross-appeal of the Order followed by her February 21, 2012 Statement of Errors. Wife's Statement of Errors fails to specify errors committed by this Court, but rather offers a five-page argument regarding the statute of limitations on actions for breach of contract. It ends with the following statements which this court will interpret as an alleged error for purposes of appeal:

"Husband sought to enforce the contract when husband filed his petition on August 24, 2011.

August 24, 2011 is more than 17 years after husband states that wife breached the contract, on April 23, 1994.

Therefore, husband's action to enforce the contract is barred by the statute of limitations.

The trial court did not bar husband's action"

#### DISCUSSION

The determination of marital property rights through settlement agreements has long been permitted and in reviewing a court's Order to uphold a marital property settlement agreement, the Appellate Court is limited to determining whether the trial court clearly abused its discretion or committed an error of law. *Cioffi v. Cioffi*, 885 A.2d 45 (Pa. Super. Ct., 2005). This Court did not abuse its discretion or commit an error of law in issuing its December 2, 2011 Order ("Order").

I. HUSBAND'S ACTION TO ENFORCE THE PROPERTY SETTLEMENT AGREEMENT WAS NOT BARRED BY THE STATUTE OF LIMITATIONS.

A. This is Not an Action for Breach of Contract.

Wife's Statement of Errors claims that Husband's action to enforce the PSA was barred by the statute of limitations due to Wife's previous breach. Wife's Statement of Errors claims that "*in an action for breach of contract*, the statute of limitations begins to run from the time of the breach." (emphasis added) See Wife's Statement of Errors, p.4. Husband's instant action is to *enforce* the existing PSA, not for breach of contract; therefore, the four year statute of limitations applicable to actions for breach of contract does not apply.

B. Statute of Limitations Does Not Apply to Continuing Contracts.

In any event, it should be noted that the four year statute of limitations does not apply to continuing contracts such as this PSA. "In the case of continuing contracts, such as postnuptial agreements, where the duties of the parties are ongoing, the statute of limitations generally does not run." *Crispo v. Crispo*, 909 A.2d 308 at 315 (Pa. Super. Ct., 2006). *Crispo* also states that when a contract is continuing, if applicable, "the statute of limitations will run either from the time when the breach occurs or when the contract is in some way terminated." *Id.* at 313. It is clear that this PSA has not been terminated, and as detailed below, no breach of the PSA has occurred.

C. No Material Breach of the PSA.

The PSA stated that "it shall be the duty of Wife to deliver the QDRO to the Plan Administrator of the Plan within ten (10) days of *the execution* of said QDRO." (emphasis added) See PSA Section 3.5. Although an undated QDRO appears to have been drafted at some point, it was never executed by either party, and therefore, was incapable of being delivered within ten days to the Plan Administrator as required. See Draft QDRO. Breach would occur when and if Wife failed to deliver the QRDO within ten (10) days of *its execution*, an event which has yet to occur. "Wife admits that in this case no QDRO has been executed." See Plaintiff's Answer to Defendant's Petition to Enforce, p. 14 at #35. Accordingly, no breach of the PSA has occurred.

II. THE PSA IS CLEAR AND VALID AND DOES NOT REQUIRE RECISSION OR REFORMATION.

Husband argues that this Court erred in failing to rescind or reform the PSA. He also

cites the failure to take additional testimony regarding the parties' intent or from an expert regarding technical issues as errors. Rescission and reformation of the PSA are not warranted nor permitted pursuant to its clear terms. In addition, no parol evidence is required to interpret this Agreement.

A. Terms of the PSA are Not Subject to Modification.

The PSA provisions at issue involve the property rights and interests of the parties and are not subject to modification. 23 Pa. C.S. 3105(c) clearly states that certain provisions of post-nuptial agreements are not subject to modification. "In the absence of a specific provision to the contrary appearing in the agreement, a provision regarding the disposition of existing property rights and interests between the parties... shall not be subject to modification by the court." 23 Pa. C.S. 3105(c). The PSA is clear, thorough and does not contain a provision permitting this Court to modify the disposition of the property rights as required by the statute.

B. PSA Terms are Clear and Enforceable.

The terms and intent of the PSA are clear and do not require rescission or reformation in order to be enforced by this Court. The standard of enforceability of post-nuptial agreements is that absent fraud, misrepresentation, or duress, spouses should be bound by the terms of their agreements. *Stackhouse v. Zaretsky*, 900 A.2d 383 at 386 (Pa. Super. Ct., 2006). This Court does not find, and neither party has alleged any fraud, misrepresentation or duress related to the creation of the PSA, and therefore, they are bound by its terms.

1. Mutual Mistake and Impossibility are Inapplicable.

Husband argues that rescission or reformation may be warranted on "account of mutual mistake of fact and law" and "impossibility". Husband fails to specify the mistake to which he is referring, so for purposes of this appeal, this court will refer to the claim previously asserted in Husband's Brief in Support of the Petition to Enforce. There, Husband argues that the PSA is flawed by the parties' mutual mistake of entering into an agreement using a lump sum value. "Mutual mistake is found where both parties have an erroneous belief as to a basic assumption of the contract at the time of formation which will have a material effect on the agreed exchange as to either party." Murray on Contracts §91(E)(3d ed. 1990). Specifying total dollar amounts of a party's pension entitlement is standard, accepted practice when drafting PSAs. Both parties agreed on the amount to which Husband is entitled, and no mutual mistake exists.

Husband cites *King v. King*, which involved a trial court's determination and order

distributing property and erroneously valuating a pension plan subsequent to equitable distribution ("ED") hearings. 481 A.2d 913 (Pa. Super. Ct., 1984); See Brief In Support of the Petition to Enforce at 3. *King* is distinguishable from the instant case in that here, the PSA was independently drafted by the parties and their attorneys and not subject to the equitable distribution and valuation findings of the trial court following divorce proceedings. *King* makes no mention of "lump sum" amounts, but rather, refers to erroneous uses of "present value amounts". In *King*, the court erred in valuating the marital portion of the pension as of January 1981 (the date of the ED hearing), rather than on the October 1973 date of separation or the 1974 date of divorce. Here, the parties used the correct "present value" of the pension based on the April 4, 1992 date of divorce in determining the value of the marital portion of the pension and the total amount ("lump sum") Husband was entitled to receive through period payments. See PSA at 3.5. In addition, both parties were ably represented by counsel and had a meeting of the minds<sup>1</sup> when they freely entered into this valid contract. Its terms should be enforced without rescission or reformation.

Husband also claims that the "impossibility caused by [Wife's] breach" requires rescission and reformation of the PSA. This Court assumes that Husband is referring to the payouts which Wife began to receive from the Plan<sup>2</sup>. Impossibility is not a standard to be considered when enforcing a PSA. In addition, it appears from a PNC letter dated November 1, 2011, that Wife's benefits were in fact put into pay status; however, the portion of her benefit that would be awarded to alternate payee, Husband, has been suspended. See 11/1/11 Letter from PNC. Based on this language, it does not appear that "impossibility" is a factor that currently requires review in determining enforcement.

C. Parol Evidence is not Required.

Husband cites error with this Court's failure to take additional testimony regarding the intent of the parties and from an expert regarding technical issues. It is evident that the relevant terms and amounts of the PSA are clear and unambiguous in stating that Husband is entitled to \$29,200 from the Plan. See Objections to Subpoena at p.2; 10/6/11 N.T. p.4, lines 21-23, p. 5 lines 11-12. "In cases of a written contract, the intent of the parties is the writing itself ... the

<sup>1</sup>As with any contract, it is essential to the enforceability that "the minds of the parties should meet upon all the terms, as well as the subject-matter, of the [agreement]." *Mazzella v. Koken*, 739 A.2d 531, 536(Pa. Super. Ct. 1999).

<sup>2</sup>Husband discovered from a letter dated 3/18/11 from PNC that Wife had already put her pension into pay status. See 10/21/11 Brief in Support of Petition to Enforce.

words of a contract are to be given their ordinary meaning ... When the terms of a contract are clear and unambiguous, the intent of the parties is to be ascertained from the document itself... When, however, an ambiguity exists, parol evidence is admissible to explain or clarify or resolve the ambiguity". *Kripp v. Kripp*, 849 A.2d 1159, 1163 (Pa. 2004). The intent, terms and dollar amount of the document were clear and unambiguous and accordingly, any parol evidence from parties' additional testimony or testimony from the expert is not admissible.

**III. THE PSA CONTAINED ALL MATERIAL TERMS NEEDED TO SPECIFY EACH ELEMENT OF THE QDRO.**

Husband argues that this Court's interpretation of the PSA failed to include material terms and set forth with specificity each element of the QDRO.

**1. No Interpretation of the Terms Required.**

This Court did not re-interpret the PSA; but, rather enforced the clear and unambiguous terms. The \$29,200.00 dollar amount is repeated throughout the filings, briefs and transcripts and is a clear figure to which both parties agree that Husband is entitled. *See* Objections to Subpoena at p.2; Plaintiff's Brief in Response to Defendant's Petition to Enforce at p. 19;10/6/11 N.T. p.4, lines 21-23, p. 5 lines 11-12. Additionally, this Court "may not modify the plain meaning of the contract under the guise of interpretation." *Crawford Central School District v. Commonwealth*, 888 A.2d 616 at 623 (Pa. 2005). No interpretation of the plain meaning of the PSA was required and accordingly, this Court did not err.

**2. Material Terms Specified in the PSA.**

Husband cites each element of the QDRO not being specified by this Court's Order as an error. The Order specified the undisputed dollar amount to be received by Husband with instructions for the Plan Administrator to determine the payment method. *See* 12/2/11 Order. PSAs are typically drafted and submitted by the Parties and approved by this Court. Subsequently, QDROs are then drafted by the parties, reflecting the intentions and terms of the PSA, and submitted directly to the Plan Administrator, not this Court, for approval. *See* Family Law and Practice §41.04. The PSA clearly shows the intent of the parties and they are now required to cooperate fully and jointly to facilitate submission of the appropriate QDRO to ensure appropriate and prompt distribution of the funds. *Ref. Prol v. Prol*, 935 A.2d 547 (Pa. Super. Ct., 2007). The PSA is detailed and clear and a QDRO is to be drafted by the parties pursuant to its terms. This Court was therefore not required to set forth with specificity the terms

of the QDRO when issuing the Order. This Court did not err and Husband's appeal should be dismissed.

**IV. QUASHAL OF WIFE'S OBJECTIONS TO THE SUBPOENA, INTERIM RELIEF AND COUNSEL FEES WERE NOT WARRANTED IN THIS CASE.**

Husband argues that this Court failed to quash Wife's objections to the subpoena, enter interim relief, and award counsel fees.

**A. Quashal and Interim Relief Unnecessary.**

Husband initially served Wife notice of his intent to serve a subpoena on PNC requesting information on the pension account. Wife responded by filing with this Court objections to the subpoena. *See* Objections to the Subpoena. Shortly thereafter, Husband filed the instant petition to enforce the PSA. The hearings were consolidated and a final Order was issued by this Court resolving all outstanding issues including terms related to information sought through the subpoena. Having issued a final order, the subpoena to PNC was rendered moot and quashal was no longer required. Likewise, Husband's request for interim relief was also rendered moot by the timely entry of a final Order on the matter. Accordingly, this court did not err and Husband's appeal should be dismissed.

**B. Counsel Fees Not Warranted.**

Section 1.17 of the parties' PSA stated that "In the event that either party breaches any terms of this Agreement *and* the other party retains counsel to assist in enforcing the terms hereof, the breaching party shall pay all counsel fees and expenses which are incurred by the other party in enforcing this Agreement". (Emphasis added) *See* PSA p.7-8. The contractual language states that in order for counsel fees to be granted, there must first be a breach by one party, followed by retention of counsel by the other party in an enforcement action. "A breach of contract occurs when a party to the contract fails to perform any contractual duty or immediate performance, or violates an obligation, engagement or duty." *Agrecycle, Inc. v. City of Pittsburgh*, 783 A.2d 863, 871 (Pa. Commw. Ct. 2001). In the eighteen (18) years since the PSA was signed, neither party was diligent in effectuating the appropriate entitlements. This Court finds that both parties bear responsibility for the failures to perform and violations of any contractual duties. Accordingly, counsel fees were not awarded and this Court did not err.

CONCLUSION

This Court did not err in entering its December 2, 2011 order which found husband entitled to \$29,200.00 of wife's PNC pension benefit. Husband's Petition to Enforce is not barred by the statute of limitations. The PSA is clear and unambiguous, and does not require any rescission, reformation or modification. It contains all material terms required for the parties to execute a QDRO for submission and approval by the Plan administrator. Additionally, quashal of the objections, interim relief and counsel fees were not warranted in this case. Parties have failed to show an abuse of discretion or allege any errors committed by the trial court that are supported by the record, statute, or case law. Accordingly, both appeals should be dismissed.

BY THE COURT

  
LISETTE SHIRDAN-HARRIS, J.

May 23, 2012