

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

DARIN C. LESEFKA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
HEATHER KOWGER,	:	
	:	
Appellant	:	No. 524 WDA 2012

Appeal from the Order December 5, 2011,
Court of Common Pleas, Allegheny County,
Family Court at No. FD 07-05186-005

BEFORE: DONOHUE, SHOGAN and WECHT, JJ.

MEMORANDUM BY DONOHUE, J.:

Filed: February 6, 2013

Heather Kowger (“Wife”) appeals from the order of court entered on December 5, 2011, dividing the parties’ marital assets. Following our review, we affirm.

Wife and Darin C. Lesecka (“Husband”) married on December 31, 2005 and separated on February 8, 2008. The trial court succinctly summarized the factual and procedural background as follows:

... At the time of the marriage, Husband was enrolled part-time in the National Guard and also worked as a UPMC helicopter pilot. Wife was also in the National Guard and worked as a registered nurse. Three months after the parties married, Husband was deployed to Oklahoma and shortly thereafter to Iraq. Husband was gone for [16] months, and when he returned the parties had some difficulties readjusting which led to a several month separation. The parties did reconcile, at which time Wife became pregnant with their son. Soon after, Husband was offered a full-time Army position in Maryland, which provided

a sizable increase in salary from what he had been earning as a UPMC pilot. The parties discussed the opportunity and initially Wife agreed that he should take the offered job and that she would move with Husband to Maryland. The parties then located a house in Maryland and signed an Agreement of Sale. Wife then informed Husband that she was not going to move to Maryland with him and that she and their son would remain in Pennsylvania, which led to their final separation on February 8, 2008.

Prior to the start of the [equitable distribution hearing before Special Master Peggy Lynn Ferber], the parties entered into several [s]tipulations. The marital property components of Husband's Tennessee home and of Wife's Winchester Drive home were agreed to be of equal value, and, therefore, not subject to further distribution. Each of the parties' [sic] has a Savings Deposit Account, which were also agreed to have equal value and not subject to distribution. Husband retained all right, title and interest to his Honda Civic and Ford Escape. Wife retained all right, title and interest to her Mazda Tribute and Ford F-150. Wife also received an advance of \$2,000 in equitable distribution.

Following a two-day hearing, Master [] Ferber recommended a fifty-fifty distribution of the martial estate. The Master based her decision on the marriage being very short, both parties being able to maintain employment and provide substantial income, both parties being educated prior to the marriage, and both parties being in a position to acquire future assets. Master Ferber also recommended that each party be responsible for his/her own counsel fees incident to the divorce, but did award Husband \$1,200 in counsel fees as a result of Wife's failure to comply with reasonable and timely discovery requests. The Master also recommended an *alimony pendent lite* (APL) and child support modification retroactive to 2009, which set arrears due to Wife at \$34,644.79 as of April 5,

2011, payable at the rate of \$300 per month until paid in full. The Master found that the \$300 per month payable on arrears should be taxable to Wife and deductible to Husband until such time as they are satisfied in full. A prospective child support order effective upon the entry of the divorce decree was also recommended.

Following the Master's [r]eport and [r]ecommendation, ... Wife, through her counsel, filed exceptions to the recommendation. Following oral argument on exceptions, and a review of the record, I affirmed Master Ferber's findings and adopted her report and recommendations as my reasoning, findings, and conclusions. It is this December 5, 2011 [o]rder of [c]ourt, dismissing Wife's exceptions and adopting the Master's findings as a final order, to which Wife has filed a timely appeal.

Trial Court Order, 6/8/12, at 2-4.

On appeal, Wife presents five issues for our review, which we address *seriatim*. We start by acknowledging our standard of review:

In reviewing equitable distribution orders, our standard of review is limited. It is well established that absent an abuse of discretion on the part of the trial court, we will not reverse an award of equitable distribution. In addition, when reviewing the record of the proceedings, we are guided by the fact that trial courts have broad equitable powers to effectuate economic justice and we will find an abuse of discretion only if the trial court misapplied the laws or failed to follow proper legal procedures. Further, the finder of fact is free to believe all, part, or none of the evidence and the Superior Court will not disturb the credibility determinations of the court below. In addition, we do not evaluate the propriety of the distribution order upon our agreement with the court's actions nor do we find a basis for reversal in the court's application of a single factor. Rather,

we 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. If we fail to find an abuse of discretion, the order must stand.

Lee v. Lee, 978 A.2d 380, 382-83 (Pa. Super. 2009) (citations omitted).

In her first issue, Wife asks, "Did the [t]rial [c]ourt commit an abuse of discretion and/or an error of law in her determination that this was a 50/50 case?" Appellant's Brief at 6.

As referenced above, section 3502 of the Domestic Relations Code contains a list of factors "relevant to the equitable division of marital property" that a trial court must consider when making an equitable distribution award.¹ 23 Pa.C.S.A. § 3502(a). "In fashioning an equitable

¹ This statute provides as follows:

General rule.--Upon the request of either party in an action for divorce or annulment, the court shall equitably divide, distribute or assign, in kind or otherwise, the marital property between the parties without regard to marital misconduct in such percentages and in such manner as the court deems just after considering all relevant factors. The court may consider each marital asset or group of assets independently and apply a different percentage to each marital asset or group of assets. Factors which are relevant to the equitable division of marital property include the following:

- (1) The length of the marriage.
- (2) Any prior marriage of either party.
- (3) The age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties.
- (4) The contribution by one party to the education, training or increased earning power of the other party.

distribution award, the trial court must consider, at a minimum, the eleven factors set forth in 23 Pa.C.S.A. § 3502." **Gates v. Gates**, 933 A.2d 102, 105 (Pa. Super. 2007). "These factors require the trial court to consider the relative economic positions of the parties and the nature of the parties' relationship. The section 3502 factors are not a simple formula, rather they serve as a guideline for consideration. The facts of a particular case mandate how the section 3502 factors will be applied." *Id.*

Wife acknowledges that the trial court must consider the section 3502 factors when making an award of equitable distribution, but directs our attention to the four factors that she believes are "the relevant factors in this

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- (5) The opportunity of each party for future acquisitions of capital assets and income.
 - (6) The sources of income of both parties, including, but not limited to, medical, retirement, insurance or other benefits.
 - (7) The 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.
 - (8) The value of the property set apart to each party.
 - (9) The standard of living of the parties established during the marriage.
 - (10) The economic circumstances of each party at the time the division of property is to become effective.
 - (10.1) The Federal, State and local tax ramifications associated with each asset to be divided, distributed or assigned, which ramifications need not be immediate and certain.
 - (10.2) The expense of sale, transfer or liquidation associated with a particular asset, which expense need not be immediate and certain.
 - (11) Whether the party will be serving as the custodian of any dependent minor children.

23 Pa.C.S.A. § 3502(a).

case[.]” Appellant’s Brief at 6. Wife’s argument is that the trial court should have given greater weight to four particular factors, and therefore assigned Wife a greater percentage of the martial estate. We rejected this argument in **Gates**. We stated, “[I]t is apparent appellant is urging us to simply reweigh the section 3502 factors in the hope the scales will tip in his favor the second time around. We cannot do so in the absence of an abuse of discretion, which appellant has failed to demonstrate.” **Gates**, 933 A.2d at 106. In the present case, Wife has failed to demonstrate an abuse of discretion in the trial court’s application of the section 3502 factors beyond its failure to assign more weight to certain factors that Wife deems to be in her favor. As such, we cannot reweigh the section 3502 factors and substitute our judgment for that of the trial court.

Wife next complains that the trial court abused its discretion by denying her request for counsel fees while awarding Husband counsel fees in the amount of \$1,200. The grant or denial of a request for counsel fees is within the discretion of the trial court, which we will not disturb absent an abuse of that discretion. **Plitka v. Plitka**, 714 A.2d 1067, 1070 (Pa. Super. 1998).

A party may seek an award of counsel fees in a divorce action pursuant to 23 Pa.C.S.A. § 3702.²

The purpose of an award of counsel fees is to promote fair administration of justice by enabling the dependent spouse to maintain or defend the divorce action without being placed at a financial disadvantage; the parties must be 'on par' with one another... . Counsel fees are awarded based on the facts of each case after a review of all the relevant factors. These factors include the payor's ability to pay, the requesting party's financial resources, the value of the services rendered, and the property received in equitable distribution.... In most cases, each party's financial considerations will ultimately dictate whether an award of counsel fees is appropriate.

Id. (citing ***Litmans v. Litmans***, 673 A.2d 382, 390 (Pa. Super. 1996)).

The trial court adopted the master's recommendation that Wife's claim for counsel fees be denied, finding that "each party should be responsible for his or her own counsel fees incident to the divorce because each party has the means to pay them." Trial Court Opinion, 6/8/12, at 5. The record supports this determination, as it reveals that Wife has kept current on her counsel fees throughout the course of the parties' divorce action. N.T. 3/23/11, at 114-18.³ It also reveals that Wife has a steady stream of

² "In proper cases, upon petition, the court may allow a spouse reasonable alimony *pendente lite*, spousal support and reasonable counsel fees and expenses." 23 Pa.C.S.A. § 3702.

³ Wife was represented by three other attorneys prior to retaining her present counsel. Wife testified that she has paid all of her prior counsel in full, and that she had no outstanding balance with her current counsel as of the time of the hearing. N.T., 3/23/11, at 114-18.

income in the form of payment from her job, monthly stipends from the Army Reserves, and APL and child support from Husband. *Id.* at 172-78.

Moreover, we note that Wife does not claim that she does not have the ability to pay her counsel fees; rather, she complains only that she should be entitled to them because Husband earns more money than she does and because Husband employed his cousin as his counsel for a portion of these proceedings, ostensibly at a discounted rate.⁴ Appellant's Brief at 7. Assuming that these statements are true, they do not entitle Wife to an award of counsel fees. The trial court determined that both parties had the ability to pay their own counsel fees. As the purpose of a counsel fee award is to ensure that both parties have the ability to pay for adequate representation, *Plitka*, 714 A.2d at 1070, and the trial court properly found that Wife possessed the ability to pay, the trial court did not err in denying her claim.⁵

In her third issue, Wife challenges the trial court's calculation of the arrears due on Husband's APL and child support obligation. Wife presents

⁴ The record reveals that while Husband was initially represented by his cousin, Husband has been represented by other counsel since May 2010.

⁵ To the extent that Wife is claiming that the trial court erred in awarding Husband counsel fees as a sanction against Wife for her failure to respond to Husband's discovery requests, *see* Appellant's Brief at 7-8, we find this issue waived for Wife's failure to develop this contention with citation to or discussion of any relevant authority. *See In re W.H.*, 25 A.3d 330, 339 (Pa. Super. 2011) ("[W]here an appellate brief fails to provide any discussion of a claim with citation to relevant authority ... that claim is waived."); Pa.R.A.P. 2119(a).

two arguments in support of this issue. First, Wife argues that the trial court erred in determining her income for 2011 for purposes of the APL calculation. Appellant's Brief at 8. Second, Wife argues that the trial court erred in allowing Husband to pay the sizable arrearage (\$34,644.79) at a rate of \$300 per month. *Id.* at 9.

Rule of Appellate Procedure 2119(c) requires that "[i]f reference is made to ... any [] matter appearing in the record, the argument must set forth, in immediate connection therewith, or in a footnote thereto, a reference to the place in the record where the matter referred to appear." Pa.R.A.P. 2119(c). Here, Wife is asking us to review the trial court's determination of her income for 2011, which necessarily requires us to review the evidence presented on this issue. Wife has not indicated where in the record we may find this relevant evidence. Furthermore, Wife does not develop her argument on these points with citation to the record or discussion of relevant authority. It is axiomatic that this Court will not comb the record for evidence in support of a party's position, and we will not develop arguments on a party's behalf. *J.J. DeLuca Co., Inc. v. Toll Naval Associates*, 56 A.3d 402, 411 (Pa. Super. 2012). Furthermore, "where an appellate brief fails to provide any discussion of a claim with citation to relevant authority ... that claim is waived." *In re W.H.*, 25 A.3d 330, 339 (Pa. Super. 2011); *see also* Pa.R.A.P. 2119(a). Because of Wife's

failure to properly develop these claims with citation to the record and proper development of argument, we find them waived.

Fourth, Wife contends that the trial court erred in awarding certain funds to Wife that the parties had stipulated to exclude from equitable distribution. Wife contends that this was an oversight on the Master's part, that the sum should be subtracted from the assets awarded to Wife, and that she should be awarded the same amount from other marital assets. Appellant's Brief at 10.

The record reveals that at the hearing before Master Ferber, the parties entered into the following stipulation: "The savings deposit program; they're both in the military. They each had such an account and they each made withdrawals of [sic] that ... post-sep[aration] and are willing to just say that that's all a wash[.]" N.T., 3/23/11, at 7. Thus, the parties stipulated to exclude the value of their individual military savings deposit program ("SDP") accounts from equitable distribution. Wife now contends that she deposited this money into a Roth IRA account, and that by awarding her that Roth IRA account, the trial court ran afoul of the parties' stipulation.

Addressing this claim, the trial court acknowledged the stipulation, but found that Wife failed to present any evidence that the SDP funds had been deposited into the Roth IRA at issue. We have reviewed the record and agree with the trial court's conclusion; there is simply no factual basis upon

which the trial court could have found that Wife deposited her SDP funds into the relevant Roth IRA, such that this Roth IRA (or any portion thereof) should have been excluded from the marital estate.⁶ Wife is therefore due no relief on this claim.

In her final claim, Wife challenges the trial court's decision to exclude an inheritance received by Husband from the marital estate. Appellant's Brief at 10. The argument Wife sets forth here, however, is distinctly different than the one she pursued in the trial court.

At the hearing, Husband testified that he had two pre-marital accounts at WesBanco in West Virginia that were composed entirely of funds received as an inheritance from his grandmother (the total amount of which is not clear from the record) prior to 1993. N.T., 3/23/11, at 66–72. One of these accounts was an IRA. *Id.* at 69. Husband did not deposit or withdraw funds from these accounts during the marriage, but he named Wife the beneficiary of the IRA account prior to beginning his tour of duty in Iraq. *Id.* at 68, 70–72. Wife testified that following the parties' separation, Husband alerted her that a check in the amount of \$20,000 from WesBanco would be coming to the marital residence, and asked Wife to forward the check to him. *Id.* at 121. Wife also contradicted Husband's testimony regarding the death of his

⁶ In contrast, Husband presented evidence that he used the money withdrawn from his SDP account as part of the down payment for his house in Maryland. N.T., 3/23/11, at 16-19, Exhibits 2-3.

grandmother, as she testified that she attended Husband's grandmother's funeral with him in 2006. *Id.* at 121.

The master excluded the WesBanco funds from the marital estate, finding that they were proceeds from an inheritance received prior to marriage. In her exceptions to the master's report, Wife argued that the master erred in excluding these funds from the marital estate, stating only the following:

[Wife] believed that [the \$20,000 from WesBanco] was money inherited from [Husband's] grandmother during the marriage. [Husband] testified that his grandmother died in 1993. [Wife] testified that she attended [Husband's] grandmother's funeral in 2006. Given that [Wife] had no prior knowledge of the origin of these funds and that [Husband] was unable to explain their existence, it is more than fair to assume that these were monies that [Husband] had accumulated during the marriage and was attempting to hide from [Wife], now that their marriage was falling apart.

Defendant's Brief in Support of Exceptions, 7/26/11, at 3-4.

Thus, in the trial court, Wife argued that it was error to determine that the funds in Husband's WesBanco accounts were received prior to the parties' marriage. The trial court rejected this claim on the basis that regardless of when received, "funds acquired by Husband through inheritance are statutorily excluded from the marital estate". Trial Court Opinion, 6/8/12, at 8.

On appeal, Wife has abandoned the argument she pursued below. She now acknowledges that our law explicitly provides that property received as an inheritance is not marital property⁷ and argues that because Husband named Wife as the beneficiary to the IRA, the IRA became marital property. Appellant's Brief at 10-11. It is well settled that claims not raised in trial court may not be raised for the first time on appeal. *Mazlo v. Kaufman*, 793 A.2d 968, 969 (Pa. Super. 2002). Because Wife did not raise this claim in the trial court, she has waived it for purposes of appeal. Pa.R.A.P. 302 ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.").

Order affirmed.

⁷ "As used in this chapter, 'marital property' means all property acquired by either party during the marriage and the increase in value of any non[-]marital property acquired pursuant to paragraphs (1) and (3) as measured and determined under subsection (a.1). However, marital property does not include: ... (3) Property acquired by gift, except between spouses, bequest, devise or descent or property acquired in exchange for such property." 23 Pa.C.S.A. § 3501(a)(3).