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NO. COA05-156

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

FRED HARDING NELSON,  
Plaintiff,

v.

Rockingham County  
Nos. 02 CVD 935, 02 CVD 1077

ROBIN KINGERY NELSON,  
Defendant.

Appeal by plaintiff from judgment and order entered 7 July 2004 by Judge Frederick B. Wilkins, Jr. in Rockingham County District Court. Heard in the Court of Appeals 22 September 2005.

*Farver, Skidmore & McDonough, L.L.P., by H. Craig Farver, for plaintiff-appellant.*

*Hill, Evans, Duncan, Jordan & Beatty, by William W. Jordan and Robert E. Gray, III, for defendant-appellee.*

HUDSON, Judge.

On 30 May 2002, plaintiff Fred Harding Nelson filed a complaint seeking equitable distribution. On 2 July 2002, plaintiff Robin Kingery Nelson answered, counterclaimed and also requested equitable distribution. On 31 October 2002, the court entered a consent order providing for the management of two investment properties owned by the parties. The court entered an equitable distribution judgment and order on 7 July 2004. Plaintiff moved for relief from the judgment, which motion the court denied. Plaintiff appeals. As discussed below, we affirm.

Plaintiff and defendant were married to each other 30 June 1991. At the date of their separation on 24 May 2002, the parties jointly owned two investment properties, one on Briarcliff Road and the other on Kingsport Drive in Rockingham County. They also jointly owned the marital residence on Fairway Drive, in which defendant continued to live. Before trial, the parties sold the Kingsport property pursuant to the consent order, and placed the proceeds from the sale into a First Citizens Bank checking account. At trial, both parties presented evidence in support of their contentions for unequal distribution.

Plaintiff first argues that the court erred in entering its judgment of equitable distribution more than eight months after trial. We disagree.

"We first note that the trial court is vested with wide discretion in family law cases, including equitable distribution cases. Thus, a trial court's ruling will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Wall v. Wall*, 140 N.C. App. 303, 307, 536 S.E.2d 647, 650 (2000) (internal citations and quotation marks omitted).

"[T]here is inevitably some passage of time between the close of evidence in an equitable distribution case and the entry of judgment." *Wall*, 140 N.C. App. at 314, 536 S.E.2d at 654. This Court has established a "case-by-case inquiry as opposed to a bright line rule for determining whether the length of a delay is prejudicial." *Britt v. Britt*, 168 N.C. App. 198, 202, 606 S.E.2d

910, 912 (2005). In *Britt*, we noted three factors present in *Wall* which supported reversal of the untimely order. *Id.* First, the delay must be more than *de minimis*. *Id.* at 201, 606 S.E.2d at 912. Second, there must be "potential changes in the value of marital or divisible property between the hearing and entry of the equitable distribution order." *Id.* at 202, 606 S.E.2d at 912. Finally, "changes in the relative circumstances of the parties warrant[ed] additional consideration by the trial court." *Id.* at 202, 606 S.E.2d at 913. In *Wall*, where this Court reversed, the delay in entry was more than nineteen months, there had been changes in the value of distributional assets, and one of the parties had suffered a serious decline in health. *Wall*, 140 N.C. App. at 314, 536 S.E.2d at 654. In *Britt*, the delay was sixteen months, but the appellant failed to show either of the other factors, and thus this Court affirmed the trial court. *Britt*, 168 N.C. App. at 202, 606 S.E.2d at 912-13. See also *White v. Davis*, 163 N.C. App. 21, 26, 592 S.E.2d 265, 269 (2004), *disc. review denied*, 358 N.C. 739, 603 S.E.2d 127 (2004) (holding that delay of seven months between hearing and entry of equitable distribution order was not prejudicial).

Here, the trial ended on 5 November 2003, and the order was entered on 7 July 2004. Plaintiff contends that in the eight months prior to entry of the order he was prejudiced because the First Citizens Bank checking account distributed to plaintiff was depleted as it was used to pay off an equity line, a marital debt distributed to both parties. However, the court was fully aware

that plaintiff would be making payments on the equity line, as the order provides that:

*All monies received by the Plaintiff, who the parties agree shall receive and manage said funds, shall be applied to debt service, hazard insurance, ad valorem taxes, repairs and maintenance on said houses, or the equity line on the Deep Springs residence.*

(emphasis supplied). Thus, we do not believe the payments on the equity line from the designated funds constituted a change in the value of distributional assets as the court understood them. In addition, plaintiff makes no showing that the parties' circumstances have changed. We overrule this assignment of error.

Plaintiff next argues that the court erred in distributing the Kingsport investment property to plaintiff. We disagree.

N.C. Gen. Stat. § 50-20 (b) (1) (2001) defines marital property as "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property. . . ." Plaintiff contends that the court erred in distributing the Kingsport property to him, because it was sold between the date of separation and the date of the trial. Plaintiff asserts that this property was not currently owned pursuant to N.C. Gen. Stat. § 50-20 (b) (1). "This Court has clearly held, however, that [the 'present' in] 'presently owned' under G.S. § 50-20(b)(1) refers to the date of separation." *Wornom v. Wornom*, 126 N.C. App. 461, 465, 485 S.E.2d 856, 858 (1997). This assignment of error is without merit.

Plaintiff next argues that the court erred in considering Fuzzy's Wholesale BBQ Co., Inc., in determining whether an equal distribution of marital property was equitable. We disagree.

The court found that Fuzzy's Wholesale BBQ Co., Inc., ("Fuzzy's") was plaintiff's separate property, but that the evidence presented was insufficient to form a rational basis for valuing Fuzzy's. The court also found that it would consider this property in determining whether an equal division of marital property would be equitable. Plaintiff contends that defendant bore the burden of establishing Fuzzy's value for this purpose.

Pursuant to N.C. Gen. Stat. § 50-20(c), if the court determines that an equal division of property is not equitable, it must divide the parties' property in an equitable manner, considering a list of factors. Those factors include "[t]he income, property, and liabilities of each party at the time the division of property is to become effective" and "[a]ny other factor which the court finds to be just and proper." N.C. Gen. Stat. § 50-20 (c) (1), (12) (2001). "[A] party desiring an unequal division of marital property bears the burden of producing evidence concerning one or more of the twelve factors in the statute and the burden of proving by a preponderance of the evidence that an equal division would not be equitable." *White v. White*, 312 N.C. 770, 776, 324 S.E.2d 829, 832 (1985). "[T]he finding of a single distributional factor under N.C. Gen. Stat. § 50-20(c) may support an unequal division." *Jones v. Jones*, 121 N.C. App. 523, 525, 466 S.E.2d 342, 344, *disc. review denied*, 343 N.C. 307, 471 S.E.2d 72

(1996) (internal citation omitted). In addition, this Court's review of an equitable distribution award "is limited to a determination of whether there was a clear abuse of discretion." *White*, 312 N.C. at 777, 324 S.E.2d at 833. A court may "in its discretion, grant[] defendant the benefit of a distributional factor out of fairness considerations." *White v. Davis*, 163 N.C. App. 21, 29, 592 S.E.2d 265, 271 (2004). In *White*, this Court found no abuse of discretion when the trial court treated defendant's separate property interest in a medical practice as a distributional factor even though the parties had stipulated the interest to be marital. *Id.*

Here, the court found the evidence insufficient to form a rational basis for evaluating Fuzzy's, but went on to discuss the value of real estate and other business assets of Fuzzy's totaling at least \$124,000 in 2002 and noted that the business had been the primary source of employment and income for both parties during the marriage. We hold that it was not an abuse of discretion for the court to consider plaintiff's separate interest in Fuzzy's in determining whether an equal distribution would be equitable.

Plaintiff also argues that the court erred in valuing the account from the sale of the marital residence. Again, we disagree.

The proceeds from the marital home went into a checking account which was valued at \$24,000 and subsequently distributed to plaintiff. Plaintiff contends that the account was used to pay down the equity line debt on the marital residence and the balance

had declined to only \$13,401.12. By a pretrial order, the parties stipulated to a range of values which the court could find without detailed findings of fact when value was in question. The equitable distribution worksheet lists a value of \$24,000 for the account from the sale of the marital home. The court did not abuse its discretion by valuing this account within the range the parties stipulated.

Plaintiff next argues that the court erred in finding that each of the parties had the present means and ability to comply with the terms and conditions of the order. We disagree.

Plaintiff contends that the court made no findings of fact to support its conclusion that he was able to comply. Specifically, he challenges the court's conclusion that he was able to refinance the debt distributed to him within ninety days of entry of the order. Plaintiff asserts that ordering him to refinance debt is analogous to ordering him to pay a distributive award, which requires that the court consider his liquid assets, circumstances and ability to pay. See *Shaw v. Shaw*, 117 N.C. App. 552, 554-55, 451 S.E.2d 648, 649-50 (1995). While plaintiff cites *Shaw* as requiring these findings before ordering payment of a distributive award, he cites no authority for his contention that refinancing debt is the equivalent of ordering payment of a distributive award and we find none. Rather, N.C. Gen. Stat. § 50-20(e) provides that "it shall be presumed in every action that an in-kind distribution of marital or divisible property is equitable." While this presumption may be rebutted, plaintiff did not present rebuttal

evidence here. The total amount of debt distributed to plaintiff and requiring refinancing is approximately \$189,000. The in-kind assets distributed to plaintiff included a rental property valued at \$134,500, and this, along with plaintiff's separate property in Fuzzy's which included at least \$124,000 in assets, supports the court's finding that plaintiff was able to comply with the order.

Plaintiff also argues that the court erred in simply listing some of the N.C. Gen. Stat. § 50-20(c) factors in its conclusion that an equal distribution would not be equitable. We disagree.

Plaintiff appears to argue that the court should have restated the findings supporting each factor listed in the conclusion. Plaintiff cites the following language in support for this contention:

In determining whether an equal distribution is equitable, the trial court must make findings of fact showing its due consideration of the evidence presented by the parties in support of the factors enumerated under section 50-20(c). The trial court need not make 'exhaustive' findings of the evidentiary facts, but must include the 'ultimate' facts considered. We note that a finding which merely states that 'due regard' has been given to the section 50-20(c) factors, without supporting findings as to the ultimate evidence presented on these factors, is insufficient as a matter of law, because such a general finding does not present enough information to allow an appellate court to determine whether evidence presented on each of the section 50-20(c) factors was duly considered by the trial court. . . ."

*Daetwyler v. Daetwyler*, 130 N.C. App. 246, 249-50, 502 S.E.2d 662, 665 (1998), *affirmed*, 350 N.C. 375, 514 S.E.2d 89 (1999) (internal citations and footnote omitted). The language above does not



require that the conclusion restate the findings supporting the factors listed; it merely requires that the court make findings showing its "due consideration" of the evidence presented in support of those factors. The court's findings here show its due consideration of the factors and support its conclusion. We overrule this assignment of error.

Finally, plaintiff argues that the court erred in failing to make findings of fact and conclusions of law about additional distributional factors put forth by plaintiff. We do not agree.

Plaintiff contends that the court should have made findings from the evidence about a condominium he owned when the parties married, the proceeds of which were used to pay down the mortgage and make improvements to the marital home and about vandalism to a car. Regarding the condo, plaintiff presented evidence that the proceeds from its sale went entirely into the marital home. The classification, value and distribution of the marital home was stipulated to by the parties. The court did make the appropriate findings about the marital home. The car vandalized was owned by Fuzzy's, and was not classified as either marital or separate property. Any claim by the corporation regarding vandalism to its property is unrelated to this action. The court did not need to make specific findings regarding this evidence, and there was no error.

Affirmed.

Judges ELMORE and SMITH concur.

Report per Rule 30(e).

