NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

DENISE M. MILLER, Appellant v. BRIAN K. MILLER, Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 82 MDA 2012

Appeal from the Order December 2, 2011
In the Court of Common Pleas of Clinton County
Domestic Relations at No(s): 219-2004

BEFORE: BOWES, OTT, and STRASSBURGER,* JJ.

MEMORANDUM BY BOWES, J.: Filed: February 22, 2013

Denise M. Miller ("Mother") appeals from the order entered on December 2, 2011, wherein the trial court dismissed her complaint against Brian K. Miller for child support. We quash.

The parties married on October 21, 1989, and separated on March 23, 2009. Children were born of the marriage during February 1993 and August 1995, respectively. A divorce decree was entered in Clinton County on October 3, 2002.[1] The divorce decree incorporated an undated Marital

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* Retired Senior Judge assigned to the Superior Court.

[1] The certified record includes an undated and unsigned reproduction of the divorce decree, which was introduced as a trial exhibit. Although the reproduction in the certified record is not a clean copy, Mother's reproduced

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Settlement Agreement ("MSA") wherein the parties agreed, *inter alia*, to allocate child rearing expenses equally, to forgo filing a complaint in child support, and to award to the support obligor a credit totaling $150,000 in the event a support complaint was filed.[2] Specifically, the MSA provided in pertinent part as follows:

(Footnote Continued) ————————————————

record included a photocopy of the original decree. While it is axiomatic that this Court will not consider the substance of documents *dehors* the certified record, herein, we reviewed the photocopy to confirm the accuracy of the exhibit contained in the record.

[2] The statement in the divorce decree that the child support provisions merged is inconsistent with the express terms of the MSA, which declares that the agreement shall not be merged into a divorce decree:

> This Agreement may be incorporated into a decree of divorce for purposes of enforcement only, but otherwise shall not be merged into said decree. The parties shall have the right to enforce this Agreement under the Divorce Code of 1980, as amended, and in addition, shall retain any remedies in law or in equity under this Agreement as an independent contract. Such remedies in law or equity are specifically not waived or released.

See Exhibit 1 at 15-16. As the MSA reveals the parties' categorical intention to incorporate, but not merge, the agreement into the divorce decree, the provision should be treated accordingly. ***See Ballestrino v. Ballestrino***, 583 A.2d 474, 476 (Pa.Super. 1990) (determination whether marital settlement agreement survived divorce decree or merged into decree depends upon parties' intention as demonstrated by the terms of the agreement). Generally, whether an agreement merged into a decree or simply was incorporated affects the parties' ability to modify or enforce the agreement. ***Id***. (incorporated agreement is governed by the law of contracts but merged agreement is subject to full range of modification permitted a court order). However, due to the application of 23 Pa.C.S. § 3105(b), which permits modification of child support orders upon a showing of changed circumstances regardless of merger, the distinction is not

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> 7. Child Support. Based on the distribution of assets under this Agreement, both parties agree not to file a Complaint for child support. In the event such a Complaint is filed, the parties agree Husband and Wife are entitled to a credit of $150,000 as against any monthly child support obligation.
>
> Husband and Wife agree to equally share any and all unreimbursed medical expenses, including expenses for dental, orthodontic and eye care.
>
> Husband and Wife agree to equally share the expense of daycare and other expenses on behalf of the children but not limited to clothing, school activities and extracurricular activities.

See Exhibit 1, at 10.

Mother initially filed a complaint for support of the two children on September 21, 2004; however, she withdrew the complaint without prejudice the following week. Seven years later, on October 3, 2011, Mother filed a second complaint seeking support for the parties' youngest child, who was then sixteen years old. The oldest child had attained majority earlier that year. Based upon the submission of the parties' financial documents, the domestic relations section in the Court of Common Pleas of Clinton County entered an interim support award totaling $459.51 per month in favor of Mother. The interim order, which set Father's arrears at $461.61, was effective October 3, 2011.

(Footnote Continued) ––––––––––––––––––––

relevant herein. ***See*** 23 Pa.C.S. § 3105(b) ("A provision of an agreement regarding child support, visitation or custody shall be subject to modification by the court upon a showing of changed circumstances.").

Father demanded a *de novo* hearing, wherein he invoked the $150,000 credit against any support obligation. Mother countered that she entered the MSA under duress and that the amount of the credit was unconscionable. She also alleged that Father failed to pay his portion of the children's expenses. Significantly, however, Mother failed to specifically assert that the provision was void as contrary to public policy because it purported to bargain away the children's right to adequate support.[3] Accordingly, the trial court did not confront that issue. Instead, the trial court addressed and rejected the position that Mother actually asserted, and on December 2, 2011, it entered an opinion and order dismissing Mother's support complaint with prejudice. The trial court reasoned that the $150,000 credit applied and that Mother lacked sufficient time to draw the credit to zero before her youngest child attained majority. Specifically the court declared, "Because the child is now in excess of seventeen years of age, we believe the proper course is to dismiss this Complaint for child support." Trial Court Opinion, 12/2/11, unnumbered page 2. Mother filed a timely motion for reconsideration and the trial court initially scheduled a

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[3] Aspects of Mother's argument in support of her contention that the agreement was unconscionable inferred the argument that she levels on appeal, *i.e.*, (the amount of the credit is so substantial that it would effectively alleviate Father from any court-ordered support obligation if applied). ***See*** N.T., 11/29/11, at 9. Thus, we decline to find the issue waived pursuant to Pa.R.A.P. 302(a).

hearing on Mother's motion. However, the court subsequently dismissed the scheduling order after Mother filed the instant appeal.

Mother presents two questions for our review:

> I. Whether the Trial Court erred in granting Father a $150,000.00 credit towards his child support obligation.
>
> II. Whether the Trial Court erred in allowing Mother to properly present testimony and evidence during the hearing on this matter.

Mother's brief at 6.

Prior to addressing the merits of Mother's issues, we must determine whether her appeal is timely filed. Mother had thirty days from the entry of the underlying order to timely file a notice of appeal. ***See*** Pa.R.A.P. 903(a). The thirty-day period is strictly construed, and we have no jurisdiction to expand the period or excuse the failure to file a timely notice of appeal. ***Valley Forge Center Associates v. Rib-It/K.P., Inc.***, 693 A.2d 242, 245 (Pa.Super. 1997). However, "[e]ven when a party has filed an untimely notice of appeal, . . . appellate courts may grant a party equitable relief in the form of an appeal *nunc pro tunc* in certain extraordinary circumstances." ***Criss v. Wise***, 781 A.2d 1156, 1159 (Pa. 2001).

Herein, the trial court entered the underlying order on December 2, 2011, the date the Clinton County Prothonotary issued notice of the order and noted that the domestic relations section had distributed copies of the order to the parties. ***See*** Pa.R.A.P. 108(b) and Pa.R.C.P. 236(b). Thus, in order to comply with the Rule 903(a) time requirements, Mother had to file a

notice of appeal in this case on or before Tuesday, January 3, 2012, the date that courts re-opened following the legal holiday recognizing New Year's Day. As the trial court did not receive Mother's notice of appeal until January 5, 2012, the appeal is untimely.

On February 6, 2012, this Court entered an order directing Mother to show cause why this appeal should not be quashed as having been untimely filed. In response, Mother filed a motion on February 16, 2012, wherein she asserted, *inter alia*, that she transmitted an electronic facsimile ("FAX") of the notice of appeal to the Clinton County Prothonotary Office on December 30, 2011, and on the same date, deposited the original and four copies in the mail for delivery by the United States Postal Service ("USPS"). In addition to contending that the notice was timely filed based upon the FAX and mailing, Mother's February 16, 2012 motion also requested that we permit the appeal to proceed *nunc pro tunc* if we deemed the notice untimely filed. She did not, however, request that we remand the matter for an evidentiary hearing so that she could establish grounds for *nunc pro tunc* relief.

Mother's equitable contentions were three-fold. First, Mother argued, albeit implicitly, that she relied on the prothonotary's representation that a "faxed copy of the Notice of Appeal would be sufficient for filing the document[.]" Mother's Response to Rule to Show Cause, 2/16/12, at unnumbered page 1. Second, invoking a telephone conversation between

her attorneys' office and a representative of the USPS, Mother claimed that the notice of appeal that was mailed from Lycoming County on December 30, 2011, would have been retrieved on December 31, 2011, and delivered to the Clinton County Prothonotary on the following business day, *i.e.*, January 3, 2012. Finally, recognizing that the notice of appeal contained in the certified record is emblazoned with a January 5, 2012 date stamp, Mother attributes the two-day delay between the date that she claims the prothonotary received the notice of appeal and the date the domestic relations section stamped the document and entered it on the docket to a breakdown in the trial court's operations. The latter argument is the only contention that Mother expressly asserted. Specifically, Mother opined that the prothonotary received her appeal "in a timely fashion" but pursuant to an internal policy, declined to time-stamp the document until it transferred the notice to the domestic relations section located in a different building. ***Id***. at unnumbered 5.

Mother sought to bolster her position by attaching to her response the affidavits of her prior counsel, Mary Kilgus, Esquire, and an individual from her current attorney's office. Attorney Kilgus attested both that a representative from Clinton County Prothonotary informed her that a FAX of the notice of appeal would be sufficient for timely filing and that she transmitted the FAX to the prothonotary on December 30, 2011. She added, "[a]lthough the first fax I sent did not go through . . . and I do not

have documented confirmation in the file of the fax being received by the prothonotary's office, I did view confirmation from the fax machine that the second fax went through to the Prothonotary's office[.]" Affidavit, 2/15/12, at 1-2. Attorney Kilgus also confirmed that she mailed the original document to the prothonotary on December 30, 2011 and that it was picked up for delivery the following day. ***Id***. at 2. The second affiant, Rebecca Buttorff, attested that she contacted the domestic relations section of the Clinton County Court of Common Pleas on February 15, 2012 and it confirmed the existence of an internal policy that requires support matters to be filed in the domestic relations section directly and not the prothonotary.[4]

Upon receiving Mother's response, this Court entered a *per curiam* order on February 24, 2012, wherein we deferred the issue of timeliness to the current panel for disposition and discharged the order to show cause.[5] Upon review of the certified record and relevant legal principles, we quash Mother's appeal.

At the outset, we observe that while the Pennsylvania Rules of Civil Procedure authorize the filing of legal documents in person, by mail, or

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[4] We observe that Rebecca Buttorff's affidavit is unsigned and lacks a notarial seal.

[5] The February 24, 2012 order also denied Mother's request to treat the trial court's decision to schedule a hearing on her motion for reconsideration, as an express grant of reconsideration. Mother does not challenge this aspect of our *per curiam* order.

electronically by local rule, the rules of procedure do not permit the filing of original legal papers by FAX transmission under any circumstances. ***See*** Pa.R.C.P. 205.1; 205.3; and 205.4. Indeed, the *Note* to Rule 205.3, which addresses the filing of facsimile **copies**, explains, "This rule does not authorize the filing of legal papers with the prothonotary by facsimile transmission, but, rather, authorizes the filing of a non-original facsimile or other copy." Similarly, Rule 205.4, relating to electronic filing and service, specifically excludes facsimile transmissions from the definition of electronic filing. ***See*** Pa.R.C.P. 205.4(a)(2) ("'electronic filing' [is] the electronic transmission of legal papers by means other than facsimile transmission"). Thus, Mother's assertion that she timely filed the notice of appeal by an alleged FAX transmission to the Clinton County Prothonotary on December 30, 2011 fails.[6]

Likewise, to the extent Mother seeks to invoke the so-called prisoner mailbox rule, her assertion is unavailing because that doctrine applies only to filings posted by an incarcerated individual proceeding *pro se*. Specifically, the so-called prisoner mailbox rule provides that a *pro se* prisoner is deemed to file a legal document on the date the prisoner deposits

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[6] It is noteworthy that the FAX is not included in the certified record, there is no indication in the record that the transmission was received, and neither the certificate of service nor the concomitant cover letter that Mother attached to the original document that she filed by mail references the December 30, 2011 FAX.

the document with prison authorities or places it in the prison mailbox. ***See Commonwealth v. Little***, 716 A.2d 1287 (Pa.Super. 1998) and ***Commonwealth v. Castro***, 766 A.2d 1283 (Pa.Super. 2001) (document deemed filed by prisoner when delivered to prison authorities for mailing). In contrast to this limited exception that applies to incarcerated *pro se* litigants, all other legal filings by mail are considered filed when they are received. ***See*** Pa.R.C.P. 205.1 ("A paper sent by mail shall not be deemed filed until received by the appropriate officer."). Thus, as Mother is neither incarcerated nor proceeding *pro se*, her notice of appeal was filed when it was received on January 5, 2012, three days late.

Next, we address the equitable aspects of Mother's contentions, and for the reasons explained below, we conclude that no relief is due. Generally, an appeal *nunc pro tunc* may be granted in cases where an appeal was filed untimely due to non-negligent circumstances related to appellant, appellant's counsel, or an agent of appellant's counsel. ***Criss***, ***supra*** at 1159 (Pa. 2001). For an appeal *nunc pro tunc* to be granted on this basis; however, the appellant must prove that: "(1) the appellant's notice of appeal was filed late as a result of non-negligent circumstances, either as they relate to the appellant or the appellant's counsel; (2) the appellant filed the notice of appeal shortly after the expiration date; and (3) the appellee was not prejudiced by the delay." ***Id***. "The exception for allowance of an appeal *nunc pro tunc* in non-negligent circumstances is

meant to apply only in unique and compelling cases in which the appellant has clearly established that she attempted to file an appeal, but unforeseeable and unavoidable events precluded her from actually doing so." ***Id***. at 1160.

As previously noted, the crux of Mother's express assertion is that a breakdown occurred in the trial court's operations that caused her timely received notice of appeal to be time stamped and filed two days late. In addition, she implies that she is entitled to *nunc pro tunc* relief because she relied upon the prothonotary's misrepresentation that a FAX transmission would suffice for the filing of the notice of appeal and because she mailed the notice of appeal in sufficient time for the prothonotary to receive it before the appeal period expired on January 3, 2012. For ease of disposition, we address Mother's inferred arguments first and conclude that this case does not fulfill the test presented in ***Criss***.

In ***Criss***, our Supreme Court addressed a similar issue and reversed this Court's holding that an appellant was entitled to an appeal *nunc pro tunc* because she mailed her notice of appeal with the USPS within sufficient time for it to arrive at the prothonotary's office before the expiration of the period for filing such an appeal even though the appeal was not received until after the appeal period had expired. The Supreme Court succinctly summarized the pertinent facts of that case as follows:

> Appellee's counsel mailed her notice of appeal on December 22nd and it arrived at the Prothonotary's office on December 30th, two

> days after the expiration date for filing the appeal with the Prothonotary. Although Appellee concedes that the notice of appeal was not received by the Prothonotary on time, Appellee argues that she should be allowed to appeal *nunc pro tunc* because the delay was due to non-negligent circumstances.

Id. at 1160. In overruling our decision to grant *nunc pro tunc* relief, the Supreme Court ruled "delays in the U.S. mail are both foreseeable and avoidable, [and] Appellee's failure to anticipate a potential delay in the mail was not such a non-negligent circumstance for which an appeal *nunc pro tunc* may be granted." ***Id***.

Herein, Mother mailed the notice of appeal on December 30, 2011, but it was not received until January 5, 2012, two days after the appeal period expired. Thus, employing our Supreme Court's rationale in ***Criss***, we concluded that since any delay associated with the delivery of mail is foreseeable and avoidable, Mother's failure to anticipate the potential delay is not a non-negligent circumstance that warrants *nunc pro tunc* relief. Indeed, in contrast to the party in ***Criss***, who mailed the notice of appeal six days prior to the expiration of the thirty-day period, Mother mailed her notice of appeal on the last possible business day prior to the expiration of the appeal period. Similarly, to the extent that Mother complains that she relied upon the representations of an unidentified agent within the Clinton County Prothonotary's Office that a FAX transmission would be acceptable, this argument is unavailing in light of the published rules of civil procedure that controvert the prothonotary's alleged representations. ***See*** Pa.R.C.P.

205.1; 205.3; and 205.4. Contrary to Mother's implicit premise that she reasonably relied upon the prothonotary's statements, it is axiomatic that since Attorney Kilgus is the one learned in the law and not the unidentified agent in the prothonotary's office, her alleged reliance upon inaccurate legal advice does not constitute a non-negligent circumstance that warrants an appeal *nunc pro tunc*.

Moreover, to the extent that this case differs from the factual scenario presented in ***Criss*** in that Mother does not concede that the notice of appeal was received late, the certified record does not sustain Mother's assertion that the prothonotary received her notice of appeal on January 3rd, which is both the conclusion of the thirty-day period and the earliest possible date that USPS could have delivered mail picked up on December 31, 2011.[7]

As noted *supra*, Mother argues that the prothonotary received the notice of appeal on January 3, 2012, but, pursuant to an unpublished policy in Clinton County that requires support matters to be filed in the domestic relations section, the prothonotary declined to time-stamp the notice of appeal upon its receipt and instead transferred the document to the domestic relations section two days later. While we agree with Mother that

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[7] Although the notice of appeal was deposited in the mailbox the evening of December 30, 2011, the mail was picked up from that location in Lycoming County on Saturday, December 31, 2011, and it could not have been delivered in Clinton County on Sunday, January 1, 2012 or Monday, January 2nd, the recognized legal holiday.

the domestic relations section's informal policy of requiring litigants to file legal papers with it directly is contrary to Pennsylvania jurisprudence, Mother's reliance on this irregularity is a red herring because she cannot demonstrate that the notice of appeal actually was delivered to the prothonotary on January 3rd.

Indeed, contrary to the scenario that Mother proposes, it is entirely possible, if not probable, that the prothonotary received the notice of appeal on January 5th and, on the same date, transferred it to the domestic relations section located less than one-tenth of a mile down a pedestrian walkway. In fact, the time-stamp on an unrelated document in the certified record reveals that after the prothonotary accepted the document at 9:09 a.m., it transferred it to the domestic relations section for filing approximately two and one-half hours later. Thus, contrary to Mother's assertion that the domestic relations section's policy was responsible for the two-day delay, the record currently before this Court will not sustain the finding that Mother's notice of appeal was filed untimely due to a non-negligent circumstance.

In order to establish an extraordinary circumstance such as the breakdown in the trial court's operations that Mother alleges in this case, Mother would have had to request an evidentiary hearing and adduce evidence to establish when the prothonotary received her notice of appeal. The affidavits that Mother submitted to this Court are insufficient to satisfy

her burden of proof. Indeed, in order to prevail, Mother was required, at a minimum, to present evidence from the postal service establishing, at the very least, the probability that the notice would have been delivered on January 3, 2012. Her former attorney's declaration that the mail is routinely delivered the following day is unavailing in light of our Supreme Court's rationale in ***Criss***. Likewise, rather than simply assert that the prothonotary waited two days before transmitting the notice of appeal to the domestic relations section for filing, Mother needed to adduce evidence from a representative of the Clinton County Prothonotary to establish how and when it typically transfers documents to the domestic relations section. As outlined *supra*, in contrast to Mother's unsupported supposition that the prothonotary was responsible for the delay, the certified record militates in favor of the finding that the prothonotary transmits documents between the offices within hours of delivery. Thus, Mother's attempt to invoke *nunc pro tunc* relief fails.

As Mother failed to establish a non-negligent circumstance warranting *nunc pro tunc* relief, we quash the appeal. ***See Criss***, ***supra*** at 1160. ("allowance of an appeal *nunc pro tunc* in non-negligent circumstances is meant to apply only in unique and compelling cases in which the appellant has clearly established that she attempted to file an appeal, but unforeseeable and unavoidable events precluded her from actually doing so"). Our finding that Mother did not establish a unique and compelling case

to warrant *nunc pro tunc* relief should not be interpreted as this Court's *imprimatur* of the domestic relations section's irregular and unpublished practice of requiring litigants to file documents at that location rather than the Clinton County Prothonotary.

Mother's motion to hear her appeal *nunc pro tunc*, filed February 16, 2012, is denied. Appeal quashed.

Judge Strassburger files a Concurring and Dissenting Memorandum.