

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL ACTION -- LAW

DANTE ANGELUS,
Plaintiff

v.

JAMIE ANGELUS,
Defendant

Stanley J. Margle, III, Esquire
Abele A. Iacobelli, Esquire

NO. 19-1384

Counsel for Plaintiff
Counsel for Defendant

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FACULTY
COURT

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FILED

MEMORANDUM OPINION

Nanovic, P.J. – June 28, 2024

In these divorce proceedings, Husband raises multiple issues regarding the equitable distribution of the increase in value of his interest in a Subchapter S corporation acquired prior to marriage, including the valuation of that interest, the tax effects and expenses to be considered if the business were sold, and the timing and amount of payments to be made to wife, all of which are the subject of his exceptions to the Hearing Officer's Report and Recommendation now before us.

PROCEDURAL AND FACTUAL BACKGROUND

Dante Angelus ("Husband") and Jamie Angelus ("Wife") were married on September 25, 2004. On July 8, 2019, they separated; on July 9, 2019, one day later, Husband filed for divorce. In her Answer to the Divorce Complaint, Wife included a counterclaim for equitable distribution, counsel fees and costs, and post-divorce alimony.

[FN-15-24]

An order granting Wife alimony *pendente lite* in the amount of \$2,752.00 a month was entered on October 1, 2019, effective August 30, 2019. This amount was increased to \$4,554.00 a month, effective July 19, 2021, by Order entered on December 10, 2021, and subsequently decreased to \$3,906.00 a month, effective January 1, 2022, by Order entered on May 16, 2023.

On March 9, 2020, a hearing officer was appointed to preside over the parties' claims for divorce, equitable distribution, counsel fees and costs, and alimony. Hearings were held before a hearing officer on September 16, 2021; December 16, 2021; November 18, 2022; and May 12, 2023. At these hearings, the parties reached agreement on the valuation and distribution of a majority of the marital assets and that the net value of all marital assets should be distributed equally between them. (N.T., 12/16/21, pp. 21-27). The main issue on which the parties could not agree was the increase in value of Husband's ownership interest in Motola's Paving, Inc. ("MPI") for equitable distribution and Wife's claim for alimony.

On November 13, 2023, the Hearing Officer filed her Report and Recommendation to which Husband filed the following Exceptions on December 4, 2023, which we quote verbatim and which we review in our Discussion below in this same sequence:

1. Exception to the Divorce Hearing Officer's conclusion that the increase in value of Husband's business for the purposes of equitable distribution is \$431,000.00.
2. Exception to the Divorce Hearing Officer's Recommendation at paragraph 1(k) of the Decree that Husband shall pay Wife "one half of the increase in value of the business from the date of marriage to date of separation or one half of \$431,000.00 which is \$221,500.00."

3. Exception to the Divorce Hearing Officer's Recommendation at Paragraph 1(j) of the proposed Decree that Husband shall reimburse Wife "one half of the value of the net proceeds of the skidster sold for \$36,000.00 and the paver which sold for \$44,553.00. The one half due to Wife is \$40,276.50."
4. Exception to the Divorce Hearing Officer's failure to consider the tax effects and expenses associated with a potential sale of the business. See Balicki v. Balicki, 4 A.3d 654 (Pa.Super. 2010) and Carney v. Carney, 167 A.3d 127 (Pa.Super. 2017).
5. Exception to the Divorce Hearing Officer's Recommendation that the payment of \$221,500.00 to Wife is to be made within ninety (90) days of the date of the Decree.
6. Exception to the Divorce Hearing Officer's failure to provide Husband with credit in equitable distribution for the alimony *pendente lite* ("APL") he has paid to Wife during the pendency of this action since September of 2019, which sum is over \$130,000.00.
7. Exception to the Divorce Hearing Officer's Recommendation that Husband shall continue to pay alimony *pendente lite* in the amount of \$4,140.00 per month until Wife has been paid her equitable distribution in full.
8. Exception to the Divorce Hearing Officer's Recommendation at paragraph 1(h) of the proposed Decree. Specifically, Husband takes Exception to the Divorce Hearing Officer's Recommendation that Wife is to become the owner of the Transamerica Life Insurance Policy and the American Front IRA.
9. Husband asserts that the Divorce Hearing Officer's Recommendation was entered against the weight of the evidence and contrary to applicable Law.¹

The Hearing Officer's Report and Recommendation recommended Wife's request for alimony be denied given the amount awarded Wife in equitable

¹ For ease of reference and discussion, we have reordered the sequence in which Husband listed his Exceptions to the Hearing Officer's Report and Recommendation. In his brief and argument to the court on these Exceptions, Husband did not discuss or argue Nos. 7 and 9 which we consider waived, noting, however, that as to Exception No. 7, Husband's obligation to pay alimony *pendente lite* to Wife is as set forth in DeMasi v. DeMasi, 591 A.2d 101, 104 (Pa.Super. 1991).

distribution and the conclusion that additional financial assistance from Husband was unnecessary. (Hearing Officer's Report and Recommendation, pp. 29-30). No exceptions to the Hearing Officer's Report and Recommendation were filed by Wife.

DISCUSSION

Increase in Value of MPI Subject to Equitable Distribution

As appears on the Settlement Statement, Husband purchased the assets of MPI, a Subchapter S corporation, on December 11, 2002, for \$450,000.00, approximately two years before the parties' marriage, allocated as follows.

Real Estate	\$200,000.00
Equipment	\$240,000.00
Good will/Non-complete	<u>\$ 10,000.00</u>
Total:	\$450,000.00

(Husband's Ex. No. 3 (Settlement Statement)).² The purchase price was financed by Husband with a \$400,000.00 SBA loan and two promissory notes totaling \$74,000.00 taken back by the seller, and representing money paid by Husband to seller not reflected on the Settlement Statement. (N.T., 9/16/21, p.36; N.T., 11/18/22, pp. 17-86). .

Husband is the sole shareholder of the Subchapter S corporation known as Motola's Paving, Inc., a privately owned business engaged in asphalt paving during the summer months and snow removal in the winter months. (N.T., 9/16/21, p.20; N.T., 11/18/22, p.18). Following the purchase of this business, Husband retained the business

² The aggregate amount due from Husband as appears on the Settlement Statement is \$484,522.36. This amount includes \$450,000.00 specifically allocated to corporate assets, but also adjustments for real estate taxes, for an escrow amount, and for settlement charges due from the buyer.

name of MPI. For purposes of determining the increase in value of Husband's interest in MPI between the date of the parties' marriage and their final separation, both parties employed expert witnesses: Martin C. Levin for Husband and Joseph M. Egler for Wife.

Both experts explained and considered the three approaches to valuing a business: (1) book value (*i.e.*, assets, adjusted to current market value, less debt equals equity), (2) market value based on sales of comparable businesses and (3) income capitalization – applying a reasonable rate of return to cash flow. (N.T., 9/16/21, pp. 56-58, 61; N.T., 11/18/22, p.31). In part because of the proximity of the parties' marriage date to when Husband acquired MPI and the absence of sufficient data to value the business based on either market value or income capitalization, both experts used book value in determining the date of marriage valuation on the premise that a recent purchase of property in an arm's length transaction is a strong indicator of value. For date of separation values, Levin used income capitalization only, whereas Egler used a combination of income capitalization and market value with the income approach weighted more heavily.

The fair market values of MPI as determined by Levin and Egler for the date of marriage and date of separation are as follows:

	<u>Levin</u>	<u>Egler</u>
Date of Marriage	\$555,650.00 ³	\$144,000.00 ⁴
Date of Separation	\$568,000.00 ⁵	\$575,000.00 ⁶
Difference	\$12,350.00	\$431,000.00

In accordance with the foregoing, Levin determined the increase in value of Husband's interest in MPI subject to equitable distribution to be \$12,350.00, while Egler determined this increase in value to be \$431,000.00.

In her Report and Recommendation, the Hearing Officer accepted Egler's valuations for a variety of reasons with which we agree. (Hearing Officer's Report and Recommendation, pp. 27-28). See Carney v. Carney, 167 A.3d 127, 131 (Pa.Super. 2017) (observing that although only advisory, a master's report and recommendation is to be given "the fullest consideration, particularly on the question of credibility of witnesses, because the master has the opportunity to observe and assess the behavior and demeanor of the parties") (citations omitted)). In applying the income approach to determine the value of MPI as of the date the parties separated, both parties used as their primary starting point for ascertaining MPI's income, the federal income tax returns filed by MPI as a Subchapter S corporation, Form 1120-S, to which both made adjustments to

³ (N.T., 9/16/21, p.55; Husband's Ex. No. 2 (Levin Report), pp. 39-40).

⁴ (N.T., 11/18/22, pp. 48-49).

⁵ (N.T., 9/16/21, p.90; Husband's Ex. No. 2 (Levin Report), p.39).

⁶ (N.T., 11/18/22, pp. 44, 49).

determine MPI's normalized cash flow (i.e., income from operations) without any deductions for interest (Egler only), taxes and depreciation. (N.T., 9/16/21, pp. 86-87, 92; Husband's Ex. No. 2 (Levin Report), pp. 30, 34); N.T., 11/18/22, p.30; Wife's Ex. No. 3 (Egler Report), p.10).

In adjusting the income on MPI's tax returns, both experts agreed that Husband's reported compensation of \$38,000.00 annually on these returns was unreasonably low and needed to be adjusted to a figure commensurate with the compensation paid for work of the same type performed by Husband in similar comparable businesses, but whereas Levin set this adjusted figure at \$121,000.00, Egler more credibly set the compensation at \$84,000.00, consistent with the proper application of Risk Management Associates (RMA) data and in accordance with the Pennsylvania Occupational Wage Survey for Carbon County. (N.T., 9/16/21, pp. 75, 83-84, 154-155; Husband's Ex. No. 2 (Levin Report), p.30); N.T., 11/18/22, pp. 20, 23-25, 57-58; Wife's Ex. No. 3 (Egler Report), p.9). The effect of this adjustment by Egler, in combination with the salary paid to Wife of \$20,500.00, reduced MPI's pre-tax income by \$25,500.00, as compared to a reduction of \$62,500.00 if the compensation were adjusted to \$121,000.00 as recommended by Levin. As Egler explained, Levin misinterpreted the RMA ratios inherent in this business type in making his adjustment. (N.T., 11/18/22, pp. 18, 23-25, 52-56).

A further adjustment to MPI's pretax income was to add back payments made by MPI for personal (i.e., non-business) expenses of Husband and Wife totaling in excess of \$65,000.00 annually. (N.T., 11/18/22, pp. 12, 25-29; Wife's Ex. No. 3 (Egler Report),

p.10). As a non-cash expense for determining MPI's cash flow, both experts also added back the amount of depreciation MPI reported on its tax returns and Egler further added back the interest expense reported on these returns. (N.T., 9/16/21, pp. 62-64). The effect of these additions to MPI's pre-tax income was to increase the amount of that income in valuing MPI under the income approach.

Levin was unable to value MPI using the comparable business approach, a/k/a the guideline transaction approach, having been unable to locate a sufficient number of comparables to reliably utilize this approach. (N.T., 9/16/21, pp. 59, 149). In contrast, by utilizing a database for the sale of businesses using the same NAICS Code as MPI, which Code categorizes companies of a similar nature and size, Egler found ten comparables he was able to use in determining MPI's value on this basis. (N.T., 11/18/22, p.32; Wife's Ex. No. 3 (Egler Report), see Exhibit V – Transactions attached). Taking into account both the comparable business approach pursuant to which Egler valued MPI at \$714,700.00 (N.T., 11/18/22, p.43), and the income approach, for which Egler found a value of \$477,706.00 (N.T., 11/18/22, p.38; Wife's Ex. No. 3 (Egler Report), p.16), Egler determined that the equity Husband held in MPI as of the date of the parties' separation was \$575,000.00. (N.T., 11/18/22, pp. 44, 49, 59, 96, 101; Wife's Ex. No. 3 (Egler Report), p.19). Notwithstanding the additional adjustments made to income by Egler, including for a projected growth rate of 4% (N.T., 11/18/22, p.34), the date of separation values determined by both experts were remarkably close to one another: \$568,000.00 versus \$575,000.00, for a difference of \$7000.00. (N.T., 11/18/22, pp. 64-65).

The major difference in the experts' valuations were with respect to their date of marriage values. As Egler explained in his testimony, the object of each approach to valuing MPI was to determine its net value after factoring in its debt. The incorporation of debt in determining market value is inherent in both the income capitalization and comparable business approaches (N.T., 11/18/22, pp. 43, 49, 62, 90-95, 101-102), but not in the net asset value approach. In determining the equity in a business premised on its assets alone, the debt of the business needs to be expressly subtracted from the value of its assets.

In computing the value of MPI as of the parties' date of marriage under this approach, Egler added to the value of the assets identified in the settlement sheet at the time of purchase (*i.e.*, \$450,000.00) the \$74,000.00 paid as part of a side agreement between Husband and seller and subtracted the corporate debt estimated at \$380,000.00 for an equity value of \$144,000.00. (N.T., 11/18/22, pp. 44-49; Wife's Ex. No. 3 (Egler Report), p.22). Levin's computation of the value of MPI as of the date of marriage using this approach in effect used the amount due from the buyer at the time of settlement as appears on the settlement statement, \$484,522.36, to which \$74,000.00 was added under the side agreement with the seller, but failed to subtract from this figure, the amount of corporate debt existing at the time of the parties' marriage. (N.T., 11/18/22, pp. 65-66, 148). Had Levin used the allocated amounts for MPI's assets listed on the settlement statement, added \$74,000.00 for the side agreement with the seller, and subtracted the outstanding corporate debt at the time of marriage, his valuation as of this date would

likely have been the same or very close to that given by Egler. In accordance with the foregoing, we affirm the Hearing Officer's determination of \$431,000.00 as the marital value of MPI. Fifty percent of this amount is \$221,500.00.

50/50 Division of Net Proceeds From Sale of Corporate Assets

In 2018, MPI received \$36,000.00 in net proceeds from the sale of a skidster and in 2019, net proceeds of \$44,553.00 from the sale of a paver as reported in MPI's federal income tax returns for 2018 and 2019, respectively, under other income. (Wife's Ex. No. 3 (Egler Report) see page 2 of Exhibit 1 attached).⁷ Both pieces of equipment were owned and used by MPI in its business.

The 2019 federal income tax return for MPI reports the 2019 sale of the paver under Form 4797, which amount also appears on Line 4 of Form 1120-S, p.1, as other income, and is included in the ordinary business income of MPI as reported on Line 21 of Form 1120-S, p.1. While Levin considered this income as of a non-recurring nature, not a normal part of business operations, and therefore excluded this amount in his adjustments to MPI's operating income for 2019 (N.T., 9/16/21, pp. 76-77), because Egler never testified to making this adjustment in MPI's income, or a similar adjustment for the sale of the skidster in 2018, in computing MPI's fair market value under an income capitalization approach, to allow this asset to be used both in computing MPI's fair market

⁷ In his brief in support of his exceptions, Husband claimed these were not sales outright but rather trade-ins made by MPI to purchase upgraded pieces of equipment necessary to continue the operation of his business and that the income reported was attributable to a recapture of depreciation, rather than monies actually received. (Brief in Support of Exceptions, p.22).

value for equitable distribution and as separate income to Husband to be equally divided between Husband and Wife would result in impermissible double dipping. Rohrer v. Rohrer, 715 A.2d 463, 465 (Pa.Super. 1998) (holding that with respect to a Subchapter S corporation, the retained earnings are to be considered either as an asset subject to equitable distribution or income, but not both); Cerny v. Cerny, 656 A.2d 507, 509 (Pa.Super. 1995) (holding that to avoid “double-dipping,” the same revenue cannot be used as both income available for “support” and as a marital asset subject to “equitable distribution”).

Tax Ramifications of the Potential Sale of MPI

Husband claims the Hearing Officer erred in failing to consider the tax effects and expenses associated with a potential sale of MPI, which would have the effect of lowering the marital value of MPI to account for the tax ramifications and expenses of a sale, before assigning this asset solely to Husband. While Husband is correct that “the tax ramifications and expenses associated with the sale of a marital asset is a relevant consideration whether a sale is likely or not,” as held in Balicki v. Balicki, 4 A.3d 654, 663 (Pa.Super. 2010), at issue in Balicki was whether the trial court committed an error of law or abused its discretion in *sua sponte* considering “the costs of sale and tax effect” in equitable distribution in deciding wife’s exceptions to the master’s report and recommendation where the master had not considered these tax consequences and expenses of selling a family-owned insurance agency in which husband was a shareholder, and where husband’s interest in the business was awarded solely to

husband. In holding the trial court did not err in this regard, the Superior Court relied heavily on 23 Pa.C.S.A. §3502(a)(10.1) and (10.2) and stated that “the statute requires us only to consider the tax ramifications and expense of sale, along with numerous other listed factors, but the Divorce Code does not make a deduction for them mandatory.” *Id.* at 664 (quoting from the trial court opinion); see also Carney v. Carney, 167 A.3d 127, 133-134 (Pa.Super. 2017) (same).

The Divorce Code lists eleven relevant factors in an equitable distribution analysis, including the tax ramifications and expenses associated with the sale of each marital asset. 23 Pa.C.S.A. §3502(a). Section 3502(a) provides, in pertinent part:

3502. Equitable division of marital property

(a) 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:

* * *

(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.

23 Pa.C.S.A. §3502(a)(10.1), (10.2). Significantly, Section 3502(a)(10.1) and (10.2) are factors to be considered in an equitable distribution analysis. As to a percentage division of marital assets, that was not required here since the parties had already agreed and stipulated that the aggregate value of all marital assets would be divided on a 50-50 basis.

As significantly, neither party presented any evidence before the Hearing Officer related to the potential sale of MPI and the tax implications and expenses associated with such a sale. Nor has Husband even argued what these implications and expenses are. What Husband appears to ask the court to do is to speculate as to how such a sale would be structured, what the tax basis of MPI's various assets is and how the sales price will be allocated among these assets, and what taxes and expenses will be incurred, among other factors. This the court cannot do. Absent such evidence, the issue has been waived.

Offsetting Equitable Distribution With Past Payments of Alimony Pendente Lite

APL is “an order for temporary support granted to a spouse during the pendency of a divorce or annulment proceeding.” 23 Pa.C.S.A. § 3103. APL “is designed to help the dependent spouse maintain the standard of living enjoyed while living with the independent spouse.” Litmans v. Litmans, 449 Pa.Super. 209, 673 A.2d 382, 389 (1996). Also, and perhaps more importantly, “APL is based on the need of one party to have equal financial resources to pursue a divorce proceeding when, in theory, the other party has major assets which are the financial sinews of domestic warfare.” Id. at 388. APL is thus not dependent on the status of the party as being a spouse or being remarried but is based, rather, on the state of the litigation. DeMasi v. DeMasi, 408 Pa.Super. 414, 597 A.2d 101, 104–105 (1991). Alimony, in contrast, is terminated upon remarriage or cohabitation. Id. at 104–105; see also 23 Pa.C.S.A. § 3706. Since, however, the purpose of APL is to provide the dependent spouse equal standing during the course of the divorce proceeding, it does not come with the “sanction” of Section 3706. DeMasi, at 104–105. “APL focuses on the ability of the individual who receives the APL during the course of the litigation to defend her/himself, and the only issue is whether the amount is reasonable for the purpose, which turns on the economic resources available to the spouse.” Haentjens, at 1062; see also DeMasi, at 105.

Childress v. Bogosian, 12 A.3d 448, 463 (Pa.Super. 2011) (quoting Schenk v. Schenk, 880 A.2d 633, 644-45 (Pa.Super. 2005)).

APL does not terminate until a divorce is final.

A divorce is not final for purposes of APL until appeals have been exhausted and a final decree has been entered. Thus, while APL typically ends at the award of a divorce decree, which also should be the point at which equitable distribution has been determined, if an appeal is pending on matters of equitable distribution, despite the entry of a decree, APL will continue throughout the appeal process and any remand until a final order has been entered.

Swisher v. Swisher, 2014 WL 10987058 *3 (Pa.Super. 2014) (Non-Precedential Decision) (quoting DeMasi v. DeMasi, 597 A.2d 101, 104 (Pa.Super. 1991).

APL is awarded during divorce proceedings without fault, and is based upon the need of one party for support and to have equal financial resources to pursue the divorce litigation. APL is awarded based on need alone and not to punish the other spouse. There is no evidence in the record before us that the payments of APL to Wife were excessive, that Wife is not dependent on these payments, or that Wife can independently afford the costs and expenses of this litigation and those on appeal, if such is the case, without these payments. To offset any award of equitable distribution with APL payments made to Wife is contrary to the purpose and objective of APL and thus untenable under the law.

Equitable Distribution Payment Schedule

Husband claims he does not have the financial wherewithal to pay Wife \$221,500.00 within ninety days of the final divorce decree, which amount represents fifty percent of the marital interest in MPI to which Wife is equitably entitled. This claim fails for several reasons, not the least of which is Husband never testified and there is nothing

in the record showing what Husband can or cannot afford.

Beyond this, pursuant to the parties' stipulation regarding the distribution of other marital assets, Husband is to receive various parcels of real estate having an agreed-upon net equity of \$221,347.00 with Husband to pay Wife one-half of this amount (*i.e.*, \$110,673.50). Presumably, Husband has access to make this agreed-upon payment, begging the question from where these monies are coming.

Nor can it be forgotten that within three months of settling on the purchase of MPI, Husband paid in full and satisfied the \$74,000.00 debt owed to the seller. (Husband Ex. No(s). 4 and 5 (Notes and Satisfaction, respectively)). Finally, as of the date of Husband and Wife's separation, Husband's interest in MPI was valued at \$560,000.00 by his expert and \$575,000.00 by Wife's expert, and thus may serve as collateral for any monies owed by Husband to Wife. There is no basis on the record before us to conclude Husband does not have access to sufficient funds to make this payment to Wife.

Ownership of Life Insurance Policy


As to this last exception, Husband claims, without any citation to legal authority, that ownership of a life insurance policy insuring his life cannot be transferred to Wife once the parties are divorced as Wife will then have no insurable interest on Husband's life. Rather than addressing this issue, Wife has suggested the issue be avoided by directing Husband to pay the date of separation cash surrender value of the policy - \$8,785.00 - to Wife. This is a sensible solution and one we adopt, namely that Husband be provided the option of either transferring the policy to Wife or paying Wife its cash

surrender value.⁸

CONCLUSION

For the foregoing reasons, we affirm the Hearing Officer's Report and Recommendation in all respects except as to the distribution of the net proceeds of the sale of MPI's skidster and paver in the tax years 2018 and 2019, respectively, and by giving Husband the option of either transferring ownership of the Transamerica Life Insurance Policy to Wife or paying Wife the cash surrender value of this policy.

BY THE COURT:



P.J.

⁸ Although Husband's exception on this issue also objects to the transfer of the American Front IRA to Wife, Husband presents no legal basis why this transfer cannot occur. Accordingly, we find this exception as applicable to the transfer of the American Front IRA to Wife to be waived.