

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO  
FILE MOTION FOR REHEARING AND  
DISPOSITION THEREOF IF FILED

RAJEEV GUPTA,

Appellant,

v.

Case No. 5D20-536

LT Case No. 2017-DR-011768

SHAILY GUPTA,

Appellee.

---

Opinion filed October 1, 2021

Appeal from the Circuit Court  
for Orange County,  
Diana M. Tennis, Judge.

Richard P. Spence, of The Spence Law  
Firm, P.A., Orlando, for Appellant.

Nicole L. Benjamin, of Benjamin Law  
Firm, P.A., Orlando, and Paulette  
Hamilton, of The Law Office of Paulette  
Hamilton, P.A., Orlando, for Appellee.

NARDELLA, J.

Rajeev Gupta (“Former Husband”) appeals the Final Judgment of  
Dissolution of Marriage (“final judgment”). He argues the lower court erred  
in: (1) awarding the marital home to the Shaily Gupta (“Former Wife”) to

facilitate its sale; (2) calculating his income, child support, and alimony; (3) valuing and distributing certain assets and liabilities; (4) awarding temporary possession and exclusive use of the parties' marital home to the Former Wife coupled with a coercive suspended sanction to compel compliance; and (5) awarding the Former Wife attorney's fees for the first trial. We affirm in part, reverse in part, and dismiss in part. We remand for further proceedings consistent with this opinion.

In 2017, the Former Wife relocated to Texas with their young son, prompting the Former Husband to petition for dissolution. During the proceedings, the Former Husband continued to reside in the marital home, while the Former Wife made payments to ensure the asset did not go to waste.

The lower court entered a temporary order on October 2, 2019, which found that although "[n]either party pled for partition . . . the [Former] Wife shall have temporary sole possession of the Marital home . . . as of December 1, 2019. The [Former Husband] shall be out of the marital home by December 1, 2019, at 6pm . . . . The [Former] Husband shall pay liquidated damages in the amount of \$500 per day for every day that he is required to be out of the marital home by this Court Order and isn't . . . . the [Former] Wife shall solely be responsible and authorized to complete all parts

of the process to sell the marital home . . . .” The Former Husband argued in his motion for reconsideration that the lower court lacked jurisdiction to enter such an order because neither he nor the Former Wife requested the relief ordered.

On December 5, 2019, the Former Wife amended her counterpetition to request, among other things, partition of the marital home. The case proceeded to trial on February 14, 2020, and the lower court entered final judgment on February 17, 2020, dissolving the marriage, creating a parenting plan, calculating the Former Husband’s income, valuing and distributing certain assets and liabilities, and awarding the marital home to the Former Wife to facilitate its sale.

#### A. Failure to Preserve

As an initial matter, the Former Husband raises two issues not preserved, to wit, the failure to appoint commissioners to facilitate the sale of the marital home and the application of the wrong methodology to calculate his income. Since these errors were never brought to the lower court’s attention, they were not preserved for review and, therefore, we affirm those aspects of the trial court’s ruling. *See Sunset Harbour Condo. Ass’n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) (“[I]n order to be preserved for further review by a higher court, an issue must be presented to the lower

court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.” (citing *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985))).

#### B. Order to Vacate Marital Home and Coercive Sanction

In contrast, the Former Husband did file a motion for reconsideration after the lower court entered a temporary order on October 2, 2019, ordering him to vacate the marital home and transfer his ownership interest to the Former Wife to facilitate the marital home’s sale. In his motion for reconsideration and on appeal, the Former Husband argues that, because no party had yet pled for partition, the lower court lacked jurisdiction to order him to vacate the marital home, to transfer his interest to Former Wife to sell the marital home, and to subject him to liquidated damages in the amount of \$500 per day for every day he interfered with the Former Wife’s possessory rights.

Although the Former Husband properly preserved his argument that the trial court erred in ordering partition in the temporary order, we do not reach the merits of this argument for another reason—the final judgment states specifically that it “shall supersede the October 2, 2019 [temporary

order].”<sup>1</sup> See *Schumaker v. Schumaker*, 931 So. 2d 271, 274 (Fla. 5th DCA 2006) (“Once a final judgment of dissolution is rendered, the final judgment supersedes any prior temporary orders.”). Additionally, while the Former Husband complains that the temporary order contains a suspended coercive sanction, it is unclear that such sanction has ever been imposed. Thus, the issue is not properly before this Court. See *Muszynski v. Muszynski*, 45 Fla. L. Weekly D365 (Fla. 5th DCA Feb. 14, 2020).

### C. Calculation of Former Husband’s Income

As to alleged errors regarding computation of the Former Husband’s income, we reverse the lower court’s decision to impute \$1,000 per month of in-kind income to the Former Husband as it is not supported by competent, substantial evidence. See *Freilich v. Freilich*, 897 So. 2d 537, 543 (Fla. 5th DCA 2005) (providing that “[t]he standard of review we must therefore apply to appropriately review a lower court’s order imputing income to a spouse is whether competent, substantial evidence supports the findings”).

At the second trial, the Former Husband testified that if he returned to India he could live for free with his family and earn \$400 or \$500 per month

---

<sup>1</sup> After the lower court entered the temporary order, the Former Wife amended her counterpetition to request partition of the marital home. The partition was not yet accomplished at the time the final judgment was rendered.

at a job near his family's home. In contrast, he testified that if he moved far away from his family's home, he could get a higher-earning job making approximately \$1,000 per month. In the final judgment, the lower court imputed \$2,000 per month of income to the Former Husband, assessing \$1,000 per month of in-kind income to the Former Husband for living with his family for free and adding that amount to the highest income he could earn in India, \$1,000 per month.

There are two issues with imputing \$1,000 per month of in-kind income to Former Husband based upon his ability to live with his family in India for free. First, the record does not contain any evidence regarding rental values, thereby prohibiting the lower court from calculating the amount of in-kind income to impute to Former Husband with any certainty. Second, the record does not contain any evidence to support a finding that the Former Husband would be able to live for free while earning \$1,000 per month in India. Accordingly, we reverse the lower court's imputation of in-kind income and remand for additional proceedings at which the lower court should reconsider the child support award, which relied upon an incorrect income calculation for the Former Husband.

#### D. Equitable Distribution of Assets

The Former Husband has also demonstrated that the lower court erred in valuing certain assets and liabilities, namely a condominium in India identified as E-205 and a line of credit paid down by the Former Husband's family. While the lower court's determination of equitable distribution is subject to an abuse of discretion standard of review, the "[d]istribution of marital assets and liabilities must be supported by factual findings in the judgment or order based on competent substantial evidence." *Bardowell v. Bardowell*, 975 So. 2d 628, 629 (Fla. 4th DCA 2008).

As to the condominium in India identified as E-205, which the Former Husband received through equitable distribution, the Former Husband asserts that the lower court did not account for the cost to transfer title to his name, despite his uncontradicted testimony that the condominium was "jointly titled" and that there would be "a transfer cost of eight percent." Although the Former Wife presented no evidence to the contrary, the lower court did not account for this transfer cost in either the valuation of the condominium or the distribution of liabilities. To this extent, the lower court erred. *Cf. Dowie v. Dowie*, 668 So. 2d 290, 292 (Fla. 1st DCA 1996) (finding that the lower court "reasonably determined that by agreeing to transfer certain business software to the [former] husband, [former wife] became

obligated to pay the costs associated with the transfer, including the cost of transferring the license, without which the [former] husband could not use the software).

The equitable distribution scheme also fails to account for a line of credit opened by the Former Wife's father, which was paid down by the Former Husband's family. The lower court found that "amounts paid down since separation" by Former Husband "appear" to have been "paid with marital funds." Yet, there was no evidence presented at trial to support that conclusion. Instead, the only testimony on the issue came from the Former Husband, who explained at trial that Former Wife's father opened lines of credit against a CD from India, and that the balance on the lines of credit as of the date of the filing of the petition for dissolution of marriage was \$71,590. He further testified that with his brother's help the debt was "pretty much paid off" by May 2018. While the Former Husband's testimony never provided a precise figure of the debt remaining after his family's assistance, he did testify that as of October 2019 only \$10,507 of marital debt, was left on the line of credit.

With nothing to contradict his testimony and no evaluation of his credibility on this point, there does not exist competent, substantial evidence to support the lower court's finding that the line of credit was paid down with



marital funds. The only record evidence indicates that Former Husband paid down the line of credit—a marital liability—subsequent to the parties' separation with nonmarital money from his family and that such debt was reduced to, at least, \$10,507. As such, the Former Husband is entitled to a credit and on remand, the lower court should consider the value of the line of credit connected to a CD from India in reformulating the equitable distribution scheme.

#### E. Attorney's Fees

Finally, we dismiss in part the Former Husband's request to reverse an award of attorney's fees to the Former Wife. In the final judgment, as well as the temporary order and the order vacating the initial final judgment, the lower court awarded attorney's fees to the Former Wife in relation to the first trial. However, while the lower court determined that the Former Wife was entitled to attorney's fees, it did not determine the amount of the attorney's fees. Indeed, in the final judgment, the lower court reserved jurisdiction to determine the amount of attorney's fees at a later hearing. Accordingly, we dismiss this portion of the appeal because an order awarding attorney's fees without setting the amount of such fees is a non-appealable order. See *Raton v. Wallace*, 207 So. 3d 978, 979 (Fla. 5th DCA 2016) (citing *Raush v.*

*Raush*, 680 So. 2d 624, 625 (Fla. 5th DCA 1996)). As to all other issues raised on appeal, we affirm without further discussion.

AFFIRMED in part; REVERSED in part; DISMISSED in part; REMANDED with instructions.

EISNAUGLE and WOZNIAK, JJ., concur.