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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-635

No. COA21-279

Filed 16 November 2021

Forsyth County, No. 18 CVD 5403

FRANCES D. ROACH, Plaintiff,

v.

MALLORY M. ROACH, Defendant.

Appeal by Plaintiff from order entered 11 December 2020 by Judge Carrie F. Vickery in Forsyth County District Court. Heard in the Court of Appeals 21 September 2021.

Harvey W. Barbee, Jr. for plaintiff-appellant.

No appellee brief filed.

MURPHY, Judge.

¶ 1 A trial court abuses its discretion when, absent a proper stipulation, it fails to follow each of the three steps of the equitable distribution process required by N.C.G.S. § 50-20(c). Here, the trial court abused its discretion by finding the parties stipulated to the distribution of certain real and personal property when the Record reflects no written stipulation existed and the trial court made no inquiry of the parties as to whether there was an oral stipulation. In addition, the trial court abused

its discretion by not following each step of the equitable distribution process outlined in N.C.G.S. § 50-20(c) when it ordered the parties' real and personal property to be sold without first valuing it.

BACKGROUND

¶ 2 This appeal arises from an action for equitable distribution. Plaintiff Frances D. Roach and Defendant Mallory M. Roach were married on 17 July 1982 and separated on 19 September 2018. During the marriage, the parties purchased three acres of real property where they built a home in Kernersville. The home is unencumbered, and Frances has resided there since the parties' separation. After an equitable distribution hearing on 3 December 2020, the trial court signed an *Equitable Distribution Judgment and Order*, entered on 11 December 2020, in which it concluded that "[t]he distributional factors set forth in N.C.G.S. § 50-20(c) weigh in favor of [Mallory]" and "[a]n equal distribution of marital and divisible property and debt is not equitable." The *Equitable Distribution Judgment and Order* also found that "[d]uring the course of the hearing, the parties agreed that the [home] would be listed for sale and the proceeds would be divided equally." The trial court ordered the parties to list the home for sale no later than 15 January 2021. The trial court also ordered the parties to list and sell twenty-five items of personal property on Craigs List, or another method the parties could mutually agree on.

¶ 3 Frances timely appealed, arguing she did not stipulate to listing or selling the real or personal property, and that (A) the trial court erred in ordering the sale of the home, as opposed to classifying, valuing, and distributing the asset; and (B) the trial court erred in ordering the sale of the twenty-five items of personal property, as opposed to classifying, valuing, and distributing the assets.

ANALYSIS

¶ 4 "Our review of an equitable distribution order is limited to determining whether the trial court abused its discretion in distributing the parties' marital property. Accordingly, the findings of fact are conclusive if they are supported by any competent evidence from the record." *Robinson v. Robinson*, 210 N.C. App. 319, 322, 707 S.E.2d 785, 789 (2011) (marks and citations omitted).

> However, even applying this generous standard of review, there are still requirements with which trial courts must comply. Under N.C.G.S. § 50-20(c), equitable distribution is a three-step process; the trial court must (1) determine what is marital and divisible property; (2) find the net value of the property; and (3) make an equitable distribution of that property.
>
> . . . .
>
> 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 [trial] court must be specific and detailed enough to enable a reviewing court to determine what was done and its correctness.

Id. at 322-23, 707 S.E.2d at 789 (marks and citations omitted).

¶ 5 While parties may stipulate as to any or all of these steps, any such stipulation must ordinarily be in writing. *See McIntosh v. McIntosh*, 74 N.C. App. 554, 556, 328 S.E.2d 600, 602 (1985) ("Any agreement entered into by parties regarding the distribution of their marital property should be reduced to writing, duly executed and acknowledged."). If the parties make an oral stipulation regarding the division of their marital property, that stipulation will not be binding unless it "affirmatively appear[s] in the record that the trial court made contemporaneous inquiries of the parties at the time the stipulations were entered into." *Id.*; *see also Robinson*, 210 N.C. App. at 324, 707 S.E.2d at 790. "It should appear that the [trial] court read the terms of the stipulations to the parties; that the parties understood the legal effects of their agreement and the terms of the agreement, and agreed to abide by those terms of their own free will." *McIntosh*, 74 N.C. App. at 556, 328 S.E.2d at 602.

A. Valuation and Distribution of Real Property

¶ 6 First, we address Frances's argument regarding the real property, the home. Frances concedes the trial court correctly classified the home as marital property. However, Frances argues that since there was no oral or written stipulation to sell the home, "the trial court [erred when it] skipped the second and third steps [of equitable distribution] by failing to value and distribute the asset to one party or the other, instead ordering it to be sold."

1. Stipulations

¶ 7 In the *Equitable Distribution Judgment and Order*, the trial court made the following finding of fact:

> 18. During the course of the hearing, the parties agreed that the [home] would be listed for sale and the proceeds would be divided equally.

Frances challenges Finding of Fact 18 as unsupported by the evidence. We agree. No evidence of either a written or oral stipulation regarding the valuation of the home appears in the Record before us. Nor is there a written or oral stipulation as to the distribution of the home.

a. No Written Stipulation

¶ 8 N.C.G.S. § 1A-1, Rule 16(a) states that "the [trial] court may in its discretion direct the attorneys for the parties to appear before the [trial] court for a conference to consider" the issues of the case, amendments to the pleadings, admissions of fact and "documents which will avoid unnecessary proof[,]" the number of expert witnesses, a reference of the case, matters of judicial notice, and any other matters "as may aid in the disposition of the action." N.C.G.S. § 1A-1, Rule 16(a) (2019). Rule 16(a) further states:

> If a conference is held, the judge shall make an order which recites the action taken at the conference, any amendments allowed to the pleadings, and any agreements made by the parties as to any of the matters considered, and which may limit the issues for trial to those not disposed of by

> admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

N.C.G.S. §1A-1, Rule 16(a) (2019).

¶ 9 Here, the *Equitable Distribution Pre-Trial Order* ("PTO") states the following:

> 9. Schedule D is a list of marital property upon which there is *disagreement as to distribution* and *disagreement as to date of separation value*.
>
> . . . .
>
> 18. The Presiding Judge shall rule on the following:
>
> . . .
>
> (c) What is the value of and which party shall be the owner of the items on Schedule[] D . . . ?

(Emphases added).

¶ 10 In order for a stipulation in a pretrial equitable distribution order to be binding, the parties must use unequivocal language that removes an issue from dispute. *See Despathy v. Despathy*, 149 N.C. App. 660, 662-63, 562 S.E.2d 289, 291 (2002). We have previously held "[a] stipulation need not follow any particular form, but its terms must be sufficiently definite and certain as to form a basis for judicial decision, and it is essential that the parties or those representing them assent to the stipulation." *Estate of Carlsen v. Carlsen*, 165 N.C. App. 674, 678, 599 S.E.2d 581, 584 (2004). "Accordingly, the effect of a stipulation by the parties withdraws a particular fact from the realm of dispute." *Plomaritis v. Plomaritis*, 222 N.C. App.

94, 101, 730 S.E.2d 784, 789 (2012). Our Supreme Court has also cautioned that "stipulations will receive a reasonable construction with a view to effecting the intent of the parties; but in seeking the intention of the parties, the language used will not be so construed as to give the effect of an admission of a fact obviously intended to be controverted[.]" *Rickert v. Rickert*, 282 N.C. 373, 380, 193 S.E.2d 79, 83 (1972).

¶ 11 In this case, Schedule D of the PTO is entitled "Marital Property as to Which There is Disagreement as to Distribution and Disagreement as to Value[.]" For each line item, there are columns for "value per W," "value per H," "give to, per W," and "give to, per H." A visual of Schedule D is reproduced below:

SCHEDULE D
MARITAL PROPERTY AS TO WHICH THERE IS DISAGREEMENT AS TO DISTRIBUTION AND DISAGREEMENT AS TO VALUE

	ITEM & CURRENT POSSESSION	VALUE PER W	VALUE PER H	GIVE TO, PER W	GIVE TO, PER H
	LEAVE THIS ROW BLANK				
1	[redacted] ROAD, KERNERSVILLE, NC 27284	To be Sold	$319,000.00	TBD	Sell and divide net proceeds 50/50

For the line item for the home, the column for "value per W" indicates "[t]o be [s]old[.]" Frances's response indicates she contends the value of the home is whatever price it would sell at. Under the "value per H" column, Mallory indicated a valuation of

"$319,000.00." The parties were not in agreement on the issue of valuation and, per the specific terms of paragraphs 9 and 18 of the PTO, the issue was to be determined by the trial court.

¶ 12 While both parties may have contemplated the home being sold, there was no stipulation or agreement. Frances's recognition of the valuation of the home in the PTO is the value it would sell at, while Mallory's recognition of the valuation of the home in the PTO is $319,000.00. This does not indicate an agreement as to the valuation of the home and does not withdraw the value of the home from the realm of dispute. The terms of a stipulation "must be definite and certain in order to afford a basis for judicial decision, and it is essential that they be assented to by the parties or those representing them." *Plomaritis*, 222 N.C. App. at 101, 730 S.E.2d at 789. The parties had no meeting of the minds as to valuation, much less a definite or certain agreement. The issue of the valuation of the home was left to the trial court's determination.

¶ 13 The same is true as to the issue of the *distribution* of the home. The line item for the home in Schedule D indicates under the "give to, per W" column, Frances indicated "TBD" or to be determined. Under the "give to, per H" column, Mallory indicated "[s]ell and divide net proceeds 50/50[.]" The parties were not in agreement as to the distribution of the home, and, again, the PTO left a determination of this issue to the trial court.

¶ 14 In addition to the lack of any valid stipulation or agreement in Schedule D, the title of the schedule utilized for this marital asset and non-schedule terms of the PTO indicate the distribution of the home was a fact "obviously intended to be controverted[.]" *Rickert*, 282 N.C. at 380, 193 S.E.2d at 83. There was not an agreement or binding stipulation removing the issues of the valuation and the distribution of the home from the trial court's determination due to the PTO. Further, there was not a binding stipulation during the actual trial on this matter.

b. No Oral Stipulation

¶ 15 Frances testified to the following during the equitable distribution hearing:

> [FRANCES'S COUNSEL:] Okay. Since separation have you been in that house [located in Kernersville]?
>
> [FRANCES:] Yes, sir.
>
> [FRANCES'S COUNSEL:] Okay. Tell the [trial court] what you would like to see happen as far as distribution of the house.
>
> [FRANCES:] Well, I feel like I deserve the ---
>
> [MALLORY'S COUNSEL]: --- I would object to that question, Your Honor.
>
> The reason I would object is because if you look at Schedule D, her -- it indicated that she wants the house to be sold, it states to be sold as does my client's column, sell and divide net proceeds.
>
> So I don't think how she wants to distribute it is in dispute.
>
> [FRANCES'S COUNSEL]: Your Honor, please, if you'll

> look at Schedule D. [Mallory] is the one that says he wants to sell and divide. That may be what we have to do, but she put *to be determined*.
>
> [MALLORY'S COUNSEL]: [Frances's Counsel], if you look at value per [wife], it says to be sold in your column. We thought (break in audio) agree that it would be sold.
>
> [FRANCES'S COUNSEL]: Okay.
>
> . . . .
>
> [FRANCES'S COUNSEL]: The house is a very sensitive issue to her. I think it's going to have to be sold, but she would rather stay there if it's possible. I don't think the numbers work, but if possible.

(Emphasis added).

¶ 16 This testimony indicates Frances did not orally agree to sell the home; her words indicate she did not understand the terms or effects of any such oral stipulation or agreement, and no inquiry was made by the trial court into the parties' understanding of the terms of any such agreement. *See McIntosh*, 74 N.C. App. at 556, 328 S.E.2d at 602. The trial court's finding of fact that "the parties agreed that the [home] would be listed for sale and the proceeds would be divided equally" is not supported by the Record. Accordingly, we do not consider Finding of Fact 18 in deciding if the trial court could depart from the three steps of the equitable distribution process required by N.C.G.S. § 50-20(c).

2. Three-Step Equitable Distribution Process

¶ 17 In the *Equitable Distribution Judgment and Order*, the trial court decreed:

> 6. The parties shall list the [home] for sale no later than [15 January 2021]. [Frances] shall propose a realtor to [Mallory] no later than [21 December 2020]. [Mallory] shall notify [Frances] if he is in agreement with [Frances's] proposed realtor as the listing agent, and if not, [Mallory] shall propose an alternate realtor no later than [30 December 2020]. If [Frances] is not in agreement with [Mallory's] proposed realtor, then [Mallory's] proposed realtor and [Frances's] proposed realtor shall select a mutually agreeable realtor and the parties shall promptly execute a listing agreement with the selected realtor.
>
> 7. The parties shall list the [home] for sale at the price recommended by the realtor and shall follow all recommendations of the realtor with regard to price dropping. If the realtor recommends any repairs or upgrades to the home prior to selling, the parties shall mutually agree upon repairs or upgrades prior to their undertaking. The parties shall then equally share the cost of any repairs or upgrades.
>
> 8. The parties shall accept any offers recommended by the realtor. Upon the sale of the property, the proceeds shall first be applied to realtor's fees and other costs and expenses traditionally associated with the sale of a home. Any remaining proceeds shall be split equally between the parties.

¶ 18 Frances argues the trial court erred by ordering the sale of the home without valuing it first and then distributing it to one of the parties. We agree.

¶ 19 "The trial court's role is to classify, value, and distribute property, not simply to order that it be sold. In doing so, the trial court must consider the property's market value, if any, less the amount of any encumbrance serving to offset or reduce the market value." *Miller v. Miller*, 253 N.C. App. 85, 105, 799 S.E.2d 890, 903 (2017)

(marks omitted). "In order to properly conduct [the equitable distribution process], it is clear . . . the trial court [must] actually place a value on the property to be distributed." *Id.* at 104, 799 S.E.2d at 903.

> The trial court must value and distribute each parcel of real property to a party, and a distributive award may be needed to equalize the division or to make the distribution equitable. Then, the party who receives distribution of the real property is free to keep it or sell it.

Id. at 105, 799 S.E.2d at 903.

¶ 20 The trial court did not place a valuation on the home. In Finding of Fact 30, the trial court listed items of real and personal property acquired during the marriage and valued all the listed items, but not the home:

> 30. The following other items of property were acquired during the marriage and the [trial court] values them as follows:
>
> a. 22 revolver, 35 revolver and a single barrel shot gun valued collectively at $1,500[.00]
>
> b. Coin collection - $1,000[.00]
>
> c. [Home]
>
> d. Four televisions - $100[.00]
>
> e. 1 bedside table - $20[.00]
>
> f. Upstairs bedroom queen bed - $100[.00]
>
> g. Chain Saw - $100[.00]
>
> h. [Frances's] clothing - $100[.00]

While the trial court valued the other items in this list, it failed to place any value on the home. The trial court erred by failing to place a value on the home, and we vacate and remand for the trial court to value the home as of the date of separation. *See Soares v. Soares*, 86 N.C. App. 369, 371-72, 357 S.E.2d 418, 419 (1987) (holding the trial court erred by ordering the sale of real property without first determining its value and vacating and remanding the order appealed from).

B. Valuation and Distribution of Personal Property

¶ 21 Frances again does not challenge the trial court's classification of the twenty-five items of personal property listed in Finding of Fact 31 as marital. However, Frances argues "[t]he trial court failed to value or distribute the items to either party." On these issues, we also agree.

¶ 22 In the *Equitable Distribution Judgment and Order*, the trial court made the following finding of fact:

> 31. The following items of property were acquired during the marriage. During the course of the hearing, the parties indicated verbal consent to sell the items and divide the proceeds equally:
>
> a. Golf cart
>
> b. Zero turn lawn mower
>
> c. Living room sofa
>
> d. Recliner
>
> e. Grinder

f. Kitchen dishes, stoneware 1 mixer

g. Master bedroom queen bed

h. Chest of drawers

i. 1 bedside table

j. Recliner

k. 2 lamps

l. Computer and printer sideboard

m. Desk and Chair – 3rd bedroom

n. Hand drill

o. Air compressor

p. 4 Oak rocking chairs

q. Oak swing

r. Pots and pans

s. Outside gas grill

t. Hand tools

u. 2 Wingback chairs

v. Antique cabinet

w. End tables

x. Floor lamp

y. Large [m]irror

The trial court went on to decree:

> 9. The parties shall list the items of personal property set out [in Finding of Fact 31] for sale and divide the proceeds equally. The parties shall list the items for sale on Craigs List, or via another method if they mutually agree. The parties shall list the items for sale at a mutually agreeable price. If an individual item has not sold within ten (10) days of listing for sale, the parties shall drop the price by 10%. The price reduction mechanism shall continue until the item is sold or the parties agree otherwise.

¶ 23 As discussed in paragraph 5, above, before accepting an oral stipulation to distribute marital property, the trial court is required to conduct a contemporaneous inquiry of the parties to ensure the parties understand the legal effect of such an agreement and the terms of their agreement. *McIntosh,* 74 N.C. App. at 556, 328 S.E.2d at 602. The Record reflects the trial court did not ask the parties about the terms of any verbal agreement to sell these items. The trial court did not ensure the parties understood the legal effect and the terms of any agreement. As such, there is no valid stipulation and the trial court was required to complete the three-step process of classifying, valuing, and distributing the twenty-five items of personal property listed in Finding of Fact 31. The trial court erred by failing to conduct the three-step equitable distribution process, and we must vacate the *Equitable Distribution Judgment and Order* and remand to the trial court for entry of a new equitable distribution order.

CONCLUSION

¶ 24 The trial court erred by failing to value and distribute the home and the twenty-five items of personal property listed in Finding of Fact 31 of the *Equitable Distribution Judgment and Order*. As such, we vacate and remand for the trial court to value each marital asset as of the date of separation, and to determine the total net value of the entire marital estate. After valuing the entire marital estate on remand, the trial court must also reconsider, based on these complete valuations, whether an equal division is unequitable, how the property will be distributed, and if any distributive award will be necessary. The trial court shall enter a new equitable distribution order accordingly.

VACATED AND REMANDED.

Judges INMAN and HAMPSON concur.

Report per Rule 30(e).