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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-635

Filed 21 March 2023

Henderson County, No. 20 CVD 4

WESLEY DONATI, Plaintiff,

v.

HOLLY DONATI, Defendant.

Appeal by plaintiff from judgment entered 22 April 2022 by Judge Emily G. Cowan in Henderson County District Court. Heard in the Court of Appeals 7 February 2023.

Donald H. Barton, P.C., by Donald H. Barton, for Plaintiff-Appellant.

No brief filed for Defendant-Appellee.

CARPENTER, Judge.

Wesley Donati (“Plaintiff-Husband”) appeals from the “Equitable Distribution Judgment” (the “Judgment”) entered by the Henderson County District Court. On appeal, Plaintiff-Husband argues this Court should reverse the Judgment because the parties are entitled to reimbursement for the separate funds that they each contributed toward the acquisition of their former marital residence (the “Home”). After careful review of the record, we affirm the Judgment.

I. Factual & Procedural Background

This case concerns the trial court’s equitable distribution of the parties’ marital and divisible property. Plaintiff-Husband and Holly Donati (“Defendant-Wife”) were married on 24 January 2014 and separated on 11 November 2019. No children were born of the marriage. On 2 January 2020, Plaintiff-Husband filed a complaint for divorce from bed and board pursuant to N.C. Gen. Stat. § 50-7(4) and sought equitable distribution. Plaintiff-Husband asserted in the complaint that he “is entitled to a share greater than . . . fifty percent of all Marital and Divisible properties[.]”

On 31 January 2020, Defendant-Wife filed an “Answer and Counterclaim,” in which she sought equitable distribution, an interim distribution, post-separation support and alimony, and costs and attorneys’ fees. Defendant-Wife “allege[d] that an equal division by using net value of all marital and divisible property would not be equitable in this case[.]”

On 3 August 2020, Plaintiff-Husband filed an initial equitable distribution inventory affidavit. Along with the schedules, Plaintiff-Husband included the following contentions:

Wife wants Chevrolet Silverado, Jayco camper, hot tub, and marital home Husband wants half of the equity of the marital properties and personal belongings that belong to the Husband that Wife will not allow Husband to retrieve. Husband will keep the debt from the Ferris mower. Each party can keep their own 401k.

On 30 June 2021, Plaintiff-Husband filed an amended equitable distribution

inventory affidavit, in which he included the following additional contention: “Husband sold house in his name owned before marriage and put about \$60,000.00 into the marital home.” On 30 November 2020, Defendant-Wife filed an equitable distribution inventory affidavit. The parties listed under the “marital assets” or “marital debts” sections of their affidavits’ schedules: the Home, debts associated with the Home, vehicles, a lawnmower, a hot tub, and other personal property.

On 14 April 2022, a draft “Equitable Distribution Pre-Trial Order” was filed in the trial court, but this draft order was not signed by the parties, counsel, or the trial judge. On 20 April 2022, the matter came on for hearing before the Honorable Emily G. Cowan.

On 22 April 2022, the trial court entered the written Judgment, finding *inter alia*: (1) a complete distribution in-kind is practical, (2) the Home is a marital asset, and (3) an equal division of marital and divisible property is not equitable. On 19 May 2022, Plaintiff-Husband filed a timely written notice of appeal. On appeal, Plaintiff-Husband did not file the verbatim transcript from the hearing but did include in the record a narrative (the “Narrative”) of the proceeding pursuant to Rule 9(c)(1) of the North Carolina Rules of Appellate Procedure.

II. Jurisdiction

The Judgment is a final judgment; therefore, this Court has jurisdiction to address Plaintiff-Husband’s appeal pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2021).

III. Issues

The issues before this Court are whether the trial court erred by not: (1) making specific findings of fact as to each factor under N.C. Gen. Stat. § 50-20(c), for which evidence was presented; (2) finding that the presumption of an in-kind distribution was rebutted; and (3) ordering a reimbursement or credit to the parties for their separate property contributions toward the acquisition of the Home.

IV. Standard of Review

“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).

V. Analysis

A. Findings of Fact under N.C. Gen. Stat. § 50-20(c)

In his first argument, Plaintiff-Husband contends the trial court erred in not making findings of fact as to each factor under N.C. Gen. Stat. § 50-20(c)(1)-(12), for which evidence was presented. We disagree. On appeal, Plaintiff-Husband only generally challenges the trial court’s findings of fact and does not point to any specific item of evidence that he alleges the trial court failed to consider. *See Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 398, 617 S.E.2d 306, 314 (2005) (“It is not the role of this Court to fabricate and construct arguments not presented by the

parties before it.”), *overruled in part on other grounds, Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 853 S.E.2d 698 (2021). Thus, we consider only those findings of fact made by the trial court in our determination of whether the trial court satisfied its statutory obligation under N.C. Gen. Stat. § 50-20(c).

When the trial court finds that an equal division of marital property and divisible property would not be equitable, it must consider the factors set out in N.C. Gen. Stat. § 50-20(c), including, but not limited to:

(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.

. . . .

(12) Any other factor which the court finds to be just and proper.

N.C. Gen. Stat. § 50-20(c)(11a), (12) (2021); *see also Fountain v. Fountain*, 148 N.C. App. 329, 341, 559 S.E.2d 25, 34 (2002) (explaining a factor is “just and proper” under subsection (c)(12) when it relates “to the economic condition of the marriage”). The trial court need not “make exhaustive findings regarding the evidence presented”; rather, the trial court is only required to make findings as to the ultimate facts. *Armstrong v. Armstrong*, 322 N.C. 396, 405–06, 368 S.E.2d 595, 600 (1988) (citations omitted). “If evidence is presented only as to one of the [S]ection 50-20 statutory factors and that evidence weighs toward an unequal distribution, a finding as to that

single factor will support the trial court's conclusion of unequal distribution." *Rosario v. Rosario*, 139 N.C. App. 258, 261, 533 S.E.2d 274, 276 (2000) (citations omitted).

Here, the trial court found as fact that it considered all evidence presented by the parties, as well as the statutory factors set out in N.C. Gen. Stat. § 50-20(c). It made a specific finding of fact as to statutory factor 11a, tending to show Defendant-Wife paid on the parties' line of equity from the date of separation until the date of the hearing, making all payments and decreasing the total balance owed. It also made findings of fact under statutory factor 12, relating to the marital Home and its acquisition, which demonstrate: (1) Plaintiff-Husband removed marital assets from the Home when Defendant-Wife was not present; (2) the Home is located on land that was owned by and purchased from Defendant-Wife's family; (3) the parties lived in the Home for several years while it was owned by Defendant-Wife's father; (4) Plaintiff-Husband requested his name be on the Home's title while the parties were reconciling during a temporary separation; (5) Defendant-Wife's father sold the Home to the parties following this temporary separation; and (6) the Home was owned by the parties for only months prior to their permanent separation. These findings of fact made under N.C. Gen. Stat. § 50-20(c) support the trial court's conclusion that an unequal distribution of assets, in favor of Defendant-Wife, is equitable. *See Rosario*, 139 N.C. App. at 261, 533 S.E.2d at 276; *see also* N.C. Gen. Stat. § 50-20(c). Therefore, the trial court did not abuse its discretion by not making exhaustive findings of fact as to the Section 50-20(c) factors. *See Wiencek-Adams*, 331 N.C. at

691, 417 S.E.2d at 451; *Armstrong*, 322 N.C. at 405–06, 368 S.E.2d at 600.

B. Findings of Fact regarding “In-Kind” Distribution of Marital Property

In his second argument, Plaintiff-Husband contends the trial court erred by not finding the presumption of an in-kind distribution had been rebutted in its Judgment. We disagree and discern no basis for the trial court to make such a finding.

North Carolina General Statute § 50-20(e) “create[s] a rebuttable presumption that an in-kind distribution of [marital or divisible] property is equitable.” *Urciolo v. Urciolo*, 166 N.C. App. 504, 506, 601 S.E.2d 905, 908 (2004) (citation omitted); *see also* N.C. Gen. Stat. § 50-20(e) (2021) (“In any action in which the presumption [of an in-kind distribution] is rebutted, the court in lieu of in-kind distribution shall provide for a distributive award in order to achieve equity between the parties.”). “[I]n equitable distribution cases, if the trial court determines that the presumption of an in-kind distribution has been rebutted, it must make findings of fact and conclusions of law in support of that determination.” *Urciolo*, 166 N.C. App. at 507, 601 S.E.2d at 908 (citation omitted). When the trial court needs “to facilitate, effectuate or supplement a distribution of marital or divisible property,” it “may provide for a distributive award.” N.C. Gen. Stat. § 50-20(e); *see Painter-Jamieson v. Painter*, 163 N.C. App. 527, 529, 594 S.E.2d 217, 219 (2004).

Here, the trial court made several pertinent findings of fact indicating it was able to achieve equity in its property distribution by allocating the marital and

divisible assets between the parties. In other words, the trial court did not need “to facilitate, effectuate or supplement” the distribution of property between the parties with a distributive award. *See* N.C. Gen. Stat. § 50-20(e). Rather, the trial court concluded that “[a] complete distribution in-kind is practical, and the most equitable division in this matter.” Accordingly, it made an in-kind distribution of the marital and divisible property without making a distributive award. *See* N.C. Gen. Stat. § 50-20(e). Because the presumption under N.C. Gen. Stat. § 50-20(e) was not rebutted in this case, the trial court was not required to make findings regarding such determination. *See Urciolo*, 166 N.C. App. at 506, 601 S.E.2d at 908. Therefore, we reject Plaintiff-Husband’s argument.

C. Reimbursement for Separate Property Contributions

In his third argument, Plaintiff-Husband asserts he “is entitled to the return or reimbursement or credit for his separate property contributions to the purchase of the marital residence.” He maintains his separate property contribution totaled \$60,000.00, while Defendant-Wife’s separate property contribution towards the residence totaled \$40,000.00. Because Plaintiff-Husband has failed to show that either party admitted evidence which traced the respective contributions of separate property, we disagree with Plaintiff-Husband’s assertions.

North Carolina General Statute § 50-20:

requires the trial judge to follow a three-step procedure in deciding equitable distribution matters: (1) all property must be classified as marital or separate, and when

property has dual character, the component interests of the marital and separate estates must be identified; (2) the net value of marital property must be determined; and (3) marital property must then be distributed equally or, if equal division would be inequitable, distributed according to the equitable factors set out in N.C. Gen. Stat. [§] 50-20(c).

McIver v. McIver, 92 N.C. App. 116, 123–24, 374 S.E.2d 144, 149 (1988) (citations omitted); *see also* N.C. Gen. Stat. § 50-20. The trial court’s “[c]lassification of property must be supported by the evidence and by appropriate findings of fact.” *Id.* at 127, 374 S.E.2d at 151 (citation omitted).

“A party claiming that property is marital has the burden of proving beyond a preponderance of the evidence that the property was acquired: by either or both spouses; during the marriage; before the date of separation; and is presently owned.” *Fountain*, 148 N.C. App. at 332, 559 S.E.2d at 29 (citation and quotation marks omitted); *see also* N.C. Gen. Stat. § 50-20(b)(1) (2021). “If the party meets this burden, then the burden shifts to the party claiming the property to be separate to show by a preponderance of the evidence that the property meets the definition of separate property” *Lilly v. Lilly*, 107 N.C. App. 484, 486, 420 S.E.2d 492, 493 (1992) (citation and quotation marks omitted). “‘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)(2) (2021).

This Court has recognized the source of funds theory, in which “a single asset

may be acquired through contributions of both marital and separate property” *Minter v. Minter*, 111 N.C. App. 321, 327, 432 S.E.2d 720, 724, *disc. rev. denied*, 335 N.C. 176, 438 S.E.2d 201 (1993). Under the source of funds 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.” *Wade v. Wade*, 72 N.C. App. 372, 382, 325 S.E.2d 260, 269 (citation omitted), *disc. rev. denied*, 313 N.C. 612, 330 S.E.2d 616 (1985).

Generally, the commingling of separate funds with marital funds does not transmute separate property into marital property. *O’Brien v. O’Brien*, 131 N.C. App. 411, 419, 508 S.E.2d 300, 306 (1998), *disc. rev. denied*, 350 N.C. 98, 528 S.E.2d 365 (1999). Nevertheless, transmutation of separate property into marital property may occur “if the party claiming the property to be his separate property is unable to trace the initial deposit [of separate property] into its form at the date of separation.” *Fountain*, 148 N.C. App. at 333, 559 S.E.2d at 29 (citation omitted).

Here, the trial court found the Home was marital property. The trial court also found the Home “was purchased during the marriage with marital funds and both parties’ names on are on the deed.” Although a full transcript of the 20 April 2022 hearing was not provided on appeal, the Rule 9(c)(1) Narrative indicates Plaintiff-Husband testified the Home was purchased during the course of the marriage but before the date of the separation and was owned by the parties as of the date of the

hearing. Thus, the burden of proof has been met showing the Home is marital property. *See Fountain*, 148 N.C. App. at 332, 559 S.E.2d at 29; *see also* N.C. Gen. Stat. § 50-20(b)(1). Hence, the burden shifted to Plaintiff-Husband to prove separate funds contributed to the purchase of the Home. *See Lilly*, 107 N.C. App. at 486, 420 S.E.2d at 493.

The Narrative also shows Plaintiff-Husband testified “that he sold a residence and real property owned by him, prior to the marriage, and applied \$60,000.00 of net proceeds of those monies into the parties’ marital Home.” Similarly, Defendant-Wife testified “she put \$40,000.00 into the marital residence from the sale of real estate owned before the marriage.” Plaintiff-Husband has not shown, nor does our review of the record reveal, that either party presented evidence tending to show any funds used to acquire the Home can be traced back into separate property accounts. *See Minter*, 111 N.C. App. at 329, 432 S.E.2d at 725 (holding the husband did not meet his burden of proving “the source of the contested property was separate property”). Because Plaintiff-Husband did not introduce any evidence tracing his contribution, he cannot meet his burden of proving that the Home was acquired, in part, with separate property contributions. *See Lilly*, 107 N.C. App. at 486, 420 S.E.2d at 493; *Minter*, 111 N.C. App. at 327, 432 S.E.2d at 724. Accordingly, the trial court did not abuse its discretion by finding the Home was a marital asset. *See Wiencek-Adams*, 331 N.C. at 691, 417 S.E.2d at 451.

VI. Conclusion

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Opinion of the Court

We conclude the trial court did not abuse its discretion in determining that an unequal distribution of marital and divisible property in favor of Defendant-Wife is equitable. The presumption that an in-kind distribution is equitable was not rebutted in the case; thus, the trial court did not err by not making a finding regarding the rebuttal of this presumption. Finally, we conclude the trial court did not abuse its discretion in finding the Home was a marital asset because Plaintiff-Husband did not satisfy his burden to show that any funds used to acquire the Home constituted “separate property” within the meaning of N.C. Gen. Stat. § 50-20(b)(2).

AFFIRMED.

Chief Judge STROUD and Judge RIGGS concur.

Report per Rule 30(e).