

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

MARK ALBERT,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
PEGGY ALBERT,	:	
	:	
Appellee	:	No. 784 WDA 2012

Appeal from the Order February 1, 2012,
Court of Common Pleas, Allegheny County,
Family Court at No. FD 86-004609-008

BEFORE: BOWES, DONOHUE and MUNDY, JJ.

MEMORANDUM BY DONOHUE, J.: FILED: May 28, 2013

Mark Albert (“Husband”) appeals from the February 1, 2012 order of court dividing the parties’ martial assets. Following our review, we vacate the order and remand for further proceedings.

Husband and Peggy Albert (“Wife”) married on April 25, 1996 and separated on March 7, 2008. The parties are the parents of one son who was born before their marriage and who was an adult at the time of these proceedings. Husband has two sons from a prior relationship, and Wife also has a son from another relationship. During the parties’ marriage, Husband worked at Albert’s Lounge, a bar and restaurant that he owns. He also managed commercial property located at 1600 Potomac Avenue in Dormont, Pa., which is owned by his brother. Prior to marriage, Wife earned her cosmetology license and worked in a salon. After the parties married Wife

stopped working so that she could focus on taking care of the children and being a homemaker. Wife maintains her cosmetology license, although she contends that injuries to her elbows and foot make it difficult for her to work in that field.

Husband filed a complaint for divorce on June 9, 2008, also raising a claim for equitable distribution. Wife filed an answer and counterclaim, seeking awards of alimony and counsel fees. In 2011, equitable distribution proceedings were held over three days before Special Master Patricia Miller. The Master issued her report and recommendation, to which Husband filed exceptions. Following argument, the trial court dismissed Husband's exceptions and adopted the Master's report and recommendation as the equitable distribution order. **See** Trial Court Order, 2/1/12. A divorce decree was entered on April 23, 2012, and Husband filed this timely appeal.

Husband presents three issues for our review:

- A. Did the [trial] [c]ourt err and/or abuse its discretion in determining that Husband's premarital business, Albert's Lounge, was a marital asset valued at \$100,000?
- B. Did the [trial] [c]ourt err and/or abuse its discretion when it failed to make a specific finding on the parties' substantial IRS debt for tax years 1996-2004, which was marital?
- C. Did the [trial] [c]ourt err and/or abuse its discretion when it ordered Husband to pay Wife alimony of \$1,200 per month for [24] months?

Appellant's Brief at 5-6.¹ 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.

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

Husband first argues that the trial court "erred and/or abused its discretion by finding [Husband's] premarital business, Albert's Lounge, was a marital asset valued at \$100,000." Appellant's Brief at 14. We are constrained to agree.

The trial court's first error is with regard to its categorization of Albert's Lounge as a marital asset. **See** Master's Report and Recommendation, 7/12/11, at 5, 9; Trial Court Opinion, 9/5/12, at 5. Property owned by party prior to marriage is not a marital asset. 23 Pa.C.S.A. § 3501(a)(1). Only the increase in value of such property over the duration of the marriage is a marital asset subject to equitable distribution.

¹ We have reordered the issues presented by Husband for purposes of our discussion.

23 Pa.C.S.A. § 3501(a); **Anderson v. Anderson**, 822 A.2d 824, 828 (Pa. Super. 2003).

The evidence here is uncontradicted that Husband purchased Albert's Lounge in 1984, 12 years before the parties married. Unquestionably, it is pre-marital property. Therefore, only the increase in value of Albert's Lounge during the course of the marriage is subject to equitable distribution. **Id.** Instead of properly identifying this marital asset, the Master found Albert's Lounge in its entirety to be a marital asset and the trial court adopted this determination. **See** Master's Report and Recommendation, 7/12/12, at 5-6, 9-10; Trial Court Opinion, 9/5/12, at 5. This was clearly a misapplication of the law.

Further, the only evidence presented with regard to the value of Albert's Lounge was Husband's testimony that he would sell Albert's Lounge for \$100,000. **Id.** at 131. Thus, the only evidence presented was of the present day fair market value.² This is germane to these proceedings only insofar as it is a measure from which the value of Albert's Lounge as of the date of the parties' marriage may be subtracted in order to determine the increase of value over the course of the parties' marriage. However, there is absolutely no evidence of record from which a value as of the date of

² "Fair market value" is defined as "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction; the point at which supply and demand intersect." BLACK'S LAW DICTIONARY (9th ed. 2009), Value.

marriage may be discerned; as such, there is no way to value the marital asset at issue. Additional proceedings are required so that such evidence may be presented.

We are troubled because the trial court (following the recommendation of the Master) seemingly disregarded the well settled definitions of marital and non-marital property, as its concluded that “the inclusion of Albert’s Lounge as a marital asset was appropriate as there has certainly been an increase in value during the marriage, which was contributed to by Wife’s tenure there in an ‘ownership’ capacity.” Trial Court Opinion, 9/5/12, at 5. The problem in this case is that neither party presented evidence that would permit a determination of the increase in value of Albert’s Lounge, but rather than recognizing this absolute lack of evidence, the Master and then the trial court decided instead to include an asset that is indisputably non-marital as part of the marital estate. This is in direct contradiction of the terms of the Divorce Code, **see** 23 Pa.C.S.A § 3501, and therefore a misapplication of the law. The trial court may not transform Husband’s pre-marital property into a marital asset because there was insufficient evidence to determine the increase in value thereof.³ We recognize the trial court’s frustration with

³ The trial court rationalizes its use of the fair market value figure based on the discretion it is afforded in choosing how to value an asset. Trial Court Opinion, 9/5/12, at 3-5. While we recognize that a trial court has great discretion in selecting the manner in which it values an asset, **see Childress v. Bogosian**, 12 A.3d 448, 456 (Pa. Super. 2011), that discretion must be applied to the proper asset.

Husband's relentlessly obdurate behavior, which is readily apparent from the record before us. However, the trial court may not disregard the law in order to sanction Husband for his misbehavior. While sanctions may have been appropriate, the record is devoid of a motion to compel discovery and subsequent motion for sanctions for failure to comply with an order to comply.

In his second issue, Husband argues that the trial court erred "when it failed to make a specific finding on the parties' substantial IRS debt[, totaling more than \$160,000,] for tax years 1996-2004[.]" Appellant's Brief at 20. Again, we must agree. Tax liability that accrues prior to separation is properly included in the marital estate for purposes of equitable distribution. ***Duff v. Duff***, 510 Pa. 251, 254, 507 A.2d 371, 373 (1986); ***see also Hicks v. Kubit***, 758 A.2d 202, 204 (Pa. Super. 2000). The trial court was required to "equitably divide, distribute or assign, in kind or otherwise, the marital property between the parties ... in such percentages and in such manner as the court deems just after considering all relevant factors[,]" including those listed in § 3502 of the Divorce Code. 23 Pa.C.S.A. § 3502(a). Thus, as it was part of the marital estate, the trial court was bound to address the IRS debt when making its equitable distribution award. The trial court elected instead to ignore this significant debt, going only so far as to adopt the Master's statement that "[t]here is a substantial IRS debt ... but it is joint since the returns were joint so both parties have exposure for same."

Master's Report and Recommendation, 7/12/11, at 10. This observation does not discharge the trial court's duty to divide all aspects of the marital estate between the parties. **See** 23 Pa.C.S.A. § 3502(a). On remand, the trial court must "equitably divide, distribute or assign" the parties' IRS debt as part of its equitable distribution scheme.

In his final issue, Husband argues that the trial court erred in awarding Wife alimony in the amount of \$1,200 per month for two years. Essentially, he argues that Wife failed to "demonstrate her need for alimony[.]" Appellant's Brief at 18. "Where a divorce decree has been entered, the court may allow alimony, as it deems reasonable, to either party only if it finds that alimony is necessary." 23 Pa.C.S.A. § 3701(a).

Following a thorough review of the record, the briefs of the parties, the relevant law, and the comprehensive opinion of the trial court on this issue, we find no error in the trial court's determination that the evidence supports a limited award of alimony to Wife for a period of two years. However, as we have found that the trial court must reconsider the division of marital assets, we also vacate the award of alimony. "[A]limony 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." **Kent v. Kent**. 16 A.3d 1158, 1161 (Pa. Super. 2011), *appeal denied*, 612 Pa. 692, 29 A.3d 797 (2011). After reconsidering the division of

the parties' marital estate as we have directed, the trial court will need to revisit the question of whether Wife is entitled to an award of alimony.

Having disposed of the issues presented on appeal, we pause only to recognize that our decision here appears, at first blush, to reward the party who has taken great efforts to thwart the authority of the trial court over the many years this action has been pending. To the extent this is true, Husband's victory is likely fleeting. We are remanding this case for further proceedings so that the trial court can determine the value of a substantial marital asset - the increase in value of Albert's Lounge. It is our hope that both parties will rise to the occasion and present the trial court with evidence relevant to this inquiry.⁴ With the proper evidence, the value of this asset may be determined to be in excess of the arbitrary \$100,000 figure that the trial court adopted, and therefore inure to Wife's benefit by increasing the marital estate. Furthermore, regarding the IRS debt, the trial court may find it appropriate to assign the entire amount to Husband, thus foreclosing Husband from seeking a contribution from Wife toward payments of the same at some later date.

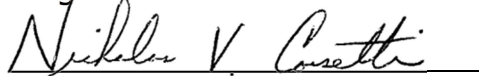
This case came before this Court in a state we may most politely refer to as a morass. The parties failed in their obligations to produce relevant evidence, and the Master and then the trial court failed to apply the law

⁴ We urge the parties to use the rules of discovery and to seek sanctions when appropriate in their attempts to gather such evidence.

accurately. While we recognize that the trial court is afforded discretion in these matters, our standard of review requires us to disturb that discretion where there has been a misapplication of the law. **See Lee**, 978 A.2d at 382-83. As we have found two such misapplications, we vacate the order of court equitably dividing the parties' marital property and remand for further proceedings consistent with this decision.

Order vacated. Case remanded. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in cursive script, reading "Nicholas V. Casatti", is written over a horizontal line.

Deputy Prothonotary

Date: 5/28/2013