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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-431

Filed: 6 March 2018

Wake County, No. 14-CVD-6809

RUQAIYA AMIR, Plaintiff,

v.

SYED J. AMIR, Defendant.

Appeal by Defendant from order entered 28 July 2016 by Judge Lori G. Christian in Wake County Superior Court. Heard in the Court of Appeals 16 October 2017.

*Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for the Plaintiff-Appellee.*

*Jonathan McGirt for the Defendant-Appellant.*

DILLON, Judge.

Syed J. Amir (“Husband”) appeals from an equitable distribution order entered by the trial court. In its order, the trial court determined that an unequal distribution of the parties’ marital property was equitable, and therefore awarded 65% of the marital estate to Ruqaiya Amir (“Wife”) and 35% of the marital estate to Husband. After thorough review of the record, we can discern no error in the trial court’s

application of the law, nor any abuse of discretion by the trial court. The trial court's only error is clerical in nature. Therefore, we affirm the ruling of the trial court and remand for the limited purpose of correction of the clerical error.

### I. Background

The parties were married in 1964. In May 2014, Wife filed a complaint seeking divorce from bed and board, equitable distribution of the parties' assets, and other relief. In her complaint, Wife conceded that the parties were "not yet separated." Husband filed an answer and motion to dismiss Wife's equitable distribution claim, contending that Wife's claims were "not ripe and shall not become ripe until the parties separate." Approximately two years later, in March 2016, before Husband's motion to dismiss was heard, Wife filed a verified motion for equitable distribution, alleging that the parties separated in September 2014. Husband did not dispute the September 2014 date of separation.

In July 2016, after a full hearing on the issue of equitable distribution, the trial court entered an order (the "ED Order") in which it concluded that the circumstances of the parties warranted an unequal distribution of their marital property. Accordingly, the trial court distributed 65% of the parties' marital estate to Wife and the remaining 35% to Husband. Husband appealed.

### II. Analysis

On appeal, Husband contends that the trial court lacked subject matter jurisdiction to enter its equitable distribution order. Alternatively, Husband contends that the trial court failed to properly apply the equitable distribution statute in determining that an unequal distribution was equitable, erred in its calculation of part of the distributive award, and erred in ordering Husband to pay a cash distributive award without considering his ability to pay such an award. We address each argument in turn.

A. Subject Matter Jurisdiction

Husband contends that Wife failed to assert a claim for equitable distribution under any of the procedures allowed by statute, and therefore, the trial court lacked subject matter jurisdiction over the claim. We disagree.

A challenge to a court's subject matter jurisdiction may be raised at any time, even for the first time on appeal. *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986). We review the issue of whether a trial court had subject matter jurisdiction *de novo*. See *Catawba County ex rel. Rackley v. Loggins*, \_\_\_ N.C. \_\_\_, \_\_\_, 804 S.E.2d 474, 477-78 (2017).

Our General Statutes provide that a party may assert a claim for equitable distribution only *after* separation has occurred, providing as follows:

At any time after a husband and wife begin to live separate and apart from each other, a claim for equitable distribution may be filed and adjudicated . . . [1] as a separate civil action, or [2] together with any other action

brought pursuant to Chapter 50 of the General Statutes, or [3] as a motion in the cause as provided by [N.C. Gen. Stat] § 50-11(e) or (f).

N.C. Gen. Stat. § 50-21(a) (2015).<sup>1</sup> Relying on a case from our Supreme Court, *see Hagler v. Hagler*, 319 N.C. 287, 290, 354 S.E.2d 228, 232 (1987), our Court has specifically held that “a pleading requesting the court to enter an order distributing the parties’ assets in an equitable manner *is sufficient to state a claim for equitable distribution.*” *Coleman v. Coleman*, 182 N.C. App. 25, 28, 641 S.E.2d 332, 336 (2007) (emphasis added). And recently, our Court clarified that this is true even where the pleading was filed *prior to the parties’ separation*, stating, in relevant part:

[R]egardless of whether the parties were separated at the time plaintiff filed the complaint, the record is clear that the parties were separated by the time defendant asserted his claim for equitable distribution. Therefore the trial court did have subject matter jurisdiction to equitably distribute the marital property.

*Gurganus v. Gurganus*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 796 S.E.2d 811, 814-15 (2017), *disc. rev. denied*, 369 N.C. 753, 799 S.E.2d 621 (2017).

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<sup>1</sup> N.C. Gen. Stat. § 50-11(e) and (f) essentially provide that a party may file a motion seeking equitable distribution until an absolute divorce is granted. “The failure to specifically apply for equitable distribution prior to a judgment of absolute divorce will destroy the statutory right to equitable distribution.” *Lockamy v. Lockamy*, 111 N.C. App. 260, 261, 432 S.E.2d 176, 177 (1993) (citing *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 588 (1987)). Here, there is no indication in the record that an absolute divorce had been granted to Husband and Wife as of the date of the ED Order, 28 March 2016.

In *Gurganus*, our Court essentially found that the trial court had subject matter jurisdiction over an equitable distribution claim – despite the fact that the original request for equitable distribution was filed prior to the parties’ actual date of separation – because the defendant filed an answer and counterclaim requesting equitable distribution *after* the parties had separated.<sup>2</sup> *See id.* at \_\_\_, 796 S.E.2d at 814. This conclusion suggests that so long as either party makes a request for equitable distribution after the date of separation, the trial court has jurisdiction to consider the request. This is consistent with the language of the equitable distribution statute. *See* N.C. Gen. Stat. § 50-21(a).

We acknowledge that the trial court did *not* have subject matter jurisdiction over Wife’s equitable distribution claim as asserted in her May 2014 complaint, because the parties were not yet separated at that time. *See* N.C. Gen. Stat. § 50-21(a); *Gurganus*, \_\_\_ N.C. App. at \_\_\_, 796 S.E.2d at 814 (“[T]he separation of the parties provides the court with subject matter jurisdiction to adjudicate a claim for equitable distribution.”). However, the trial court did obtain subject matter jurisdiction over Wife’s claim as asserted in her verified motion in the cause filed in March 2016, on the morning of the parties’ ED hearing. Specifically, the verified motion alleged that Husband and Wife had separated on 6 September 2014 and

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<sup>2</sup> The plaintiff in *Gurganus* filed several claims, including one for equitable distribution, on 15 March 2001. A later order of the trial court established that the parties actually separated on 22 March 2001.

“remained separate and apart since that date” and specifically requested that the trial court enter an order providing for the distribution of the parties’ property under N.C. Gen. Stat. § 50-20 (2015). This is compliant with the requirements of N.C. Gen. Stat. § 50-20 and our case law. *See* N.C. Gen. Stat. § 50-20; *Gurganus*, \_\_\_ N.C. App. at \_\_\_, 796 S.E.2d at 814-15.

Husband contends that Wife’s verified motion was invalid because it did not have a complete certificate of service. However, unlike personal jurisdiction, which *does require* “service of process upon [a party], [or the party’s] voluntary appearance or consent[,]” the jurisdiction of a court “over the *subject matter* of a proceeding is derived from the law which organized the tribunal.” *In re Peoples*, 296 N.C. 109, 144, 250 S.E.2d 890, 910 (1978) (emphasis added). Thus, whether this motion was, in fact, served upon Husband is irrelevant to the presence of subject matter jurisdiction. And regarding the issue of the lack of a certificate of service, we note that Husband has made no argument concerning personal jurisdiction, and the record clearly shows that he fully and voluntarily participated in the hearing. *See Stunzi v. Medlin Motors, Inc.*, 214 N.C. App. 332, 336, 714 S.E.2d 770, 774 (2011) (citing *Grimsley v. Nelson*, 342 N.C. 542, 545, 467 S.E.2d 92, 94 (1996) (“[A] court may properly obtain personal jurisdiction over a party who consents or makes a general appearance, for example, by . . . appearing at a hearing without objecting to personal jurisdiction.”)). Husband even provided the trial court with a document at the outset of the hearing titled “Amir

Equitable Distribution Spreadsheet,” which was prepared by Husband’s attorney and showed Husband’s desired distribution of the parties’ property. In fact, Husband acknowledged that the date of separation was 6 September 2014. The record clearly shows that Husband and Wife both stated during the hearing that the date of Separation was 6 September 2014, and that Husband’s counsel, in closing, specifically referenced “the date of separation [as] September 6, 2014[.]”

In sum, Wife’s complaint was sufficient to state a claim for equitable distribution. *See Coleman*, 182 N.C. App. at 28, 641 S.E.2d at 336. Wife’s verified motion filed after the parties separated, providing the trial court with notice of the parties’ date of separation, and requesting equitable distribution of their marital assets, was sufficient to provide the trial court with subject matter jurisdiction. *See Gurganus*, \_\_\_ N.C. App. at \_\_\_, 796 S.E.2d at 814-15. And by virtue of Husband’s full participation in the hearing and failure to contest Wife’s verified motion at the trial court level, Husband has waived his right to challenge the issue of *personal* jurisdiction. *See Grimsley*, 342 N.C. at 545, 467 S.E.2d at 94. Accordingly, we conclude that the trial court properly exercised its jurisdiction to consider the parties’ equitable distribution claim.

#### B. Statutory Considerations

Next, we consider Husband’s arguments relating to the trial court’s application of the equitable distribution statute. Specifically, Husband contends that the trial

court (1) failed to comply with the requirements of N.C. Gen. Stat. § 50-20(c), and (2) failed to properly analyze Husband's ability to pay a cash distributive award. We disagree.

1. Unequal Distribution of Property

Section 50-20(c) of our General Statutes provides that “[t]here shall be an equal division . . . of [property] . . . *unless the court determines that an equal division is not equitable.*” N.C. Gen. Stat. § 50-20(c). Here, the trial court's findings stated, in relevant part:

29. An unequal distribution is appropriate as an equal distribution would be inequitable, and [Wife] should be awarded 65% of the marital estate and [Husband] 35%.

30. In considering whether an equal distribution would be equitable, the [trial court] has considered all evidence presented relating to the statutory factors set out in N.C. Gen. Stat. § 50-20[.]

31. Based on the foregoing, the [trial court] has determined and finds as fact that an unequal division of the marital assets would be equitable[.]

The trial court then concluded, as a matter of law, that “an unequal distribution of the property [] is equitable and fair considering all of the evidence and the statutory factors.”

Citing *Lucas v. Lucas*, 209 N.C. App. 492, 706 S.E.2d 70 (2011), Husband contends that because the trial court concluded that “an unequal division would be equitable,” rather than “an equal division is *not* equitable,” it failed to properly rebut

the statutory presumption in favor of equal distribution. In *Lucas*, our Court held that the trial court's equitable distribution order failed to comply with N.C. Gen. Stat. § 50-20 where it found that "an unequal distribution of marital property is equitable." *Lucas*, 209 N.C. App. at 503, 706 S.E.2d at 278. However, in *Lucas*, there was no indication that the trial court gave due consideration to whether an equal distribution would be equitable. *Id.* at 504-05, 706 S.E.2d at 278-79. In contrast, here, the trial court specifically found that it had "considere[d] whether an equal distribution would be equitable," and that in doing so, it considered "all evidence presented relating to the statutory factors[.]" The fact that this paragraph of the trial court's ED Order comes after its first proclamation that "an unequal distribution is appropriate" is irrelevant. We hold that the trial court complied with N.C. Gen. Stat. § 50-20 in concluding that an equal distribution of the parties' property would be inequitable.

## 2. Distributive Award

Husband also contends that the trial court erred in ordering him to pay a cash distributive award<sup>3</sup> without properly analyzing his ability to pay.

Section 50-20(e) of our equitable distribution statute states that in any action where the presumption of Section 50-20(c) has been rebutted, a trial court "may provide for a distributive award to facilitate, effectuate[,] or supplement a

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<sup>3</sup> A "distributive award" is defined by the statute as "payments that are payable either in a lump sum or over a period of time in fixed amounts[.]" N.C. Gen. Stat. § 50-20(b)(3). A distributive award does not include alimony payments or other similar payments for support and maintenance. *Id.*

distribution of marital or divisible property.” N.C. Gen. Stat. § 50-20(e). When it provides for a distributive award in its order, “[t]he trial court is required to make findings as to whether the defendant has sufficient liquid assets from which he can make the distributive award payment.” *Urciolo v. Urciolo*, 166 N.C. App. 504, 507, 601 S.E.2d 905, 908 (2004).

Here, the trial court ordered that Husband pay \$1,971 to Wife each month for three years to ensure that Wife received 65% of the marital estate. The trial court made several findings regarding Husband’s substantial income, which is an obvious liquid asset from which he could pay the award. *See Pellom v. Pellom*, 194 N.C. App. 57, 68, 669 S.E.2d 323, 329 (2008). The trial court found that Husband has two pensions which pay him approximately \$1,799 per month, an IRA which pays approximately \$400 per month, and that Husband receives approximately \$2,000 per month in social security. These findings are all supported by competent evidence in the record, and are thus binding on appeal.<sup>4</sup> *See id.* at 62, 669 S.E.2d at 325 (providing that our Court “will not second-guess values of marital . . . property where there is evidence to support the trial court's figures” (internal marks and citation omitted)). The trial court found that Husband’s income was approximately \$4,202

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<sup>4</sup> Husband contends that there is “no evidence” of his Social Security income to support the trial court’s finding that Husband receives \$2,000 per month in Social Security; however, Wife submitted an exhibit to the trial court which shows a \$2,261 deposit labeled “SSA” and “SOC SEC.”

per month, leaving \$2,231 per month for his personal expenses after paying the distributive award to Wife.

We conclude that there is sufficient evidence in the record showing that Husband has the ability to pay the distributive award to Wife out of his liquid assets. *See id.* at 69, 669 S.E.2d at 329-30 (“[I]f a party’s ability to pay an award with liquid assets can be ascertained from the record, then the distributive award must be affirmed.”). Accordingly, we find no error in the trial court’s distributive award.

Defendant also contends that the trial court failed to consider “adverse financial ramifications such as adverse tax consequences that might arise from liquidation of non-liquid assets[.]” However, our Court has held that the trial court is only required to consider tax consequences that will result from the distribution of the property that the court actually orders.” *Id.* at 66, 669 S.E.2d at 328. And here, Husband was ordered to pay a distributive award out of his monthly income that he already receives, not liquidate his non-liquid assets, which could potentially have a significant tax consequence. *See id.*

#### C. Cash Distributive Award

Finally, Husband argues that the ED Order contained an incorrect valuation of the marital estate. Wife concedes this argument, acknowledging that the trial court committed a mathematical error in its calculation of the net marital estate.

The trial court correctly stated that the total value of the net marital estate was \$979,665.92 in its findings of fact; however, the decretal portion of the ED Order stated that the total value was \$982,380.00. The parties agree that the appropriate net valuation of the marital estate on the date of separation is \$979,665.92.

In light of this clerical error, we remand for the limited purpose of allowing the trial court to correct the net valuation in the decretal portion of the ED Order to reflect the proper amount from the trial court's findings: \$979,665.92. *See* N.C. R. Civ. P. 60(a) (2015). In addition, the trial court shall review the ED Order in its entirety to ensure that any calculations which may be based on the incorrect figure are corrected.

AFFIRMED IN PART, REMANDED IN PART.

Chief Judge McGEE and Judge CALABRIA concur.

Report per Rule 30(e).