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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1425

Filed: 21 August 2018

Mecklenburg County, No. 15 CVD 5249

CATHERINE A. BOND, Plaintiff,

v.

MICHAEL MANFREDO, Defendant.

Appeal by defendant from judgment entered 8 June 2017 by Judge Sean P. Smith in Mecklenburg County District Court. Heard in the Court of Appeals 7 August 2018.

Seth B. Weinshenker, P.A., by Seth B. Weinshenker, for plaintiff-appellee.

Epperson Law Group, PLLC, by James L. Epperson, for defendant-appellant.

ARROWOOD, Judge.

Michael Manfredo (“defendant”) appeals from equitable distribution judgment ordering him to pay Catherine A. Bond (“plaintiff”) a distributive award of \$240,561.08 to achieve an equal distribution of the marital property. For the following reasons, we reverse in part and remand.

I. Background

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Plaintiff and defendant were married on 21 May 1999 and separated approximately fifteen years later on 8 November 2014. On 18 March 2015, plaintiff filed a complaint asserting claims for (1) postseparation support and alimony and (2) equitable distribution. After being allowed an extension of time to respond to plaintiff's complaint, defendant filed an answer, counterclaims for postseparation support and alimony and for equitable distribution, and a motion to dismiss on 29 May 2015; followed by an amended answer, counterclaims for postseparation support and alimony and for equitable distribution, and a motion to dismiss on 16 June 2015. Plaintiff filed a reply on 4 September 2015.

Following discovery, a pretrial conference, and the filing of equitable distribution affidavits, the matter came on for an equitable distribution hearing in Mecklenburg County District Court before the Honorable Sean P. Smith on 8 March 2017.

During the hearing, the trial court went through an equitable distribution pretrial order filed 3 March 2017 and addressed the contested property item by item, announcing its determination regarding each item after considering the evidence and arguments of both parties concerning the item. The trial court then heard arguments on whether an equal or unequal distribution was proper. The trial court concluded the hearing by allowing the parties to submit additional arguments on distribution.

On 22 March 2017, defendant submitted his argument in support of unequal distribution and plaintiff submitted her response.

On 8 June 2017, the trial court entered a judgment of equitable distribution that ordered defendant to pay plaintiff a distributive award of \$240,561.08 to achieve an equal distribution of the marital property. Defendant filed notice of appeal on 20 June 2017.

II. Discussion

On appeal, defendant raises issues with the trial court's distribution of a home in Denver, North Carolina (the "Denver Home") and City of New York pension plans. Defendant also challenges the trial court's determination that an equal distribution was equitable in this instance.

Equitable distribution is governed by statute, which 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" N.C. Gen. Stat. § 50-20(a) (2017). This Court has explained that,

[i]n making an equitable distribution of marital assets, the trial court is required to undertake a three-step process: (1) to determine which property is marital property, (2) to calculate the net value of the property, fair market value less encumbrances, and (3) to distribute the property in an equitable manner.

Fitzgerald v. Fitzgerald, 161 N.C. App. 414, 418, 588 S.E.2d 517, 520 (2003) (internal quotation marks and citation omitted). “[I]n 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.” *Carr v. Carr*, 92 N.C. App. 378, 379, 374 S.E.2d 426, 427 (1988) (citing *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)).

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.

Wienczek-Adams v. Adams, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (citations omitted).

1. Denver Home

Defendant first argues that the trial court erred in the equitable distribution by classifying the Denver Home as marital property.

Defendant makes this argument despite his classification of the Denver Home as marital property in his equitable distribution affidavit filed on 25 September 2016 and the parties’ agreement that the Denver Home was marital property in the equitable distribution pretrial order filed on 3 March 2017.

The affidavit and pretrial order are sufficient in themselves to support the trial court’s classification of the Denver Home as marital property. However, because this

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was the first and the most contentious issue raised at the equitable distribution hearing, and because the trial court specifically issued findings and conclusions concerning the Denver Home, we address defendant's argument on appeal.

The evidence presented at the equitable distribution hearing relevant to the classification of the Denver Home was that during the early years of the parties' marriage, the parties lived separately in New York. The parties talked about moving to North Carolina together and, in October 2007, defendant made a down payment of \$202,636.50 to purchase the Denver Home. The money for the down payment was defendant's separate property obtained from the refinance of his property in New York. Although defendant was listed alone on the mortgage, both plaintiff and defendant attended the closing and signed the deed to the Denver Home. Plaintiff and plaintiff's "best friend" testified that defendant stated that his intent was to build the house for plaintiff. Defendant testified that he "could've" stated that he built the house for plaintiff and even acknowledged that plaintiff picked the house she wanted to be built. Plaintiff testified that defendant never indicated by words or writing that he wanted the Denver Home to remain his separate property. Defendant, however, testified that he never intended the Denver Home to be a gift to plaintiff and that plaintiff was only included on the deed because the realtor and the attorney said that she had to be included at the time of the closing.

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Plaintiff and defendant traveled back and forth between New York and North Carolina for a number of years before moving to the Denver Home together in July 2013. Plaintiff and defendant lived together in the Denver Home until their separation in November 2014, at which time plaintiff moved out.

Upon consideration of this evidence and the arguments, the trial court announced its determination that the Denver Home was marital property, explaining in open court as follows:

I'm going to find that this property, the [Denver Home], was acquired during the marriage and was deeded in both parties' names. \$202,000 -- \$202,636.50 was used by the husband as a down payment, which was proceeds from a refinance of his separate property.

The parties previously maintained separate bank accounts and generally lived apart during the marriage. However, this property was obtained and purchased for the joint benefit of the parties. This was the intent at the time of the purchase, and the parties subsequently lived together and separately at various times at the property subsequent to the purchase.

Deeding the property in both parties' names creates a rebuttable presumption to be rebutted by the greater weight of the evidence to be separate property. This expressed intent was not indicated -- to keep it separate property was not indicated at the time of the purchase, nor was it indicated in the years subsequent, though it was claimed by the husband in his testimony at trial.

The parties' joint use of the property as well as their joint intent to use the [Denver Home] as a property to live on after leaving New York precludes this presumption from being rebutted. Therefore, it's marital property subject to

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distribution.

In the 8 June 2017 judgment, the trial court found that the Denver Home was marital property and distributed the \$241,738.16 in equity to defendant. The court further explained in finding number six that,

[a]s to [the Denver Home], the distributable equity of the marital home of \$241,738.16 was calculated, by stipulation of the parties, by deducting the mortgage balance of \$108,261.84 as of date of separation, from the agreed-upon value of the marital home of \$350,000.00. After the date of separation, the [d]efendant continued to reside in the marital home. The remaining mortgage debt is distributed to the husband along with the marital home. Any increase in the home from date of separation to the present is divisible property, and is already included in the parties' stipulation as to the equity in the home.

The court also found that,

[d]efendant undoubtedly intended to make a gift to the marriage of the marital home (to the extent of the down payment of approximately \$202,000.00 on said home, which were part of the proceeds of the sale of a separate parcel of real property owned by the husband prior to the party's marriage); that said marital home was put in the names of both parties, that the [d]efendant allowed the [p]laintiff to pick out said marital home, and purchased it for her to live in; and that the [d]efendant never expressed in writing (such writing not being legally required, but certainly probative of the issue), that he expected to receive his down payment back from the wife.

Now on appeal, defendant contends the trial court ignored the evidence that he used \$202,636.50 of his own separate property for the down payment on the

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Denver Home and erred in failing to apply the source of funds rule to determine that at least part of the Denver Home was his separate property. We disagree.

It is obvious from the announcement of the trial court's decision in open court that the court did not ignore the evidence that defendant used separate funds to make the down payment on the Denver Home. Instead, the court's findings make clear that it determined defendant's use of separate funds for the purchase of the Denver Home was a gift to the marriage.

In reviewing the trial court's gift determination, we are guided by the definitions in the equitable distribution statute. "Marital property" is defined in the statute as follows:

"[m]arital 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 in accordance with subdivision (2) or (4) of this subsection It is presumed that all real property creating a tenancy by the entirety acquired after the date of marriage and before the date of separation is marital property. Either presumption may be rebutted by the greater weight of the evidence.

N.C. Gen. Stat. § 50-20(b)(1) (2017). In the definition for "separate property," the statute further provides that "property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance." N.C. Gen. Stat. § 50-20(b)(2). This Court explained in *McLean v. McLean* that "[d]onative intent is properly presumed when a

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spouse uses separate funds to furnish consideration for property titled as an entireties estate.” 323 N.C. 543, 551, 374 S.E.2d 376, 381 (1988).

In this case, the trial court’s determination that the down payment for the Denver Home was a gift to the marriage is supported by the court’s findings, which in turn are supported by the evidence. What defendant essentially asks this Court to do is to reweigh the evidence. We decline to do so.

2. Pension Plan

Defendant also argues that the trial court erred in the equitable distribution in its classification, valuation, and distribution of his City of New York Pension Plan.

The equitable distribution pretrial order shows that defendant participated in a City of New York Pension Plan from 1987 to 2007 and that defendant receives a monthly benefit of \$3,051.00. Similarly, plaintiff participated in a City of New York Pension Plan from 1987 to 2003 and receives a monthly benefit of \$2,518.00. Both pension benefits are part marital and part separate. The parties stipulated that the marital portion of each pension was forty percent and, therefore, \$1,220.40 of defendant’s monthly benefit was marital and \$1,007.20 of plaintiff’s monthly benefit was marital.

At the equitable distribution hearing, plaintiff argued to the trial court that the difference between the marital portions of the monthly benefits, \$213.20, should be split so that wife receives \$106.60 each month. Defendant argued the calculations

were not that simple and because there were no experts to testify as to life expectancy and present value, the pensions could not be distributed as part of the equitable distribution. In response, plaintiff argued that the life expectancy tables in N.C. Gen. Stat. § 8-46 could be used to determine the value of the life of the benefit and then the value of the life of the benefit could be discounted to present value. Defendant repeatedly objected to plaintiff's proposed method for valuing the pension plans, but defendant would not offer an alternative method. Instead, defendant argued the trial court could not distribute the pension plans because there were no experts available to testify.

Based on the stipulations of the parties as to the marital portion of the pensions and to the fair market value of the monthly benefits as of the date of separation, and based on the arguments of the parties, the trial court valued and distributed the pension plans by considering them together as follows:

10. Regarding [defendant's] City of New York pension and [plaintiff's] City of New York pension, the Court finds that [p]laintiff's present valuation as to the monetary difference in the pensions, \$15,316.00, is based upon sound financial principles, and statutory actuary tables in [N.C. Gen. Stat. §] 8-46. The difference in the marital portion of the monthly benefits to each party, and then dividing that amount by two is \$107.60. This sum is then multiplied by the number of months, (rounded out) 227, that are in 18.9 years, (which is the life expectancy of the [d]efendant who is currently 63 years old), pursuant to in [sic] [N.C. Gen. Stat. §] 8-46. That sum is \$24,425.20. The present value of that amount over 18.9 years at a 2.5% discount rate, is

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\$15,316.00, and is awarded to the wife. Defendant argued that an expert was necessary to value these pensions, but offered no alternative valuation of these two pension plans, or option for distribution.

Now on appeal, defendant acknowledges that the parties stipulated to the marital portion of the monthly pension plan benefits, but maintains the trial court erred because plaintiff failed to present any evidence concerning the life expectancy of the parties to value the pensions. Defendant also argues the trial court erred by considering the pension plans together and not valuing them individually.

Although this Court has stated there is no required method for valuing marital property, *see Robertson v. Robertson*, 174 N.C. App. 784, 785, 625 S.E.2d 117, 119 (2005) (“While there is no required method to follow in assessing the value of the parties’ marital property, the approach utilized must be sound[.]” (internal quotation marks omitted)), this Court has set forth a process for valuing a defined benefit plan like the pension plans at issue here, *see Bishop v. Bishop*, 113 N.C. App. 725, 731, 440 S.E.2d 591, 595-96 (1994).

First, the trial court must calculate the amount of monthly pension payment the employee, assuming he retired on the date of separation, will be entitled to receive at the later of the earliest retirement age or the date of separation. This calculation must be made as of the date of separation and shall not include contributions, years of service or compensation which may accrue after the date of separation. The calculation will however, include gains and losses on the prorated portion of the benefit vested at the date of separation. Second, the trial court must determine the employee-spouse’s life expectancy as of the date of separation and use this figure to ascertain the

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probable number of months the employee-spouse will receive benefits under the plan. 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. . . . 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.

Bishop, 113 N.C. App. at 731, 440 S.E.2d at 595-96 (internal quotation marks and citations omitted).

A review of the record in this case shows that the trial court attempted to follow the procedure set forth in *Bishop* using the life expectancies provided in N.C. Gen. Stat. § 8-46. The trial court's method was sound. However, we agree with defendant that the trial court erred in valuing the difference between the marital portion of the monthly benefits to each party instead of valuing the actual marital portion of the monthly benefits individually. In valuing the difference between the marital portion of defendant's and plaintiff's monthly benefit, the trial court never determined the value of the pension plans. The trial court's calculations failed to take into account variables such as plaintiff's life expectancy and the effect it has on the value of her pension plan. In order to properly determine the value of the parties' pension plans for equitable distribution purposes, the trial court must value the plans individually

and then consider the values of each plan in distributing the marital property equitably.

Additionally, we note that even if the trial court did not err in valuing the difference in the marital portion of the monthly benefits to each party, the trial court's erred in calculating each parties' portion of the difference to be \$107.60, as found in finding number 10. A review of the calculations demonstrates that the difference between the marital portions of each parties' monthly benefit is \$213.20. When that difference is split between defendant and plaintiff, each parties' portion is \$106.60.

Because the trial court never properly valued the marital portion of the monthly benefits to each party under their respective pensions, we reverse that portion of the equitable distribution award. Upon remand, the trial court should value each pension separately in keeping with the method set forth in *Bishop*. The value of each individual pension may then be used in the determination of an equitable distribution of marital property.

3. Equal Distribution

Lastly, defendant argues the trial court erred in determining that an equal distribution was equitable in this instance.

Our Supreme Court has held "that an equal division of marital property is mandatory unless the trial court determines that an equal division would be inequitable. The party seeking an unequal division bears the burden of showing, by

a preponderance of evidence, that an equal division would not be equitable.” *Armstrong v. Armstrong*, 322 N.C. 396, 404, 368 S.E.2d 595, 599 (1988) (citing *White v. White*, 312 N.C. 770, 776, 324 S.E.2d 829, 832-33 (1985)). “[W]ritten findings of fact are required in every case in which a distribution of marital property is ordered under the Equitable Distribution Act.” *Id.* at 403, 368 S.E.2d at 599. Ultimately, however, it is within the trial court’s discretion to determine whether an equal distribution is equitable or not. *Leighow v. Leighow*, 120 N.C. App. 619, 621-22, 463 S.E.2d 290, 291-92 (1995) (“It is entirely within the trial court’s discretion, absent some clear abuse, to determine whether or not to divide the marital estate equally or unequally.”).

Concerning the distribution of marital assets in the present case, the trial court found as follows in finding number 12:

- a. The Court considered the factors for an unequal division put forward by the parties in the PTO, and all the statutory factors for an unequal distribution, and finds that none of the factors contained in [N.C. Gen. Stat. §] 50-20(c), apply in this case to justify an unequal distribution of the marital property of the parties. The Court finds that there has been no credible evidence submitted by the [d]efendant to rebut the strong presumption under the Equitable Distribution Statute that equitable distribution means an equal distribution of the marital assets, and that he should receive an unequal distribution of the marital assets. The Court thus finds that an equal distribution of calculable marital assets, as set forth herein, is appropriate and is equitable.

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- b. In requesting an unequal distribution of the marital assets, [d]efendant relied, in part, upon the catch-all provision of [N.C. Gen. Stat. §] 50-20(c)(12), and stated in the PTO, that “husband used separate funds for the down payment of the N.C. [marital] home. Wife put no money down.” The Court does not find this to be a sufficient reason to make an unequal distribution of marital assets.

As discussed in the first issue on appeal above, the trial court further explained in finding 12.b. that the down payment is not sufficient to warrant an unequal distribution because the down payment was a gift to the marriage. Based on the evidence and its findings, the trial court concluded as follows:

After consideration of the parties’ contentions regarding an unequal division of property, and based upon the factors for unequal division of marital property, the Court determines that an equal distribution of calculable marital asset[s,] as set forth herein, is appropriate and is equitable.

Defendant now argues that the marriage in this case was unique and, “[i]n a marriage where parties keep separate houses and households, and do not live together for the vast majority of the marriage, applying the idea that equal distribution is equitable is fundamentally unfair to the parties.” Defendant contends the trial court failed to consider and make findings on the distributional factors in N.C. Gen. Stat. § 50-20(c). Yet, defendant does not indicate which factors the trial court should have addressed more specifically in the order. Defendant only states that he offered “testimony about the unconventional marriage of the parties” and

“uncontroverted evidence that he solely made all payments on the mortgage and Homeowners Dues for the [Denver Home].”

The trial court’s findings make clear that it considered the distributional factors in N.C. Gen. Stat. § 50-20(c) and specifically address the “catch-all” factor in N.C. Gen. Stat. § 50-20(c)(12). The order, however, does not specifically address each factor on which evidence was introduced as required. *See Fox v. Fox*, 114 N.C. App. 125, 135, 441 S.E.2d 613, 619 (1994) (“[W]hen evidence of a particular distributional factor is introduced, the court must consider the factor and make an appropriate finding of fact with regard to it.”).

Because we hold the trial court erred in valuing the parties’ City of New York Pension Plans and will have to revisit that issue on remand, the trial court will necessarily have to revisit its equitable distribution. In doing so, the trial court should make specific findings regarding the evidence of distributional factors in N.C. Gen. Stat. § 50-20(c).

III. Conclusion

For the foregoing reasons, we hold the trial court did not err in determining the Denver Home is marital property. The trial court did err in the valuing of the parties’ City of New York Pension Plans by considering only the difference in the marital portion of the monthly benefits. Because the trial court must revisit the

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valuation of the pension plans on remand, the trial court must also revisit its equitable distribution of the property.

REVERSE IN PART AND REMAND.

Judges CALABRIA and MURPHY concur.

Report per Rule 30(e).