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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1301

Filed: 5 September 2017

Cabarrus County, No. 12 CVD 1023

PATRICK COURTNEY ULI, Plaintiff,

v.

RHETTA PARKMAN ULI, Defendant.

Appeal by defendant from judgment entered 5 November 2015 and order entered 29 December 2015 by Judge Christy E. Wilhelm in Cabarrus County District Court. Heard in the Court of Appeals 9 August 2017.

*Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson, for plaintiff-appellee.*

*Ferguson, Hayes, Hawkins & DeMay, PLLC, by James R. DeMay for defendant-appellant.*

ARROWOOD, Judge.

Rhetta Parkman Uli (“defendant”) appeals the trial court’s equitable distribution of property between her and her ex-husband Patrick Courtney Uli (“plaintiff”). For the following reasons, we reverse and remand.

I. Background

Plaintiff and defendant were married on 26 March 1998 and lived together as husband and wife until they separated on 23 March 2012. There were no children born of the marriage.

On 28 March 2012, plaintiff filed a “Complaint and Motion for Injunctive Relief” seeking a divorce from bed and board, possession of the marital residence and property, equitable distribution, and an injunction to prevent defendant from disposing of marital property. Defendant filed an “Answer and Counterclaims” on 5 April 2012. Defendant denied the majority of plaintiff’s allegations in her answer and asserted her own claims for post-separation support and sequestration of the marital residence, alimony, equitable distribution, attorney’s fees, and an injunction to prevent plaintiff from disposing of marital property. Plaintiff filed a “Reply and Counterclaim” on 17 April 2012 in which he denied defendant’s claims and asserted his own counterclaims for post-separation support and alimony and attorney’s fees. The parties divorced on 24 May 2013.

A pretrial order was filed on 28 September 2015 and the case was heard in Cabarrus County District Court on 28 and 29 September 2015 by the Honorable Christy E. Wilhelm. A “Judgment” on equitable distribution matters was entered 5 November 2015. The trial court retained jurisdiction over the case for determinations of alimony, post-separation support, and attorney’s fees.

On 16 November 2015, defendant filed a “Motion to Amend Judgment” challenging the distribution of certain items. The trial court denied defendant’s motion by order entered 29 December 2015.

On 9 May 2016, after a hearing on the issues of alimony and attorney’s fees, the trial court entered an “Order for Alimony” disposing of the remaining issues in the case. Defendant filed notice of appeal from the 5 November 2015 judgment and the 29 December 2015 order denying her motion to amend on 7 June 2016.

## II. Discussion

On appeal, defendant challenges the trial court’s equitable distribution. “Equitable distribution is vested in the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion. Only a finding that the judgment was unsupported by reason and could not have been a result of competent inquiry, or a finding that the trial judge failed to comply with the statute, will establish an abuse of discretion.” *Wiencek-Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (citations omitted). Thus, although largely left to the discretion of the trial court, the court must comply with the requirements of N.C. Gen. Stat. § 50-20.

N.C. Gen. Stat. § 50-20 provides that “[u]pon application of a party, the court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between

the parties in accordance with the provisions of [N.C. Gen. Stat. § 50-20].” N.C. Gen. Stat. § 50-20(a) (2015).

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, 202-203 (1993) (citations omitted), *rev’d in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994).

The first step of the equitable distribution process requires the trial court to classify *all* of the marital and divisible property—collectively termed distributable property—in order that a reviewing court may reasonably determine whether the distribution ordered is equitable. In fact, to enter a proper equitable distribution judgment, the trial court must specifically and particularly *classify and value all assets and debts maintained by the parties at the date of separation*. . . . Furthermore, in doing all these things the court must be specific and detailed enough to enable a reviewing court to determine what was done and its correctness.

*Robinson v. Robinson*, 210 N.C. App. 319, 323, 707 S.E.2d 785, 789 (2011) (citations and quotations omitted) (emphasis in original). To that end, N.C. Gen. Stat. § 50-20 provides that “[i]n 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.” N.C.

Gen. Stat. § 50-20(j); *see also* *Armstrong v. Armstrong*, 322 N.C. 396, 403, 368 S.E.2d 595, 599 (1988) (“The plain language of the statute mandates that written findings of fact be made in any order for the equitable distribution of marital property made pursuant to [N.C. Gen. Stat.] § 50-20.”).

This Court has explained that “ ‘[t]he degree of specificity required in a court order pertaining to equitable distribution cannot be established with scientific precision.’ However, the court's findings of fact must be ‘sufficiently specific to allow appellate review.’ ” *Plummer v. Plummer*, 198 N.C. App. 538, 543, 680 S.E.2d 746, 750 (2009) (quoting *Rosario v. Rosario*, 139 N.C. App. 258, 267, 533 S.E.2d 274, 279 (2000)) (internal citations omitted). “The purpose for the requirement of specific findings of fact that support the court’s conclusions of law is to permit the appellate court on review to determine from the record whether the judgment—and the legal conclusions that underlie it—represent a correct application of the law.” *Mrozek v. Mrozek*, 129 N.C. App. 43, 49-50, 496 S.E.2d 836, 841 (1998) (quotation marks omitted). “As to whether property is marital or separate, the findings of the trial court will not be disturbed on appeal if there is competent evidence to support the findings.” *Loving v. Loving*, 118 N.C. App. 501, 507, 455 S.E.2d 885, 889 (1995) (citing *Nix v. Nix*, 80 N.C. App. 110, 112-13, 341 S.E.2d 116, 118 (1986)).

A. 2611 Myrtle Street Property

Defendant first argues the trial court erred in the first step of the equitable distribution analysis when it classified the 2611 Myrtle Street property as an entirely marital asset.

The concepts of “marital property” and “separate property” are defined in N.C. Gen. Stat. § 50-20(b) as follows:

- (1) “Marital property” means 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 or divisible property . . . .
- (2) “Separate property” means all real and personal property acquired by a spouse before marriage or acquired by a spouse by devise, descent, or gift during the course of the marriage. . . .

N.C. Gen. Stat. § 50-20(b) (2015). This Court has explained that

[t]he key term in both definitions is “acquired.” In *Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260, *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985), this Court adopted a dynamic rather than a static interpretation of the term “acquired” as used in [N.C. Gen. Stat.] § 50-20(b), stating “that acquisition must be recognized as the ongoing process of making payment for property or contributing to the marital estate rather than being fixed on the date that legal title to property is obtained.” This Court further recognized that since acquisition is an ongoing process, property may have a dual nature and consist of both marital property and separate property components.

By recognizing that acquisition is an ongoing process and that property may have a dual nature, this Court adopted what is known as the “source of funds” approach. The Court explained the source of funds approach as follows:

“Under this [approach], when both the marital and separate estates contribute assets towards the acquisition of property, each estate is entitled to an interest in the property in the ratio its contribution bears to the total investment in the property. . . . Thus, both the separate and marital estates receive a proportionate and fair return on its investment.”

*Smith*, 111 N.C. App. at 473-74, 433 S.E.2d at 204 (citations omitted). “This approach takes into account the active appreciation of separate property which often results from contributions made by one or both spouses.” *Nix*, 80 N.C. App. at 113, 341 S.E.2d at 118.

Regarding the 2611 Myrtle Street property, the trial court found as follows in finding of fact 30(t):

Before the parties were married, the Defendant inherited the real property located at 2611 Myrtle Street in Newberry, South Carolina. During the course of the marriage, namely in 2002, the parties moved into the house and used it as the primary marital residence for an extended time, after encumbering the property with a mortgage. As a result, this home and real property were converted to marital property. The parties agree the property has a fair market value of approximately \$90,000.00.

The trial court then found in finding of fact 31 that the 2611 Myrtle Street property was a “marital asset[] of the parties acquired during the marriage and in existence on the date of separation.” The trial court valued the 2611 Myrtle Street property at \$90,000.00 and split it evenly between plaintiff and defendant, with each receiving \$45,000.00. In order to split the value of the property between plaintiff and

defendant, the court further ordered in finding of fact 41 that the parties “place the former marital residence located at 2611 Myrtle Street . . . on the market for sale . . . .”

Defendant now argues the court erred in distributing the property equally among parties based on the erroneous finding that the “home and real property were converted to marital property.” Defendant contends “[t]he property should have been classified as a dual asset, with [defendant’s] separate estate and the marital estate each receiving an interest in the property based upon the contribution of each estate to the total value of the property.”

Defendant further contends that, in finding that the property became marital property when the parties moved into the property after encumbering it with a mortgage, the trial court applied a theory of “transmutation through commingling.” In *Wade*, this Court explained that “[u]nder [the transmutation] theory, affirmative acts of augmenting separate property by commingling it with marital resources is viewed as indicative of an intent to transmute, or transform, the separate property to marital property.” *Wade*, 72 N.C. App. at 381, 325 S.E.2d at 269. This Court, however, refused to adopt the theory of transmutation in North Carolina. *Id.* Thus, defendant asserts “[t]he separate nature of the property cannot be ‘transformed’ into a marital asset simply because the parties lived in the home and performed renovations with marital funds.” Defendant claims this Court’s decisions in *Wade*



and *Goldston v. Goldston*, 159 N.C. App. 180, 582 S.E.2d 685 (2003), are controlling in the present case. We agree.

In *Wade*, this court reviewed the classification of real property consisting of a parcel of land owned by the plaintiff prior to his marriage to the defendant and a house constructed on the parcel with marital funds during the parties' marriage, in which the parties lived. As discussed above, in classifying the property for equitable distribution purposes, this Court rejected the transmutation through commingling theory and adopted a source of funds theory. This court then held,

[t]hat part of the real property consisting of the unimproved land owned by [the] plaintiff prior to the marriage should be considered separate in character and that part of the property consisting of the house which was constructed during the marriage with marital funds should be considered marital in character.

*Id.* at 382, 325 S.E.2d at 269. This Court explained that “[t]he appreciation of the real property . . . was clearly the active type as it resulted from the parties’ contributions during the marriage.” *Id.* at 379, 325 S.E.2d at 268. Thus, “the marital estate [was] entitled to a proportionate return of its investment.” *Id.* at 380, 325 S.E.2d at 268. In so holding, this Court made clear that it rejected the defendant’s argument that improvements to plaintiff’s separate property made during the marriage with marital funds transmuted the property into entirely marital property. *Id.* at 381, 325 S.E.2d at 269.

In *Goldston*, this Court reversed the trial court's determination that proceeds from the sale of a lot and a house situated thereon was entirely marital property where the defendant owned the house prior to his marriage to the plaintiff, but moved the house onto the lot owned by both parties during their marriage. 159 N.C. App. at 184-85, 582 S.E.2d at 687-88. This Court explained that the trial court concluded that by moving his separate property onto the lot owned by both parties, defendant transformed his separate property to marital property. *Id.* at 182, 582 S.E.2d at 686. Relying on *Wade* and applying the source of funds theory, this Court held "the trial court erred in classifying the monies received for the sale of the lot and house . . . as entirely marital." *Id.* at 186, 582 S.E.2d at 688. In so holding, this Court concluded that "the act of physically transferring the location of the house onto the lot owned by the parties as tenants by the entireties, unaccompanied by any other evidence of donative intent by [the] defendant, was insufficient to rebut the statutory mandate that separate property remain separate unless a contrary intention is expressly stated in the conveyance." *Id.* at 185, 582 S.E.2d at 688 (quotation marks omitted). Therefore, this Court held "[t]he proceeds of the sale of the lot and house [were] dual in nature[.]" *Id.*

*Wade* and *Goldston* demonstrate how property acquires a dual nature upon application of the source of funds theory. It seems the 2611 Myrtle Street property is no different.

In this case, the trial court found that “[b]efore the parties were married, the [d]efendant inherited the real property located at 2611 Myrtle Street in Newberry, South Carolina. During the course of the marriage, namely in 2002, the parties moved into the house and used it as the primary marital residence for an extended time, after encumbering the property with a mortgage.” Although there is no finding as to improvements made to the property, the evidence is that at least a portion of the money from encumbering the property was used to improve the property.

From the findings, it is clear the property was defendant’s separate property at the time she acquired it. *See* N.C. Gen. Stat. § 50-20(b)(2) (“ ‘Separate property’ means all real and personal property acquired by a spouse before marriage or acquired by a spouse by devise, descent, or gift during the course of the marriage.”) The trial court fails to explain how defendant living in that property together with plaintiff and encumbering the property converted that property to marital property. We agree with defendant that it appears the trial court applied a transmutation through commingling theory in this case, which was error. Under a source of funds theory, plaintiff’s separate property is not converted to marital property; the use of funds from encumbering the property during marriage to improve the property would cause the property to be dual in nature, with the value of those improvements being marital property. However, in order to properly classify the property as dual nature, the trial court must make further, more specific findings concerning the value of the

property both before and after the improvements to the property and the amount of marital funds used to make the improvements.

Plaintiff agrees with defendant that the court is to apply a source of funds theory and not a transmutation of property theory. Plaintiff, however, contends the trial court correctly applied a source of funds theory in finding the 2611 Myrtle Street property was entirely a marital asset because the parties jointly encumbered the property with a mortgage for more than the value of the property, and used that money for remodeling. The trial court, however, did not make such specific findings. Moreover, plaintiff's argument fails to give any value to the \$120,000 valuation of the 2611 Myrtle Street property in 2001 when the property was clearly defendant's separate property.

As this Court has repeatedly held, under the source of funds theory, "each estate is entitled to an interest in the property in the ratio its contribution bears to the total investment in the property. Thus, both the separate and marital estates receive a proportionate and fair return on its investment." *Wade*, 72 N.C. App. at 382, 325 S.E.2d at 269 (citation omitted). In this case, the trial court was required to make findings regarding the contributions of each party. Based on a cursory inspection of the evidence, it appears defendant contributed the \$120,000 separate property and the marital estate contributed some portion of the approximately \$140,000 loan proceeds to improve the property. But it is up to the trial court to make

specific findings based on the evidence presented to determine what portion of the property is separate and what portion is marital; and then apply that ratio to the net value of the property.

Defendant also challenges the trial court's order that she sell the property and be responsible for expenses relating to the property. Having held that the trial court erred in finding the 2611 Myrtle Street property was entirely marital property, we do not address this issue further at this time. Instead, we remand to the trial court to revisit the distribution after revisiting the classification of the 2611 Myrtle Street property. We note, however, that equitable distribution is vested in the discretion of the trial court.

B. American Express Debt

Defendant also challenges the trial court's classification of plaintiff's \$17,228.21 American Express debt as a marital debt.

This Court has explained that

[d]ebt, as well as assets, must be classified as marital or separate property. If the debt is classified as marital, the court must value the debt and distribute it pursuant to [N.C. Gen. Stat. §] 50-20(c). For the purpose of an equitable distribution, marital debt is debt incurred during the marriage for the joint benefit of the husband and wife. The burden of proof is on the party seeking to classify the debt as marital.

*Byrd v. Owens*, 86 N.C. App. 418, 424, 358 S.E.2d 102, 106 (1987) (citations omitted); *see also Miller v. Miller*, 97 N.C. App. 77, 79, 387 S.E.2d 181, 183 (1990), and *Warren*

*v. Warren*, 241 N.C. App. 634, 636-37, 773 S.E.2d 135, 137 (2015). “The trial court’s findings of fact regarding marital debts must be specific enough to allow an appellate court to determine whether the judgment represents a correct application of the law.” *Pott v. Pott*, 126 N.C. App. 285, 288, 484 S.E.2d 822, 825 (1997) (citing *Armstrong*, 322 N.C. at 405, 368 S.E.2d at 599-600).

Concerning the American Express debt at issue in the instant case, the trial court found as follows in finding of fact 32(b):

Although the Defendant nominally disputed whether this account represented marital debt, there was no debate that the balance was acquired during the course of the marriage, nor that the parties lived above their means during the course of the marriage. The Plaintiff used this credit card account to purchase items for the household, such as appliances and daily expenses for food, clothing, trips, and other items. There is no evidence to indicate that this amount of \$17,288.21 was acquired for any item or series of items that was not for the joint benefit of the parties.

The trial court then found in finding of fact 33 that the debt was a “marital debt[] of the parties, acquired during the course of the marriage and for the benefit of both parties.” The trial court distributed the entire debt to plaintiff.

Defendant now challenges the trial court’s finding that “[t]here is no evidence to indicate that [the debt] was acquired for any item or series of items that was not for the joint benefit of the parties[,]” asserting it is plaintiff’s burden to prove the debt is marital and plaintiff failed to produce any competent evidence. Defendant also specifically challenges the trial court’s findings that “there was no debate that the

balance was acquired during the course of the marriage[]” and “[p]laintiff used this credit card account to purchase items for the household, such as appliances and daily expenses for food, clothing, trips, and other items.” Upon review of the record, we agree the trial court erred.

First, defendant is correct in her assertion it was plaintiff’s burden to prove that the debt was marital. Regarding the classification of property, this Court has explained as follows:

[T]he party claiming the property to be marital must meet the burden of showing by a preponderance of the evidence that the property was acquired by either spouse or both spouses during the marriage, before the date of separation, and is presently owned.

Once that burden is met, the burden shifts to the party claiming the property to be separate property.

*Godley v. Godley*, 110 N.C. App. 99, 108, 429 S.E.2d 382, 388 (1993) (citations omitted). Yet, when classifying debt, “[t]he party claiming the debt to be marital has the burden of proving the value of the debt on the date of separation and that it was ‘incurred during the marriage *for the joint benefit of the husband and wife.*’ ” *Miller*, 97 N.C. App. at 79, 387 S.E.2d at 183 (quoting *Byrd*, 86 N.C. App. at 424, 358 S.E.2d at 106) (emphasis added). Thus, while the burden shifts once the party claiming property is marital has shown that the property was acquired during the marriage, before the date of separation, and is presently owned, when dealing with debt, the

party claiming the debt is marital must additionally show that the debt was incurred for the joint benefit of the parties.

We reiterate, “[t]he burden of proof is on the party seeking to classify the debt as marital.” *Byrd*, 86 N.C. App. at 424, 358 S.E.2d at 106. It was not defendant’s duty in this case to dispute that the American Express debt was incurred for the joint benefit of the parties, it was plaintiff’s burden to show that it was.

Second, plaintiff testified at trial that the American Express debt was his, that he used the credit card for “[s]ome outside business stuff” and to purchase an oven as a surprise for defendant, that he had been an American Express member since 1983 and he had not always been good about paying off the full balance, and that he took cash advances from the account. Two American Express statements were also admitted into evidence, showing that the account balance was \$17,228.21 on 2 March 2012 and that the balance had been paid as of 2 April 2012. Plaintiff testified that he did not have any documentation to show that the debt was for the benefit of the marriage. This evidence does not show that the entirety of the \$17,228.21 American Express debt was incurred for the joint benefit of the parties and there is no evidence to suggest that plaintiff used the credit card to pay for “daily expenses for food, clothing, trips, and other items.” At most, the evidence shows that a portion of the debt was incurred for the purchase of an oven for the joint benefit of plaintiff and defendant. Moreover, although the trial court found “there was no debate that



the balance was acquired during the course of the marriage,” it was plaintiff’s burden to show that the debt was acquired during the marriage. Plaintiff’s testimony that he was a member of American Express for years before the marriage and he was not good about paying off the full balance leaves open the possibility that not all of the debt may have been acquired during the marriage.

Yet, regardless of whether the debt was acquired during the marriage, there is no competent evidence showing that the entirety of the debt was for the joint benefit of the parties. The trial court erred and we reverse and remand for additional findings with respect to what portion, if any, of the American Express debt was incurred for marital expenses and what portion, if any, was incurred for plaintiff’s sole benefit.

In response to defendant’s arguments, plaintiff does not point to any specific evidence presented at the hearing to show that the American Express debt was marital debt besides his testimony that he used the credit card for business expenses and to purchase an oven. Instead, plaintiff argues the parties stipulated that the American Express debt was a marital debt and, “in the face of the stipulation . . . , there was no evidence of any debt incurred which was not for the benefit of the marriage or was incurred as a separate debt either prior to or during the marriage.” Plaintiff contends that this Court should defer to the trial court’s characterization of the evidence and the contentions below.

Upon review, we do not second guess the trial court’s characterization of the evidence or contentions, but instead hold the above referenced portions of the trial court’s findings 32 and 33 are not supported by competent evidence or correct application of the law. Furthermore, we note that although the pretrial order does provide that “Schedule F is a list of marital debts[.]” the pretrial order also provides that the presiding judge shall determine whether “debts listed on Schedule F [are] marital debts[.]” It is clear from the contradictions in the pretrial order and the remainder of the record that there was no agreement between the parties that the American Express debt was a marital debt.

Lastly, plaintiff points to defendant’s closing argument and motion to amend judgment in support of his argument that defendant conceded that the credit card was used to purchase an upgraded diamond ring. Defendant’s closing argument and motion to amend, however, were not competent evidence at the hearing. And even if there was evidence that an upgraded diamond ring was purchased with the credit card, that is not evidence that the entire American Express debt was marital debt. The trial court must make more specific findings regarding the American Express debt based on the evidence in the record.

### C. Remaining Issues

In addition to defendant’s specific challenges to the trial court’s classification of the 2611 Myrtle Street property and the American Express debt, defendant

generally challenges the trial court's valuation of the marital estate, the distributive award, and the denial of her motion to amend judgment. Having held the trial court erred in classifying the 2611 Myrtle Street property and the American Express debt, it is clear the trial court must revisit the valuation of the marital estate and the distributive award after making further findings. It is also clear the trial court erred in refusing to revisit its judgment upon defendant's motion to amend. We need not address these remaining issues any further.

III. Conclusion

For the reasons discussed, we reverse the trial court's equitable distribution judgment and remand the matter to the trial court to make additional findings regarding the 2611 Myrtle Street property and the \$17,228.21 American Express debt.

REVERSED AND REMANDED.

Judges ELMORE and DIETZ concur.

Report per Rule 30(e).