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PLJ

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OPINIONS

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Commonwealth of Pennsylvania v. Richard Broaden

Abuse of Discretion—Guilty Plea—Mandatory Minimum Sentence

1. When the defendant never moved to withdraw his guilty plea prior to sentencing, even after notice that the Commonwealth sought to invoke a mandatory minimum sentence in his case, his claim of error is meritless.

2. Trial counsel's arguments were directed at convincing the court not to impose the mandatory minimum sentence and were not a motion to withdraw the defendant's guilty plea.

3. There was no abuse of discretion in denying the defendant's post-sentence motion to withdraw his guilty plea since manifest injustice is required to allow such a withdrawal, which was not present in this case.

4. Defendant knowingly and voluntarily entered his guilty plea and was aware that a mandatory minimum sentence was required in this case.

(Carol Sikov Gross)

Julie Capone for the Commonwealth.
Brandon Ging for Defendant.

No. C C200613894. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

OPINION IN RESPONSE TO THE SUPERIOR COURT'S ORDER OF MAY 15, 2009

Mariani, J., June 12, 2009—This opinion is being filed in response to the Superior Court's order of May 15, 2009 directing this Court to issue an opinion responding to the Defendant's Pa.R.A.P. 1925(b) Concise Statement *Nunc Pro Tunc* in which the defendant raises a number of issues in addition to those already raised by the defendant in prior filings with this Court. This Court previously filed an Opinion in this matter on December 9, 2008. The facts and procedural history of this case are set forth therein. This Court will limit the discussion in this Opinion to the following issues raised by the Defendant in his supplemental filing:

Whether the Trial Court abused its discretion in not granting Trial Counsel's oral pre-sentencing motion requesting to withdraw Mr. Broaden's guilty plea when the law does not require that a pre-sentence motion to withdraw a guilty plea be made in writing and when Mr. Broaden maintained his innocence prior to the formal imposition of sentence, which constituted a fair and just reason to permit him to withdraw his guilty plea prior to sentencing?

Whether the Trial Court abused its discretion in not granting Trial Counsel's post-sentence motion to withdraw Mr. Broaden's guilty plea when the Commonwealth failed to inform Mr. Broaden prior to acceptance that it actually intended to impose mandatory-minimum sentencing as the law requires, which denied Mr. Broaden his Due Process right to consider the alternatives of going to trial versus entering a guilty plea, and thus there was prejudice on the order of manifest injustice so as to permit him to withdraw his guilty plea after sentencing?

The defendant's first claim of error is meritless. This Court has reviewed the record and the record reveals that

the defendant never moved to withdraw his guilty plea prior to sentence. The sentencing proceeding was replete with trial counsel's complaints about the invocation of the mandatory minimum sentence in this case. Trial counsel claimed that he was not aware that the Commonwealth would seek a mandatory minimum sentence and/or that the invocation of the mandatory minimum sentence was arbitrarily invoked in this case. However, prior to the sentencing date of September 20, 2007 (but after his guilty plea), the defendant was placed on notice that the Commonwealth sought to invoke a mandatory minimum sentence in this case. The Commonwealth filed a formal notice advising the defendant of their position on August 16, 2007. This Court entertained trial counsel's arguments and even noted for the record that despite trial counsel's complaints, the defendant had not moved to withdraw his guilty plea. Just prior to the imposition of sentence, as set forth in the following exchange, defendant's counsel acknowledged on the record that the defendant was not seeking to withdraw his guilty plea:

THE COURT: But you didn't file a motion to withdraw the plea, nor have you said up until this minute that you want to withdraw the plea; right?

MR. TAYLOR: That's correct.

The record demonstrates that trial counsel's arguments were directed at convincing this Court not to impose the mandatory minimum sentence and not as a motion to withdraw the defendant's guilty plea. The record reveals that an oral pre-sentence motion to withdraw the defendant's guilty plea was never made. This claim of error should be rejected.

The defendant next asserts that this Court abused its discretion in denying his post-sentence motion to withdraw his guilty plea. The defendant claims that he did not have notice that the Commonwealth intended to seek a mandatory minimum sentence in this case.¹

As this Court noted previously, two different standards exist for reviewing requests to withdraw a guilty plea, one for pre-sentence requests to withdraw and one for post-sentence requests to withdraw. *Commonwealth v. Flick*, 2002 Pa.Super. 189, 802 A.2d 620, 623 (Pa.Super. 2002). The Supreme Court has explained that there is no absolute right to withdraw a guilty plea however, a pre-sentence request to withdraw a guilty plea should be liberally granted when there exists any fair and just reason for the withdrawal. *Commonwealth v. McLaughlin*, 469 Pa. 407, 366 A.2d 238 (1976); *Commonwealth v. Forbes*, 450 Pa. 185, 299 A.2d 268, 271 (1973). Post-sentence motions for withdrawal, however, are subject to higher scrutiny. This scrutiny exists "to discourage entry of guilty pleas as sentence-testing devices." Manifest injustice is required to withdraw guilty pleas which are requested after sentence has been imposed. *Flick*, 802 A.2d at 623; *Commonwealth v. Gunter*, 565 Pa. 79, 771 A.2d 767 (2001). Such a manifest injustice occurs when a plea is not tendered knowingly, intelligently, voluntarily, and understandingly. *Commonwealth v. Persinger*, 532 Pa. 317, 615 A.2d 1305 (1992). In *Commonwealth v. Rosmon*, 477 Pa. 540, 542, 384 A.2d 1221, 1222 (1978), the Supreme Court recognized that a manifest injustice occurs if a guilty plea is entered by a defendant who lacks full knowledge and understanding of the charge against him. "The law does not require that [a defendant] be pleased with the outcome of his decision to enter a plea of guilty: 'All that is required is that [a defendant's] decision to plead guilty be knowingly, voluntarily and intelligently made.'" *Commonwealth v. Yager*, 454 Pa.Super. 428, 685 A.2d 1000, 1004 (Pa.Super. 1996) (*en banc*), *appeal denied*, 549 Pa. 716, 701 A.2d 577 (1997) (quotation omitted). An on-the-record colloquy is required by

Rule Pa.R.Crim.P. 319(a); *Commonwealth v. Schultz*, 505 Pa. 188, 477 A.2d 1328, 1329-30 (1984).

In *Commonwealth v. McCauley*, 2001 Pa.Super. 301, 797 A.2d 920 (2001) the Superior Court, citing *Commonwealth v. Stork*, 1999 Pa.Super. 212, 737 A.2d 789, 790-791 (Pa.Super. 1999), appeal denied, 564 Pa. 709, 764 A.2d 1068 (2000) explained that

[o]nce a defendant has entered a plea of guilty, it is presumed that he was aware of what he was doing, and the burden of proving involuntariness is upon him. Therefore, where the record clearly demonstrates that a guilty plea colloquy was conducted, during which it became evident that the defendant understood the nature of the charges against him, the voluntariness of the plea is established. Determining whether a defendant understood the connotations of his plea and its consequences requires an examination of the totality of the circumstances surrounding the plea.

The minimum inquiry required of a trial court must include the following six areas: (1) Does the defendant understand the nature of the charges to which he is pleading guilty? (2) Is there a factual basis for the plea? (3) Does the defendant understand that he has a right to trial by jury? (4) Does the defendant understand that he is presumed innocent until he is found guilty? (5) Is the defendant aware of the permissible ranges of sentences and/or fines for the offenses charged? (6) Is the defendant aware that the judge is not bound by the terms of a nyplea agreement entered unless the judge accepts such agreement? *McCauley*, 797 A.2d at 920; *Commonwealth v. Young*, 695 A.2d 414, 417 (Pa.Super. 1997).

This examination may be conducted by defense counsel or the attorney for the Commonwealth, as permitted by the judge. Pa.R.Crim.P. 590. Moreover, the examination does not have to be solely oral. Nothing precludes the use of a written colloquy that is read, completed, and signed by the defendant, made part of the record, and supplemented by some on-the-record oral examination. *Commonwealth v. Moser*, 921 A.2d 526, 529 (Pa.Super. 2007); see also Comment to Pa.R.Crim.P. 590.

The record discloses that the defendant understood the nature of the charges to which he ultimately pled guilty and, therefore, his guilty plea was entered knowingly and intelligently. The Court reviewed all of the charges filed against the defendant as well as the charge to which he ultimately pled guilty. The Assistant District Attorney presented a factual basis for the guilty plea and the defendant agreed with the presentation of the Assistant District Attorney. The defendant completed an exhaustive written guilty plea colloquy clearly evidencing his awareness of his pertinent constitutional rights including, but not limited to, his right to a jury trial, the presumption of innocence and the fact that this Court was not bound by the terms of the plea agreement.

The defendant claims that he should have been able to withdraw his guilty plea because he was not aware that the Commonwealth was actually seeking imposition of a mandatory minimum sentence. The defendant pled guilty in this case on June 21, 2007. As set forth above, on August 16, 2007, the Commonwealth filed a notice advising the defendant that it sought to impose a mandatory minimum sentence in this case. The defendant never moved to withdraw his guilty plea prior to sentencing. The defendant was sentenced on September 20, 2007. At the time he was sentenced, the defendant was aware that the Commonwealth was seeking a mandatory minimum sentence in this case. Additionally, at the time of his guilty plea, the defendant had knowledge that a mandatory minimum sentence could apply to him. The

guilty plea colloquy executed by the defendant contained the following question:

If there is a mandatory minimum sentence applicable and this mandatory sentence is sought by the Commonwealth, then this Court has no discretion to impose a lesser sentence and must impose at least the minimum sentence that is required by law. Do you fully understand this?

The defendant checked the box marked “yes” after this question. The record indicates that the defendant was aware of the maximum potential penalties that could be imposed in this case. The totality of the trial court record indicates that the defendant knowingly and voluntarily entered his guilty plea and was aware that a mandatory minimum sentence was required in this case. Thus, no manifest injustice has occurred and the motion to withdraw guilty plea was properly denied. Accordingly, the judgment in this case should be affirmed.

BY THE COURT:
/s/Mariani, J.

¹ In its previous Opinion, this Court discussed the law relevant to the withdrawal of a guilty plea. For clarity, this Court again recites the law herein.

The Mansions of North Park Homeowners Association v. Mark McCullough

Pa. R.C.P. 1038—Motion for Post-Trial Relief

1. When a decision has been entered in accordance with Pa. R.C.P. 1038, “Trial without Jury,” motion for post-trial relief is to be filed. The filing of a motion to vacate and a motion for reconsideration does not suffice.

2. By failing to file a proper motion for post-trial relief, Plaintiff deprived the Court and opposing counsel of the opportunity to review possible errors in the manner prescribed by the rule of civil procedure.

(Linda A. Michler)

Fred C. Jug, Jr. for Plaintiff.

C. William Kenney for Defendant.

No. AR 07-13693. In the Court of Common Pleas Allegheny County, Pennsylvania, Civil Division.

OPINION

Friedman, J., July 30, 2009—Plaintiff has filed an appeal from a judgment it caused to be entered on June 18, 2009. According to Plaintiff, the entry was based on our Decision and Order dated May 21, 2009. In the course of drafting this Opinion, we noticed for the first time that the appeal may be procedurally defective in that Plaintiff never filed a motion for post-trial relief. On June 1, 2009, Plaintiff did file a Motion to Vacate and a Motion for Reconsideration, which we denied without requiring an answer and without hearing further argument. We did not regard it, at the time, as being in the nature of a motion for post-trial relief under Pa. R.C.P. 227.1. Our recent re-examination of the Motion confirms our earlier understanding.

Our Decision had been entered in accordance with Pa. R.C.P. 1038, “Trial Without Jury.” It is very clear from the

Note to that Rule that a motion for post-trial relief should have been filed. We have reviewed Rule 227.1 to see if somehow the Motion that was filed could be regarded as a motion for post-trial relief. Paragraphs 29-31 of the Motion make it clear that it was not so intended. Plaintiff merely felt we were wrong and wanted to persuade us of that via additional oral argument, even though closing arguments had already been presented by way of briefs. In fact, Plaintiff even states that “granting this Motion to Vacate the Order would stop the appeal period from running.” It was a pure motion for reconsideration.

It should be noted that we only require answers to motions for reconsideration that raise an issue we might have missed or a fact we did not consider. We do not waste our time or the time of attorneys on such motions when they raise nothing new. For post-trial motions, however, we permit answers as a matter of routine and always schedule briefing and argument. By failing to file a proper motion for post-trial relief, Plaintiff deprived the Court and opposing counsel of the opportunity to review possible errors in the manner prescribed by the Rules.

Ordinarily, we give parties substantial leeway when we enforce the technicalities of the Rules of Court. However, this failure seems fatal to Plaintiff’s appeal. No grounds for appeal have been preserved. The appeal should be quashed or dismissed.

In the event the Superior Court decides to reach the merits of the case, we note that Plaintiff raises four matters in its Concise Statement of Matters Complained of on Appeal:

I. Whether the Plaintiff Association is entitled to Judgment, as a matter of law, for the amount of fines, legal fees and costs, as Judge Friedman specifically found that the third cat violates the Rules and Regulations or By-Laws of the Plaintiff Association.

II. Whether the trial judge erred in failing to apply the terms of the Uniform Planned Community Act of Pennsylvania and the Association documents.

III. Whether the trial judge erred in deciding that the activities of the cats did not rise to the level of a nuisance and in deciding that the fines represented an abuse of discretion and unwarranted exercise by the Board.

IV. Whether the trial court erred in failing to grant the Motion to Vacate/Motion to Reconsider.

Our Decision sets forth the factual scenario shown by the credible evidence. We substantially repeat it below.

FACTUAL BACKGROUND

The dispute involves daily fines imposed by the Plaintiff, a planned community which is quite similar to a condominium association but governed by a different act of the Legislature, against one of the unit owners, Mark McCullough. The Plaintiff did not seek to enjoin the offending conduct but had been content to assess daily fines which, as of the date of the Complaint, had reached the amount of \$2,297.20, and which by trial had exceeded \$11,000. Plaintiff also sought an award of attorney fees of more than \$6,000 for the instant effort to collect the fines it has been imposing.

The conduct complained of was McCullough’s maintenance of three cats in his unit, when the Plaintiff’s rules and regulations permit only two. Plaintiff also alleged in its Complaint that the cats created “a nuisance and unreasonable disturbances to other Unit Owners.” (Complaint, ¶20.) McCullough did not deny that he had three cats but contended, *inter alia*, that the fact that there were three and not two

did not rise to the level of a nuisance, nor did they constitute a nuisance for any other reason, and did warrant the imposition of any fine. He also contended that Plaintiff, through its Board, had granted him a “variance” and then had improperly withdrawn it, while allowing other “variances” in favor of other unit owners to stand.

The undisputed evidence showed that McCullough had adopted three feral cats a number of years ago before the Plaintiff had any rules concerning the number of pets any unit owner might have. He contended that those three cats were “grandfathered in” and we agreed. However, when two of those three cats died, McCullough, in July 2006, replaced both of them, not just one as the rules would seem to require. He then had one older “grandfathered” cat, and two new kittens. In October 2006 he was granted the “variance” for the three cats which was later withdrawn.

On occasion the current cats would run out of the house and allegedly climbed on the car of the next-door neighbor, leaving paw prints on her car. The neighbor also believed the cats had defecated on her property, although a photograph of the alleged cat excrement is inconclusive. The Court was aware, by coincidence, that there are actually experts who can tell, by a visual examination, whether or not a particular deposit was made by a cat, a dog, a badger, a raccoon, or some other animal. We did not possess such expertise nor did any witness do more than speculate as to the source of the item shown in the photograph taken by the neighbor on May 17, 2007 and admitted as Plaintiff Exhibit 46.¹ We note that the source of paw prints is also a matter of expertise; the prints could just as easily have been made by raccoons, although we had assumed for purposes of argument that cats were the culprits here.

McCullough believed the neighbor was trying to poison his cats with antifreeze. The neighbor said the liquid she placed in the saucer was intended to repel them, not kill them. In any case, after September 2007, McCullough did not let the cats out at all because of his concern for their safety.

DISCUSSION

We had noted in our Decision that, despite the allegation of nuisance in the Complaint, the stated basis of the daily fines was that McCullough had three cats when he was only allowed two and had concluded that the extra new cat did technically violate the rules and regulations or by-laws of the Plaintiff. However, we also concluded that the essentially unlimited daily fines represent an abuse of discretion and an unwarranted exercise of power by the Board. It is this conclusion that Plaintiff had asked us to reconsider.

Plaintiff has taken different positions with regard to the number of cats or dogs members of the association are permitted to have and has enforced its varying policies or rules haphazardly and without regard to any concept of fairness. It is not entitled to the relief it seeks now, enforcement of daily fines that have no relation to the conduct which the fines are supposedly designed to correct or discourage. The amount requested in the original Complaint filed in 2007 was excessive, given that the credible evidence showed that the cats were allowed outside only occasionally prior to September 2007 and not at all after that. The amount requested at trial is outrageous in the circumstances and does not merit enforcement at all.

There was no credible evidence that supported the notion that McCullough’s cats were a nuisance, as the term is usually understood. They were not running wild nor did they defecate everywhere. On occasion, they got out of the unit. They may or may not have, on occasion, walked on a car. In addition, there was no evidence that the animal whose feces were photographed is even a cat, much less one of

McCullough's cats. In other words, there was no real purpose served by the arbitrary two-cat limit. We properly refused to condone the abusive fines assessed by Plaintiff for a violation that was *de minimis* at best. The amount was totally out of line with the violation alleged and, as a result, did not merit even partial enforcement. We also properly refused to award attorneys fees.

We entered an Order on our own motion, hoping to avoid the need for further litigation regarding the cats of McCullough. We enjoined McCullough from replacing the last grandfathered cat upon its demise, and we further enjoined him from keeping more than two cats in the future so long as he remains an owner of a unit in the Mansions of North Park. This was possibly more relief than Plaintiff was entitled to. We may even have been wrong in thinking that McCullough's cats were "grandfathered" rather than McCullough's right to have three cats. No one has appealed from this aspect of our Decision so it is now final and therefore moot. However, it is pertinent to the question of whether there was any violation, even the *de minimis* one we had concluded occurred.

CONCLUSION

By not filing a motion for post-trial relief, Plaintiff has waived all grounds for its appeal, which should be quashed or dismissed.

If that is not done, the appeal in any case is without merit. If there was a technical violation of the "Rules and Regulations or By-Laws of the Plaintiff Association," the maximum damages would be a peppercorn. Need we add that the reasonable amount of attorneys fees for pursuing this action would be zero? The Board members that authorized or directed Plaintiff's attorney to soldier on against all reason are the ones who should pay his fee. We also note that we are at the point where Defendant's attorney fees begin to appear awardable under 42. Pa. C.S. §2503(6), (7) and (9).

BY THE COURT:
/s/Friedman, J.

Dated: July 30, 2009

¹ The exhibits of Plaintiff had been pre-marked and the numbers do not reflect the order in which they were used at trial.

**In the Matter of the Condemnation by the
Redevelopment Authority of Allegheny
County of certain land in the Borough of
Homestead, Allegheny County,
Pennsylvania, being Property of DeBolt
Unlimited Travel Services Incorporated,
successor by merger to
DeBolt Realty Co., Inc., et al.**

Federal Lien Priority—26 U.S.C.S. §6323

1. The priority of the federal lien depends on whether the United States has complied with 26 U.S.C.S. §6323 (a) and (f) which requires that the federal tax lien be filed in accordance with state law.

2. It was the responsibility of the United States to see that the proper indexing had been accomplished.

3. Because the indexing was not proper, the liens of the subsequent lien, properly indexed has priority over the United States lien.

(Linda A. Michler)

Donald C. Fetzko for the Steel Valley School District.

William P. Bresnahan and David L. Nixon for DeBolt Unlimited Travel Services Incorporated.

Kenneth J. Yarsky, II for Danny P. Brown and Harry P. Brown.

Geoffrey J. Klimas for the USA.

T. Lawrence Palmer for Office of Attorney General, Commonwealth of Pennsylvania.

William G. Merchant for the Redevelopment Authority of Allegheny County.

No. GD 05-4607. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

MEMORANDUM IN SUPPORT OF ORDER INTRODUCTION

Friedman, J., July 30, 2009—The captioned condemnation action is in its final stages. Various petitions for distribution of proceeds have been filed, two of which remain pending and are now before us for decision.¹ The petitions concern the appropriate distribution of the remaining balance of the just compensation paid as a result of the condemnation of certain real estate ("the Condemnation Proceeds"). Most of the Condemnation Proceeds have already been paid out. Some of the disputes regarding the instant petitions have been resolved by some of the parties *inter se*, but some still need to be decided by the Court. The amount to be released is understood by the Court to be \$70,193.32, plus whatever interest has accrued. The total of all the liens claimed by the instant petitioners exceeds that principal amount.

An Order was entered on January 7, 2009 setting forth the partial resolution and also establishing a briefing schedule for the matters that remained in dispute. The briefs were filed and the matter is now ready for decision.

As we understand the dispute, the United States of America ("the United States") claims that its tax liens ("the Federal Liens") on certain of the condemned parcels have priority over the tax liens of the Commonwealth of Pennsylvania ("the Commonwealth's Liens") and over the Judgment Lien of the Browns. The Commonwealth contends that the United States did not file its notice of the lien it asserts early enough to have priority over the Commonwealth's Lien. The Browns contend that the United States did not fully comply with the statutory requirements that would give the Federal Lien priority over their Judgment Lien.

The Federal Liens are for unpaid withholding taxes owed by DeBolt Unlimited Travel Services, Inc. ("DeBolt") which owned the condemned real estate. The Federal Lien primarily at issue was filed against DeBolt at File TL04-931 in September 2004 for the withholding taxes due for June 2003, September 2003, and December 2003. The Commonwealth's liens are at GD 03-7788 and GD 05-10069. The Browns' Judgment Lien is at GD 04-23965. See list in Exhibit E to the United States' Brief on the Issue of Relative Lien Priority.

DISCUSSION

1. The Joint Petition is adequately pled and any procedural deficiencies are not only harmless, they have been waived.

In its brief, the United States contends that the Commonwealth and the Browns not only did not properly plead, in their Joint Petition, the existence of their liens, they have not introduced any evidence of their liens. The United States' chief argument focuses on Pa. R.C.P. 1019(a) and its effect on the Joint Petition of the Commonwealth and

the Browns. This is a largely technical question which involves Pa. R.C.P. 206.1, *et seq.* as well as Rule 1019(a).

A review of the Joint Petition and the pleadings in the underlying condemnation case does not reveal any obvious or fatal deficiencies. We also note that it is generally the custom in this Court to extend deadlines or allow amendment or waive defects, depending on the circumstances and the actual prejudice to any party. The technical errors of the United States caused real difficulty for the Court, yet we have also overlooked those errors. For example, the United States failed to file an Answer to the Joint Petition, admitting or denying the averments by numbered paragraph as required by the Rules. Instead, it filed a narrative "Opposition to the Joint Petition" which also included its own petition in a narrative form, both of which are non-compliant with Pa. R.C.P. 206.2(b). We properly could have stricken that combined "opposition" and cross-petition but have instead addressed its merits.

In its "Opposition," the United States attaches Exhibit A, "Account Transcript," which shows a claim of only \$26,558.17 for the tax period ended September 30, 2003. Contrary to its assertion in its brief, the United States did not attach "evidence" of its claim until it filed with that brief a printout of the Notice of Federal Tax Lien filed with the Department of Court Records. See Exhibit F to the United States' Brief. However, rather than hoist the United States by its own petard, we will not limit the claim of the United States to the \$26,558.17 as even a liberal construction of the Pa. Rules of Court might require. (A strict construction would bar any recovery by the United States for its failure to file a proper Answer to the Joint Petition.) Rather, we will consider the actual lien filed at FTL 04-931 which does specify a total lien of \$87,133.48. We will also take judicial notice of all the liens at issue, as indicated later herein.

We also point out that the Order entered after preliminary argument on January 7, 2009 suggests that the Court was to decide the underlying merits of the respective lien priority claims of the interested parties and that any technical missteps of procedure would not be delved into. That Order is consistent with the Petition and Answer practice here in Allegheny County.

Since all parties were clearly aware at the time they wrote their briefs of the pertinent docket numbers of all the liens claimed we will proceed to decide the merits of the disputes. We note that a cursory review of the docket shows the instant lienholders were all given notice of various motions and petitions during the years this case was active. This too suggests that everyone has known of everyone else's liens for quite some time.

The technical objection by the United States is without merit.

2. Judicial notice of liens and judgment index.

Both sides attached printouts from the electronic docket to their briefs. Neither side has disputed the accuracy of those printouts. According to Exhibit F to the United States brief, the Federal Liens at issue were all recorded at FTL 04-931 on September 3, 2004 and we take judicial notice that those liens had been previously assessed as follows:

\$40,334.61 for the period ending June 30, 2003 was assessed on October 6, 2003.

\$30,442.69 for the period ending September 30, 2003 was assessed on February 9, 2004.

\$16,356.28 for the period ending December 31, 2003 was assessed on April 5, 2004.

(The United States' suggestion that its Federal Liens record-

ed on February 11, 2005 and August 29, 2005 also have priority is moot or without merit as will be discussed later herein.)

We take judicial notice of the following liens of the Commonwealth:²

\$59,583.12 for Employer Withholding Tax recorded on April 21, 2003 at GD 03-7788.

\$4,017.77 for Employer Withholding Tax recorded on April 26, 2005 at GD 05-10069.

We take judicial notice that a judgment in the amount of \$31,300.00 was entered at GD 04-23965 on October 12, 2004 in favor of the Browns.

All of the above liens have been alluded to in the various documents filed during the pendency of the captioned matter and were easily found at the docket numbers indicated.

We must also take notice of the fact that the Federal Lien at FTL 04-931 was never indexed properly by the Department of Court Records, Civil Division, formerly known as the Prothonotary.

The Joint Petitioners filed copies of the Judgment Index of the Department of Court Records. That list does not include the Federal Lien filed at FTL 04-931. The United States has not addressed the failure to index the lien at all in its brief filed per the January 2009 Order, and has not filed a supplemental brief contesting the accuracy of the Judgment Index copies. This failure to index has great significance regarding the question of the priority of the Federal Lien over the Browns' Judgment Lien, which will be discussed later herein.

The United States has also attached Exhibit G to its brief, possibly in the hope that we would take judicial notice of its contents as well. We decline to do so. Exhibit G purports to be a "transcript" of monies owed to the United States by DeBolt Unlimited and is not a copy of anything filed in our Department of Court Records, Civil Division (formerly the Prothonotary). We are unclear as to its overall meaning and are therefore unable to take judicial notice of the items contained therein except to note that they do not appear to constitute liens on the real estate in dispute. We note that it is possible that Exhibit G was intended to relate to the table on page 10 of the United States' brief, which shows the later-recorded liens.

3. The Commonwealth's Lien at GD 03-7788 has priority over the Federal Lien at FTL 04-931.

The parties agree that there are two essential requirements that must be satisfied before a state lien can have priority over a federal tax lien: "(1) it must be choate, and (2) it must be first in time." See Brief of the United States, citing *U.S. v. Pioneer American Insurance*, 374 U.S. 84 (1963). The parties also agree that for a lien to be "choate" the state "must establish...the identity of the lienor, the property subject to the lien, and the amount of the lien," with an additional requirement here in the Third Circuit that the lien be "summarily enforceable," i.e. enforceable without any additional judicial action. *Ibid.* Furthermore, the Commonwealth and the Browns do not dispute the contention of the United States that the state lien must be choate prior to the date that the federal tax was assessed, not the date that the federal tax lien was recorded. As to the Judgment Lien of the Browns, the parties agree that the requirements are similar except that the assessment date of a United States lien is not controlling; rather it is the date the United States actually recorded its lien. The United States claims to have recorded tax liens on September 3, 2004, February 11, 2005, and August 29, 2005 that are ahead of the Commonwealth's liens and the Browns' Judgment Lien. As previously indicated,

only the Federal Lien filed September 3, 2004 needs to be discussed in any detail.

The Declaration of Taking was filed on February 24, 2005. As of that date the following events had occurred:

Federal tax lien at FTL 04-931 was recorded on September 3, 2004, the taxes having been assessed on October 6, 2003, February 9, 2004 and April 5, 2004.

Federal tax lien at FTL 05-218 was recorded on February 11, 2005, the taxes having been assessed on July 12, 2004 and October 18, 2004.³

Commonwealth's tax lien at GD 03-7788 was recorded on April 21, 2003.

Commonwealth's tax lien at GD 05-10069 was recorded on April 26, 2005.

The Browns' judgment at GD 04-23965 was entered on October 12, 2004.

All these liens are "choate" as defined by the United States in its brief. The lienor is identified, the amount of the lien is identified, and the lien attaches automatically under Pennsylvania law to all real estate then owned by the lien debtor. It is undisputed that the parcels that were taken in eminent domain were subject to the recorded liens whose priority relative to each other is in dispute. Therefore, the only remaining issue is which of the various liens are first in time.

The Commonwealth's lien at GD 03-7788, in the amount of \$59,583.12, is clearly the earliest, having been recorded on April 21, 2003, well before the earliest assessment by the United States, which occurred on October 6, 2003. Therefore, even under the United States' interpretation of the applicable law, FTL 04-931 is no higher than second in priority to GD 03-7788.

The dates also show that the Commonwealth's other lien, at GD 05-10069, is later in time to the Browns' Judgment Lien and the Federal Lien at FTL 04-931. In any event, the balance available for distribution will be exhausted before that other Commonwealth lien is reached.

4. The Judgment Lien of the Browns is superior to the Federal Lien.

The next question is whether the Federal Lien is also inferior to the Judgment Lien of the Browns.

The priority of the Federal Lien over the Browns' Judgment Lien depends on whether the United States has complied with 26 U.S.C.S. §6323(a) and (f) which require that the federal tax lien be filed in accordance with state law (here 74 P.S. §157-3).⁴

For the federal tax lien to be valid as to a judgment creditor such as the Browns, it must have been filed, i.e. recorded, prior to the date of that judgment and it also must have been properly indexed. The brief of Joint Petitioners suggests that there is a question of whether or not the Federal Lien was properly indexed. Joint Petitioners contend that under the Federal law, it was the responsibility of the United States to see that proper indexing has been accomplished. After a review of 26 U.S.C.S. §6323, as well as the pertinent case law, we agree with Joint Petitioners.

The undisputed docket entries of which we took judicial notice earlier show that FTL 04-931 was recorded on September 3, 2004 but was not indexed properly as late as March of this year, 2009. The Browns' Judgment Lien was filed on October 12, 2004.

We researched the question of whether the failure to index is fatal to the Federal Lien filed at GD 04-931 and found that there is probably no case exactly on point and very little guidance in the cases that touch on the issue.

The most useful case we found is *VanDolen v. Dept. of the Treasury*, 929 F. Supp. 1083 (D. Tenn. 1996). The United

States District Court for the Middle District of Tennessee denied the motion of the Internal Revenue Service for summary judgment in its favor regarding a federal tax lien such as the one at issue here. The Court stated the applicable law very clearly and then found that summary judgment in favor of the United States was precluded by the very language at issue here, "filing in such a manner that a reasonable inspection of the index will reveal the existence of the deed [or judgment]." We quote below the pertinent portion of the *VanDolen* holding:

Determination of the sufficiency of filing of a federal tax lien is governed by federal law. Furthermore, section 6323 [of 26 U.S.C.] provides that the Secretary of the Treasury shall prescribe the "form and content of the notice" of filing. With regard to notice, subsection (f)(4) provides that the lien shall be filed and indexed in the local registry of deeds when state law requires, such that "a reasonable inspection of the index will reveal the existence of the deed." 26 U.S.C. §6323(f)(4)(1978)....

In 1978, section 6323(f)(4) was amended to include an additional requirement for notice filing by the IRS. Prior to the 1978 amendment, section 6323 "required simply that the fact of a lien's filing be recorded 'in a public index at the district office of the Internal Revenue Service for the district in which the property subject to the lien is situated.'.... The statute now requires a filing which would give notice of the lien's existence upon a "reasonable inspection." *Id.*....

However, the Court can find no binding authority, under the current version of section 6323(f)(4), stating that filing in the proper location under a taxpayer's correct legal name precludes investigation into the sufficiency of the notice. Indeed, the law in the Sixth Circuit provides little guidance with regard to the notice provision. As such, the court must be guided by the statutory language.

Section 6323(f)(4) provides in pertinent part:

[U]nder the laws of the State in which the real estate property is located, a deed is not valid as against a purchaser of the property who (at the time of purchase) does not have actual notice or knowledge of the existence of such deed unless the fact of filing of such deed has been entered and recorded in a public index at the place of filing in such a manner that a reasonable inspection of the index will reveal the existence of the deed....

26 U.S.C. §6323(f)(4) (1978).

The statutory language plainly requires that the filing of the deed be such that a "reasonable inspection" will establish that the property is encumbered. The provision does not state, or even imply, that filing under the taxpayer's correct legal name is dispositive of the sufficiency of the notice. The statute establishes the benchmark by which the sufficiency of notice is determined: "filing in such a manner that a reasonable inspection of the index will reveal the existence of the deed." *Id.*

To determine whether the filing of the notice was such that a "reasonable inspection" would have unearthed the lien from the voluminous records of the Register's office, it is necessary to view evi-

dence of the “reasonable inspection” that either occurred or should have occurred.”

292 F. Supp. at 1085-87 (citations omitted). The *VanDolen* Court therefore denied the United States’ motion for summary judgment so that a jury could decide what a “reasonable inspection” of the judgment index would have revealed.

Here, there is no need for a jury or other factfinder as the undisputed evidence shows that an error by the “filing officer,” the Department of Court Records, Civil Division, resulted in the Federal Lien at issue not being indexed properly even though it had been recorded. The question then becomes who is to bear the burden of that failure, the United States or the Browns.

The holding of the Tennessee District Court in *VanDolen* suggests that when Congress added the requirement that a “reasonable inspection of the index [was to] reveal the existence” of federal tax liens that have been recorded, the purpose was to protect those *other than the United States*, since, under any other interpretation, the United States was already adequately protected by the former language of §6323(f)(4). Because we have to give meaning to all the language of that section, we can only conclude that the burden was on the United States to be sure that the filing officer not only recorded the Federal Lien but also indexed it correctly. Now that the Department of Court Records is computerized and on the web, that burden is slight.

The lien of the Browns is therefore superior to that of the United States at FTL 04-931.

CONCLUSION

The priority of the liens at issue in the two petitions now before us is as follows:

First in priority, the Commonwealth’s Lien at GD 03-7788, in the amount of \$59,583.12, plus accrued interest, if any.

Second in priority, the Browns’ Judgment Lien at GD 04-23965, in the amount of \$31,300.00, plus accrued interest, if any.

Third in priority, the Federal Tax Lien at FTL 04-931, which cannot be paid out of the proceeds at issue here which are insufficient to pay the two prior liens.

Because the Commonwealth and the Browns agreed to different amounts as between themselves only, distribution of the remaining balance of the just compensation paid in this case shall be made as set forth in the proposed Order attached to the Joint Petition. See Order filed herewith.

BY THE COURT:
/s/Friedman, J.

Dated: July 30, 2009

ORDER OF COURT

AND NOW, to-wit, this 30th day of July 2009, the Joint Petition of the Commonwealth of Pennsylvania and Danny P. Brown and Harry P. Brown is hereby GRANTED, and the Petition of the United States (included in its Opposition to the Joint Petition) is hereby DENIED, and the relative priority of the liens at issue having been decided as discussed in the attached Memorandum in Support of Order, it is hereby ORDERED that the remaining balance of just compensation paid into Court shall be released to the following parties in the amounts indicated:

1. To the Commonwealth of Pennsylvania the amount of \$43,542.75, plus accrued interest, if any, in partial satisfaction of its lien recorded at GD 03-7788.

2. To Danny P. Brown and Harry P. Brown the amount of \$28,800, plus accrued interest, if any, in

partial satisfaction of their Judgment Lien at GD 04-23965.

BY THE COURT:
/s/Friedman, J.

¹ Joint Petition of Danny P. Brown and Harry P. Brown and the Commonwealth of Pennsylvania and the Petition of the United States of America, which is included in a narrative form as part of its “Opposition” to the Joint Petition.

² This listing comes from Exhibit B to one of many earlier Petitions to Pay Estimate of Just Compensation into Court. It is attached to the United States’ brief as Government Exhibit E. Those earlier Petitions were filed August 2, 2006.

³ The United States assessed taxes due by DeBolt, for the periods ending September 30, 2004 and December 27, 2004, but did not record a lien related to this assessment until August 29, 2005 (FTL 05-1136), after the date of the taking. It is therefore not a lien against the real estate at issue.

⁴ Although §6323(f) uses the term “deed” throughout rather than “lien,” §6323(a) makes it clear that the requirements of §6323(f) must be met before the Federal Lien here has priority over the Browns’ Judgment Lien.

NC Venture I, L.P. v. Vora Enterprises, Inc. a dissolved Florida corporation, and Madhuben C. Shah

*Foreign Judgment—Petition to Vacate Foreign Judgment—
42 Pa.C.S.A. Section 4306—Uniform Enforcement of Foreign
Judgments Act*

1. The transfer of a foreign judgment to Pennsylvania pursuant to the Uniform Enforcement of Foreign Judgments Act for the purposes of effecting judgment, does not confer jurisdiction upon a Pennsylvania court to reconsider the merits of the underlying case de novo.

2. A Pennsylvania court may undertake a limited inquiry regarding the jurisdiction of the court that issued the judgment and the process afforded the judgment debtor, and then determine whether to permit the judgment execution.

3. In the absence of fraud, the service return which is full and complete on its face, is conclusive and immune from attack by extrinsic evidence. This does not extend to 1) facts of which the sheriff cannot be expected to have personal knowledge, but hearsay, 2) statements made by third parties, or 3) conclusions based upon facts known to the sheriff only through statements made by others. Therefore a service return which states that a certain place is a residence or dwelling can be attacked as that is a statement which has been told by others.

4. Plaintiff did not comply with notice of the transfer of judgment to Pennsylvania, a technical violation of 42 Pa.C.S.A. §4306 (c) (2), however, defendant did have notice of the intended enforcement of the judgment.

5. Despite the notice of the sheriff’s sale, defendant waited eight months after she learned of the sheriff’s sale to file her petition to vacate foreign judgment. It would be

inequitable to refuse to allow enforcement of the judgment for a technical violation of §4306 (c) (2) when defendant was dilatory in filing her petition.

(Linda A. Michler)

Dominic A. DeCecco for Plaintiff.
Daniel A. Austin for Defendants.

No. GD 05-014566. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

OPINION

O'Brien, J., July 27, 2009—Madhuben C. Shah (“defendant”), has appealed my denial of her Amended Petition to Vacate Foreign Judgment. The judgment stems from a Business Note and Security Agreement, dated March 17, 1998, between Barnett Bank, N.A. (plaintiff’s predecessor in interest), as lender, and Vora Enterprises, Inc., as borrower. The Note, Exhibit B to defendant’s petition, lists Vora’s address as 829 SE 17th Street, Ocala, FL 34470. The Note is purportedly signed by defendant as president of Vora. A “Continuing Guaranty,” purportedly signed by defendant in her individual capacity, guarantees payment of the note. No address is given for defendant.

On December 31, 2002, plaintiff filed suit in Florida against defendant and Vora to recover on the note. The return of service states that on January 25, 2003, at 11:13 a.m., defendant was served at 1411 Southeast 9th Avenue, Ocala, FL 34471, by “substitute service” as follows:

By leaving a true copy of this process with the date and hour of service endorsed thereon by me, a copy of the complaint, petition, or other initial pleading or paper (if any) at the within named person’s [i.e., defendant’s] usual place of abode with any person residing therein who is 15 years of age or older and informing the person of the contents:

NAME: Dharmendra C. Shah. TITLE/RELATION: Son.

Service was effectuated by Michael W. Jones of the State Service Corporation. On April 23, 2003, plaintiff obtained a default judgment against defendant and Vora.

On June 23, 2005, plaintiff filed with the Prothonotary of this county an Application For Registration Of Foreign Judgment Pursuant To Uniform Enforcement Of Foreign Judgments Act. 42 Pa.C.S.A. §4306 (c) (2), Notice of Filing, provides:

Promptly upon the filing of the foreign judgment and the affidavit, the clerk shall mail notice of the filing of the foreign judgment to the judgment debtor at the address given and shall make a note of the mailing in the docket. The notice shall include the name and post office address of the judgment creditor and the attorney for the judgment creditor, if any, in this Commonwealth. In addition, the judgment creditor may mail a notice of the filing of the judgment to the judgment debtor and may file proof of mailing with the clerk. *Lack of mailing notice of filing by the clerk shall not affect the enforcement proceeding if proof of mailing by the judgment creditor has been filed.*

Emphasis added. The docket does not reveal that the Prothonotary sent defendant notice of the filing. Plaintiff does not contend that it sent defendant notice of the filing of the judgment.

Plaintiff filed a Praecipe for Writ of Execution on August 17, 2007. It was reissued on December 4, 2007. On January 17, 2008, defendant was personally serviced with notice of

sheriff’s sale to be held March 3, 2008. Defendant does not deny being served. The sale was continued for reasons that do not appear of record. On June 19, 2008, the sale was stayed because defendant filed bankruptcy. Defense counsel entered his appearance on August 19, 2008. Defendant’s original Petition to Vacate Foreign Judgment was filed September 9, 2008. Thus, although defendant was aware of the judgment at least by January 2008, it took eight months to file said petition.

Defendant essentially avers three grounds in support of her Petition to Vacate Foreign Judgment:

- (1) she did not sign the Note or the Guaranty upon which the judgment was based;
- (2) she was not served with notice of the Florida lawsuit; and
- (3) neither the Prothonotary nor the plaintiff notified her of the filing of the foreign judgment.

The transfer of a foreign judgment to Pennsylvania pursuant to the Uniform Enforcement of Foreign Judgments Act, 42 Pa.C.S.A. § 4306, for the purpose of effecting judgment, does not confer jurisdiction upon a Pennsylvania court to reconsider the merits of the underlying case de novo. A Pennsylvania court may only undertake a limited inquiry regarding the jurisdiction of the court that issued the judgment and the process afforded the judgment debtor, and then determine whether to execute the judgment. *Tronagun Corporation v. Mizerock*, 820 F. Supp. 225 (W.D. Pa. 1993). Therefore, this Court has no jurisdiction to consider whether or not defendant signed the note and guaranty. Only the jurisdiction where the judgment was initially entered can open a default judgment which was entered in that jurisdiction. *Great Bay Hotel v. Saltzman*, 609 A.2d 817 (Pa.Super. 1992). This Court can only enforce or refuse to enforce the judgment.

Defendant contends she was not served with notice of the Florida lawsuit. As noted above, the return of service indicates that service was effectuated by serving defendant’s son, Dharmendra C. Shah [a/k/a Danny Shah] at defendant’s usual place of abode, i.e., 1417 Southeast 9th Avenue, Ocala, Florida. At ¶4 of her verified original petition, defendant asserts that she “never owned or lived at” that address. At ¶6 she avers that at all relevant times she “did not own property in Florida, was not a resident of Florida, and did not do business in Florida.” Emphasis added. In her supporting brief she also claims that she has lived in Pennsylvania at all times since 1994.

Generally, in the absence of fraud, the return of service of a sheriff (or other official process server), which is full and complete on its face, is conclusive and immune from attack by extrinsic evidence. But this conclusiveness is restricted only to facts stated in the return of which the sheriff presumptively has personal knowledge. It does not extend to 1) facts of which the sheriff cannot be expected to have personal knowledge and which are based upon information obtained through hearsay; 2) statements made by third parties; or 3) conclusions based upon facts known to the sheriff only through statements made by others. *Hollinger v. Hollinger*, 206 A.2d 1 (Pa. 1965). If a sheriff’s return states that a certain place is the residence or dwelling of the defendant, such a statement is not a matter ordinarily within the personal knowledge of the sheriff, but a statement based upon what he has been told by others. Thus defendant can attack the statement in the return that 1417 Southeast 9th Avenue was her usual place of abode.

In *Frontier Leasing Corporation v. Shah*, 931 A.2d 676 (Pa.Super. 2007), in a proceeding to enforce an Iowa judg-

ment, the debtor disputed that the Iowa court had personal jurisdiction over him. In resolving the issue, the Superior Court stated that the question is whether the Iowa court had the requisite personal jurisdiction, not whether a Pennsylvania court would. Therefore, the Court looked to Iowa law for the answer.

Florida Statutes, Title VI, Civil Practice and Procedure, Chapter 48, Process and Service of Process, §48.031 (1) (a), provides as follows:

Service of original process is made by delivering a copy of it to the person to be served with a copy of the complaint, petition, or other initial pleading or paper or by leaving the copies at his or her usual place of abode with any person residing therein who is 15 years of age or older and informing the person of their contents. Minors who are or have been married shall be served as provided in this section.¹

In *Emmer v. Brucato*, 813 So.2d 264 (Fl. 2002), the Florida District Court of Appeal held that a return of service which is regular on its face is presumed valid unless clear and convincing evidence is presented to the contrary. A determination of credibility is within the prerogative of the trial court, even if it is based upon a review of transcribed depositions. See *American Vending Co., Inc. v. Brewington*, 432 A.2d 1032 (Pa.Super. 1981).

The defendant did not testify, file an affidavit or produce any form of identification to indicate that she did not reside in Florida in January of 2003. In her petitions, she avers that she never resided at 1417 SE 9th Avenue. She also contended that she was not a resident of Florida and did not do business in Florida. In her supporting brief, defendant states that she has lived in Pennsylvania since 1994. These contentions are belied by the record and Florida court documents.

In defendant's divorce action, Case No. 97-349-C A-FC, filed in the 5th Circuit of Marion County, Florida, the Marital Settlement Agreement or Dissolution Of Marriage was signed by defendant on January 23, 1997, and lists her address as 1417 SE 9th Avenue. Her signature was notarized, and the notary stated that defendant produced a Florida Identification Card as identification.² In the Final Judgment of Dissolution of Marriage entered March 17, 1997, the certificate of service by the court states that notice was mailed to defendant at 1417 SE 9th Avenue.

In his deposition of November 25, 2008, defendant's son testified that Vora Enterprises, Inc. was a Florida corporation which his mother set up and owned. (T-6, 7). The corporation was set up in 1994 and operated a convenience store which was licensed in Florida. (T-9, 10). It would thus appear that, contrary to her assertion, defendant did business in Florida even though the son managed the store. The son claimed that his mother never lived in Florida, but the property agreement she signed contradicts that contention. (T-14). The son's testimony was vague and contradictory. He did not recall how the loan documents were initiated or whether or not his mother signed them. (T-21, 22, 29, 30, 32). He stated that he did not recall if he was an officer of the corporation (T-8), and then claimed he was not an officer of the corporation. (T-23). Yet a "Profit Corporation Annual Report" filed with the Florida Department of State by the son on March 31, 1998, states that defendant was president and he was vice-president. The address given for the corporation, defendant and son was 829 SE 17th Street, the address used by the business. (T-9). If defendant did not live in Florida, why would her son list her as having a Florida address? Due to the vagueness and inconsistencies in the son's deposition and Florida Court documents related to

defendant's divorce, I cannot find that defendant presented credible evidence, let alone clear and convincing evidence, that she did not live at 1417 SE 9th Avenue at the time service was effectuated.³

After argument on the petitions on March 25, 2009, and the submission of briefs on May 12, 2009, defendant filed the affidavit of her daughter, Toral Sodhi. The affidavit states as follows:

March 20, 2009

To Whom It May Concern:

I Toral Sodhi verify that I was living with my mother (Madhuben C . S hah) at 2 707 A utumnwood Drive, Glenshaw, PA 15116 since the property was first bought in summer of 1997.

I moved out of my mother [sic] house in May 2007 after I got married and now currently live in New Jersey.

If you have any questions or concerns please feel free to contact me at 412-519-8922.

Although this affidavit purports to have been executed on March 20, 2009, it was not filed until May 12, 2009.

Also, ¶13 of the marital settlement agreement provides as follows:

The parties agree that the two minor daughters, Sujata Shah and Toral Shah...will all reside with their father in Pittsburgh, P ennsylvania, and that he shall be solely responsible for their maintenance and support. The parties further agree that the Wife shall have the right to visitation without restriction.

The defendant and her husband signed this agreement on January 23, 1997, just months before the daughter claims she was living with the mother. The daughter did not testify at the hearing or by deposition. Whether or not the affidavit is accepted as evidence, I do not find it credible.

Defendant asserts that plaintiff has failed to promptly notify her of the filing of the judgment pursuant to 42 Pa.C.S.A. §4306 (c) (2). I have not found any case law dealing with whether a violation of §4306 (c) (2) prohibits the enforcement of the judgment. The only P ennsylvania case which cites §4306 (c) (2) is *Andrews v. Wallace*, 657 A.2d 24 (Pa.Super. 1995). In that case, Andrews contended that she never received proper notice of the transfer of a New Jersey judgment to P ennsylvania. Andrews presumed that notice must take the form of personal service of process, which she never received. She argued that the Pennsylvania courts lacked jurisdiction over her. The Superior Court held as follows:

Personal s ervice w as n ot n ecessary i n Pennsylvania, however , because P ennsylvania courts do not need to exercise any jurisdiction over Andrews' person: no one has ever hauled her into court here. R ather, W allace only wants the Commonwealth to exercise control over some of Andrews' Pennsylvania real estate. This is called *in rem* jurisdiction, because it involves the state exercising authority over things, not people.

Pennsylvania courts have automatic *in rem* jurisdiction over all property located in the Commonwealth. That is part of the inherent power of a sovereign. The Commonwealth makes it possible f or A ndrews t o o wn r eal p roperty i n Pennsylvania by maintaining a recording system,

and authorizing the sheriff to eject trespassers, etc. The Commonwealth also keeps society running by using its sovereign power over property to satisfy valid judgments through the sheriff's powers of levy and execution. All Wallace seeks is to execute her valid judgment against Andrew's Pennsylvania property.

The d ictates o f d ue p rocess d o r equire t hat Commonwealth authorities *provide* some *notice* before seizing a person's property to satisfy a judgment. This notice requirement is less stringent than personal service, because the Commonwealth is only going after property to satisfy a judgment which has been obtained with the fullest due process protections our society , or any society , offers. Specifically , the Prothonotary must mail notice to the judgment debtor . 42 P a.C.S.A. §4306 (c) (2). This has been done to the trial court's satisfaction.

Id. at 25-26. (footnote omitted).

It is undisputed in the instant case that neither the Prothonotary nor plaintiff's counsel sent defendant notice of the filing of the judgment. In its Answer , at ¶5, plaintiff denied that it had a duty to notify defendant of the entry of the judgment prior to commencing execution proceedings. This is clearly an incorrect statement of the law . The issue, however, becomes whether I should refuse to allow execution on the judgment because of plaintiff's failure to comply with 42 Pa.C.S.A. §4306 (c) (2).

Were I to refuse to enforce the judgment based on the violation of §4306 (c) (2), nothing would preclude plaintiff from refileing the judgment and mailing defendant the proper notice. Defendant acknowledges that she was personally served with notice of a sheriff's sale in January of 2008. The sale was stayed and defendant has had the opportunity to present and argue her challenge to the Florida judgment, which is the same procedural posture she would have been in had she been mailed notice of the filing of the judgment. The record does not reveal that defendant has sustained any prejudice by the initial lack of notice. In the interest of judicial economy, a rid because defendant was personally served with notice of the sheriff's sale, I see no reason to refuse enforcement of the judgment based on plaintiff's technical failure to comply with §4306 (c) (2). In *Quatrochi v. Gaiters*, 380 A.2d 404 (P a.Super. 1977), defendant filed a petition to open default judgment attacking the validity of service and the sheriff's return. The petition was filed eight weeks after he received notice of the judgment without satisfactorily explaining the delay. The Superior Court found that defendant had not acted promptly and reversed the trial court's granting of defendant's petition. Here defendant waited eight months after she learned of the sheriff's sale to file her petition, without explanation, It would be inequitable to refuse to allow enforcement of the judgment for a technical violation of §4306 (c) (2) when defendant was dilatory in filing her petition.

BY THE COURT:
/s/O'Brien, J.

¹ While defendant also argues there was not proper service upon her as a nonresident doing business in Florida (see §48.071), plaintiff does not contend that it attempted service on her on that basis.

² Interestingly, defendant's husband, Chinulal Shah, signed, and his signature was notarized. The notary stated that he produced a P ennsylvania driver's license as identification.

When the Florida Court entered its final judgment on March 17, 1997, at ¶ A it stated that the Court had jurisdiction over one or both of the parties. Since defendant had produced a Florida ID and her husband a Pennsylvania driver's license, it would seem that the Court found it had jurisdiction because defendant was a Florida resident.

³ Defendant's son acknowledged being served with the complaint, stating that defendant was his mother , and that he could accept service. (T-54, 55).

M.P. v. S.B.

Custody—Relocation

1. Mother and father never married and were living together at the time of the birth of their son. One month later they separated as a result of the father starting a prison sentence that lasted nine and a half months. Upon his release, he resumed living with the mother and the parties' son. The father then began living with his mother and stepfather while the mother began attending college full time as well as working full time. The father exercised custody of the son from Friday through Monday every weekend and his parents provided care for the child two to three weekdays per week.

2. The child was subsequently in the father's care for approximately six weeks when mother was without a vehicle. Altercations occurred between the parents and the father obtained a protection from abuse order against the mother awarding temporary custody of the child to the father.

3. Subsequently, the parties shared custody of the child on an equal basis, with the mother not fully complying with the shared custody order and filing a complaint for modification. The mother failed to attend a custody conciliation and later informed the father of her desire to move to Nebraska with the child. She had been accepted into the "Mother Living Learning" program in Nebraska that would provide her with a tuition scholarship as well as food, shelter, clothing, and child care. The assigned judge at a conciliation denied the mother's request to relocate with the child since no relocation petition had been filed and no relocation hearing had been held. A trial was scheduled and evaluations were ordered.

4. Three days later, the mother presented an emergency *ex parte* petition to a different judge in the Family Division who granted the mother primary custody of the child and gave her permission to relocate to Nebraska the next day . The assigned judge was presented with and granted a motion for reconsideration and an order was entered directing the child to return to Allegheny County. The mother then filed a formal request for relocation and a hearing was held, after which time the assigned judge denied the mother's request to relocate.

5. The court explained that relocation was denied as the parties had equally shared custody of their child, and daily care was better provided by the father . The child had a strong bond not only with the father, but also with the paternal grandparents who provided extensive care. The child had other family members in the area and would not have to spend nearly the amount of time in child care when with the father as he would when with the mother . While relocation

may improve the quality of life of the mother, it would not improve the quality of life for the child.

6. The court was also concerned about mother's behavior and credibility, disrespectful and deceitful conduct throughout the litigation. She violated the county's "one judge/one family" rule by presenting an *ex parte* motion to another judge in the same division.

(Christine Gale)

Jan Medoff for Plaintiff/Father.

Peter J. Ennis for Defendant/Mother.

Laura A. Maines for the child.

No. FD 05-004733-001. In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division.

OPINION

Hertzberg, J., June 17, 2009—This Opinion explains our decision to deny the request of S.B. ("Mother") to relocate to Nebraska with the parties' son. Mother has appealed from our decision to the Superior Court. This is a Children's F ast Track appeal. See Pa.R.A.P. Nos. 9 04(f), 9 05(a) and 1925(a)(2).

Mother and M.P. ("Father") never married, but they were living together when their son was born in January of 2005. One month later they separated as a result of Father starting a prison sentence that lasted nine and a half months. After his release from prison, for approximately ten months, Father resumed living with Mother, the parties' son and a daughter Mother had from a previous relationship. Around January of 2007, Father began living with his Mother and Stepfather ("Paternal Grandparents"). Mother then began attending college full-time at Duquesne University and also working forty hours per week. Father, who also worked, had custody of his son from Friday through Monday every weekend and Paternal Grandparents cared for him during the daytime two or three weekdays every week.

In October of 2007, Mother's car stopped working resulting in the parties' son being left in the custody of Father and Paternal Grandparents for approximately six weeks. Mother's daughter from a previous relationship, who was then seven years old, continued to be in Mother's custody. Early in December of 2007 Mother received an inquiry from the Allegheny County Department of Children Youth and Families ("CYF") concerning the welfare of her daughter. Mother erroneously suspected that Father or Paternal Grandparents asked CYF to investigate her, and she was angry at them. She took a bus to their home, but Paternal Grandparents, after consulting with CYF, refused to let her in to take the child. Mother then screamed profanities, kicked the front door to their home and punched the living room window. The window broke, cutting Mother's hand. Paternal Grandparents called the police, but Mother left before they arrived. Later, Mother threatened harm to Father by telephone.

Father immediately obtained a temporary Protection from Abuse Order. The undersigned then presided over the final hearing on Father's Protection from Abuse Petition and heard testimony from Father, Paternal Grandparents, Maternal Grandmother and Mother. Mother admitted to the poor behavior at Paternal Grandparents' home. Mother also acknowledged that she had not cooperated with the CYF investigation. We, therefore, signed a Final Protection from Abuse Order against Mother that terminated in six months and awarded temporary custody of the parties' son to Father. However, we also included a provision for possible custody modification "upon receipt of CYF's investigative report of Mother." 1/7/2008 Final Order of Court, p. 2.

Mother then cooperated with the CYF investigation, which determined that there were no safety risks to either of her children. On June 10, 2008, Father agreed the Final Protection from Abuse Order could be terminated, but he opposed Mother's Petition for Special Relief requesting primary physical custody of the parties' child. Father argued he should continue to have primary physical custody. We instead ordered the parties to share custody equally, first on a 2-2-5-5 schedule and then on a week on-week off schedule. Mother did not fully comply with our shared custody order; hence in August of 2008 we ordered the local police to enforce it. Mother then filed a Complaint for Modification of a Custody Order, and Father filed a Counterclaim for Shared Custody. The parties both attended custody mediation in October of 2008, but were unable to reach an agreement. The parties were therefore both ordered to attend a Conciliation with a Custody Conciliator in November. Mother, however, failed to attend it. Next, the parties were ordered to attend a conciliation before the undersigned on January 12, 2009.

It was on January 12, 2009 that Mother first informed Father she wanted to take their son with her to attend the College of St. Mary in Omaha, Nebraska. Also on January 12, 2009, Mother for the first time verbally requested permission from the undersigned to take the child to Nebraska on January 16, 2009. Mother, who was a Sister Thea Bowman Black Catholic Educational Foundation tuition scholarship recipient at Duquesne University, was accepted into the "Mother Living Learning" (MLL) program at St. Mary that provided not only Mother with a tuition scholarship, but also the children and Mother with food, shelter, clothing and child care while Mother attended the all-female College in Nebraska. Contributions from the Foundation and the College to Mother and the children for them to be in the MLL program would amount to a total of approximately \$60,000. Mother implied that she would be unable to accept this "once in a lifetime opportunity" unless we permitted her to relocate with the parties' son. The undersigned refused Mother's request because the implication that she had to suddenly relocate with the parties' son to get the benefits of the program was unbelievable, and because Mother had not filed a Relocation Petition, and we therefore had not conducted a relocation hearing pursuant to *Plowman v. Plowman*, 409 Pa.Super. 143, 597 A.2d 701 (Pa.Super. 1991). The undersigned told Mother he hoped she would take advantage of this opportunity, but that she could not relocate the child at that time. We instead issued three orders: an order scheduling a custody trial for May 14, 2009, an order for a child custody psychological evaluation to be paid for by Allegheny County (since both parties were *in forma pauperis*) and an order appointing Reed Smith, L.L.P. as the Child Custody Guardian to represent the best interests of the child *pro bono*.

Three days later, Mother had the Supervising Attorney of the Duquesne University School of Law Clinical Legal Education program present an Emergency Petition for Special Relief *ex parte* to a different Judge of the Court of Common Pleas of Allegheny County. This other Judge, believing Mother would otherwise miss a "once in a lifetime opportunity," (Emergency Petition for Special Relief dated 1/15/2009, p. 3), essentially reversed the decision of the undersigned and granted Mother's Emergency Petition. The other Judge signed an order granting Mother primary custody of the parties' son with permission to relocate him to Nebraska the next day. Four weeks after Mother took the child to Nebraska with her, Father, who had been proceeding *pro se*, obtained counsel who presented a Motion for Reconsideration to the undersigned. Since it was not in the child's best interests to remain in Nebraska, the under-

signed vacated the other Judge's order and directed return of the child to Allegheny County at the time Mother's Spring Break from college began. Mother then filed a formal written request for relocation, and we held a hearing on it pursuant to *Plowman, supra*. Following a hearing before the undersigned held on April 16, 2009, we denied Mother's Petition to Relocate, and Mother appealed to the Superior Court. Mother contends on appeal that our decision denying relocation is incorrect because relocation is in the child's best interests, relocation will substantially improve the quality of life of Mother and the child and there are suitable alternative arrangements for visitation with Father that are available. See Mother's Statement of Matters Complained of on Appeal.

In *Thomas v. Thomas*, 199 Pa.Super. 249, 739 A.2d 206, the parties equally shared custody of their children for over two years under a consent order until the Mother requested primary custody and permission to relocate with the children to Alabama. In permitting relocation, the trial court in *Thomas* myopically applied the factors identified in *Gruber v. Gruber*, 400 Pa.Super. 174, 583 A.2d 434 (1990), to the Mother's household. The Superior Court reversed the trial court because an analysis different from *Gruber, supra* must be applied to equally shared custody. The *Gruber* factors are to be considered as part of an overall best interests of the child analysis that scrutinizes the competing custodial environments of both parents. See, *Thomas*, 739 A.2d at 209-211. Since Mother and Father in the instant custody dispute were sharing custody equally, *Thomas, supra* is the appropriate analysis.¹

Mother in the subject custody proceeding described the environment in the Nebraska dormitory as permitting the child to spend time with his half-sister, especially since they shared a bedroom. Economically, Mother could work part-time two days per week since the MLL program covers the food, clothing, rent, and childcare expenses incurred by her and her two children. The parties' child attends daycare three days per week from 7:00 a.m. to 5:00 p.m. in Nebraska while Mother attends classes and works. Mother also testified that Nebraska is more "family-oriented" than Pittsburgh:

...it's like they have rec centers. They have all these different mothers and kids things at the different universities there, which are also for learning and reading and math and whatever. So there's just so much out there. There's just so much.

Transcript of Audio taped Relocation Hearing of April 16, 2009 ("T." hereafter), p. 83.

Father and Paternal Grandmother described the child's Pittsburgh environment. Father works full time as a barber. He and the child live with Paternal Grandparents, who are retired. The child has his own bedroom there. The child attends pre-school from 9:15 a.m. to 3:15 p.m. two or three days per week. Most of the time Father takes the child to and from pre-school, and two of the child's cousins attend the same pre-school with him. Sometimes after pre-school the child will go to the YMCA to play with his cousins. On weekends he may go to the Carnegie Science Center and Chuck-E-Cheese with his cousins. Although Mother is critical of the Paternal Grandparents for treating him "like a little king" (T., pp. 87-88), Mother clearly acknowledges a bond exists between the child and his Paternal Grandparents that is extremely close because they frequently assist Father with raising the child. Father has an extremely large family (30 aunts and uncles and more than 20 cousins), and nearly all of them live in or near Pittsburgh. Mother's entire family also lives in the Pittsburgh area.

Scrutinizing these competing custodial environments, clearly the Father's is better for the child. He spends as much if not more time with his Father and Paternal Grandparents as he does with his Mother and half-sister, but he also has all of his cousins in the Pittsburgh area. Mother failed to convince us that Nebraska is more family-oriented. Her descriptions above are extremely vague, and in any event, these "opportunities" (T., p. 92) also exist in the Pittsburgh area, as Father was able to demonstrate in a very specific manner when he testified about the child going to the Carnegie Science Center, Chuck-E-Cheese and the YMCA. The Child Custody Guardian, in arguing that relocation to Nebraska was in the child's best interests was extremely critical of Father for not spending the entire day on alternating Mondays with the child, since Father does not work on alternating Mondays. T., p. 151. We find such criticism inappropriate. The child only goes to pre-school "for a couple of hours" (T., p. 124) on those Mondays. Mother actually leaves the child in child care more hours per week than Father, and the child spends ten long, consecutive hours in child care when left there by Mother. Finally, we are impressed by the fact that Father does not take the child to pre-school simply to provide supervision while he works. If this were the reason, Paternal Grandparents could supervise the child whenever Father worked at no expense to Father. However, Father pays to place his son in pre-school because Father values the education his son is receiving there. T., pp. 112-115.

Mother also argues relocation would substantially improve the quality of life of herself and the child. Although this appears to be true for Mother, for the reasons set forth above, it is not the case for the child.

Mother's final argument is that there are suitable alternative arrangements for visitation with Father. Father, however had exclusive custody or equally shared custody of the child during the fourteen months preceding Mother's relocation attempt, but Mother's proposal was for Father to have custody "about 90 days a year." T., p. 69. Therefore, this claim of a suitable alternative for Father has no merit. We did, however, sign an Order after the relocation hearing directing the parties to try to agree on a custody arrangement that "comes as close to equally shared physical custody as possible...[including] the exercise of physical custody of the child in Nebraska." April 17, 2009 Order of Court. Based on the testimony we received at the relocation hearing, we believe shared custody is in the best interest of the child in the instant case.

However, there has been an alternative analysis put forth for shared custody relocation cases by at least two Superior Court Judges. See *Thomas, supra* at 213 (Ford-Elliot Concurrence) and *McAlister v. McAlister*, 200 Pa.Super. 42, 747 A.2d 390 at 393 (Musmanno Concurrence). In that analysis, one of the parties is awarded primary custody. Then, the *Gruber* factors are applied to determine if relocation is in the best interests of the child. Our plan, prior to Mother presenting the Emergency Motion to the other Judge, called for the preparation of a child custody psychological evaluation to include the relocation issue followed by a combination custody trial and relocation hearing on May 14, 2009.² In both foresight and hindsight, we believe that approach, taking only four additional weeks of time, is clearly preferable. We have concerns about Father's criminal convictions for delivery of a controlled substance and theft by unlawful taking and prefer more certainty that this conduct is deep in his past and not being repeated. Similarly, we have concerns about the child neglect allegations made to CYF and prefer more certainty that Mother is not endangering her children. The psychological evaluation likely would have assisted us

with these and other issues.

In the event we must analyze Mother's relocation request by awarding one parent primary custody, we would award it to Father. Since we believe equally shared custody is the most appropriate, we find Mother and Father both to be loving and fit parents. With respect to Mother; however, we have numerous concerns that we do not have with Father.

Before the child was one and Father was in jail and Mother had exclusive custody, the child developed fleas in his hair, lead poisoning and was underweight. Paternal Grandmother, a retired nurse, pleaded with Mother to let her get the child the treatment he needed. T., pp. 140-142. Fortunately, Mother allowed Paternal Grandmother to have the child receive appropriate medical treatment thus controlling the conditions.

Mother also appears to have an untreated anger problem that was apparent to the undersigned during her testimony. In fact, when counsel was cross examining her, he also noted "[y]ou seem angry. Are you angry?" T., p. 53. The PFA described above resulted from Mother's misdirected anger at Paternal Grandparents and Father.

Mother also lacks appropriate respect for authority. She initially refused to meet with the CYF representative who was trying to meet with her. She failed to appear before a Custody Conciliator in violation of a Court Order. We also had to order local police to enforce our shared custody order as Mother otherwise refused to abide by it.

Our biggest concern with the behavior of Mother is her deceitful conduct in this custody litigation. She created the false impression that her once in a lifetime opportunity would be lost if she could not relocate with the child. The Director of the Sister Thea Bowman Foundation testified that mothers are not required to have their children at the College of St. Mary, that the program really is meant for children of single black mothers without a caring Father (which is actually the case with Mother's daughter from another relationship) and that until now, "we have never had a father that cared" with a child in the MLL program. T., pp. 23-26. Mother could simply have enrolled herself and her daughter in the MLL program without relocating the parties' son. Mother and daughter then would have received all of the benefits of the program.

Mother violated Allegheny County's "One Judge/One Family Rule." See Allegheny County Local Rule Nos. 1930(a)(4), 1930(f)(4) and 1930(g) as well as Family Division Court Manual Section IC. Mother presented no information to the other Judge of the Court of Common Pleas of Allegheny County that was not presented to the undersigned at the Conciliation three days earlier. Mother was simply "Judge Shopping" for a Judge who would fall for her once in a lifetime opportunity story. We were disappointed by the decision of the other Judge, but we were able to minimize the impact on the child by allowing Mother to wait until her Spring Break to return the child to the Pittsburgh Area.

All child custody claims, including a relocation request, seek equitable relief. "The doctrine of unclean hands requires that one seeking equity act fairly and without fraud or deceit as to the controversy in issue." *Terraciano v. Commonwealth Department of Transportation*, 562 Pa. 60, 69, 753 A.2d 233, 238 (2000). We, therefore, find that Mother's "unclean hands" are an additional justification for denying her relocation request.

We also find it necessary to describe portions of Mother's testimony that are prominent due to Mother's lack of credibility. Even though the undersigned presided over the Final PFA Hearing, during the relocation hearing Mother testified she accidentally broke the window and did not later threaten Father by telephone. T., p. 59. To minimize the hours she

works in Nebraska so she appears to spend more time with the child, Mother said her work schedule is

Just like two days a week now, and it's only like, what? Not even 12 hours. It's about eight, if even that now because I went down a day... It's Monday and Tuesday, and it's two to three hours. It's optional if I want to take three hours, but right now I just take two hours. So it's just four hours.

T., p. 90.

Although all of Mother's family lives in the Pittsburgh area, she also asked us to believe that she and the child never see these relatives. Father, on the other hand, testified quite credibly particularly when Mother's counsel asked him if he had any of the medical records from the times Father has taken the child to the hospital. T., pp. 136-137. Counsel was obviously surprised when Father answered "Actually, yes. They're actually right there."

Having determined that we would award Father primary custody if we had to choose between them, all that remains under the Judges Ford-Elliott and Musmanno proposal is to apply the *Gruber* factors. However, since *Gruber* involved a relocation by the parent with primary custody, it makes no sense to apply them in the case at hand since the parent we would award primary custody to is not relocating.

BY THE COURT:

/s/Hertzberg, J.

¹ The Superior Court in *Thomas* also pointed out that, "it is the trial court's duty in a child custody matter to file a comprehensive opinion containing its findings and conclusions regarding all pertinent facts. Effective appellate review of child custody cases requires a complete and comprehensive trial court opinion containing exhaustive analysis of the record and specific reasons for the court's ultimate decision." *Thomas*, 739 A.2d at 213, citing *Clapper v. Harvey*, 716 A.2d 1271 at 1274 (Pa. Super. 1998). Among the other problems with the trial court's decision, the *Thomas* Court found that the opinion was not "complete and comprehensive." *Id.* This Opinion in the instant matter is intended to comply with the complete and comprehensive requirements of *Thomas*, *supra* and *Clapper*, *supra*. However, Pennsylvania's Trial Judges need reconciliation of this doctrine with the Children's Fast Track amendments to the Pennsylvania Rules of Appellate Procedure (effective 3/16/2009) that now permit the filing of a "brief opinion" which may, but need not, refer to the transcript of the proceedings. See Pa.R.A.P. No. 1925(a)(2)(ii) as amended. In future child custody decisions, Pennsylvania's Trial Judges may be unable to complete an Opinion containing an exhaustive analysis within 30 days of the appeal. *Id.* Do the Children's Fast Track amendments nullify the complete and comprehensive child custody Opinion requirement of *Thomas*, *supra* and *Clapper*, *supra*?

² when Mother relocated with the child on January 16, 2009, conducting the psychological evaluation in 90 days would have been difficult if not impossible. We, therefore, postponed the custody trial until July 7, 2009. With no progress made relative to conducting the psychological evaluation and the exclusive exercise over jurisdiction by the Superior Court pursuant to *Bartle v. Bartle*, 304 Pa. Super. 348, 450 A.2d 715 (1982) and Pa.R.A.P. No. 1701 we are contemporaneously entering an Order continuing the July 7, 2009 custody trial pending the results of the appeal.

CAPSULE SUMMARIES

Beverly P. Kirik v. Michael J. Kirik, IV

Special Relief—Child Support Overpayment and Equitable Distribution Offset

1. The parties' divorce agreement required Husband to pay Wife a \$135,000 cash settlement, in equal monthly installments. Husband also paid Wife child support until February, 2008 when the child began residing with him.

2. By October 2008 Husband was \$8,582.57 overpaid in child support. Because of Mother's financial circumstances the Master marked the overpayment at "\$0.00" pursuant to Pa. R.C.P. 1910.19(f) (2) as Mother had no ability to repay the overpayment.

3. Husband then filed a Petition for Special Relief seeking to offset by credit each month a portion of his equitable distribution installment payments with the child support overpayment. The request was granted.

4. Wife asserts that the court erred in granting the offset and that Husband should have filed Exceptions to that portion of the Master's Recommendation which set the overpayment on the PACSES system at \$0.00.

5. The court held that if the Master's intention had been to cancel the support overpayment due Husband, she would have stated that. The purpose of marking the overpayment at \$0.00 pursuant to Pa. R.C.P. 1910.19(f) (2) was to conserve the court's resources and responsibility to collect support when there is no likelihood of collection.

6. The fact that the overpayment could not be collected through the PACSES system did not mean money was not owed. Husband's request for offset was proper. If Wife could keep child support payments she received for a period when the child was residing with Father and while his request for modification was pending, an inequity would result.

(Hilary A. Spatz)

Max C. Feldman for Plaintiff.

Heidi A. Sherman for Defendant.

No. FD 97-005794-005. In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division. Mulligan, K., March 26, 2009.

Pamela M. Carson v. Sidney Carson

Mutual Mistake of Fact—Rescission—Contempt

Equitable Distribution order was opened by reason of mutual mistake of fact regarding Husband's pension. The statute of limitations for opening a decree (not applicable here) is thirty days for intrinsic fraud and five years for extrinsic fraud. 23 Pa. C.S.A. §3332. Consent agreements regarding equitable distribution are governed by contract principles. Husband's contempt petition was denied because the parties' equitable distribution agreement was effectively rescinded.

(Christine Gale)

Carol Hanna for Plaintiff/Wife.

Eric J. Yandrich for Defendant/Husband.

No. FD 92-11561-003. In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division. Wecht, J., June 11, 2009.

Marie Bouzos-Reilly v.

John R. Reilly

Custody—UCCJEA "home state" provision of 23 Pa. C.S.A. §5421(a)

1. Married couple resided in New York from June 2007 to August 2008. After an altercation Mother took the parties' infant child to her family in Pittsburgh.

2. Father visited Mother in Pittsburgh three times with Mother promising to return to New York, when she was satisfied that Father could control his anger.

3. Mother failed to return and in October 2008, Father filed divorce and custody proceedings in Suffolk County, New York. On the same day Mother initiated a custody action in Allegheny County.

4. Father promptly filed a rule to show cause to establish New York as the appropriate jurisdiction in which to resolve the custody issues pertaining to their then 5 1/2 month old son.

5. The judges held a telephone conference, in which counsel participated. The New York court immediately indicated that it would not relinquish jurisdiction, and this court accepted that decision and dismissed Mother's custody action.

6. This court determined that pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) 23 Pa. C.S.A. §5421 et seq., Pennsylvania was not the child's "home state," because the parties made their marital home in New York; Mother was only in Pennsylvania temporarily during a period of marital difficulty and Mother had been in Allegheny County for only three months indicating her intent to return to New York.

7. Mother will be able to raise her concerns relating to the best interests of the child in the New York proceeding. The court determined it had not erred in acquiescing to the New York court's determination to maintain jurisdiction under the facts of the case.

(Hilary A. Spatz)

Todd Begg for Plaintiff.

Sophia Paul for Defendant.

No. FD 08-009015-006. In the Court of Common Pleas of Allegheny County, Pennsylvania, Family Division. Eaton, J., March 3, 2009.