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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-47

No. COA20-12

Filed 2 March 2021

Onslow County, No. 15 CVD 3631

TAMMIE COUNTS, Plaintiff,

v.

DANNY LEE COUNTS, Defendant.

Appeal by Defendant from judgment entered 27 June 2019 by Judge W. M. Cameron III in Onslow County District Court. Heard in the Court of Appeals 12 January 2021.

Tharrington Smith, LLP, by Steve Mansbery, for Plaintiff-Appellee.

Sandlin Family Law Group, by Deborah Sandlin, for Defendant-Appellant.

DILLON, Judge.

¶ 1 Danny Lee Counts appeals from an equitable distribution judgment (the “Judgment”).

I. Background

¶ 2 Danny Lee Counts (“Husband”) and Tammie Counts (“Wife”) were married in 1999, separated in 2015, and divorced in 2016. Husband has served a number of

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years in the military and accrued a portion of his military pension during the marriage. Wife attended school, accruing student debt, during the marriage. This appeal involves the trial court's treatment of Husband's military pension and Wife's student debt in the Judgment.

¶ 3 In 2015, Wife filed a Complaint seeking equitable distribution and other relief. In 2016, the parties consented to the trial court's entry of a temporary Memorandum of Judgment/Order ("MOJ"). In the MOJ, the parties stipulated that Wife was entitled to 29.55% of Husband's military pension. Therefore, the trial court ordered Husband to pay Wife \$630 per month as her share of the pension, reserving the subject of its final calculation for "a later date." The MOJ also required Husband to continue to pay the couple's car loan payment.

¶ 4 On 26 February 2019, the trial court conducted an equitable distribution hearing. Husband presented a Military Retirement Worksheet during his testimony concerning his military pension. He calculated Wife's marital share of his military pension as 28.585% and acknowledged Wife was owed an amount in arrears.

¶ 5 In June 2019, the trial court entered its Judgment. The trial court found that \$10,500 of Wife's student loans was marital debt. Further, the court determined the martial portion of Husband's military pension to be 57.17%, with each party to receive an equal 28.585% share. Husband appealed from the Judgment.

II. Standard of Review

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¶ 6 “[W]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court’s findings of fact and whether its conclusions of law were proper in light of such facts.” *Romulus v. Romulus*, 215 N.C. App. 495, 498, 715 S.E.2d 308, 311 (2011). “[F]indings of fact by the trial court supported by competent evidence are binding on the appellate courts even if the evidence would support a contrary finding.” *Scott v. Scott*, 336 N.C. 284, 291, 442 S.E.2d 493, 497 (1994). We review conclusions of law *de novo*. *Romulus*, 215 N.C. App. at 498, 715 S.E.2d at 311.

¶ 7 The trial court’s classifications of property are considered conclusions of law. *Id.* at 500, 715 S.E.2d at 312. However, we review the equitable distribution award itself for “an abuse of discretion and . . . [reverse it] only upon a showing that it is so arbitrary that it could not have been the result of a reasoned decision.” *Brackney v. Brackney*, 199 N.C. App. 375, 381, 682 S.E.2d 401, 405 (2009) (internal citations and quotation marks omitted).

III. Analysis

A. Husband’s Military Pension

¶ 8 Husband argues that the trial court erred in its valuation and distribution of his military pension.

¶ 9 Husband’s pension consists of monthly payments for the rest of his life. In calculating the value of these future payments, the trial court did not apply any

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discount rate, which is typically applied to determine the *present* value of future cash flow. Rather, the trial court valued the pension merely by multiplying the monthly pension benefit by Husband's life expectancy.

¶ 10 The trial court then determined what *percentage* of the pension was marital (57.17%). Finally, the trial court determined that an equal division of the marital portion of the pension benefit was equitable.

¶ 11 Specifically, in the challenged Findings 10f and 12, the trial court failed to follow the *Bishop* scheme for valuing defined pension plans:

10. That as to various particular marital debts and assets of the parties which were distributed at trial, the Court makes the following additional findings:

f. Item 19: Military Retirement – The marital portion of this asset, as determined by [Husband's] years of service during the marriage of the total number of years served, is 57.17%, which portion should be equally divided by the parties, with each party receiving 28.585%. The Court values this asset at \$841,347.00, with the marital portion being valued at \$480,998.07, and the remainder being [Husband's] separate property.

12. That with the debts and assets distributed as shown on the attached spreadsheet, [Husband] should pay [Wife] a cash distributive award of \$2,667.11, along with any arrears owed for her share of pension benefits already paid to [Husband], in order to achieve an equal division.

¶ 12 The trial court valued the pension but did so by simply adding all the future monthly payments during Husband's life expectancy, without discounting these payments. We hold that the trial court erred by not discounting the expected future

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pension benefits or considering the contingencies as required by binding precedent in our 1994 *Bishop* decision, which outlines a five-step process to follow in valuing pension benefits. *Bishop v. Bishop*, 113 N.C. App. 725, 731, 440 S.E.2d 591, 595-96 (1994). In that case, our Court held that after determining (1) the amount of the monthly benefit and (2) the life expectancy of the recipient spouse, the trial court must also do the following:

Third, the trial court, *using an acceptable discount rate*, must determine the then-present value of the pension as of the later of the date of separation or the earliest retirement date.

Fourth, the trial court must *discount the then-present value to the value as of the date of separation*. In other words, determine the value as of the date of separation of the sum to be paid at the later of the date of separation or the earliest retirement date. This calculation requires mortality and interest discounting. The mortality and interest tables of the Pension Benefit Guaranty Corporation, a corporation within the United States Department of Labor, are well suited for this purpose.

Finally, the trial court *must reduce the present value to account for contingencies* such as involuntary or voluntary employee-spouse termination and insolvency of the pension plan. This calculation cannot be made with reference to any table or chart and rests within the sound discretion of the trial court.

Id. at 731, 440 S.E.2d at 595-96 (emphasis added and paragraph breaks supplied) (internal citations omitted).

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¶ 13 The parties disagree on whether the defined pension plan must be valued at all. We have held that it is error for the trial court *not* to place a value on a pension, even where the court makes a division of the monthly benefit. *Cunningham v. Cunningham*, 171 N.C. App. 550, 556, 615 S.E.2d 675, 680 (2005). Recently, though, our General Assembly amended N.C. Gen. Stat § 50-20.1(d) (2019) to no longer require the court *to value* a pension plan when it conducts an equitable distribution of a marital estate if the court divides the benefit equally between the spouses. However, the session law enacting the amendment, Session Law 2019-172, stated that the amendment “applie[d] to distributions on or after [October 1, 2019].” The amendment, therefore, does not apply to this present appeal as the Judgment in this case was entered prior to October 2019.

¶ 14 There is precedent which suggests that the failure to value a pension, as required prior to the amendment to the statute, is not harmless error. *Cunningham*, 171 N.C. App. at 556, 615 S.E.2d at 680. For instance, it may be that the trial court might determine an equal division of the entire marital estate *not* to be equitable based on its valuation of the pension. Here, though, the trial court did value the pension; it simply overvalued the pension by failing to discount the value of the future monthly payments to the present. But even if the pension were re-valued, with the future payments properly discounted, the pension would still constitute, by far, the largest asset in the marital estate. Accordingly, we do not think it is reasonably

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possible that the trial court would change its determination that an equal division of the entire marital estate is equitable. Therefore, we hold any error in the valuing of the pension to constitute non-prejudicial error.

B. Wife's Student Loans

¶ 15 Husband argues that the trial court erred in classifying and distributing a portion of Wife's student loans as marital debt. Specifically, Husband assigns error to one sentence of Finding 10e from the Judgment. We disagree.

¶ 16 As with marital assets, marital debt must be classified, valued, and distributed. *Huguelet v. Huguelet*, 113 N.C. App. 533, 536, 439 S.E.2d 208, 210 (1994). Marital debt is "incurred during the marriage and before the date of separation by either spouse or both spouses for the joint benefit of the parties." *Id.* at 536, 439 S.E.2d at 210. Additionally, "any debt incurred by one or both of the spouses after the date of separation to pay off a marital debt existing on the date of separation is properly classified as a marital debt." *Id.* at 536, 439 S.E.2d at 210.

¶ 17 In its Finding 10e, the trial court properly classified, valued, and distributed the parties' marital debt:

10. That as to various particular marital debts and assets of the parties which were distributed at trial, the Court makes the following additional findings:

e. Item 16: Student Loan – The total amount of this debt is \$25,472.00, but distributions in 2016 would have been after the date of separation. *Of the total amount*

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of this debt, \$22,000.00 was incurred before the date of separation, with no payments having been made. The Court distinguishes the Warren Case, submitted by counsel, in that neither parties in this case contends that the proceeds of the loan were used to pay for [Wife's] education. Both agree that the GI Bill covered those costs. The benefit to the marriage had to do with how the monies were spent. The parties were living apart for most of the time, and over \$10,000.00 of the debt was disbursed the month before the parties' separation. The Court finds that half of the \$22,000.00 disbursed prior to the date of separation was used for marital purposes, and half was not. Therefore, \$10,500.00 of the debt is considered a marital debt and the balance is considered non-marital and [Wife's] separate debt.

(emphasis added). Husband challenges one sentence from Finding 10e: “Therefore, \$10,500.00 of the debt is considered a marital debt and the balance is considered non-marital and [Wife's] separate debt.” As the rest of Finding 10e is left unchallenged, it is binding on appeal. Despite the trial court's finding that half of the \$22,000.00 debt was used for marital purposes, it ultimately concluded that only \$10,500.00 of the debt was marital. However, Husband did not challenge the trial court's other findings from Finding 10e, so we do not disturb them.

¶ 18 Husband argues that Wife's evidence was not credible to support the trial court's finding that any portion of the debt was marital. The parties presented conflicting evidence at trial as to how the student loans were used. The trial court apparently chose to believe Wife's version of events rather than Husband's. We conclude that the trial court did not commit reversible error.

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IV. Conclusion

¶ 19 We hold that the trial court did not commit reversible error in its valuation of Husband's pension. Further, we hold that the trial court did not err in classifying and distributing Wife's student loans as marital debt.

AFFIRMED.

Judges INMAN and ARROWOOD concur.

Report per Rule 30(e).