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NO. COA11-560

NORTH CAROLINA COURT OF APPEALS

Filed: 1 November 2011

RITA OSAE,
Plaintiff,

v.

Wake County
No. 08 CVD 1667

SAMUEL OSAE,
Defendant.

Appeal by Plaintiff from judgment entered 10 November 2010 by Judge Debra S. Sasser in Wake County District Court. Heard in the Court of Appeals 12 October 2011.

Marshall & Taylor, P.C., by Travis R. Taylor, for Plaintiff.

Mast, Mast, Johnson, Wells & Trimyer, P.A., by George B. Mast and Ephriam B. Wright, III, for Defendant.

STEPHENS, Judge.

Procedural History and Factual Background

This appeal arises from an equitable distribution. Plaintiff Rita Osae and Defendant Samuel Osae were married on 30 June 1995, separated on 31 May 2008, and divorced on 31 July

2009. On 1 February 2008, Plaintiff filed a complaint for divorce from bed and board, child custody, child support, post-separation support, alimony, and attorney's fees. On 15 February 2008, Defendant filed his answer. Plaintiff filed a motion in the cause for equitable distribution on 26 June 2009. Plaintiff and Defendant filed their equitable distribution affidavits on 17 June 2009 and 6 November 2009, respectively. On 13 January 2010, the trial court entered an order regarding interim distribution and an initial pretrial order. Defendant and Plaintiff then filed amended equitable distribution affidavits on 10 and 12 August 2010, respectively. On 24 August 2010, the trial court entered a final pretrial order. Following a hearing, the court entered an equitable distribution judgment on 10 November 2010 which provided for an unequal distribution of property in favor of Plaintiff.

On appeal, Plaintiff makes two arguments: that the trial court erred in (1) failing to consider for distribution a piece of real property which the parties had agreed was marital, and (2) stating in conclusion of law 5 that Plaintiff is responsible for two debts assigned to Defendant in the findings of fact and the decretal portion of the judgment. We remand.

Standard of Review

Because the division of property in an equitable distribution is left to the sound discretion of the trial court, appellate review "is limited to a determination of whether there was a clear abuse of [that] discretion." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). We first consider whether any challenged findings of fact are supported by competent evidence in the record. *Beightol v. Beightol*, 90 N.C. App. 58, 60, 367 S.E.2d 347, 348, *disc. review denied*, 323 N.C. 171, 373 S.E.2d 104 (1988). We then determine whether the findings support the conclusions of law. *Squires v. Squires*, 178 N.C. App. 251, 256, 631 S.E.2d 156, 159 (2006).

Discussion

Plaintiff first argues that the trial court erred in failing to consider for distribution a piece of real property both parties agreed was marital. We agree.

In an equitable distribution, "[t]he trial court must classify and identify property as marital or separate depending upon the proof presented to the trial court of the nature of the assets." *Atkins v. Atkins*, 102 N.C. App. 199, 206, 401 S.E.2d 784, 787 (1991) (internal quotation marks and citation omitted). "'Marital 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[.]” N.C. Gen. Stat. § 50-20(b)(1) (2009).

The record reveals that during the parties’ marriage, they acquired two pieces of real property in Ghana, West Africa, one of which (“the Ghana lot”) is the subject of this appeal. The Ghana lot was listed in both parties’ equitable distribution affidavits as marital property. In its 24 August 2010 pretrial order, the trial court listed the Ghana lot as marital property in the possession of Defendant to be distributed to Defendant (per agreement of the parties). The order indicates that the only dispute regarding the Ghana lot was its net fair market value (“net FMV”) as of the date of the parties’ separation. According to the order, Plaintiff claimed the net FMV was \$19,000, while Defendant claimed it was zero. At trial, Defendant testified that, although the lot was worth \$19,000, it had been purchased using various credit cards, and that none of those debts had been paid. Thus, Defendant contended that the property’s net FMV was zero. Defendant also testified that he used funds from cash advances on his Capital One and Wachovia credit cards toward the purchase of the Ghana lot. Plaintiff

did not present any evidence about the Ghana lot. Neither party disputed their assertions in the affidavits that the Ghana lot was marital property. Thus, the undisputed evidence was that the Ghana lot was marital property. However, in finding of fact 20(b), the trial court stated, in pertinent part:

Defendant negotiated the purchase of the Ghana lot, located in West Africa, for \$19,000, without Plaintiff's knowledge. The evidence is insufficient for the court to distribute this property; therefore, the trial court makes no further findings of fact, conclusions of law, or an equitable distribution of this property.

This finding is not supported by any evidence in the record.

Defendant acknowledges that the trial court erred in failing to consider the Ghana lot for distribution, but contends that, because the parties agreed the Ghana lot was to be distributed to Defendant and it in fact remains in Defendant's possession, the error was harmless. Further, he asserts that the court's failure to consider the Ghana lot for distribution was insignificant given the great disparity of the distribution in Plaintiff's favor.¹ We are not persuaded.

We have repeatedly held that, "in the complex litigation of equitable distribution, this Court will not remand a judgment

¹The trial court ordered that Plaintiff receive 75% of the marital property and Defendant receive 25%.

for obviously insignificant errors." *Mishler v. Mishler*, 90 N.C. App. 72, 74, 367 S.E.2d 385, 386-87, *cert. denied*, 323 N.C. 174, 373 S.E.2d 111 (1988) (declining to remand where, "in view of the total value of the marital property, [the error] is of such limited significance as not to require a recomputation of the respective awards to the parties.").

Here, we cannot conclude that the trial court's error was insignificant. The judgment states that the parties' marital property had a total value of \$145,438.02. The parties disputed the net FMV of the Ghana lot, a matter not resolved by the trial court. If Plaintiff's net FMV of \$19,000 had been found as fact, the Ghana lot would constitute more than 10% of the total marital property, a percentage we cannot hold "insignificant." In addition, we cannot determine how distribution of the Ghana lot might have affected the trial court's overall distribution of marital property, particularly the credit card debts Defendant testified were associated with its purchase. Accordingly, we remand for the trial court to make findings regarding the Ghana lot's classification as marital property and for other findings or conclusions that flow therefrom.

Plaintiff also argues that the trial court erred by stating in conclusion of law 5 that Plaintiff is responsible for two

debts assigned to Defendant in the findings of fact and the decretal portion of the judgment.

In subparagraphs (ee) and (ff) of finding 20, the trial court stated that certain credit card debts are part marital debt and part Defendant's separate debt. In keeping with this finding, in decretal paragraph 4, the trial court distributed some of these debts to Defendant. However, conclusion of law 5 states that Plaintiff is liable for these debts.

We agree with the parties that this error is merely clerical. See *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (defining clerical error as one "resulting from a minor mistake or inadvertence . . . and not from judicial reasoning or determination"). "When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record "'speak the truth.'" *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (citations omitted). Accordingly, on remand, the trial court shall correct conclusion of law 5 so as to conform to its findings of fact and decree.

REMANDED.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).