

In the Superior Court of Pennsylvania

No. 366 EDA 2016

GARY GREGORY, Executor and Personal Representative of the
Estate of ELLEN GREGORY, deceased

v.

RAFAEL ROBB,
Appellant.

BRIEF FOR PLAINTIFF/ APPELLEE

On Appeal from the Interlocutory Order of the Court of Common Pleas of
Montgomery County, Pennsylvania Denying Defendant's Motion to
Release Constructive Trust as to Allegedly Exempt Assets
dated January 5, 2016 at Civil Div. No. 2008-36401

Howard J. Bashman
2300 Computer Avenue
Suite G-22
Willow Grove, PA 19090
(215) 830-1458

Robert J. Mongeluzzi
Andrew R. Duffy
Robert W. Zimmerman
Saltz, Mongeluzzi, Barrett &
Bendesky, P.C.
1650 Market Street, 52nd Floor
Philadelphia, PA 19103
(215) 496-8282

Counsel for Plaintiff/ Appellee

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I. INTRODUCTION

Before this Court can adjudicate the merits of any appeal – no matter how dramatic the underlying facts of the case may be – this Court must satisfy itself of the existence of appellate jurisdiction. *See McCutcheon v. Philadelphia Elec. Co.*, 788 A.2d 345, 350 (Pa. 2002) (holding that, where appellate jurisdiction does not exist, the Pa. Superior Court does not have the ability to decide an appeal). Here, plaintiff-appellee respectfully submits, this Court does not possess appellate jurisdiction over the appeal of defendant-appellant Gregory Robb, and thus this appeal should be dismissed for lack of appellate jurisdiction.

Robb asserts that appellate jurisdiction exists pursuant to Pa. R. App. P. 311(a)(2), because he has timely appealed from the trial court's order refusing to dissolve an attachment of certain of his assets, which he claims are exempt from collection under federal and state law. *See* Brief for Appellant at 1.

In actuality, however, the order from which Robb is aggrieved is Judge Moore's order of May 3, 2013 imposing a constructive trust over all of defendants' assets. R.131a. Robb could have and should have filed a timely appeal from that order to argue that the assets that are the subject of

Robb's current appeal are exempt from collection under federal and state law. But, for whatever reason, Robb indisputably failed to do so. R.2a.

A motion to dissolve an existing attachment is properly filed based on intervening factual or legal changes. See *Tamagno v. Waiters & Waitresses Union*, 96 A.2d 145, 146 (Pa. 1953); *Records Center, Inc. v. Comprehensive Management, Inc.*, 525 A.2d 433, 436 (Pa. Super. Ct. 1987). Here, however, Robb's motion to dissolve did not advance any changed circumstances argument; rather, Robb merely argued to the trial court, just as Robb now argues to this Court on appeal, that the original attachment of his retirement account assets in May 2013 was legally improper. R.18a-33a.

Any appeal from Judge Moore's order of May 3, 2013 imposing a constructive trust over all of defendant's assets, which included defendant's supposedly exempt retirement accounts, could have and should have been filed by early June of 2013 at the latest. Pa. R. App. P. 903(a) (notice of appeal must be filed within 30 days of entry of appealable order). The law is clear that the ability to file a motion to dissolve an attachment or an injunction based on new or intervening circumstances does not operate to extend or provide anew the opportunity to challenge on appeal the original order imposing an attachment or injunction based

on arguments that could have been raised in a timely appeal from that initial order.

Robb's appeal is precisely that: an appeal challenging the trial court's original attachment order of May 3, 2013 based on factual and legal arguments that could have and should have been raised in any appeal filed within 30 days from that order. Because Robb's notice of appeal was not filed until January 21, 2016 (R.6a), it was untimely to appeal from the trial court's order of May 3, 2013, and consequently the Court should dismiss this appeal for lack of appellate jurisdiction.

II. COUNTER-STATEMENT OF JURISDICTION

Defendant-appellant Rafael Robb asserts that this Court possesses appellate jurisdiction pursuant to Pa. R. App. P. 311(a)(2), because he has timely appealed from the trial court's order refusing to dissolve an attachment of certain of his assets, which he claims are exempt from collection under federal and state law. See Brief for Appellant at 1.

Plaintiff-appellee respectfully submits, for reasons explained both above and in the Argument section of this brief, that this Court does not possess appellate jurisdiction over Robb's appeal, because in substance

Robb is appealing in an untimely manner from the trial court's initial order of May 3, 2013 imposing a constructive trust over all of Robb's assets, including the supposedly exempt retirement fund accounts. R.131a. If Robb wanted to challenge the trial court's imposition of a constructive trust on the grounds he currently advances on appeal, Robb should have and could have filed a timely appeal from the trial court's May 3, 2013 order. Having failed to do so (R.2a), Robb cannot provide himself with another opportunity to pursue now the appeal he should have pursued in 2013 merely by moving to dissolve the attachment by means of a motion that failed to advance any actually new or intervening changed circumstances. R.18a-33a.

III. COUNTER-STATEMENT OF THE SCOPE AND STANDARDS OF REVIEW

This Court exercises plenary review concerning whether this Court possesses appellate jurisdiction over an appeal. *See Pridgen v. Parker Hannifin Corp.*, 905 A.2d 422, 431 (Pa. 2006).

This Court reviews for abuse of discretion a trial court's order denying a motion to dissolve an attachment. *See Turner Constr. v. Plumbers*

Local 690, 130 A.3d 47, 57 (Pa. Super. Ct. 2015) (applying abuse of discretion review to grant or denial of injunctive relief and explaining that a trial court's decision will be disturbed “only if it is plain that no grounds exist to support the decree or that the rule of law relied upon was palpably erroneous or misapplied”).

The trial court’s decision not to dissolve the attachment rested on both factual findings and legal conclusions. A trial court’s factual findings are given the same weight as a jury’s, so that such factual conclusions will not be disturbed so long as any admissible evidence supports them. *See Wyatt Inc. v. Citizens Bank of Pa.*, 976 A.2d 557, 564 (Pa. Super. Ct. 2009). And a trial court’s legal conclusions are subject to plenary review. *See Peters v. National Interstate Ins. Co.*, 108 A.3d 38, 43 (Pa. Super. Ct. 2014).

IV. TEXT OF ADDITIONAL ORDER IN QUESTION

On May 3, 2013, the trial court issued an order that stated, in pertinent part:

c. Petitioner is granted a constructive trust over all of Defendant’s assets and properties, other than for existing, necessary liabilities that must be paid by Defendant. Defendant must list all anticipated future liabilities for the next twelve (12) months.

R.131a.

V. COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Whether the appeal of defendant Rafael Robb from the trial court's order of May 3, 2013 imposing a constructive trust over all of his assets, under the guise of appealing from the trial court's more recent order refusing to dissolve that constructive trust, provides this Court with appellate jurisdiction over Robb's argument that a constructive trust should not have been imposed over his supposedly exempt retirement assets, an argument that Robb could have and should have raised by means of a timely appeal from the May 3, 2013 order, but which Robb failed to pursue at that time?

2. In the unlikely event that this Court does not dismiss Robb's appeal as an untimely effort to obtain appellate review of the trial court's original May 3, 2013 order imposing a constructive trust, whether appellate jurisdiction over this appeal is proper under Pa. R. App. P. 311(a)(2) in the absence of any suggestion that the order appealed from is causing serious, if not irreparable, injury to Robb and can only be effectively challenged by means of an immediate appeal, and given that interim relief orders in divorce cases are expressly excluded from immediate appellate review under Pa. R. App. P. 311(a)(2)?

3. Whether the trial court abused its discretion in refusing to release Robb's supposedly exempt retirement accounts from the constructive trust established by means of the trial court's order of May 3, 2013 based on the undisputed factual finding that Ellen Gregory Robb was on the verge of initiating judicial divorce proceedings and that, because in divorce proceedings such assets would be subject to equitable distribution, under the Slayer's Act Robb could properly be deprived of those assets to avoid conferring on him any benefit as the result of having unlawfully and intentionally caused the death of his wife?

4. Whether Robb's appeal from the trial court's order providing that the trial court intends to conduct a hearing to determine the distribution of Robb's assets should be considered now, before the hearing has occurred, or only after the hearing has occurred, when any post-hearing appeal can focus on what actually occurred at the hearing, rather than on being based solely on hypotheticals and suppositions?

VI. COUNTER-STATEMENT OF THE CASE

A. Relevant Factual History

Defendant-appellant Rafael Robb brutally and savagely killed his wife Ellen Gregory Robb on December 22, 2006 as she was wrapping Christmas presents for their 12-year-old daughter, Olivia, in the kitchen of their family home. R.168a-69a; R.58a. Robb killed his wife only four days before her 50th birthday. R.58a. Moments after killing Ellen, Robb proceeded to cover-up his involvement in the crime and thereafter denied any involvement in her death for nearly a year. R.58a.

Ultimately, Robb confessed to having intentionally caused his wife's death and pleaded guilty to voluntary manslaughter. R.176a. He received a 10-year prison sentence, which he is currently serving. R.176a.

Gary Gregory, the brother of Ellen Gregory Robb and the executor and personal administrator of the estate of Ellen Gregory Robb, commenced this civil action against defendant Raphael Robb to provide for the financial needs, the educational needs, and the emotional needs of Olivia, Ellen's daughter, who returned home from school on the day of the killing to find her home surrounded by police, only to learn a short time later that her mother's life had been prematurely ended by an assailant.

R.1a, 169a-70a. Tragically, that assailant was later revealed to have been defendant-appellant Raphael Robb. R.170a, 176a.

This case ultimately proceeded to a verdict in which the jury awarded in favor of Ellen's estate \$20 million in compensatory damages and \$100 million in punitive damages against Raphael Robb. R.169a. Together with interest and delay damages, the parties agreed to the entry of a verdict in favor of Ellen's estate and against defendant Robb in an amount in excess of \$128 million. R.169a.

As the facts of this appeal disclose, defendant Raphael Robb does not possess anywhere near \$128 million in assets, and what assets he does possess are largely contained in retirement accounts that Robb now claims are exempt from execution under federal law and Pennsylvania law. R.26a.

In advance of trial, on May 3, 2013, the trial court issued a preliminary injunction order imposing a constructive trust on all of Rafael Robb's assets, including the supposedly exempt retirement fund accounts. R.131a. It is undisputed that Robb filed no immediate appeal, timely or untimely, from the trial court's May 3, 2013 order (R.2a), even though Robb then possessed the very same supposedly exempt retirement fund accounts that Robb continues to possess today, and even thought Robb then knew

that the purpose of the constructive trust was to preserve his assets so that they would be available to satisfy the judgment in this case.

During the trial of the civil case, Ellen's estate introduced substantial evidence establishing that Ellen was on the verge of filing for divorce from Raphael Robb when Raphael Robb intentionally and unlawfully ended her life. R.169a-76a, 179a-80a; R.58a-73a. Ellen had retained a divorce lawyer with whom she had been working to implement a plan that would have her living on her own in an apartment before the divorce proceeding was filed. R.58a-73a. Ellen had visited apartment locations and was on the verge of moving into an apartment when she was murdered. R.69a-73a. The evidence at trial established that it was only a matter of weeks, if not days, before Ellen filed for divorce from Raphael Robb when she was murdered. R.58a-73a. By unlawfully killing Ellen, the trial court found as a fact, Raphael Robb ensured that her divorce action against him could never be commenced in court. R.179a-80a.

In his Brief for Appellant, Robb does not dispute any of the facts recited above. Rather, Robb's central argument is that because the Supreme Court of Pennsylvania applied the Slayer's Act in *Drumheller v. Marcello*, 532 A.2d 807 (Pa. 1987), to a fact pattern where the murdered wife had

already initiated a divorce proceeding in court, the Slayer's Act should have no applicability in a case such as this, where the husband murders his wife before she has formally filed for divorce in court. It is of no consequence, according to Robb, that the murdered wife has undertaken every necessary prefatory step to filing for divorce because, under *Drumheller*, Robb maintains that the Slayer's Act should only prevent the husband/murderer from benefitting from his crime in a case in which the divorce proceeding was already underway in court at the time of the unlawful killing.

Plaintiff of course disagrees with Robb's overly restrictive view of the operation of Pennsylvania's Slayer's Act and the Pa. Supreme Court's decision in *Drumheller*. R.57a-98a. Importantly for purposes of this appeal, the trial court agreed with plaintiff, recognizing that in the ensuing divorce proceedings that were on the verge of being initiated, Ellen Gregory Robb would have been entitled to share in the proceeds of Rafael Robb's retirement accounts. R.178a-80a. The trial court thus ruled that allowing Robb to retain all of the proceeds of those retirement accounts because he killed Ellen before she instituted the forthcoming divorce proceedings

would improperly confer a benefit on Robb that he was forbidden from retaining under the Slayer's Act. R.179a-80a.

B. Relevant Procedural History

On May 3, 2013, the trial court in this matter granted plaintiff's motion for a preliminary injunction and imposed a constructive trust on all of Rafael Robb's assets, including the supposedly exempt retirement accounts. R.131a. The entire purpose of that constructive trust was to ensure that all of Robb's assets were available to pay the judgment obtained in this suit, an action in which Robb conceded his liability. R.168a. As of May 3, 2013, Robb was already in prison, serving the 10-year sentence that he received for pleading guilty to voluntary manslaughter for having intentionally caused the death of his then-wife, Ellen Gregory Robb.

Had Robb filed a timely appeal from the trial court's May 3, 2013 preliminary injunction order, he could have argued, among other things, that the constructive trust should be lifted insofar as Robb's supposedly exempt retirement fund accounts were concerned. For whatever reason, however, Robb filed no timely appeal (indeed no appeal whatsoever) from

the trial court's May 3, 2013 preliminary injunction order imposing a constructive trust on all of his assets, including the supposedly exempt retirement fund accounts. R.2a.

Thereafter, the trial of this case proceeded before a jury, at the conclusion of which the jury found Robb civilly liable for the intentional killing of his then-wife, Ellen Gregory Robb. The jury awarded \$20 million in compensatory damages in favor of Ellen's estate and \$100 million in punitive damages. R.169a. The judgment, insofar as recovery is obtained, will provide for the physical well-being, the ongoing educational tuition and expenses, and the emotional well-being of Olivia, Ellen Gregory Robb's daughter. R.170a-71a.

As the only child and daughter who loses one's mother to a violent crime at the age of 12 only to learn thereafter that the killer was your mother's husband and your father, the risk of long-term if not permanent emotional damage is quite high. Whatever money the estate is able to recover from Robb for the benefit of Olivia will be sorely needed and sure to go to a much better purpose than being consumed by the discretionary spending of a convicted killer.

The trial court entered final judgment on the jury's verdict, with the consent of both parties, in the amount of more than \$128 million (including interest and delay damages) on March 18, 2015. R.5a. Robb filed no appeal from that judgment. R.5a. Nevertheless, fewer than two months later, on May 1, 2015, Robb filed a motion in the trial court seeking to release from the constructive trust his supposedly exempt retirement fund accounts. R.5a. Plaintiff opposed Robb's motion to release, and the trial court denied the motion. R.57a-98a; R.181a.

Robb's motion to release the constructive trust as to his supposedly exempt retirement accounts presented no arguments that could not have been presented in any timely appeal that Robb could have taken from the trial court's original May 3, 2013 order imposing a constructive trust on all of Robb's assets. R.18a-33a. Nor could Robb, as of May 2013, realistically expect to have emerged victorious in the civil suit – a suit in which he conceded liability (R.168a) – given that he had already pleaded guilty to voluntary manslaughter in the criminal case against him. R.176a. Thus, Robb had the same arguments and motivation for seeking to have his supposedly exempt retirement accounts excluded from the trial court's constructive trust pre-judgment in May 2013 as Robb had post-judgment

in May 2015. The clear purpose of the trial court's May 3, 2013 order imposing a constructive trust over all of Robb's assets was to make those assets available to pay the judgment in this case.

Importantly, the trial court's order denying Robb's motion to dissolve the constructive trust as to his supposedly exempt retirement accounts has yet to decide what amount of those accounts, if any, will be subject to recovery by the estate of Ellen Gregory Robb on the judgment in this case. R.181a-82a. Nor has defendant-appellant Rafael Robb offered any evidence or argument in the trial court demonstrating that the trial court's refusal to release Robb's supposedly exempt retirement accounts from the constructive trust is inflicting any irreparable harm on him. R.18a-33a. Robb is in prison, serving a multi-year sentence on a conviction that he voluntarily pleaded guilty to. Why he needs access to millions of dollars in assets now, while he remains imprisoned and unable to immediately benefit from spending that money, Robb's trial court motion to lift constructive trust failed to explain. R.18a-33a.

VII. SUMMARY OF THE ARGUMENT

The Pennsylvania Rules of Appellate Procedure allow a party to appeal from a preliminary injunction or an order attaching property. *See* Pa. R. App. P. 311(a)(2) & (a)(4). Those rules also allow a party to appeal from an order refusing to dissolve a preliminary injunction or refusing to dissolve an attachment on property. *See id.* What those rules do not allow, however, is for a party to confer on himself repeated opportunities to appeal from a trial court's original preliminary injunction order or original order attaching property by means of appealing from an order refusing to dissolve the injunction or attachment that issued more than 30 days from the issuance of the original preliminary injunction or attachment order.

In this case, Robb's appeal from the trial court's order refusing to dissolve the constructive trust over all of his assets fails to raise any grounds that were unavailable to Robb had he chosen to file a timely appeal from the trial court's original order of May 3, 2013 imposing the constructive trust. Under Pennsylvania law, a motion to dissolve an attachment is proper when the motion relies on new or changed circumstances that did not exist when the attachment was granted. Here, by contrast, it is readily apparent that what Robb seeks to challenge is the

propriety of the trial court's original order imposing a constructive trust over all of his assets, including the supposedly exempt retirement fund accounts.

Although Robb's appeal purports to be taken from the trial court's order refusing to dissolve an attachment on Robb's supposedly exempt retirement accounts, in substance the appeal is unquestionably taken from the trial court's order of May 3, 2013, which originally imposed a constructive trust on all of Robb's assets, including his retirement accounts.

R.131a. Because Robb's appeal was not filed within 30 days from the May 3, 2013 order, it is untimely, and this Court should deny the Robb's request to dissolve the constructive trust.

Even if this Court could overlook the untimely nature of Robb's appeal, the appeal remains improper under Pa. R. App. P. 311(a)(2), because Robb has neither alleged nor can he demonstrate any impending irreparable harm if the relief being sought is denied. The trial court has merely refused to lift the constructive trust, but the trial court has yet to determine or quantify the extent to which plaintiff can recover on the judgment against Robb's supposedly exempt retirement funds. R.181a-82a. Once the trial court issues a final decision in that regard, Robb can pursue

an appeal, in which he can challenge the trial court's decision to allow recovery against the supposedly exempt retirement accounts.

Likewise, Pa. R. App. P. 311(a)(2) expressly exempts from immediate interlocutory appeal interim relief orders entered in divorce cases. *See also Fried v. Fried*, 501 A.2d 211, 215–16 (Pa. 1985). Because the trial court in this case, in reliance on *Drumheller v. Marcello*, 532 A.2d 807 (Pa. 1987), has decided to apply the Slayer's Statute mindful of the fact that Ellen Gregory Robb was on the verge of initiating divorce proceedings against defendant-appellant Rafael Robb before he unlawfully ended her life, Rule 311(a)(2)'s prohibition on immediate interlocutory appellate review of interim relief orders in divorce cases also deprives this Court of appellate jurisdiction over Robb's appeal.

In the unlikely event that this Court concludes that it possesses appellate jurisdiction over the merits of Robb's appeal, this Court should affirm, because the trial court did not abuse its discretion in refusing to dissolve the constructive trust over Robb's supposedly exempt retirement accounts. Pennsylvania's Slayer's Act statute reflects this Commonwealth's strong policy against allowing a person who intentionally ended the life of another person from gaining *any benefit* thereby.

In this case, the trial court found as a fact, and Robb does not dispute for purposes of this appeal, that Ellen Gregory Robb was on the verge of initiating divorce proceedings in court when Robb killed her. R.179a-80a. Ellen had retained a lawyer, the lawyer had advised her to obtain an apartment, which Ellen was in the process of doing, and the lawyer was on the verge of initiating divorce proceedings in court on Ellen's behalf when Robb killed her, thereby preventing the divorce action from being filed in court. R.179a-80a.

It is further undisputed for purposes of this appeal that Robb's supposedly exempt retirement funds would have been subject to the jurisdiction of the court presiding over the divorce. R.178a-79a. That court would have possessed the jurisdiction and power to enter a Qualified Domestic Relations Order (QDRO), which would have entitled Ellen to recover an equitable portion of Robb's supposedly exempt retirement funds. R.178a-79a; R.86a-87a.

Because Robb, by killing Ellen, obtained a benefit – namely, that Ellen would never become entitled to her equitable share of Robb's supposedly exempt retirement funds – under Pennsylvania's Slayer's Act, the trial court properly ruled that it has the ability to deprive Robb of that

benefit in this case. At the same time, however, the trial court has not yet determined or quantified the extent to which plaintiff can recover on the judgment against Robb's supposedly exempt retirement funds. R.181a-82a.

The final aspect of Robb's appeal is premature, because it objects to the trial court's announced intention to hold a hearing to consider and address the distribution of Robb's assets, including the supposedly protected retirement funds. Holding a hearing on that subject in no way could conceivably prejudice Robb, because at the hearing Robb's objections to the proposed distribution of assets can be heard and considered by the trial court. And to the extent that Robb is objecting to the trial court's failure to announce this far in advance the procedures that will govern at that hearing, Robb's appeal is premature. Surely the trial court will announce those procedures sufficiently in advance of the hearing. If Robb believes that the procedures are unlawful or in any way unfair, Robb can raise those arguments in any appeal from the trial court's actual distribution order.

For these reasons, Robb's appeal should either be dismissed for lack of appellate jurisdiction, or the trial court's order refusing to dissolve the constructive trust should be affirmed.

VIII. ARGUMENT

A. **Robb's Appeal Is Untimely, Because In Substance It Seeks Review Of The Trial Court's Original Order From May 2013 Imposing A Constructive Trust Over All Of Robb's Assets, Including His Retirement Accounts**

The law is clear that an appellant should not “be allowed to use the appealability of an order denying modification [or dissolution] of an injunction to circumvent the time bar to appeal from the underlying preliminary injunction.” *Merrell–National Labs., Inc. v. Zenith Labs., Inc.*, 579 F.2d 786, 791 (3d Cir. 1978).

As the Third Circuit proceeded to explain in *Merrell–National*:

The purpose of a motion to modify [or dissolve] an injunction is to demonstrate that changed circumstances make the continuation of the order inequitable. The motion does not force the trial judge to permit relitigation of his original determination of the injunction.

Id. Pennsylvania law recognizes this same principle – that a motion to dissolve an injunction or attachment, to be proper, must rely on new or changed circumstances. *See Tamagno v. Waiters & Waitresses Union*, 96 A.2d 145, 146 (Pa. 1953); *Records Center, Inc. v. Comprehensive Management, Inc.*, 525 A.2d 433, 436 (Pa. Super. Ct. 1987).

Similarly, in *Township of Franklin Sewerage Auth. v. Middlesex County Utilities Auth.*, 787 F.2d 117, 120 (3d Cir. 1986), the Third Circuit explained that “[t]he prevailing law is that appellate review of an order denying a motion to dissolve an injunction is confined to the propriety of the denial motion; it does not extend to the propriety of the entry of the underlying injunction.”

As the U.S. Court of Appeals for the Seventh Circuit explained in *SEC v. Suter*, 832 F.2d 988, 990 (7th Cir. 1987):

If . . . the only purpose of the motion [to vacate the injunction] was to take a belated appeal from the order entering the injunction, we penetrate through form to substance and treat the appeal from the denial of the motion to vacate as an untimely appeal from the injunction, and dismiss the appeal for lack of jurisdiction.

This Court has recognized that decisions of federal appellate courts, such as those quoted above, applying 28 U.S.C. §1292(a) – the federal statute conferring appellate jurisdiction over interlocutory appeals from orders granting preliminary injunctive relief – are instructive when this Court examines whether appellate jurisdiction is available under Pennsylvania Rule of Appellate Procedure 311(a)(2) and (a)(4) over an

appeal such as this. See *Blackman v. Katz*, 568 A.2d 642, 645 (Pa. Super. Ct. 1990).

Most importantly, this Court reached exactly the same conclusion regarding the inability of an appellant to challenge an original attachment or preliminary injunction order by means of an appeal from the denial of a motion to dissolve in *Records Center, Inc. v. Comprehensive Management, Inc.*, 525 A.2d 433, 436 (Pa. Super. Ct. 1987). In *Records Center*, this Court noted that if the appellants had only appealed from the trial court's order refusing to dissolve the preliminary injunction, this Court's review would have been limited to considering whether any changed circumstances required the trial court to dissolve the preliminary injunction.

However, in *Records Center*, in contrast with this case, the appellants' notice of appeal also included a timely appeal (within 30 days of issuance) from the trial court's original order granting a preliminary injunction. Thus, in *Records Center*, unlike here, this Court had jurisdiction to consider not only the trial court's refusal to dissolve the preliminary injunction but also the propriety of the trial court's earlier order granting a preliminary injunction in the first place.

This Court's ruling in *Records Center* makes clear, however, that if the appellants in that case had not also timely appealed within 30 days of issuance from the trial court's original order granting a preliminary injunction, then this Court's jurisdiction would have been limited to considering only whether the trial court abused its discretion in refusing to dissolve the preliminary injunction based on any new or changed circumstances. *See Records Center*, 525 A.2d at 436. This case presents precisely the situation that the appellants avoided in *Records Center*, because it is undisputed that Robb filed no timely appeal within 30 days from the trial court's May 2013 issuance of the order that originally imposed a constructive trust over all of Robb's assets, including his supposedly exempt retirement accounts. R.2a.

When the trial court in this case, on May 3, 2013, issued a preliminary injunction order imposing a constructive trust over all of Robb's assets, including his supposedly exempt retirement accounts (R.131a), Robb had the ability to file an appeal within 30 days of May 3, 2013 raising precisely the very same arguments that Robb is raising in his current appeal.

Robb, for whatever reason, failed to file any timely appeal from the trial court's preliminary injunction imposing a constructive trust over all of

his assets issued on May 3, 2013. R.2a. Instead, Robb waited until he was found civilly liable in this action, to the tune of a judgment in excess of \$128 million, before arguing by means of a motion to lift the constructive trust that the trial judge never should have issued a constructive trust in the first instance that applied to his supposedly exempt retirement accounts.

Robb's motion filed in 2015 to lift the constructive trust as to his supposedly exempt retirement assets was not based on any new or changed circumstances. R.18a-33a. Indeed, the only new or changed circumstances strongly militated against lifting the constructive trust, based on the intervening entry of the jury's verdict against Robb in excess of \$128 million in compensatory and punitive damages. In order to ensure that assets would be available against which that judgment could be satisfied, at least in part, the continued existence of the constructive trust became more important than ever. And that was the precise reason a constructive trust issued in the first place, back on May 3, 2013. R.131a.

It is thus clear that Robb's current appeal from the trial court's refusal to lift its constructive trust with regard to Robb's retirement accounts raises precisely the very same issues that Robb could have raised in a timely appeal from the trial court's order of May 3, 2013, which originally

imposed the constructive trust to which Robb now objects insofar as his supposedly exempt retirement accounts are concerned.

As in federal appellate court, in Pennsylvania state court an appeal from an order attaching property or refusing to dissolve an attachment on property must be filed within 30 days from the entry of the order in question. *See* Pa. R. App. P. 903(a). As in federal court, an appeal from an order refusing to dissolve an attachment of property cannot be used to circumvent the 30-day limit on appealing from the earlier, original order imposing an attachment on property. *See Records Center*, 525 A.2d at 436.

Because Robb's appeal in substance is taken from the trial court's May 2013 imposition of a constructive trust on all of Robb's assets, including his supposedly exempt retirement accounts, and because Robb's motion to dissolve the constructive trust did not rely on any intervening or changed circumstances, this Court should reject Robb's appeal because it challenges the trial court's May 2013 order imposing a constructive trust, but this appeal was not filed until 2016, and thus was filed far too late to properly challenge the May 2013 order.

B. This Court Also Lacks Jurisdiction Over Robb's Appeal Because He Has Failed To Allege Any Imminent Irreparable Injury, And Pa. R. App. P. 311(a)(2) Excludes From Immediate Appellate Review Interim Relief Orders In Divorce Cases

Two additional procedural flaws plague Robb's appeal and require its dismissal. First, this Court recognized in *Blackman v. Katz*, 568 A.2d 642, 645 (Pa. Super. Ct. 1990), that Pennsylvania Rule of Appellate Procedure 311 only permits an appeal to be maintained from an interlocutory order "where the order causes serious, if not irreparable, injury and can be effectively challenged only by immediate appeal."

In this case, Robb has failed to allege or establish that the trial court's order refusing to dissolve the constructive trust insofar as it applies to Robb's retirement accounts is causing or threatening to cause serious or irreparable injury to him. R.18a-33a. Robb at present is in the midst of serving a multi-year prison sentence for having killed his then-wife, Ellen Gregory Robb. The trial court has maintained in place a procedure whereby Robb can petition the trial court for permission to access the funds that are subjected to the constructive trust. R.183a-87a.

Robb has failed to explain why he now needs access to millions of dollars of retirement assets. As a prison inmate, he is prohibited from

physically possessing that money himself. Because he pleaded guilty, he has no need for a lawyer to seek a new trial or to expedite his release from prison. His current 10-year prison sentence is already shockingly short for the heinous criminal offense in question.

In the absence of any allegation or evidence establishing that Robb faces imminent, irreparable harm as the result of the constructive trust's continued application to Robb's supposedly exempt retirement accounts, and given the existence of a procedure whereby Robb can request access to his money by seeking and obtaining court approval for necessary expenditures, Robb has failed to demonstrate the existence of any irreparable harm that would allow Robb to maintain this appeal under Pa. R. App. P. 311. *See Blackman*, 568 A.2d at 645. Accordingly, this appeal should be dismissed for lack of appellate jurisdiction.

In addition, Pa. R. App. P. 311(a)(2) expressly refuses to confer appellate jurisdiction over interim relief orders in divorce cases. *See also Fried v. Fried*, 501 A.2d 211, 215-16 (Pa. 1985) (holding that interlocutory relief orders in divorce cases are not immediately appealable). The substance of Robb's appeal challenges the trial court's conclusion under *Drumheller v. Marcello*, 532 A.2d 807 (Pa. 1987), that it is appropriate to

proceed to the equitable distribution phase with Robb's supposedly exempt retirement accounts because the evidence presented to the trial court established, and Robb does not dispute on appeal, that Ellen Gregory Robb was on the verge of formally filing for divorce when Raphael Robb unlawfully killed her. Given that, in reliance on *Drumheller*, the trial court is proceeding as though the supposedly exempt assets are subject to equitable distribution (R.178a-80a), Rule 311(a)(2)'s prohibition against immediate appellate review of interim relief orders in divorce cases precludes this Court's exercise of appellate jurisdiction here.

For these two additional reasons establishing the unavailability of appellate jurisdiction under Pa. R. App. P. 311, this Court should dismiss Robb's appeal for lack of appellate jurisdiction.

C. On The Merits, The Trial Court Properly Relied On Pennsylvania's Slayer's Act And *Drumheller v. Marcello* In Refusing To Dissolve The Constructive Trust Over Robb's Supposedly Exempt Retirement Accounts

Traditionally, under Pennsylvania law, the death of a spouse while divorce proceedings were underway but not yet fully concluded immediately terminated such proceedings, because a divorce could only be

obtained while both spouses remained alive. *See Drumheller v. Marcello*, 532 A.2d 807, 808 (Pa. 1987).

In *Drumheller*, as in this case, the husband unlawfully killed his wife. The question before the Pa. Supreme Court in *Drumheller* was whether under Pennsylvania's Slayer's Act – which provides that “No slayer shall in any way acquire any property or receive any benefit as the result of the death of the decedent,” *see* 20 Pa. Cons. Stat. Ann. §8802 – the trial court could proceed with the equitable distribution of marital assets in order to deprive the husband/slayer of “any [financial] benefit” stemming from his killing of his wife. *Drumheller*, 532 A.2d at 808.

Recognizing the need to broadly apply the Slayer's Act to ensure that a slayer does not obtain any benefit as the result of his heinous wrongful act, the Supreme Court of Pennsylvania ruled in *Drumheller* that even though a divorce proceeding ordinarily abated when one spouse died, where the death arose due to an unlawful killing committed by the other spouse, the court hearing the divorce proceeding should proceed with the equitable distribution of spousal assets in accordance with the principles of the Slayer's Act. *See* 532 A.2d at 812.

Drumheller recognized that “one spouse who kills the other spouse during the pendency of a divorce action avoids the equitable division of the marital estate thereby gaining valuable property and assets which he may otherwise be required to distribute to the other spouse.” 532 A.2d at 811. Pennsylvania’s highest Court thus proceeded to hold as follows:

Since the Slayer’s Act is necessarily to be construed broadly, we hold that under circumstances where a spouse slays another spouse prior to the entry of a decree in divorce, the slayer is estopped from terminating the equitable distribution action upon the legal theory that the divorce action abated.

Id. at 812.

In his Brief for Appellant, the main merits-based challenge that Robb mounts against the trial court’s refusal to dissolve its earlier attachment of Robb’s retirement accounts is predicated on the fact that, in *Drumheller*, divorce proceedings were already underway in court when the husband killed his wife. Robb relies on that procedural distinction and seeks to elevate that distinction to a holding of the *Drumheller* case, so that a trial court would only be empowered under the Slayer’s Act to proceed with equitable distribution proceedings where a divorce action was already pending in court when one spouse unlawfully killed the other.

Robb's attempt to transform the procedural distinction between this case and *Drumheller* into a holding of *Drumheller* that imposes a limitation on the availability of the relief recognized as appropriate in that case is utterly without merit. Not surprisingly, *Drumheller* merely applied Pennsylvania's Slayer's Act to the particular facts and circumstances presented in that case. The Pa. Supreme Court did not have any occasion in *Drumheller* to consider whether the same result that applied in that case should also apply to a case such as this, where all of the evidence established that the wife was on the imminent verge of initiating divorce proceedings against her husband when the husband killed his wife.

Thus, while it cannot be denied that the trial court in this case judiciously and ever so slightly expanded the scope of *Drumheller's* holding in furtherance of the unquestionably broad policy expressed in the Slayer's Act, Robb is wrong that anything in *Drumheller* itself prohibits or calls into question that very narrow, judicious expansion of *Drumheller's* holding. It is noteworthy that the most Robb can offer in criticism of the trial court's decision in this case originates from the dissenting opinion in *Drumheller*. The views of a dissenting justice, because that justice's vote was neither

necessary to nor did it count in favor of the holding of the court, fail to impose any limitation on the holding of the court in a given case.

Robb's Brief for Appellant ignores that the Pa. Supreme Court's decision in *Drumheller* strongly supports the trial court's refusal to lift its constructive trust over Robb's supposedly exempt retirement accounts. *Drumheller* recognized that Pennsylvania's Slayer's Act must be applied as broadly as possible to ensure that a slayer fails to receive *any benefit* as the result of the decedent's death. *Drumheller* further recognized that in divorce proceedings a spouse would be entitled to receive the equitable distribution of marital property.

It was undisputed in this case that in Ellen Gregory Robb's imminently impending divorce action from Rafael Robb, Ellen would be entitled to seek and obtain equitable distribution of assets that were in Robb's supposedly exempt retirement accounts. R.179a-80a; R.86a-87a. Qualified Domestic Relations Orders (QDROs) and other similar methods exist to ensure that otherwise supposedly exempt retirement funds are subject to equitable distribution in a divorce proceeding.

Other than asserting that *Drumheller* should be incorrectly read to establish a bright line separating cases in which divorce proceedings were

already underway at the time of the slaying and immediately on the verge of being filed, Robb in his Brief for Appellant fails to offer any persuasive reason for establishing such a bright line separating cases in which the slayer can benefit from his wrongful act from those in which he cannot.

Presumably one could argue that where a divorce proceeding has yet to be filed, the spouse who is on the verge of filing for divorce could always change his or her mind and not initiate the proceeding. Not only is there absolutely no evidence in this record as a factual matter to support such a hypothetical – because all the evidence in this case pointed to the fact that Ellen Gregory Robb would have imminently filed for divorce from Raphael Robb had her life not been unlawfully terminated by her then-husband – but the same thing could be said even of already pending divorce proceedings, which can be abandoned or withdrawn at any time at the request of the spouse who initiated the action.

In the absence of any bright-line prohibiting *Drumheller's* holding from being applied to cases such as this in which the spouse who was killed was imminently on the verge of initiating divorce proceedings, Robb in his Brief for Appellant fails to offer any persuasive reasons for concluding that the trial court's understanding and application of

Pennsylvania's Slayer's Act was legally erroneous or amounted to an abuse of discretion.

It is beyond any legitimate dispute that if Robb is permitted to retain in full the proceeds of his supposedly exempt retirement accounts, Robb will have received a readily identifiable "benefit" as the result of having killed his then-wife. That is because, in the divorce proceedings that otherwise necessarily would have followed, the proceeds of those retirement accounts would have unquestionably been subject to equitable distribution. R.179a-80a; R.86a-87a.

Drumheller occasioned a highly significant change in the law in reliance on Pennsylvania's Slayer's Act, by holding that a divorce action would not abate when one of the spouses died if the death occurred at the hands of the other spouse. By contrast, the trial court's ruling in this case consisted of only a slight, judicious expansion of *Drumheller's* holding, which serves the indisputably laudable function of discouraging disgruntled husbands from thinking that they could financially benefit in any way from killing their wives immediately before divorce proceedings are filed in court.

The Pa. Supreme Court in *Drumheller* invoked the Slayer's Act to disregard the fact that one spouse died during the pendency of divorce proceedings. In this case, the trial court invoked the Slayer's Act to disregard the fact that a wife on the verge of imminently filing for divorce was killed by her husband before she could formally initiate that proceeding in court. In neither case was there any doubt about what would have occurred in the absence of the husband's unlawful killing of his wife.

Given the lack of any express limitation in *Drumheller* restricting its holding only to divorce cases already pending in court, the trial court's application of the Slayer's Act in this case to deny Robb the benefit he seeks as the result of his heinous criminal act of unlawfully killing his wife constituted a sound exercise of the trial court's broad discretion in furtherance of the clear and unambiguous purpose of the Slayer's Act, a statute that the Supreme Court in *Drumheller* recognized should be applied broadly.

For these reasons, in the event this Court determines that it has jurisdiction over the substance of Robb's appeal, this Court should affirm the trial court's order refusing to dissolve the constructive trust over Robb's supposedly exempt retirement accounts.

D. Robb's Final Appellate Challenge, Focusing On The Trial Court's Decision To Hold A Hearing On Asset Distribution And Failure To Announce Applicable Procedures Thus Far, Is Both Without Merit And Premature

The guarantee of due process stands for the principle that a court should hold a hearing and allow a party to be heard before that party is deprived of life, liberty, or property. *See Gati v. Univ. of Pittsburgh*, 91 A.3d 723, 729 (Pa. Super. Ct. 2014) (“The Fourteenth Amendment forbids the State to deprive any person of life, liberty, or property without due process of law.”). It is thus remarkable that Robb’s final issue on appeal challenges the trial court’s announcement that it intends to hold a hearing allowing for the parties to be heard and evidence to be considered before entering any order specifically providing for the distribution of Robb’s assets, including the supposedly exempt retirement funds.

As best as plaintiff can tell, Robb is not truly aggrieved by the occurrence of a hearing at which his due process rights can be respected. Rather, Robb wishes that any trial court proceedings that might conclude with the outcome that all or some portion of his supposedly exempt retirement accounts are being distributed toward payment of the judgment against him simply did not occur, so that he could retain all of the proceeds

of those accounts for himself. Why should one content himself with merely being a wife-killer when he could instead be a greedy, coldhearted wife-killer with no compassion or concern for the financial or emotional well-being of his only child, whose mother he already unlawfully killed?

It is perhaps common sense, rather than sound legal advice, that when someone finds himself standing deep in a hole of his own making, the best thing to do is to stop digging any further. Here, as explained above, the hearing that the trial court has scheduled is intended to protect Robb's due process rights. *See Gati*, 91 A.3d at 729. If Robb does not wish to participate in that hearing, he can certainly choose to be absent, at his own risk. But Robb cannot seek to sabotage the usual and ordinary proceedings of the trial court simply by wishing that the consequences of his heinous, wrongful, and illegal conduct would just disappear. He once had a choice not to commit the unlawful killing of his wife, and he made the wrong choice. Now it is time to face the consequences.

To the extent that Robb is objecting to the trial court's failure thus far to announce the procedures that will govern at the forthcoming hearing, Robb's appeal is premature and unripe. *See Lonasco v. A-Best Products Co.*, 757 A.2d 367, 376 n.4 (Pa. Super. Ct. 2000) (refusing to decide unripe issues

raised on appeal). The Pennsylvania Rules of Civil Procedure are chock full of procedures, and plaintiff has no doubt that the trial court will announce what procedures will govern at the upcoming asset distribution hearing before that hearing begins.

If Robb is dissatisfied by the procedures that apply or believes he was prejudiced as a result of when the trial court made those procedures known to the parties in advance of the hearing, Robb will have the opportunity to raise any properly preserved arguments of that nature in any appeal that he may decide to pursue from the trial court's final decision on the issue of asset distribution. It is unquestionably premature for this Court to decide what procedures should apply, given that the trial court has yet even to schedule or conduct the asset distribution hearing.

Because the final issue that Robb has raised on appeal is unripe and premature, this Court should refuse to address the merits of that issue, recognizing that Robb can raise these matters, should he deem it prudent, in any appeal from the trial court's final asset distribution decision.

IX. CONCLUSION

For the foregoing reasons, this Court should dismiss Robb's appeal for lack of appellate jurisdiction. But in the event this Court holds that appellate jurisdiction exists to consider the merits of Robb's appeal, this Court should affirm, because the trial court did not abuse its considerable discretion in refusing to lift the constructive trust insofar as Robb's supposedly exempt retirement accounts are concerned.

Respectfully submitted,

/s/ Howard J. Bashman

Robert J. Mongeluzzi

Andrew R. Duffy

Robert W. Zimmerman

Saltz, Mongeluzzi, Barrett &
Bendesky, P.C.

1650 Market Street, 52nd Floor

Philadelphia, PA 19103

(215) 496-8282

Howard J. Bashman

2300 Computer Avenue

Suite G-22

Willow Grove, PA 19090

(215) 830-1458

Counsel for Plaintiff/Appellee

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Dated: August 19, 2016

/s/ Howard J. Bashman

Howard J. Bashman

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving a true and correct copy of the foregoing document upon the persons and in the manner indicated below which service satisfies the requirements of Pa. R. App. P. 121:

Service by PACFile:

Gary H. Simone, Esquire
Rishor Simone
101 East Diamond Street
Suite 208
Butler, PA 16001-5944
(724) 283-7215
Counsel for defendant/appellant

Dated: August 19, 2016

/s/ Howard J. Bashman
Howard J. Bashman
2300 Computer Avenue
Suite G-22
Willow Grove, PA 19090
(215) 830-1458
Counsel for plaintiff/appellee