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NO. COA01-892

NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2002

ETHEL JANE WARD,
Plaintiff-appellee,

v.

Columbus County
No. 98 CVD 1275

RICHARD KELLY WARD,
Defendant-appellant.

Appeal by defendant from judgment entered 16 March 2001 by Judge Jerry A. Jolly in Columbus County District Court. Heard in the Court of Appeals 24 April 2002.

Steven E. Williford, for defendant-appellant.

Pope and Sessoms, by Harold G. Pope, for plaintiff-appellee.

BIGGS, Judge.

Defendant (Richard Ward) appeals from an equitable distribution order entered 16 March 2001. For the reasons that follow, we reverse and remand.

Plaintiff (Ethel Ward) and defendant were married on 24 December 1978, separated on 26 September 1998, and divorced on 15 November 1999. Five children were born of the marriage, ranging from seven to twenty years old at the time of the parties' divorce. On 15 October 1998, plaintiff filed a complaint against defendant, seeking divorce from bed and board, child custody, post separation support, equitable distribution, and alimony. On 16 March 2001,

the trial court entered an order awarding equitable distribution. In its order, the trial court concluded that "an equal division of the marital property would not be equitable and the Plaintiff should receive a distributive award from the Defendant in the amount of \$6,000.00[.]" Defendant appeals from this order.

Preliminarily, we note that defendant is in violation of several of the N.C. Rules of Appellate Procedure. He failed to include in the record his answer to plaintiff's complaint, a violation of N.C.R. App. P. 9(a)(1)(d); failed to include references to the record or transcript in his assignments of error, a violation of N.C.R. App. P. 10(c)(1); and has included the transcript of proceedings as a part of the record, in violation of N.C.R. App. P. Appendix B, Format and Style ("[t]he transcript should not be inserted into the record on appeal, but, rather, should be separately bound and submitted for filing in the proper appellate court with the record"). Defendant's brief also omits a full "statement of the procedural history of the case . . . summariz[ing] the course of proceedings up to the taking of the appeal before the court," as required by N.C.R. App. P. 28(b)(3), and instead includes only the dates of the equitable distribution hearing, entry of equitable distribution judgment, and his notice of appeal; and lacks a "full and complete statement of the facts, as required by N.C.R. App. P. 28(b)(4), substituting only a scant two-sentence "statement of the facts" that fails to adequately summarize relevant matters.

Although we recognize that the Rules of Appellate Procedure are mandatory, and violation of the rules subjects an appeal to dismissal, *Zenobile v. McKecuen*, 144 N.C. App. 104, 548 S.E.2d 756, *disc. review denied*, 354 N.C. 75, 553 S.E.2d 214 (2001), defendant's violations of the Rules of Appellate Procedure in this case, though numerous, have not precluded effective appellate review of the issues presented. Therefore, in the interests of justice, and pursuant to our authority under N.C.R. App. P. 2, we elect to review defendant's appeal on its merits.

In defendant's first two assignments of error he argues that the trial court erred by considering the support needs of the plaintiff and of the parties' children "as a distributional factor in violation of N.C.G.S. § 50-20(f)." We agree.

N.C.G.S. § 50-20(f) (2001) provides in pertinent part that "[t]he court shall provide for an equitable distribution without regard to alimony for either party or support of the children of both parties." "The mandate could not be clearer or less equivocal[,]" *Capps v. Capps*, 69 N.C. App. 755, 757, 318 S.E.2d 346, 348 (1984), that under N.C.G.S. § 50-20(f) "the trial court [may] not consider support obligations arising out of the subject marriage in equitable distribution proceedings." *Pott v. Pott*, 126 N.C. App. 285, 289, 484 S.E.2d 822, 826 (1997). See also *Brinkley v. Brinkley*, 135 N.C. App. 608, 612, 522 S.E.2d 90, 93 (1999) ("Child support may not be used as a bargaining chip in the resolution of property or custody disputes"); *Gum v. Gum*, 107 N.C.

App. 734, 739, 421 S.E.2d 788, 791 (1992) ("fact that plaintiff wife has custody of the children born of the marriage is not alone a proper distributional factor").

Equitable distribution orders are reviewed on an abuse of discretion standard. *White v. White*, 312 N.C. 770, 324 S.E.2d 829 (1985). "[A] trial court's failure to comply with the provisions of the equitable distribution statute constitutes an abuse of discretion." *Pott v. Pott*, 126 N.C. App. at 289, 484 S.E.2d at 826. See also *Wieneck-Adams v. Adams*, 104 N.C. App. 621, 623, 410 S.E.2d 525, 526 (1991) ("trial judge's discretion is to be upheld unless it fails to comply with the requirements of the statute").

In the instant case, the trial court stated in paragraph three (3) of its equitable distribution order that it "[had] considered that the Plaintiff has custody of the four minor children and the children reside with her and in view of her income, the needs of the Plaintiff, and the needs of the children, an equal division of the property would not be equitable and therefore, the Plaintiff shall receive a distributive award as defined by G.S. 50-20(b)(3)[.]" Thus, the trial judge explicitly considered the fact that plaintiff has custody of the minor children, and considered her needs and those of the children. This was a direct contravention of N.C.G.S. §50-20(f), and constitutes an abuse of discretion. Because we cannot determine the extent to which the court's consideration of these improper distributional factors affected its conclusion that an equal distribution would be

inequitable, the trial court's error requires entry of a new equitable distribution order.

Defendant next argues that the trial court's findings of fact were insufficient to establish that it properly considered the statutorily required distributional factors.

N.C.G.S. § 50-20(c) sets out twelve factors that the trial judge must consider in its determination of whether an equal division of marital property would be equitable. Upon entry of an order of equitable distribution, the trial court is required to make findings of fact regarding each of the distributional factors for which evidence was presented, and the failure to make sufficient findings of fact may require reversal. *Rosario v. Rosario*, 139 N.C. App. 258, 533 S.E.2d 274 (2000) (this Court is "unable to discharge our appellate responsibilities unless the trial courts reach reviewable conclusions of law based upon findings of fact supported in the record"). In the instant case, defendant has not identified any statutory distributional factors that he contends were supported by evidence but not included in the trial court's findings of fact. Nor has he directed this Court to relevant transcript pages or exhibits. Accordingly, we conclude that defendant's assignment of error is "inadequate to preserve the alleged error for review." *Rowan County Bd. of Educ. v. U.S. Gypsum Co.*, 103 N.C. App. 288, 304, 407 S.E.2d 860, 868 (1991) (error not preserved for appellate review where defendant asserts error in admission of hearsay testimony without citing transcript

pages or otherwise identifying the specific testimony at issue). See *Smith v. Sealed Air Corp.*, 127 N.C. App. 359, 489 S.E.2d 445 (1997) (to preserve error for review, appellant who challenges court's findings of fact must specify where error lies). This assignment of error is overruled.

Defendant argues next that the trial court erred in its findings of fact regarding the value of the marital property located at 49 Oak Street, Hallsboro, North Carolina.

The trial court found that the house had a date of separation value of \$23,000 and a present value of \$25,000. Regarding these findings, defendant asserts that the trial court "apparently failed to consider the Plaintiff's actions in moving out of the marital home and leaving it open to the elements in determining the value of the Oak Street Property." However, the trial court made numerous findings of fact concerning the property, including findings that plaintiff had left the Oak Street house due to domestic violence; that plaintiff had incurred bills of a specified amount in repair of the property; and that both parties had left the property open for several months. These findings indicate that the court considered the matters raised by defendant. Further, the trial court is responsible for evaluating the credibility and strength of testimonial evidence. *Upchurch v. Upchurch*, 128 N.C. App. 461, 495 S.E.2d 738, *disc. review denied*, 348 N.C. 291, 501 S.E.2d 925 (1998). This assignment of error is overruled.

Finally, defendant argues that the trial court erred by "redacting language on a check" which defendant asserts was evidence of an agreement between the parties. Defendant has presented no argument or authority in support of this assignment of error and, accordingly, it is deemed abandoned. N.C.R. App. P. 28(b)(5). This assignment of error is overruled.

We hold that the trial court erred by considering, in its equitable distribution order, the support needs of the plaintiff and of the couple's minor children, in violation of N.C.G.S. § 50-20(f). Further, upon our review of the record and notwithstanding the above described error, we conclude that the trial court's findings of fact were supported by competent evidence and are thus binding on this Court. Accordingly, we remand to the trial court for entry of an order that does not include consideration of the support needs of plaintiff and of the children.

Reversed and remanded.

Judges WYNN and MCCULLOUGH concur.

Report per Rule 30(e).