

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

WENDY J. BREON

Appellee

v.

JEFFREY P. BREON

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 469 MDA 2012

Appeal from the Order Entered February 3, 2012  
In the Court of Common Pleas of Clinton County  
Civil Division at No(s): 2009-01024

BEFORE: SHOGAN, J., MUNDY, J., and OTT, J.

MEMORANDUM BY OTT, J.:

Filed: February 12, 2013

Jeffrey P. Breon (Husband) appeals from the order entered February 3, 2012, in the Clinton County Court of Common Pleas, resolving claims for equitable distribution and alimony in this bifurcated divorce proceeding initiated by Wendy J. Breon (Wife). On appeal, Husband claims that the trial court erred and abused its discretion in (1) ordering equitable distribution of marital assets at a percentage ratio of 55% to Wife and 45% to Husband, (2) failing to find that Wife was actively engaged in the dissipation of the marital assets, (3) entering an equitable distribution order that did not comport with the parties' stipulation, (4) ordering immediate distribution from Husband to Wife of \$42,500.00, and ordering Husband to re-finance the marital estate within two years, (5) providing no directive to Wife for the satisfaction of various non-marital debts that she acknowledged to have

amassed in Husband's name after the court's recognized date of separation, (6) finding a date of separation of the parties of June, 2010, (7) finding that Wife was incapable of self-support through appropriate employment and granting alimony to Wife, (8) finding that Wife had suffered physical and emotional abuse from Husband for purposes of awarding alimony, and (9) failing to apply the "abuse" definition set forth at 23 Pa.C.S. § 6102. **See** Husband's Brief at 6–7.<sup>1</sup> Based upon the following, we affirm in part, vacate in part and remand.

The parties were married on July 5, 1980, and have three adult sons. After nearly 30 years, the parties separated. The trial court has aptly summarized the procedural history:

Former Wife filed a Complaint in Divorce on July 13, 2009 requesting a Divorce, Equitable Distribution of Marital Property, Alimony Pendente Lite, Counsel Fees and Costs, and Alimony. Former Husband filed an Answer to the Complaint on October 27, 2009.

A hearing had been scheduled on June 14, 2010 on former Husband's request for Exclusive Possession of the Marital Residence. However, the parties entered into a Stipulation that awarded former Husband Exclusive Possession of the Marital Residence, granted former Wife ninety (90) days to remove herself from the marital residence, required former Husband to pay former Wife Four Hundred and 00/100 (\$400.00) Dollars per month and paid former Wife a sum of Five Thousand and 00/100 (\$5,000.00) Dollars as a partial Equitable Distribution payment. The Five Thousand and 00/100 (\$5,000.00) Dollar payment was paid from an account established upon receipt of a personal injury settlement concerning a claim by former Husband.

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<sup>1</sup> We have reordered Husband's issues for purposes of this discussion.

... The parties entered into a Stipulation for Bifurcation on September 9, 2011, and on September 12, 2011, this Court entered a Divorce Decree retaining jurisdiction on the claims raised by the parties not yet resolved and converting the existing Spousal Support Order to Alimony Pendente Lite.

Former Wife filed a Petition requesting Spousal Support on March 18, 2011 to Number 135-2010, Domestic Relations Section of this Court, and an Order was entered by the Honorable J. Michael Williamson, President Judge of this Court requiring former Husband to pay former Wife the amount of Four Hundred Thirty-eight and 47/100 (\$438.47) Dollars per month. This Court took judicial notice of said Order at the hearing of January 26, 2012 which was held to address all remaining claims. At said hearing, former Husband and former Wife testified, along with former Husband's mother, Edith Caroline Breon. The parties had also entered into evidence, as part of Joint Exhibit "1," a Stipulation which contained a list of the values of marital assets, an agreement that all debts listed must be satisfied prior to distribution of the remaining assets between the parties, and an agreement that any award by this Court of marital property would direct that the marital residence and the adjacent vacant lot be distributed to former Husband. Also, admitted as part of Joint Exhibit "1" was a letter from former Husband's counsel to former Wife's counsel, dated January 16, 2012 setting forth some additional facts and agreements. Finally, this Court received the Income and Expense Statement of former Husband as an Exhibit of former Husband.

Trial Court Opinion, 2/3/2012, at 1–2.

On February 3, 2012, the trial court entered its order, which, *inter alia*, split the marital estate 55%/45% in favor of Wife; awarded Husband certain marital assets (i.e., marital residence — \$125,000.00; vacant lot adjacent to marital residence — \$22,000.00; Husband's AXA Equitable Account — \$109,787.86; Husband's First Quality Retirement Account — \$9,671.00, and a 2004 Ford F150 — \$8,175.00); awarded Wife \$42,500.00, representing monies controlled by Husband regarding Husband's personal injury

settlement,<sup>2</sup> to be paid by Husband within 30 days; directed Husband to pay certain debts (mortgage — \$29,070.00; home equity loan — \$39,663.00; and student loans cosigned with the parties' son Garth Breon — \$15,154.00) by February 3, 2014; and ordered Husband to pay Wife the sum of \$126,035.55 on or before February 3, 2014. Additionally, the trial court ordered Husband to pay Wife alimony in the amount of \$438.47 per month for four years, denied Wife's request for attorney fees, and directed that Husband pay the specified debts in full prior to or at the closing of the refinancing of assets awarded to former Husband. **See** Order, 2/3/2012. This appeal followed.<sup>3</sup>

At the outset, we state the legal principles that guide our review:

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 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

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<sup>2</sup> The trial court's order noted that Wife had received an additional \$5,000.00 from the personal injury settlement award, pursuant to the parties' June 18, 2010 stipulation.

<sup>3</sup> On February 21, 2012, Husband filed a motion for reconsideration, which the trial court denied on February 27, 2012. Husband filed this appeal on March 1, 2012. Thereafter, Husband timely complied with the order of the trial court to file a concise statement of matters complained of on appeal, pursuant to Pa.R.A.P. 1925(b). The trial court filed its Rule 1925(a) opinion on March 28, 2012.

“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. “[W]e 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.”

Moreover, it is within the province of the trial court to weigh the evidence and decide credibility and this Court will not reverse those determinations so long as they are supported by the evidence.

***Childress v. Bogosian***, 12 A.3d 448, 455 (Pa. Super. 2011) (citations omitted).

Initially, we address Husband’s claim that the trial court abused its discretion by allocating the percentages of marital property 55/45 in favor of Wife for equitable distribution purposes “where no evidence was presented to support such an award, and the court did not provide a basis for the determination of the award pursuant to 23 Pa.C.S. § 3506.”<sup>4</sup>

Section 3506 of the Divorce Code, titled “Statement of reasons for distribution,” requires the trial court to “set forth the percentage of distribution for each marital asset or group of assets and the reason for the distribution ordered.” 23 Pa.C.S. § 3506.

Here, the trial court thoroughly discussed the various factors listed in 23 Pa.C.S. § 3502, which are relevant in fashioning an equitable distribution

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<sup>4</sup> Husband’s Brief at 6, 14.

award. **See** 23 Pa.C.S. § 3502(a)(1)–(11). The trial court noted, *inter alia*, that the parties' marriage existed almost thirty years; that Wife is 53 years of age and in good health, has a high school education, earns approximately \$27,000.00 per year, and has liabilities for credit accounts that are solely Wife's responsibility; that Husband is 53, is a high school graduate, has a commercial drivers' license, and earns approximately 45,000.00 per year, with no liabilities that are solely in Husband's name; that Wife served as the homemaker at the marital residence during the marriage; that the parties had an average standard of living during the marriage; and that "Husband is enjoying an average standard of living [and Wife] is relegated to renting a room or small apartment from co-workers, and does not own a vehicle."<sup>5</sup> **See** Trial Court Opinion, *supra*, at 3–6. The trial court concluded: "Considering all the factors, the parties' Stipulation and the evidence, this Court finds that a division of the marital assets with former Wife receiving 55% and former Husband receiving 45% is appropriate." **Id.** at 9.

Contrary to the argument of Husband that the trial court's discussion fails to indicate any factor or combination of factors that would entitle Wife to such a significant percentage of marital assets,<sup>6</sup> we conclude that the trial court's complete discussion of the Section 3502 factors, as related to the

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<sup>5</sup> Trial Court Opinion, 2/3/2012, at 5.

<sup>6</sup> At the hearing, Husband argued that Wife should receive 40% of the marital estate. **See** N.T., 1/26/2012, at 61.

facts of this case, satisfied the requirements of 23 Pa.C.S. § 3506 of the Divorce Code, and that the trial court acted within its discretion in ordering a 55%/45% equitable distribution scheme in favor of Wife. Accordingly, Husband's first claim warrants no relief.

Second, Husband contends that the trial court erred in rejecting his claim that wife actively engaged in the dissipation of the marital assets.

Under the Divorce Code, one of the factors that the trial court must consider in deciding a claim of equitable distribution is "[t]he contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party as homemaker." 23 Pa.C.S. § 3502(a)(7). With respect to Section 3502(a)(7), the trial court reasoned, in pertinent part:

Clearly, former Wife has served as the homemaker at the marital residence during the marriage. The parties have three (3) sons, who are now ages twenty-nine (29), twenty-eight (28) and twenty-seven (27), with the younger two children currently residing with former Husband at the former marital residence. Former Husband has argued that former Wife dissipated the marital estate by spending an excessive amount of money and increasing the debt of the parties. However, this Court finds former Husband was aware of these activities and when former Wife attempted to hide these activities, former Husband discovered these activities. Testimony was received that former Husband refinanced credit accounts of former Wife's numerous times to resolve those debt issues with those cancelled debts becoming part of the home equity loans entered into by the parties during the marriage. **No allegation was made that these debts contracted by former Wife were not used for the marital estate or the children.**

Trial Court Opinion, 2/3/2012, at 4-5 (emphasis supplied). Upon review of the record, we discern no basis upon which to disturb the finding of the trial court.

At the hearing, Wife testified that the parties had obtained a home equity loan in the amount of \$40,000 in order to refinance credit card debts, and had refinanced twice previously. **See** N.T., 1/26/2012 at 19–20. She admitted she “was an emotional spender... not good with money,” and stated that “a lot of that money, especially the credit card, was we had three boys ....” **Id.** at 28. Husband’s mother also testified, stating that she and her husband had loaned money to Husband and Wife a number of times. Husband’s mother recalled that on one occasion Wife had incurred debt in “purchas[ing] encyclopedias and sweepers [and] I don’t know what all.” **Id.** at 31.

Similar to Wife, Husband, in his testimony, stated that as a result of the credit card balances, the parties obtained a home equity loan for \$40,000. **Id.** at 44. He testified that in 2009 he paid off credit card debt incurred by Wife in purchasing a bed for their son and his wife-to-be. **Id.** at 43. Husband related that although Wife tried to hide her spending, she would “lose track of some of her papers, and I’d see something for the Gap or something for Outfitters or something like that.” **Id.** at 44.

In sum, although the testimony presented at the hearing demonstrated that Wife’s expenditures lead the parties to incur sizeable

debt, we agree with the trial court that the testimony did not demonstrate a non-marital purpose. Therefore, we cannot conclude that the trial court abused its discretion in rejecting Husband's claim concerning Wife's dissipation of marital assets.

In the next three issues, which we consider together, Husband contends that the trial court erred in (1) entering an order that failed to comport with the parties' stipulation regarding satisfaction of all outstanding marital debts, (2) ordering immediate distribution from Husband to Wife of \$42,500.00, and ordering Husband to re-finance the marital estate within two years, and (3) providing no directive to Wife for the satisfaction of various non-marital debts that she acknowledged to have amassed in Husband's name after the court's recognized date of separation.

Specifically, Husband argues that the trial court's order "nullified"<sup>7</sup> the agreed upon stipulation that the marital debts were to be satisfied before distribution of assets. Husband also claims that the immediate distribution of his entire savings account to Wife leaves him without the means to achieve refinancing of the marital residence.<sup>8</sup> In addition, Husband contends

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<sup>7</sup> Husband's Brief at 14.

<sup>8</sup> *See id.* at 18.

that the trial court erred in failing to require Wife to satisfy the outstanding debts in her control and held jointly or in Husband's name.<sup>9</sup>

It is well settled that “[p]arties may by stipulation resolve questions of fact or limit issues, and, if stipulations do not affect jurisdiction of the court or due order of business and convenience of the court, they become law of the case.” *Wayda v. Wayda*, 576 A.2d 1060, 1067 (Pa. Super. 1990). **See also** *Parsonese v. Midland Nat. Ins. Co.*, 706 A.2d 814, 815 (Pa. 1998).

At the hearing, the court admitted into evidence the parties' Joint Exhibit “1,” which included a letter from Husband's attorney to Wife's attorney, dated January 16, 2012, along with a stipulation. The stipulation “contained a list of the values of marital assets, an agreement that all debts listed must be satisfied prior to the distribution of the remaining assets between the parties, and an agreement that any award by the trial court would direct that the marital residence and adjacent lot be distributed to former Husband.”<sup>10</sup> The January 16, 2012 letter “set[] forth some additional facts and agreements.”<sup>11</sup> The record reflects that the letter and stipulation were offered to the court with the qualification that issues regarding

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<sup>9</sup> *See id.* at 19.

<sup>10</sup> Trial Court Opinion, 2/3/2012, at 2.

<sup>11</sup> *Id.* at 2–3.

refinance time frames and satisfaction of the outstanding student loans prior to distribution were at issue.<sup>12</sup> **See** N.T., 1/26/2012 at 3–5.

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<sup>12</sup> Specifically, the stipulation stated:

WHEREFORE, the parties to the above action In Divorce, hereby STIPULATE and AGREE to the following:

1. The values of marital assets at issue are as follows:

- a. Marital residence - \$125,000.00
- b. Vacant lot adjacent to marital residence - \$22,000.00
- c. Husband's AXA equitable account - \$109,787.46
- d. Husband's First Quality retirement - \$9,671.00
- e. Personal injury settlement - \$37,500.00
- f. Ford F150 - \$8,175.00

Total: \$312,133.46

2. The values of marital debts at issue are as follows:

- a. Mortgage - \$29,070.00
- b. Home equity loan - \$39,663.00.00
- c. Student loans cosigned with Garth Breon - \$15,154.00

Total: \$83,887.00

3. Total assets minus (-) total debts = \$228,246.46

4. All debts listed above shall be satisfied prior to the distribution of the remaining assets between the parties.

5. The marital residence and the adjacent vacant lot shall be distributed to the Defendant, Jeffrey Breon.

6. ...

Joint Exhibit "1", Stipulation. At the hearing, it was revealed that the available amount of the personal injury settlement, stated in the stipulation (*Footnote Continued Next Page*)

The trial court, in its February 3, 2012 opinion, stated that it had “consider[ed] the parties’ Stipulation.”<sup>13</sup> However, the trial court did not direct that “[a]ll of the debt listed above shall be satisfied prior to the distribution of the remaining assets between the parties,” as provided in the stipulation. Rather, the court’s order directed that Husband pay Wife \$42,500.00 — representing monies controlled by Husband regarding his personal injury settlement<sup>14</sup> — to be paid to Wife within 30 days of the date of the order. The order further directed that Husband, within two years, i.e., by February 3, 2014, pay the listed marital debts (mortgage, home equity loan, and student loan cosigned with Garth Breon), totaling \$83,887.00, and pay Wife the sum of \$126,035.55.

We find no merit in the argument of Husband that the trial court nullified the parties’ stipulation. Nor do we find merit in the argument of  
*(Footnote Continued)* \_\_\_\_\_

as “37,500.00,” was actually \$42,500.00, with an additional \$5,000.00 having already been paid to Wife by Husband. **See** N.T., 1/26/2012 at 54.

Furthermore, it should be noted that “the parties [also] agreed that former Husband’s retirement account and/or pension funds should not be distributed in awarding former Wife any funds as this would implicate penalties and tax ramifications.” Trial Court Opinion, *supra*, at 5 ¶10.1. Husband’s retirement funds consisted of the AXA Equitable account and the First Quality retirement account. **See** N.T., *supra*, at 26–27, 46.

<sup>13</sup> Trial Court Opinion, *supra*, at 9.

<sup>14</sup> As already noted, the available monies from Husband’s personal injury settlement totaled \$47,500.00, and \$5,000 from that account had already been distributed to Wife prior to the equitable distribution hearing, pursuant to the parties June 18, 2010 stipulation.

Husband that the trial court erred in immediately distributing \$42,500.00 to Wife. In fact, Husband's counsel, in his argument to the court at the conclusion of the January 26, 2012 hearing, proposed a "partial distribution, such as from the ... \$42,500 ... personal injury settlement" in order for Wife to satisfy obligations that she maintains in Husband's name. N.T., 1/26/2012, at 63. However, we agree with Husband that the trial court, in making an immediate distribution of the \$42,500 personal injury settlement fund, should have directed Wife to satisfy those debts in her control that she incurred jointly or in Husband's name post separation.

Joint Exhibit "1" and the testimony presented at the hearing clearly demonstrated that Husband's attempts to obtain refinancing of the marital residence in order to be able to satisfy the marital debts and pay Wife her share of the marital estate had been stymied by the past due balance of a Chase credit card held by Wife in either both parties' names or Husband's name. As already stated, the parties stipulated: "All debts listed above shall be satisfied prior to distribution of the remaining assets between the parties." Joint Exhibit "1", Stipulation, ¶ 4. Furthermore, the letter, admitted with the stipulation as Joint Exhibit "1" stated, in relevant part:

Also posing a problem to the re-fi loan are the still outstanding credit accounts such as the **Chase account**, which appear to also be **past due** and negatively impacting Mr. Breon's credit score. **Mr. Breon's lender has indicated that these accounts must be satisfied before they will reconsider his loan application.**

Joint Exhibit "1", Letter, 1/16/2012, at 1 (emphasis supplied).

In addition, the testimony at the hearing showed that Wife had possession of a Chase credit card with Husband's name on it, and that Husband's ability to refinance was hindered by the Chase card. Specifically, Wife was questioned on cross examination, as follows:

Q. Okay. Well, you still have a credit card that's in both of your names, correct?

A. Correct.

Q. A Chase card?

A. Yes. ... And I actually even have the cards in my purse with his name on it. ....

N.T., 1/26/2012, at 18. Thereafter, when Husband testified during direct examination regarding his inability to obtain refinancing, Wife's counsel referenced the parties' stipulation:

[BY HUSBAND'S COUNSEL]:

Q In looking into having this hearing and knowing that you're going to have to pay some money, have you tried to get a refinance loan?

A Yes. Twice.

Q And what was the result?

A Well, apparently, I still have a credit card out there with my name on it that held me up the first time. This time, they would have gave me a little bit of money; but the student loans popped in there. And there's still that Chase card out there somewhere that's on my record that they'll deny me the loan. I have a poor credit rating.

[WIFE'S COUNSEL]: Your Honor, I believe [Husband's counsel] has mentioned that in the stipulation; and we abide by that stipulation.

*Id.* at 49.

Accordingly, we conclude that in light of Joint Exhibit "1" and the testimony presented at the hearing, the trial court, in ordering an immediate distribution to Wife of \$42,500.00, should have directed Wife to use that distribution to satisfy the Chase credit card debt incurred by her in Husband's name post-separation. Therefore, to the extent that the trial court's order did not include such a directive, we vacate the court's order, and on remand the trial court is directed to order Wife to use the immediate distribution of \$42,500.00 to satisfy the Chase account obligations incurred in Husband's name post-separation.

Next, Husband contends that the trial court erred in its finding that the date of separation of the parties was June, 2010.

It is well settled that the date of separation is "a line of demarcation in a divorce proceeding." *S.M.C. v. W.P.C.*, 44 A.3d 1181, 1187 n.3 (Pa. Super. 2012).<sup>15</sup> The Divorce Code provides, in relevant part:

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<sup>15</sup> This Court, in *S.M.C. v. W.P.C.*, 44 A.3d 1181 (Pa. Super. 2012), explained:

Our legislature has determined the date of separation is a line of demarcation in a divorce proceeding. **See** 23 Pa.C.S.A. § 3301(d)(1) (date of separation is the date the two-year clock begins to run for a no-fault divorce on the ground of irretrievable breakdown); 23 Pa.C.S.A. § 3501(a)(4), § 3505(b)(1)(i) (date of separation is the date upon which the composition of the marital estate is determined); 23 Pa.C.S.A. § 3505(b)(2)(ii)  
*(Footnote Continued Next Page)*

**“Separate and Apart”** Cessation of cohabitation, whether living in the same residence or not. **In the event a complaint in divorce is filed and served, it shall be presumed that the parties commenced to live separate and apart not later than the date that the complaint was served.**

23 Pa.C.S. § 3103 (emphasis added). Therefore, under Section 3103, the date on which the parties begin living separate and apart is established upon the filing and serving of a divorce complaint, unless an earlier date can be substantiated through the presentation of evidence confirming an earlier date.

Although Husband claims, in this appeal, that the date of the parties' separation was December 17, 2008, Husband offered no specific evidence at trial regarding the date of separation.<sup>16</sup> Likewise, Wife offered no evidence at trial regarding the date of the parties' separation. Furthermore, the only

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

(date of separation is one of the dates used to determine the value of marital property); 23 Pa.C.S.A. § 3501(a.1) (date of separation is one of the dates set by the legislature to determine the increase in value of nonmarital property for equitable distribution); 23 Pa.C.S.A. § 3701(b)(14) (precluding courts from considering post-separation conduct, other than abuse of one spouse by the other, when determining whether to grant alimony).

***Id.*** at 1187 n.3.

<sup>16</sup> Although both parties executed affidavits of consent pursuant to 23 Pa.C.S. § 3301(c), Husband points out that he filed a Section 3301(d) affidavit, in which he alleged that the parties' date of separation was December 17, 2008. Husband, however, admits that he presented no evidence at the hearing concerning the parties' date of separation. **See** Husband's Brief at 20.

evidence regarding June, 2010 — used by the trial court as the date of separation<sup>17</sup> — was a June 18, 2010 stipulation of the parties that awarded exclusive possession of the marital residence to Husband. The record, however, reflects that Wife filed her complaint in divorce eleven months earlier, on July 13, 2009.

In light of the absence of any testimony at the hearing regarding the date of separation, the presumption set forth in Section 3103 applies, and the date of separation in this case must be presumed to be the July 13, 2009 filing date of Wife's complaint in divorce. **See** 23 Pa.C.S. § 3103, **supra**. Accordingly, to the extent that the date of separation underlies the trial court's order of equitable distribution, which in turn affects alimony,<sup>18</sup> we vacate the trial court's order, so that the trial court can consider what effect, if any, the July 13, 2009 date of separation has upon the court's resolution of the equitable claims.

Finally, Husband challenges two findings made by the trial court with regard to the alimony award. First, Husband contends that the trial court abused its discretion "in finding that wife was not capable of support through appropriate employment and subsequently granting alimony to Wife, where

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<sup>17</sup> **See** Trial Court Opinion, **supra**, at 3.

<sup>18</sup> **See** 23 Pa.C.S. § 3701(b)(16) (requiring that the court in determining the entitlement to alimony consider the property distributed equitably pursuant to Chapter 35).

no evidence was presented to support such a finding and the trial court specifically opined to the contrary within the same order of February 3, 2012.”<sup>19</sup>

The principles that guide our review are well settled:

Following divorce, alimony provides 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. *Teodorski v. Teodorski*, 857 A.2d 194, 200 (Pa. Super. 2004) (citation omitted). An award of alimony should be made to either party only if the trial court finds that it is necessary to provide the receiving spouse with sufficient income to obtain the necessities of life. *Stammero v. Stammero*, 889 A.2d 1251, 1259 (Pa. Super. 2005). “The purpose of alimony is not to reward one party and punish the other, but rather to ensure that the reasonable needs of the person who is unable to support herself through appropriate employment are met.” *Miller v. Miller*, 744 A.2d 778, 788 (Pa. Super. 1999) (citation omitted).

“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.” *Teodorski*, 857 A.2d at 200 (citation omitted). An award of alimony may be reversed where there is an apparent abuse of discretion or there is insufficient evidence to support the award. *Jayne v. Jayne*, 443 Pa. Super. 664, 663 A.2d 169 (1995).

*Balicki v. Balicki*, 4 A.3d 654, 659 (Pa. Super. 2010).

The trial court determined Wife’s eligibility for alimony by evaluating the facts in light of the seventeen factors listed in 23 Pa.C.S. § 3701(b). In connection with the factor set forth at Section 3701(b)(17), “Whether the party seeking alimony is incapable of self-support through appropriate

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<sup>19</sup> Husband’s Brief at 7, 21.

employment,"<sup>20</sup> the trial court found that "Former Wife is capable of self-support through appropriate employment, but needs some time to recover from the economic loss associated with this divorce."<sup>21</sup>

The trial court, in awarding Wife alimony, reasoned:

Considering former Wife's claim for Alimony, former Wife will not receive the majority of monies from the Equitable Distribution award for twenty-four (24) months, **does not earn sufficient income to support herself**, has vacated the marital residence, does not own a motor vehicle, has suffered physical and emotional abuse committed upon former Wife by former Husband, and simply needs some time and assistance to recover from the end of nearly thirty (30) years of marriage. Therefore, this Court finds that an Alimony award at the present award of Four Hundred Thirty-Eight and 47/100 (\$438.47) Dollars per month is appropriate. This Court determines that the length of the Alimony award shall be four (4) years.

Trial Court Opinion, *supra* at 10 (emphasis supplied).

Husband contends that the trial court abused its discretion in concluding that Wife "does not earn sufficient income to support herself," and that this conclusion is at odds with the trial court's Section 3701(b)(17) finding. We find no merit in this argument. While Wife is currently employed, the trial court properly considered her income against "the economic loss"<sup>22</sup> presently faced by Wife. Accordingly, there is no basis

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<sup>20</sup> 23 Pa.C.S. § 3701(a)(17).

<sup>21</sup> Trial Court Opinion, *supra*, at 9, Section III ¶17.

<sup>22</sup> *See* Footnote 19, *supra*.

upon which to disturb the conclusion of the trial court, for purposes of alimony, that Wife “does not earn sufficient income” for self-support.

Lastly, Husband contends that the trial court abused its discretion in finding that Wife had suffered physical and emotional abuse from Husband for purposes of awarding alimony. **See** 23 Pa.C.S. § 3701(b)(14). In this regard, Husband also contends that his alleged conduct does not fit within the definition of “abuse” as defined by 23 § Pa.C.S. § 6102.

At issue is Section 3701(b)(14) of the Divorce Code, which provides, in relevant part:

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: ...

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).

23 Pa.C.S. § 3701(b)(14). **See also *Remick v. Remick***, 456 A.2d 163, 167 (Pa. Super. 1983) (emphasis in original) (stating “statute clearly reads that the court must consider the marital misconduct of *either* of the parties during the marriage” before awarding alimony).

Here, Wife, during cross-examination regarding her spending habits and her attempts to conceal her spending, testified that Husband hit her.<sup>23</sup> Further, Wife recalled that she “broke her neck in 2000, and he left me lay in the manure and went up and made hay. He didn’t come to the hospital to see me for two days.”<sup>24</sup> Wife also testified that she discovered Husband was having an affair in 2008.<sup>25</sup>

The trial court found Wife’s testimony credible, and concluded that Husband had committed marital misconduct **during** the marriage, which consisted of adultery and physical and emotional abuse to Wife.<sup>26</sup> On this record, and in the light of our standard of review, we discern no abuse of discretion.<sup>27</sup> Furthermore, Husband’s argument that the conduct at issue

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<sup>23</sup> For example, Wife testified that Husband was “abusive, and I spent it.” She stated Husband “would get angry and take it out on me physically.” She also stated that Husband “would hit me and get mad[.]” N.T., 1/26/2012, at 16–17, 19.

<sup>24</sup> *Id.* at 19.

<sup>25</sup> *Id.* at 23.

<sup>26</sup> To the extent that Husband argues that at no point in Wife’s testimony did she allege her injuries to be the result of any action or harm by Husband, we note that the trial court’s opinion does not suggest that Husband caused wife’s neck injury.

<sup>27</sup> Our standard of review is deferential:

“The finder of fact is entitled to weigh the evidence presented and assess its credibility. The fact finder is free to believe all, part, or none of the evidence and the Superior Court will not  
(Footnote Continued Next Page)

does not satisfy the definition of “abuse” set forth at 23 Pa.C.S. § 6102, is misplaced, since the Section 6102 definition of abuse applies to marital misconduct **after** the date of separation. **See** 23 Pa.C.S. 3701(b)(14), **supra**. **See also Miller v. Miller**, 744 A.2d 778, 788 (citations omitted) (“Under this subsection, ‘the marital misconduct of either of the parties from the date of final separation shall not be considered by the court’ with the exception of abuse.”). Accordingly, Husband’s final two arguments fail.

Having reviewed the contentions of Husband, and having found merit in Husband’s claims of error regarding the trial court’s immediate distribution to Wife of \$42,500.00 without a directive to Wife to satisfy credit card debt incurred in Husband’s name after the date of separation, and the trial court’s assigned date of separation, we affirm in part, vacate in part and remand for further proceedings consistent with this memorandum.

Order affirmed in part, vacated in part. Case remanded. Jurisdiction relinquished.

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

disturb the credibility determinations of the court below.” “In determining whether a court has abused its discretion, we do not usurp the trial court’s duty as finder of fact. The trial court’s findings, if supported by credible evidence, are binding upon a reviewing court and will be followed.”

**Miller v. Miller**, 744 A.2d 778, 789 (Pa. Super. 1999) (citations omitted).