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NO. COA09-246

NORTH CAROLINA COURT OF APPEALS

Filed: 22 December 2009

RUBY ANDERSON MORGAN,
Plaintiff-Appellee,

v.

Henderson County
No. 03 CVD 1489

ROY DONALD MORGAN,
Defendant-Appellant.

Appeal by Defendant from judgment entered 29 September 2008 by Judge Athena Fox Brooks in District Court, Henderson County. Heard in the Court of Appeals 16 September 2009.

*Prince, Youngblood & Massagee, PLLC, by Boyd B. Massagee, Jr.,
for Plaintiff-Appellee.*

William L. Gardo, II, for Defendant-Appellant.

McGEE, Judge.

I.

Plaintiff and Defendant were married on 26 March 1981, and they separated on 2 September 2003. Plaintiff filed a complaint on 11 September 2003, seeking an equitable distribution of the marital property and debts. Plaintiff also requested that she be granted a writ of possession of the marital home at 20 Oak Knoll Drive, Hendersonville, North Carolina; that the trial court order Defendant not to enter the premises of R. Morgan, Inc. (the Corporation), which was jointly owned by Plaintiff and Defendant;

and that Defendant not "pick up the mail for [the Corporation] pending further orders of the [trial court]." Plaintiff amended her complaint on 21 October 2003 requesting, *inter alia*, that Plaintiff "be granted a divorce from bed and board from [Defendant]." Defendant filed his answer and counterclaim, and a motion to dismiss, on 25 February 2004. Defendant moved to dismiss Plaintiff's action pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) for failure to state a claim for relief. By his counterclaim, Defendant sought, *inter alia*, a divorce, post-separation support, alimony, and an equitable distribution providing more than fifty percent of the marital property to Defendant. There is no evidence in the record that Defendant's motion to dismiss was ever heard.

Plaintiff and Defendant entered into a consent judgment¹ on 16 July 2004, in which certain items of personal property were divided between Plaintiff and Defendant. Plaintiff and Defendant also each received possession of one of three residences they jointly owned. Final distribution of these residences was reserved for the equitable distribution determination. Neither Plaintiff nor Defendant was allowed to reside in the marital home, which was ordered to be sold. Plaintiff was ordered to make all payments on the marital home and provide for its maintenance and upkeep. The issue of Plaintiff's contributions toward maintaining the marital

¹ There were three consent agreements reached between Plaintiff and Defendant, all of which were adopted by the trial court. These three agreements are respectively termed a "consent judgment," an "order," and a "memorandum of judgment/order." We shall refer to all three as "consent judgments."

home was deferred until the final equitable distribution determination. Plaintiff was further ordered to "distribute the sum of \$300,000 to [Defendant,]" as an initial step in dividing the value of the Corporation between Plaintiff and Defendant.

Plaintiff and Defendant entered into a second consent judgment, filed 3 June 2005, whereby the trial court ordered one-half of the Corporation's stock to be distributed to Defendant "as his marital share." Defendant was ordered to sell the stock back to the Corporation for \$435,000.00 (with a credit to the Corporation for the \$300,000.00 already paid to Defendant). Defendant was also awarded multiple items of property owned by the Corporation, including motor homes, automobiles, and heavy equipment.

The Corporation retained ownership of all its other assets. Plaintiff became the sole owner of the Corporation and Defendant relinquished all control over and claim to the Corporation. This consent judgment stated: "That [this agreement is] the consent judgment of the parties. This is a memorandum of judgment enforceable by the contempt powers of the court and the court has [questioned] both parties as to their understanding of [the] memorandum and their voluntary consent to the terms therein."

In a third consent judgment, entered 23 August 2006, Plaintiff and Defendant agreed, and the trial court ordered (1) that the marital home would be granted to Defendant; (2) that Defendant would pay Plaintiff \$75,000.00 for her interest in the marital home; (3) that thereafter Defendant would have sole ownership of

the marital home; and (4) that Defendant would be responsible for all payments and expenses associated with the marital home. This consent judgment stated: "Hereafter distribution and valuation of [the marital home] shall not be required." The issue of Plaintiff's prior post-separation contributions towards the marital home was reserved for the equitable distribution hearing.

The equitable distribution hearing was held on multiple dates between 22 August 2007 and 23 April 2008. The trial court entered an equitable distribution judgment on 29 September 2008, whereby it divided the marital property, made determinations concerning separate property, and concluded that equal distribution of the marital property would not be equitable. The trial court determined that a 57.25 percent to 42.75 percent split of the marital property in Plaintiff's favor was equitable, and it ordered Defendant to pay a distributive award of \$61,436.00 in order to effect the equitable distribution. Defendant appeals. Further facts will be discussed in the body of the opinion.

II.

In Defendant's first, second, and eighth arguments, he contends that the trial court's findings and conclusions were erroneous as to multiple requirements of N.C. Gen. Stat. § 50-20(c), and that the trial court's findings and conclusions did not support an unequal distribution of marital property. We agree.

Upon application of a party for an equitable distribution, the trial court "shall determine what is the marital property and shall provide for an equitable distribution of the marital property . . . in accordance with the provisions of [N.C. Gen. Stat. § 50-20

(2007)] ." In so doing, the court must conduct a three-step analysis. First, the court must identify and classify all property as marital or separate based upon the evidence presented regarding the nature of the asset. Second, the court must determine the net value of the marital property as of the date of the parties' separation, with net value being market value, if any, less the amount of any encumbrances. Third, the court must distribute the marital property in an equitable manner.

Smith v. Smith, 111 N.C. App. 460, 470, 433 S.E.2d 196, 202-03 (1993), *overruled in part by*, 336 N.C. 575, 444 S.E.2d 420 (1994) (internal citations omitted). "In performing the latter task, the trial court is vested with wide discretion. '[W]here matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion.'" *Id.* at 470-71, 433 S.E.2d at 203 (citation omitted). "[F]or purposes of appellate review, the trial court's findings of fact are conclusive if supported by any competent evidence in the record." *Id.* at 471, 433 S.E.2d at 203 (citation omitted).

"An equal division of marital property is mandatory unless the court determines from evidence presented on one or more of the factors enumerated in G.S. 50-20(c) that an equal division would not be equitable." *Bradley v. Bradley*, 78 N.C. App. 150, 151, 336 S.E.2d 658, 659 (1985) (citation omitted).

The party seeking an unequal division bears the burden of showing, by a preponderance of evidence, that an equal division would not be equitable. "Therefore, if no evidence is admitted tending to show that an equal division would be inequitable, the trial court *must* divide the marital property equally." When, however, evidence is presented from which a reasonable finder of fact could

determine that an equal division would be inequitable, the trial court is required to consider the factors set forth in N.C.G.S. § 50-20(c), "but guided always by the public policy expressed . . . [in the Act] favoring an equal division." The trial court then *must* make findings and conclusions which support its division of marital property.

Armstrong v. Armstrong, 322 N.C. 396, 404, 368 S.E.2d 595, 559 (1988) (internal citations omitted) (second emphasis added); N.C. Gen. Stat. § 50-20(j) (2007) ("In any order for the distribution of property made pursuant to this section, the court shall make written findings of fact that support the determination that the marital property and divisible property has been equitably divided."). These findings and conclusions must be based upon the evidence admitted. *Khajanchi v. Khajanchi*, 140 N.C. App. 552, 557-58, 537 S.E.2d 845, 849 (2000) (citation omitted).

The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment -- and the legal conclusions which underlie it -- represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead "to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system."

Coble v. Coble, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) (citations omitted).

First, Defendant argues the trial court erred in finding, pursuant to N.C. Gen. Stat. § 50-20(c)(11a), that there "was evidence that [Defendant] failed to take any action which would

tend to maintain the marital home, which failure constitutes waste and neglect, leaving all maintenance to be performed by [Plaintiff], who did in fact so perform." Plaintiff and Defendant entered into a consent judgment signed by a district court judge and filed 16 July 2004, whereby they agreed to the division of certain property.

Before, during or after marriage the parties may by written agreement, duly executed and acknowledged in accordance with the provisions of G.S. 52-10 and 52-10.1, or by a written agreement valid in the jurisdiction where executed, provide for distribution of the marital property or divisible property, or both, *in a manner deemed by the parties to be equitable and the agreement shall be binding on the parties.*

N.C. Gen. Stat. § 50-20(d) (emphasis added). The 16 July 2004 consent judgment stated:

That the parties consent and agree to the preliminary distribution of the marital property set out below and they stipulate and agree that the same is a conclusive distribution of these assets which shall be considered in subsequent proceedings of the full and final distribution of all assets of the parties in a subsequent hearing pursuant to North Carolina General Statute 50-20.

Pursuant to the 16 July 2004 consent judgment, it was ordered that the marital home be sold, and that "Plaintiff shall continue to pay all the real property taxes, payments for insurance on the [marital home], payment for maintenance and upkeep of the [marital home] and payments on the mortgage on the [marital home] until the date of sale[.]" In its 29 September 2008 equitable distribution judgment, the trial court included the relevant terms of the 16 July 2004 consent judgment in its findings of fact. N.C. Gen.

Stat. § 50-20 states relevant to this argument:

(c) There shall be an equal division by using net value of marital property and net value of divisible property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably. The court shall consider all of the following factors under this subsection:

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(11a) Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert the marital property or divisible property, or both, during the period after separation of the parties and before the time of distribution.

N.C. Gen. Stat. § 50-20(c)(11a). Pursuant to the 16 July 2004 consent judgment, Plaintiff agreed to take all actions necessary to maintain the marital home until sale, which she did until Plaintiff and Defendant entered into a subsequent consent judgment whereby they agreed that Defendant would purchase Plaintiff's share of the marital home. After Defendant purchased Plaintiff's share of the marital home, Plaintiff was relieved of her duty to maintain it.

We hold the trial court abused its discretion in finding, as a factor in support of unequal distribution, that Defendant committed waste and neglect by not maintaining the marital home when Plaintiff voluntarily agreed to maintain the marital home, and was ordered to do so by the trial court pursuant to the 16 July 2004 consent judgment. N.C. Gen. Stat. § 50-20(d). Further, Plaintiff was credited in the 29 September 2008 equitable distribution judgment for the costs she incurred by paying the expenses for, and maintaining, the marital home.

Second, Defendant argues that the trial court erred in finding, pursuant to N.C. Gen. Stat. § 50-20(c)(11a), that there "was evidence that [Defendant] ceased working for the Corporation and it would have floundered but for the efforts of [Plaintiff] who continued to work for the Corporation, the Corporation being the largest asset of the parties." Plaintiff and Defendant agreed to preliminary actions concerning the division of their interests in the Corporation in the 16 July 2004 consent judgment. Pursuant to the 3 June 2005 consent judgment, Plaintiff and Defendant agreed that the Corporation "will distribute one half of its stock to [Defendant] as his marital share. [Defendant] agrees to and sells the stock back to [the Corporation] for \$435,000 plus" various items of personal property owned by the Corporation. In its 29 September 2008 equitable distribution judgment, the trial court included the relevant terms of the 3 June 2005 consent judgment in its findings of fact.

The trial court also found as fact in its 29 September 2008 equitable distribution judgment that "each party received an equal amount of total value in marital property" as a result of the division of the assets of the Corporation ordered by the 3 June 2005 consent judgment. Further, as Plaintiff and Defendant agreed that the 3 July 2005 consent judgment was equitable, and this consent judgment was entered by the trial court, the trial court was bound by its terms. N.C. Gen. Stat. § 50-20(d). The trial court had no authority to make a determination that this distribution of the assets of the Corporation was not equitable.

Stevenson v. Stevenson, 100 N.C. App. 750, 752, 398 S.E.2d 334, 336 (1990).

Considering the 3 June 2005 consent judgment, we hold that the trial court abused its discretion in finding that Defendant committed waste and neglect of the marital assets because he ceased working for the Corporation after the separation of the parties. Plaintiff and Defendant negotiated a consent agreement determining the fair distribution of the Corporation's shares and other assets, which agreement became an order of the trial court. Plaintiff was aware that Defendant had not been working for the Corporation when she negotiated, and agreed to, the consent judgment. Plaintiff either did, or should have, factored her post-separation contributions to the Corporation, along with Defendant's lack of contribution, into her negotiation of the 3 June 2005 consent judgment.

The equity of the distribution of the assets of the Corporation was settled by the 3 June 2005 consent judgment, and was not a matter properly revisited by the trial court in its final equitable distribution judgment. We further note that the trial court found in its final equitable distribution judgment that the Corporation "is a closely held corporation that is not susceptible to an in-kind division, in this situation, in that operation and control of it by co-owners who were unable to agree would result in loss of value of the Corporation[,] and that Plaintiff and Defendant

agreed on values of realty and stock in the Corporation, other than the effect of the

death of the life tenant after date of separation and before date of distribution on one tract of realty, which was an issue of law and not appraisal. Therefore, these valuations did not present any significant problem as to valuation.

According to the trial court, had Defendant continued to actively participate in running the Corporation, diminution of value of the Corporation would have resulted. We hold the trial court abused its discretion in considering Plaintiff's efforts, or Defendant's lack of effort, in maintaining the Corporation as a factor pursuant to N.C. Gen. Stat. § 50-20(c)(11a) justifying an unequal division of property. The Corporation and its assets had already been fully and finally divided between Plaintiff and Defendant by the 3 June 2005 consent judgment. As the 3 June 2005 consent judgment stated, it was a "consent judgment of the parties. This [wa]s a memorandum of judgment enforceable by the contempt powers of the court and the court [questioned] both parties as to their understanding of memorandum and their voluntary consent to the terms therein." There were no issues concerning the Corporation remaining to be determined by the trial court in its 29 September 2008 equitable distribution judgment.

Third, Defendant argues that the trial court erred in basing its determination that an unequal division of property was justified under N.C. Gen. Stat. § 50-20(c)(12). N.C. Gen. Stat. § 50-20(c)(12) states that the trial court may consider "[a]ny other factor which the court finds to be just and proper." The trial court found as just and proper the following additional factors in support of its determination that an unequal division of property

was equitable.

[Plaintiff] made payment of the expenses of the marital home . . . as set out hereinabove, with [Defendant] making no contribution toward the preservation and maintenance of the [marital home]. [Plaintiff] is entitled to a credit for these payments.

[Plaintiff] paid [Defendant's] health insurance after the date of separation, without reimbursement, and the Court considers this as a distributional factor.

Because the trial court determined that Plaintiff's payment of the expenses and upkeep of the marital home were to be credited to Plaintiff, this finding cannot also serve as a reason justifying an unequal distribution of property. *See Hay v. Hay*, 148 N.C. App. 649, 653, 559 S.E.2d 268, 272 (2002) ("the trial court had discretion to consider defendant's payments []'"to preserve the marital estate"' as a distributional factor, as opposed to giving defendant a credit") (citations omitted), *superseded in part by statute as recognized in Warren v. Warren*, 175 N.C. App. 509, 623 S.E.2d 800 (2006) (unpublished opinion); *see also Powers v. Powers*, 172 N.C. App. 171, 616 S.E.2d 30, 2005 N.C. App. LEXIS 1494, 12-13 (2005) ([T]hese methods for treating post-separation payments on marital debts are *alternative* methods that a trial court may use in its discretion when determining equitable distribution[.]" "By giving plaintiff a dollar for dollar credit for the indebtedness he paid on the marital residence, and by distributing the marital estate unequally because *only* plaintiff had paid these debts, the trial court erred in twice giving plaintiff the benefit of having paid the debts."). (Unpublished opinion).

The trial court does not include any finding of fact related to the amount Plaintiff paid for Defendant's post-separation health insurance. Defendant contends Plaintiff paid \$2,504.10 in post-separation insurance premiums. Our review of the record indicates the actual amount may be less than \$2,504.10. Plaintiff and Defendant separated on 2 September 2003. Plaintiff's testimony and record evidence shows that Plaintiff paid \$1,200.18 for the period covering 15 April 2003 through 15 September 2003, and further paid \$1,303.92 for the period covering 15 October 2003 through 15 March 2004. It would appear that only a small portion of the \$1,200.18 payment constituted post-separation payment by Plaintiff, as the date of separation was 2 September 2003.

Whatever the correct amount may be, it is the duty of the trial court to include sufficient findings of fact to support its judgment and to permit this Court to conduct a proper review on appeal. *Coble*, 300 N.C. at 712, 268 S.E.2d at 188-89. Assuming *arguendo* that the \$2,504.10 figure is correct, we do not find that Plaintiff's payment of \$2,504.10 in insurance premiums for Defendant, standing alone, supports a rational basis for a finding that an unequal distribution of \$61,436.00 in property in Plaintiff's favor, was equitable. See *White v. White*, 312 N.C. 770, 777-78, 324 S.E.2d 829, 833 (1985).

Our analysis above includes all the relevant factors considered by the trial court pursuant to N.C. Gen. Stat. § 50-20(c) in support of its determination that an unequal distribution of property was equitable, and that Defendant should pay a

distributive award to Plaintiff in the amount of \$61,436.00. We hold that the trial court abused its discretion in making this determination, and we remand for further action by the trial court consistent with this holding.

In Defendant's third through sixth arguments, he contends that the trial court erred "in making an unequal division of marital property based upon giving [Plaintiff] a dollar for dollar credit for payments made by a third party toward the mortgage and expenses of the [marital home]." We disagree.

Defendant argues that because the Corporation paid for the mortgage and expenses on the marital home, and Plaintiff did not pay for these expenses from her personal accounts, the trial court erred in determining that Plaintiff was entitled to a full credit for all post-separation expenses paid for the marital home. Defendant argues that it was improper for a third party, the Corporation, to pay expenses Plaintiff was ordered to pay. Defendant also argues that the Corporation paid these expenses, and deducted these same expenses on its corporate tax returns, which constituted a violation of federal tax law. Furthermore, because of the deductions, Defendant contends the dollar for dollar credit granted by the trial court represents a windfall for Plaintiff. Finally, Defendant argues that because he was the co-owner of the Corporation until the 3 June 2005 consent judgment, he should be credited for half of the expenses paid by the Corporation from the date of separation until 3 June 2005.

The trial court found as a fact that "it had been the custom

of the parties to pay some individual obligations out of the Corporation, rather than pay monies to themselves and then write a personal check, such being part of their compensation for employment." Defendant does not challenge this finding of fact on appeal, and it is thus binding. *In re Padgett*, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003). Because this uncontested finding of fact states that payments by the Corporation for Plaintiff's personal expenses were the same as Plaintiff's compensation for her work for the Corporation, we hold that the trial court did not abuse its discretion in giving Plaintiff a dollar for dollar credit for these payments.

Furthermore, as Defendant had participated in this practice before separation, and was thus aware of it, it was an issue he should have addressed while negotiating the 3 June 2005 consent judgment concerning the Corporation. These deductions benefitted the Corporation and, therefore, should have been reflected in the value of the Corporation at the time the 3 June 2005 consent judgment was negotiated. Having agreed to the terms and equity of the 3 June 2005 consent judgment, Defendant cannot now attempt, on appeal, to renegotiate his compensation for the division of the Corporation. This argument is without merit.

In Defendant's seventh argument, he contends the trial court made a mathematical error in calculating the value of marital property received by Defendant. We agree.

In its 29 September 2008 equitable distribution judgment, the trial court found that Defendant was entitled to \$11,872.00 in

tangible personal property and \$105,350.00 in realty, and thus concluded Defendant's total marital assets totaled \$135,715.00. However, \$11,872.00 plus \$105,350.00 equals \$117,222.00. We therefore remand with instruction to the trial court to either correct the mathematical error, or clearly establish in its findings justification for the \$135,715.00 figure.

In Defendant's ninth argument, he contends that the trial court "erred in ordering [Defendant] to make a \$61,436.00 distributive award within 45 days . . . where the trial court's findings of fact did not rebut the presumption of a distribution in kind, and made insufficient findings as to Plaintiff's ability to pay the distributive award." We agree in part.

Subject to the presumption of subsection (c) of this section that an equal division is equitable, it shall be presumed in every action that an in-kind distribution of marital or divisible property is equitable. This presumption may be rebutted by the greater weight of the evidence, or by evidence that the property is a closely held business entity or is otherwise not susceptible of division in-kind.

N.C. Gen. Stat. § 50-20(e). The trial court's only finding of fact relating to this issue states in relevant part:

[The Corporation] is a closely held corporation that is not susceptible to an in-kind division, in this situation, in that the operation and control of it by co-workers who were unable to agree would result in loss of value of the Corporation. Therefore, the presumption of an in-kind distribution of the marital property had been rebutted.

As we have discussed above, the 3 June 2005 consent judgment decided the division of the Corporation between Plaintiff and

Defendant. The Corporation had already been divided. Therefore, the status of the Corporation could not properly factor into whether the presumption that an in-kind division of the property was equitable for the 29 September 2008 equitable distribution judgment. The trial court shall either make findings in support of its determination that the presumption for an in-kind distribution has been rebutted, or order an in-kind distribution of the marital property pursuant to N.C. Gen. Stat. § 50-20(e).

Defendant further argues that the trial court erred in failing to include sufficient findings of fact that Defendant was capable of paying a distributive award. We hold that this argument is without merit for the reasons stated in *Pellom v. Pellom*, __ N.C. App. __, __, 669 S.E.2d 323, 329-30 (2008) (because the trial court identified in its findings sufficient liquid assets from which the plaintiff could pay the distributive award, and because the plaintiff failed to argue, either at trial or on appeal, that he would not be able to pay the award from the identified assets, the plaintiff's argument on appeal failed).

We remand to the trial court for further proceedings consistent with our holdings above.

Affirmed in part, reversed in part, and remanded.

Judges STEELMAN and JACKSON concur.

Report per Rule 30(e).