

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COLETTE M. HILSCHER,	·	IN THE SUPERIOR COURT OF
		PENNSYLVANIA
Appellant	·	
v.	·	
JAMES R. HILSCHER,	·	
		No. 61 WDA 2013
Appellee	·	

Appeal from the Decree Entered February 7, 2013
In the Court of Common Pleas of Allegheny County
Family Court at No(s): FD-10-009069-002

BEFORE: PANELLA, OLSON AND MUSMANNO, JJ.

MEMORANDUM BY OLSON, J.:

FILED DECEMBER 13, 2013

Appellant, Colette M. Hilscher ("Wife"), appeals from the decree of divorce entered on February 7, 2013. We are constrained to affirm.

The relevant factual and procedural history of this case is as follows. Wife and James R. Hilscher ("Husband") separated on April 30, 2008. On December 10, 2010, Wife filed a complaint in divorce in the Allegheny County Court of Common Pleas. On January 21, 2011, Husband filed a petition asserting a claim for the equitable distribution of property. On March 21, 2011, Wife filed an amended complaint in divorce. On January 9, 2012, the trial court referred the matter to a permanent master. The master held hearings on June 20 and July 6, 2012 and issued a report and recommendation on July 30, 2012.

Wife filed exceptions to the report and recommendation on August 17, 2012. On November 19, 2012, the final transcript of the hearings before the master was filed. On December 21, 2012, Husband filed a motion requesting that Wife's exceptions be dismissed for failure to file a brief in support thereof within 20 days of the transcript being filed.¹ A hearing on the motion was scheduled for 10:00 a.m. on December 21, 2012.² Wife filed her brief in support of her exceptions at 9:58 a.m. on December 21, 2012. Wife failed to appear for the 10:00 a.m. hearing on Husband's motion to dismiss the exceptions. At 10:45 a.m., after hearing all other motions that were scheduled for that time, neither Wife nor her counsel were present.³

¹ The docket contained in the certified record has a typographical error and lists the date as December 12, 2012. However, the text of the docket entry shows that the motion was filed on December 21, 2012. The dates stamp on the order accompanying the motion is dated December 27, 2012.

² The trial court's Rule 1925(a) opinion states that the hearing on Husband's motion was scheduled for 2:00 p.m. At oral argument, both parties agreed that this is a typographical error and the hearing was scheduled for 10:00 a.m. This is consistent with the Allegheny County Court of Common Pleas Family Division's schedule. Motion hearings are generally scheduled for 2:00 p.m. from Monday through Thursday and 10:00 a.m. on Friday. December 21, 2012 was a Friday.

³ During oral argument, Wife's counsel averred that he spoke with Husband's counsel prior to court convening and informed him that Wife's brief had been filed. In its opinion, the trial court states that Husband's counsel informed it that Wife's counsel would not be present for the motion hearing as he was scheduled to be in front of another member of the Allegheny County Court of Common Pleas. Trial Court Opinion, 3/4/13, at 2 n.3. However, Wife's counsel failed to inform the trial court of the conflict. *Id.*

The trial court granted Husband's motion, dismissed Wife's exceptions, and adopted the master's recommendation as an order of the court. That order was entered on the docket on December 27, 2012.

On January 4, 2013, Wife filed a motion to reconsider the dismissal of her exceptions to the master's report and recommendation. The trial court denied the motion for reconsideration. Wife filed a notice of appeal on January 8, 2013.⁴ On January 28, 2013, we issued an order to show cause why this appeal should not be quashed as being interlocutory in nature. **See *Schenk v. Schenk***, 880 A.2d 633, 639 (Pa. Super. 2005) (citation omitted) ("[o]rders of property distribution are not appealable until entry of a final divorce [d]ecree"). On February 7, 2013, the trial court entered a decree of divorce. Therefore, on February 11, 2013 we discharged the order to show cause. **See *Busse v. Busse***, 921 A.2d 1248, 1253 n.2 (Pa. Super. 2007), *appeal denied*, 934 A.2d 1275 (Pa. 2007) (citation omitted) (entry of divorce decree while appeal from interlocutory order of property distribution is pending cures defect and permits appeal to be considered); Pa.R.A.P. 905(a)(5).

⁴ On January 11, 2013, the trial court ordered Wife to file a concise statement of errors complained of on appeal ("concise statement"). **See** Pa.R.A.P. 1925(b). Wife filed her concise statement on January 29, 2013. On March 4, 2013, the trial court filed its Rule 1925(a) opinion.

Wife presents seven issues for our consideration:⁵

1. Whether economic justice, and a fair and just determination of the parties' property rights, precludes the [t]rial [c]ourt, pursuant to Pa.R.C.P. 239(f), from summarily dismissing [Wife]'s exceptions because of the late filing of [Wife]'s [b]rief in [s]upport of the [e]xceptions?
2. Whether economic justice, and a fair and just determination of the parties' property rights, requires the [t]rial [c]ourt to hear argument on [Wife]'s [e]xceptions pursuant to Pa.R.C.P. 1920.55-2(c)?
3. Whether the [t]rial [c]ourt erred by dismissing [Wife's] [e]xceptions to [the] [r]eport and [r]ecommendation of the [m]aster pursuant to Pa.R.C.P. 1920.55-2(b) because the dismissal is inconsistent with the avowed objectives of the [d]ivorce [c]ode to effectuate economic justice between the parties and to [ensure] a fair and just determination of their property rights pursuant to 23 Pa.C.S.[A.] § 3102(a)(6)?
4. Whether the [t]rial [c]ourt erred by making the [r]eport and [r]ecommendation of the [m]aster a final [o]rder of [c]ourt because the award of equitable distribution fails to consider many relevant factors under . . . 23 Pa.C.S.[A.] § 3502(a)?
5. Whether the [t]rial [c]ourt erred by making the [r]eport and [r]ecommendation of the [m]aster a final [o]rder of [c]ourt because the award of equitable distribution fails to apply a different percentage to each individual item of marital property and each individual item of marital debt as opposed to applying a percentage share to the lump sum whole of the property and debt?
6. Whether the [t]rial [c]ourt erred by making the [r]eport and [r]ecommendation of the [m]aster a final [o]rder of [c]ourt because the award of equitable distribution requires [Wife] to be liable for [p]arent [p]lus [l]oans for the college education of the parties' emancipated children when [Wife] never contractually agreed to be jointly liable for these loans?

⁵ We have re-numbered the issues for ease of disposition.

7. Whether the [t]rial [c]ourt erred by making the [r]eport and [r]ecommendation of the [m]aster a final [o]rder of [c]ourt because it denies [Wife]'s claim for counsel fees without a meaningful review of all the relevant factors for a counsel fee award?

Wife's Brief at 5-6.

Wife first contends that the trial court erred by dismissing her exceptions to the master's report and recommendation for failure to file a brief within 20 days of the transcripts being filed. Wife contends that the dismissal, pursuant to Allegheny County Court of Common Pleas Family Division Court Manual, Adult Section, § III(M)(5) ("the local rule"),⁶ violated

⁶ The relevant portions of the local rule provide that:

Within [20] days after the notice of the filing of the report [and recommendation] has been mailed, exceptions may be filed by any party to the report [and recommendation], or any part thereof, in accordance with the procedures set forth in Pennsylvania Rule of Civil Procedure 1920.55-2. . . .

To the extent that transcription of the hearing before the master has not been requested, the party taking the initial exceptions ("exceptant") shall immediately request and pay the deposit required for transcription of the complete record of all proceedings before the master. . . .

Exceptant shall file a brief in support of exceptions within 20 days after the filing of the record. . . .

Failure to comply with the procedure set forth above will result in the automatic termination of the exceptions . . . because of either unreasonable inactivity or failure to comply with rules of court. Any exceptions terminated on such grounds shall not be

(Footnote Continued Next Page)

Pa.R.C.P. 239(f).⁷ Husband counters that the trial court did not automatically dismiss the exceptions for failure to file a timely brief. Rather, Husband avers that the trial court granted his motion to dismiss the exceptions when Wife failed to appear at the scheduled motion hearing.

“Prior to addressing the substance of [Wife’s argument] we must determine whether [she] properly preserved [the issue]. An appellant’s failure to include an issue in h[er] Rule 1925(b) [concise] statement [of errors complained of on appeal (‘concise statement’)] waives that issue for purposes of appellate review.” **Madrid v. Alpine Mountain Corp.**, 24 A.3d 380, 382 (Pa. Super. 2011) (citation omitted). Although we have previously held that the Allegheny County local rule must yield to Pennsylvania Rule of Civil Procedure 239(f), **Murphy v. Murphy**, 715 A.2d 477, 478 (Pa. Super. 1998), Wife, in her concise statement, failed to raise the validity of the local rule. The trial court recognized this in its Rule 1925(a) opinion. Trial Court Opinion, 3/4/13, at 5 (“Wife does not contend that the local rule is improper or that its application was contrary to law.”).

(Footnote Continued) _____

reinstated except upon petition to the [c]ourt for good cause shown.

Allegheny County Court of Common Pleas Family Division Court Manual, Adult Section, § III(M)(5).

⁷ Rule 239(F) of the Pennsylvania Rules of Civil Procedure provides “[n]o civil action or proceeding shall be dismissed for failure to comply with a local rule.”

Furthermore, the trial court was not put on notice about the potential applicability of Rule 239(f). Wife failed to argue that the local rule was invalid or conflicted with Rule 239(f) in her motion for reconsideration. **See generally** Wife's Motion for Reconsideration, 1/4/13. As Wife failed to include the issue in her concise statement, the issue is waived and we may not consider its merits.⁸ **See Commonwealth v. Butler**, 812 A.2d 631, 634 (Pa. 2002) (we have duty to *sua sponte* raise the waiver of issues not included within concise statement).

In her second and third issues on appeal, Wife presents separate challenges to the dismissal of her exceptions pursuant to Pennsylvania Rule of Civil Procedure 1920.55-2 and 23 Pa.C.S.A. § 3102(a)(6). Generally, "[o]ur standard of review in assessing the propriety of a marital property distribution is whether the trial court abused its discretion by a misapplication of the law or failure to follow proper legal procedure." **Strauss v. Strauss**, 27 A.3d 233, 235 (Pa. Super. 2011), *appeal granted on other grounds*, 41 A.3d 1286-1287 (Pa. 2012) (citation omitted). However, "[t]he interpretation and application of a Pennsylvania Rule of Civil Procedure presents a question of law. Accordingly, to the extent that we are

⁸ We do, however, remind the trial court of our decision in **Murphy**, in which we held that the local rule at issue in this appeal is invalid because it conflicts with Rule 239(f) and the provision relating to the dismissal of exceptions for failure to file a brief may not be enforced by the Family Division of the Court of Common Pleas of Allegheny County. 715 A.2d at 478.

required to interpret a rule of civil procedure, our standard of review is *de novo*, and our scope of review is plenary." **Keller v. Mey**, 67 A.3d 1, 5 (Pa. Super. 2013), quoting **Gray v. Buonopane**, 53 A.3d 829, 834 (Pa. Super. 2012). Likewise, "[t]he interpretation of a statute is a pure question of law, and therefore our standard of review is *de novo* and our scope of review is plenary." **Commonwealth v. Felder**, 75 A.3d 513, 515 (Pa. Super. 2013) (citation omitted).

In dismissing Wife's exceptions, the trial court enforced the local rule. Wife does not argue that she showed good cause in her motion to reconsider to warrant reinstating her exceptions. Instead, she argues in generalities that Rule 1920.55-2(c) and 23 Pa.C.S.A. § 3102(a)(6) required the trial court to hear oral argument on her exceptions.

However, Rule 1920.55-2(c) only requires oral argument to be heard on exceptions pending before the court.⁹ Wife's exceptions were no longer pending once the trial court dismissed the exceptions on procedural grounds. Thus, the trial court was not required to hear oral argument thereon. The statute cited by Wife, 23 Pa.C.S.A. § 3102(a)(6) merely lists legislative findings and the objectives of the divorce code. It does not address the dismissal of exceptions to masters' reports and recommendations.

⁹ Specifically, Pa.R.Civ.P. 1920.55-2(c) provides "[i]f exceptions are filed, any other party may file exceptions within twenty days of the date of service of the original exceptions. The court shall hear argument on the exceptions and enter a final decree."

Accordingly, the trial court did not err by declining to hold oral argument because Wife's exceptions were no longer pending.

Wife alleges in her fourth through seventh issues on appeal that the trial court's equitable distribution was an abuse of discretion. Prior to addressing the merits of these issues, we must first determine if the issues are waived because of the trial court's dismissal of the exceptions on procedural grounds. Under Rule 1920.55-2, "Matters not covered by exceptions are deemed waived unless, prior to entry of the final decree, leave is granted to file exceptions raising those matters." Pa.R.C.P. 1920.55-2(b); *Hayward v. Hayward*, 868 A.2d 554, 561 (Pa. Super. 2005) (citations omitted) ("In order to preserve an issue for appeal, a party must make an exception to the [master's] report.").

It is well settled that if exceptions are filed after the timeframe established by rule, the issues contained therein are waived. *See Metzger v. Metzger*, 534 A.2d 1057, 1058 (Pa. Super. 1987); *Sipowicz v. Sipowicz*, 517 A.2d 960, 963 (Pa. Super. 1986), *appeal denied*, 533 A.2d 713 (Pa. 1987). In such circumstances, it is appropriate for the trial court to dismiss the exceptions and decline to address the merits of the exceptions. We believe that the dismissal of exceptions for other procedural infirmities should be treated in the same manner. We find persuasive a decision from

our sister court.¹⁰ In *In re Miller*, 2008 WL 9401373, *2 (Pa. Cmwlth. May 23, 2008) (unpublished), exceptions were dismissed for a procedural defect other than the timing requirement. Although the Commonwealth Court chose to exercise its discretion and reach the merits of the exceptions, the court held that it was not necessary to do so as the dismissal acted as a waiver of the merits of the exceptions. *Id.* Based upon the rationale articulated by the Commonwealth Court, we conclude in the present case that when exceptions are dismissed for failure to comply with a rule of court or court order, such dismissal acts as a waiver of the issues raised in those exceptions pursuant to Pennsylvania Rule of Civil Procedure 1920.55-2(b). To avoid waiver, Wife needed to obtain leave of court to reinstate her exceptions. As Wife's exceptions were dismissed on procedural grounds, and were not reinstated, she waived the merits of issues raised in those exceptions.¹¹

In certain limited circumstances, this Court has discretion to reach the merits of an issue although that issue has technically been waived. We discussed this concept in *In re J.W.*, 578 A.2d 952 (Pa. Super. 1990). In

¹⁰ The Commonwealth Court's Internal Operating Procedures provide, in relevant part, that "an unreported panel decision of [the Commonwealth Court] issued after January 15, 2008, [may be cited] for its persuasive value, but not as binding precedent." Commonwealth Court I.O.P. § 414.

¹¹ We would not have hesitated to reach the merits of Wife's claims if she had properly preserved her challenge to the trial court's erroneous application of the local rule in dismissing her exceptions.

J.W., exceptions to a *decree nisi* terminating parental rights were not timely filed. *Id.* at 955-956. We explained that “[w]hen . . . an issue presented on appeal was raised, briefed, argued, and considered in the trial court, we **may** decline to dismiss the claim on waiver grounds.” *Id.* at 956 (emphasis in original), *citing Kurtas v. Kurtas*, 555 A.2d 804 (Pa. 1989). We exercised our discretion to reach the merits of the appellant’s untimely filed exceptions in *J.W.* because despite waiver on procedural grounds, the appellant’s claims would inevitably have been examined on collateral review. *J.W.*, 578 A.2d at 956. As the issue in *J.W.* was the termination of parental rights, we concluded it was in the best interest of the child to expedite the process by exercising our discretion to reach the merits. *Id.*

Likewise, in *In re Adoption of Stickley*, 638 A.2d 976, 980 (Pa. Super. 1994), *appeal denied*, 648 A.2d 790 (Pa. 1994), a father filed untimely exceptions to an order terminating his parental rights. We declined to find that the father had waived his right to challenge the order because terminating his parental rights was a drastic measure that not only impacted him, but also impacted his child. *Id.* Because the case *sub judice* does not involve the termination of parental rights, we are not persuaded that our prior decisions in *J.W.* and *Stickley* compel us to overlook waiver in the present case.

We have, in the past, considered the merits of exceptions that have been dismissed in circumstances similar to the case at bar. In *Keller v.*

Keller, 760 A.2d 22, 24 (Pa. Super. 2000), the trial court dismissed wife's exceptions for failure to file a brief in support of her exceptions to the master's report and recommendation, as directed by an order of the trial court. We declined to find waiver, stating:

Although we do not condone [w]ife's apparent disregard for the trial court's direction to file a brief in support of her exceptions, because [h]usband does not cite to any applicable local rules or case law endorsing such waiver, we fail to find that [w]ife has waived her issues on appeal. **See *Fielding v. Fielding***, 685 A.2d 178, 179–[1]80 (Pa. Super. 1996) (holding that appellate courts will not review undeveloped and unsupported arguments).

Keller, 760 A.2d at 25.

In **Keller** we did not hold that we may always address the merits of an appeal when exceptions were dismissed by the trial court. Rather, we declined to find waiver in that particular case because the party advocating waiver failed to properly develop the issue in his brief. **Id.** Thus, we found that husband waived his waiver argument.

The situation in **Keller** was one of those in which this Court had the discretion whether to consider the merits of wife's argument or find the issue waived. We chose not to find waiver in **Keller** because husband failed to properly argue his waiver claim. **Id.** Furthermore, wife was not put on notice that her failure to comply with the trial court's order to file a brief in support of her exceptions would result in the issue being waived on appeal.

In the case *sub judice*, Husband has not argued that Wife waived any issue on appeal. **See generally** Husband's Brief. However, we had an

obligation to *sua sponte* find Wife's argument regarding the validity of the local rule's sanction for failure to file a brief within 20 days waived as she failed to include the issue in her concise statement. **See *Butler***, 446 A.2d at 634. Also, unlike ***Keller***, Wife was on notice that her failure to file a brief within 20 days of the filing of the transcript could result in the waiver of the issue on appeal. In contrast to the order issued in ***Keller***, the local rule specifies that failure to file the brief could result in the automatic termination of exceptions and that the exceptions would not be re-instated absent a showing of good cause. Thus, the facts in this case are distinguishable from those in ***Keller***.

Wife had a myriad of opportunities to ensure that her exceptions were not dismissed by the trial court and/or were preserved for appellate review. She could have filed her brief in support of her exceptions within the 20-day timeframe specified by the local rule. She could have filed a written response to Husband's motion to dismiss citing Rule 239(f) and/or ***Murphy***. She could have included within her belatedly filed brief in support of her exceptions a short argument as to why the exceptions should not be dismissed pursuant to the local rule citing Rule 239(f) and/or ***Murphy***. She could have appeared at the hearing on Husband's motion to dismiss (or requested that it be continued because of counsel's conflict) and raised Rule 239(f) and/or ***Murphy*** as a defense against the motion. She could have included the invalidity of the local rule as a ground for her motion for

reconsideration. Finally, she could have included the invalidity of the local rule in her concise statement. Instead, she failed to raise the invalidity of the local rule at any of the above opportunities. She waited until she filed her brief in this Court to challenge the validity of the local rule.

The trial court in the case at bar never reached the merits of Wife's exceptions. Instead, after dismissing Wife's exceptions on procedural grounds the trial court adopted the recommendation of the master as the order of the court. In its Rule 1925(a) opinion, the trial court does not address Wife's fourth through seventh issues on appeal, all related to the merits. **See** Trial Court Opinion 3/4/13, at 4 ("The remaining four issues raised by Wife pertain to the merits of her exceptions and are not at issue in the subject appeal.").

Under these circumstances, we decline to exercise our discretion to review the merits of Wife's exceptions. Decisions regarding equitable distribution of property properly reside with the trial court and we typically review the trial court's decision for an abuse of discretion. **Strauss**, 27 A.3d at 235. It would be imprudent for us to usurp the trial court's role and review the master's report and make findings of fact thereon.

Furthermore, it would create perverse incentives if we were to review the master's report and recommendation in the first instance. Wife failed on numerous occasions to properly preserve her issues for appellate review. If we addressed the merits of Wife's exceptions, it would incentivize litigants to

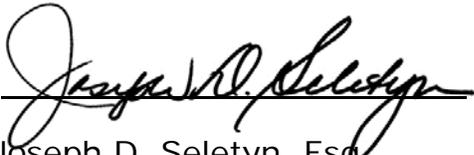
not raise issues at the proper time, before the trial court, and instead procedurally default on those issues in the hope of having this Court review the merits of those claims through a less deferential standard than the abuse of discretion standard that we typically apply. It would also create uncertainty for trial courts and litigants. Trial courts would likely address issues that had been waived to ensure that we applied the abuse of discretion standard rather than a less deferential standard. Litigants would likewise be forced to litigate issues at the trial level which have been waived in order to ensure that their arguments are considered.

In sum, we decline to exercise our discretion and reach the merits of Wife's fourth through seventh issues on appeal which address the merits of Wife's exceptions. Instead, we conclude that, because the trial court dismissed the exceptions on procedural grounds, and because Wife failed to properly preserve any challenge to the propriety of that ruling, Wife has waived appellate review of the merits of her exceptions to the master's report and recommendation. **See** Pa.R.C.P. 1920.55-2(b). As such, we affirm the decree of the trial court.

Decree affirmed.

J-A28029-13

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: 12/13/2013