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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1064

Filed: 6 June 2017

Cabarrus County, No. 11 CVD 4064

THOMAS STEVEN HENSON, Plaintiff,

v.

ROBIN BLACK HENSON, Defendant.

Appeal by plaintiff from order entered 11 August 2015 by Judge D. Brent Cloninger in Cabarrus County District Court. Heard in the Court of Appeals 18 April 2017.

Kenneth P. Andresen, PLLC, by Kenneth P. Andresen, Esq., and Burns, Gray & Gray, PA, by John T. Burns, Esq., for plaintiff-appellant.

Ferguson, Hayes, Hawkins & DeMay, PLLC, by Edwin H. Ferguson Jr. and James R. DeMay, for defendant-appellee.

BRYANT, Judge.

Where defendant's assignments of error challenging the trial court's valuation of most items of marital property are overruled, we affirm the valuations. However, where the record reveals evidence of potential additional property in plaintiff's possession as of the date of separation which was not classified or distributed ("about

$10,000" cash), we reverse and remand for the trial court to classify this property and, if appropriate, determine its value and distribute it as part of the marital estate.

Plaintiff Thomas Steven Henson and defendant Robin Black Henson were married on 2 June 1984. The parties lived together until they separated on 1 October 2010. They had two adult children at the time of separation. The parties owned two residences as marital property on the date of separation: a single family residence on Bald Head Island, North Carolina, (the "Bald Head Island residence"), and a single family residence in Midland, North Carolina (the "Midland residence"). After separation, defendant lived at the Midland residence and plaintiff lived at the Bald Head Island residence.

On 8 December 2011, plaintiff filed a complaint for equitable distribution in Cabarrus County District Court. Defendant filed an answer and counterclaim for equitable distribution, post-separation support, and alimony.

The issue of equitable distribution was heard before the Honorable D. Brent Cloninger, Judge presiding, on 18–19 March and 2 June 2014 and on 23 February 2015. On 11 August 2015, the trial court entered its equitable distribution order. On 10 September 2015, defendant filed notice of appeal.

On 15 December 2015, plaintiff filed a motion to dismiss defendant's appeal in the trial court pursuant to the North Carolina Rules of Appellate Procedure, specifically Rules 7 (preparation and ordering of the transcript) and 25 (failure to

take timely action). By order entered 25 February 2016, the trial court denied plaintiff's motion to dismiss, concluding that "[e]ven if [defendant's] actions [did] constitute violations of Appellate Rule 7, [defendant's] actions do not rise to the level of 'substantial failure' or 'gross violation' of the Appellate Rules such that the Court should consider sanctions, including dismissal of the appeal." Defendant thereafter perfected her appeal in this Court.

Plaintiff, who did not file notice of appeal of the trial court's separate order denying his motion to dismiss defendant's appeal, now attempts to argue the trial court's denial was error in his appellee brief to this Court. Thus, because plaintiff failed to comply with the jurisdictional requirements of Appellate Rule 3 (that a party must file and serve notice of appeal from a judgment or order within thirty days of entry, *see* N.C. R. App. P. Rule 3(c)(1) (2017)), we lack jurisdiction to hear plaintiff's argument, and it is dismissed.

On appeal, defendant challenges several of the trial court's classifications and/or valuations of various items of property. Specifically, defendant contends the trial court committed reversible error in (I) failing to classify and divide as divisible property the $522,000.00 passive decrease in the equity line debt secured against the Bald Head Island residence; (II) finding that the Bald Head Island boat slip had no value and distributing it to plaintiff; (III) failing to make sufficient findings to support

its conclusion that TS Henson Builders, Inc. had no value on the date of separation; (IV) valuing the Midland residence at $325,000.00 on the date of separation; (V) valuing the Bald Head Island residence at its 2011 tax appraised value; (VI) failing to classify and divide as marital property $10,000.00 in cash; and (VII) finding that the net value of the marital estate is –$55,178.49.

Standard of Review

> Our standard of review of [equitable distribution orders] is well-settled: "[W]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts."

Montague v. Montague, 238 N.C. App. 61, 63, 767 S.E.2d 71, 73–74 (2014) (quoting *Lee v. Lee*, 167 N.C. App. 250, 253, 605 S.E.2d 222, 224 (2004)). "[W]hen reviewing an equitable distribution order, the standard of review is limited to a determination of whether there was a clear abuse of discretion. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *Id.* at 64, 767 S.E.2d at 74 (quoting *Peltzer v. Peltzer*, 222 N.C. App. 784, 787, 732 S.E.2d 357, 359–60 (2012)).

I

The trial court found that the balance of the equity line secured against the Bald Head Island residence was $602,000.00 on the date of separation, which finding defendant does not dispute. Defendant argues, however, that because after the

parties' separation plaintiff reached an agreement with the creditor whereby the creditor would accept only $80,000.00 in discharge of a debt in the amount of $602,000.00, this $522,000.00 reduction in debt should have been accounted for in the trial court's equitable distribution order in that it should have been identified, classified, and divided as divisible property. We disagree.

"The trial court must classify, value, and distribute marital property and divisible property in equitable distribution actions." *Id.* (quoting *Ubertaccio v. Ubertaccio*, 161 N.C. App. 352, 353–54, 588 S.E.2d 905, 907 (2003)). Divisible property is defined to include "[p]assive increases and passive decreases in marital debt and financing charges and interest related to marital debt." N.C. Gen. Stat. § 50-20(b)(4)d. (2015). Such passive increases and decreases in marital debt are presumed to be marital property "*unless* the trial court finds that the change in value is attributable to the postseparation actions of one spouse." *Wirth v. Wirth*, 193 N.C. App. 657, 661, 668 S.E.2d 603, 607 (2008).

In Finding of Fact No. 5, the trial court found that the residence on "Bald Head Island, North Carolina . . . is encumbered by a first mortgage of $753,319.00 and a HELOC of $602,000.00." There was evidence before the trial court, however, that plaintiff had reached a settlement agreement with the Bank of the Ozarks, wherein the bank agreed to assign the equity line note to the parties (plaintiff and defendant) in exchange for an $80,000 payment by plaintiff. But there was also evidence that

defendant had not, as of the date of the hearing on 23 February 2015, signed those settlement documents for plaintiff to pay the Bank of Ozarks $80,000.00. Indeed the trial court included as a handwritten provision in its order that "[d]efendant shall sign [the] Assignment of Promissory Note by 9/2/2015." Plaintiff's testimony on this point is illustrative:

> Q. . . . With regard to this $602,000, is it your intention to pay the $602,000?
>
> . . . .
>
> A. No; it's my intention to pay them [$]80,0000 as a settlement that we've worked on and hammered out, and they were going to -- that [$522,000] will be forgiven.
>
> Q. Okay. So this [$]602,000 debt that you were given credit for is not an accurate number?
>
> A. I've got to deal with it. They may not accept the offer. I've agreed to it. Your client hasn't. I mean, I don't know where that is right now, but right now it's a valid debt for $600,000.
>
> Q. But you have an agreement, as you've just indicated, with the bank to settle it for [$]80,000?
>
> . . . .
>
> A. I'm hoping to settle for [$]80,000. Absolutely.
>
> . . . .
>
> Q. Mr. Henson, as we sit here in the courtroom today, you owe the Bank of Ozarks 600 plus thousand dollars that's secured by a second mortgage on your Bald Head Island home?

A. Yes. That's a fact.

Q. Did you agree to resolve that debt for $80,000?

A. I did.

Q. And were the settlement documents for that agreement drawn up?

A. Yes.

. . . .

Q. And did Ms. Henson ever sign those documents?

A. To my knowledge, she has not signed it.

Q. And so you don't have an $80,000 settlement without Ms. Henson's signature, do you?

A. No, I don't.

Q. Now, let's assume that Ms. Henson gets on board with that and does sign those settlement documents for you to pay the Bank of Ozarks $80,000.

A. Right.

Q. What happens to the balance of that $600,000?

A. Well, that debt was distributed to me, so that 520 would most likely come as income to me.

Q. It's going to be treated as imputed income?

A. That's what I understand.

Q. Just like the discussion that we had over other debt cancellation income --

> A. Right.
>
> Q. -- that you had to recognize during the --
>
> A. And we've done that. We've paid tax on that. Right.
>
> Q. So you don't get off Scott-free for $80,000, do you?
>
> A. No, sir. I'll have the IRS to deal with then.
>
> . . . .
>
> Q. . . . [Y]ou will accept the agreement of [$]80,000, as well as the imputed income on that debt; you will accept it, the entire imputed income, and pay [$]80,000 to resolve that debt?
>
> A. Yes, sir; I will do that. I will do that. If you can get your client to sign that document, I will accept the responsibility for dealing with that income.

Defendant argues that the $522,000.00 debt reduction is a passive debt reduction and should be classified as divisible property and distributed to plaintiff, despite the fact that, at the time of the hearing, defendant had not yet signed the settlement agreement which would have allowed for the debt reduction in the first place.[1] First, the trial court could not value or distribute this debt reduction as

[1] Defendant's argument simply assumes that this debt reduction is passive, not active. We are not certain that this debt reduction would be passive, since it did not result from external economic influences such as inflation or circumstances beyond the control of either party. *See O'Brien v. O'Brien*, 131 N.C. App. 411, 420, 508 S.E.2d 300, 306 (1998) ("Active appreciation refers to financial or managerial contributions of one of the spouses to the separate property during the marriage; whereas, passive appreciation refers to enhancement of the value of separate property due solely to inflation, changing economic conditions or other such circumstances beyond the control of either spouse." (citations omitted)). Instead, this debt reduction was a result of plaintiff's efforts to resolve a pending

divisible property since it did not exist on the date of trial. Defendant had refused to sign the documents to finalize this debt reduction, and the creditor could have withdrawn this offer at any time. *See* N.C.G.S. § 50-20(c)(11) ("Divisible property and divisible debt shall be valued as of the date of distribution."). In fact, the settlement was not finalized until over a year after the equitable distribution trial.

In addition, we note that the trial court did address the debt reduction in its Permanent Alimony Order filed 31 March 2015, several months prior to entry of the equitable distribution order. The trial court found several factors regarding the amount and duration of alimony under N.C. Gen. Stat. § 50-16.3A(b), including the second mortgage on the Bald Head Island residence as one of the "assets and liabilities of the parties and the relative debt service of the parties" under N.C. Gen. Stat. § 50-16.3A(b)(10). The trial court found that "[t]he second mortgage on the Bald Head Island home in the amount of $600,000.00 is the subject of a lawsuit. The plaintiff has indicated that it can be resolved for $80,000.00 and that he would accept the imputed forgiveness of the remaining balance and hold the defendant harmless." The trial court awarded defendant alimony of $5,000.00 per month until her death or cohabitation as defined by N.C. Gen. Stat. § 50-16.9 or plaintiff's death. Neither party appealed the alimony order.

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lawsuit and his assumption of this liability and debt forgiveness would also trigger imputed income upon which he alone would have to pay income taxes. We are simply referring to this as a passive debt reduction because this was the argument presented; we are not making any holding that the debt reduction would properly be considered as passive or active.

The trial court did not err in failing to account for the $522,000.00 reduction in the equity line debt in its division of the marital estate, since the settlement had not yet been finalized. In addition, the trial court had previously addressed this debt reduction in the permanent alimony order. Accordingly, the trial court did not commit reversible error, and defendant's argument is overruled.

II

Defendant contends the trial court committed reversible error in distributing the Bald Head Island boat slip to plaintiff at no value. Defendant argues that plaintiff "stipulated" that the boat slip had a value of at least $75,000.00. We disagree.

"The purpose of a stipulation is to 'limit[] the issues for trial to those not disposed of by admissions or agreements of counsel.' " *Despathy v. Despathy*, 149 N.C. App. 660, 662, 562 S.E.2d 289, 291 (2002) (alteration in original) (quoting N.C. Gen. Stat. § 1A-1, Rule 16(a)(7)). "The normal effect of a stipulation by the parties is the 'withdraw[al] [of] a particular fact from the realm of dispute.' " *Id.* (alterations in original) (quoting *Crowder v. Jenkins*, 11 N.C. App. 57, 62, 180 S.E.2d 482, 486 (1971)).

The problem with defendant's argument is that there was no stipulation as to the *value* of the boat slip. The boat slip was listed in "Schedule B: Marital Property: Agree on Distribution: *Disagree on Value*" as part of a pretrial order. (Emphasis added). While the parties agreed to whom the boat slip was distributed (plaintiff),

the parties *disagreed* with regard to its value. Plaintiff believed the boat slip to be worth $75,000, but defendant disagreed, stating it was worth $100,000. In its order, the trial court determined the boat slip had "no value to the marital estate" and distributed it to plaintiff:

> 6. There is a boat slip which is marital property located at Bald Head Island. This boat slip is part of a settlement with First Bank when the parties were sued for a deficiency after a foreclosure. There is a covenant in the settlement agreement that upon the sale of that boat slip, the net proceeds go to the bank. The deficiency was a marital debt and was settled prior to the parties' separation but an obligation that nonetheless is outstanding to the extent of the value of the boat slip. The Plaintiff's accountant made a $6,000.00 per year accounting entry for the business use of the boat slip; that there is no requirement of when the slip is to be sold and no evidence as to the value of the slip use and for what period and the value of the boat slip therefore has no value to the marital estate and is distributed to the Plaintiff.

Despite plaintiff's representation in the pretrial order that he believed the boat slip was worth $75,000.00, his testimony revealed other relevant facts about its value:

> Q. . . . You testified that the boat slip is tied up in a settlement agreement with a bank. Which bank is that?
>
> A. I believe -- I've thought about it since yesterday. I think it was in the settlement, the deficiency judgment, with First Bank, the $225,000 judgment that has yet to be filed.
>
> Q. That is a document -- that's a settlement agreement that you and [defendant] both signed?
>
> A. That's correct.

> Q. And the amount of that judgment is $225,000?
>
> A. That's correct.
>
> Q. And is there an agreement that if and when this boat slip is sold, all of the proceeds of that boat slip go to that bank?
>
> A. To satisfy the [$225,000], that's exactly right.
>
> Q. So, in effect, that boat slip has a lien against it of $225,000?
>
> A. In effect, it does.

The trial court's finding that the boat slip was part of a settlement agreement between both plaintiff and defendant and First Bank which required that the proceeds from the sale of the boat slip were to be distributed to the Bank was supported by the evidence. Plaintiff's original assertion that it was worth $75,000.00 notwithstanding, the trial court did not abuse its discretion in finding instead that the boat slip had no value to the marital estate. Defendant's argument is overruled.

III

Defendant argues the trial court committed reversible error by failing to make sufficient findings to support its conclusion that TS Henson Builders, Inc. had no value on the date of separation. Specifically, defendant contends the trial court failed to undertake any analysis as to the value of the corporation's assets and that it is unclear from the trial court's sole finding as to how it arrived at its valuation of the business. We disagree.

"In valuing a marital interest in a business, the task of the trial court is to arrive at a date of separation value which 'reasonably approximates' the net value of the business interest." *Offerman v. Offerman*, 137 N.C. App. 289, 292, 527 S.E.2d 684, 686 (2000) (quoting *Poore v. Poore*, 75 N.C. App. 414, 422, 331 S.E.2d 266, 272 (1985)).

> [A] court should make specific findings regarding the value of a spouse's professional practice and the existence and value of its goodwill, and should clearly indicate the evidence on which its valuations are based, preferably noting the valuation method or methods on which it relied. On appeal, if it appears that the trial court reasonably approximated the net value of the practice and its goodwill, if any, based on competent evidence and on a sound valuation method or methods, the valuation will not be disturbed.

Id. at 293, 527 S.E.2d at 686 (quoting *Poore*, 75 N.C. App. at 422, 331 S.E.2d at 272). "[T]he requirements and standard of review set forth [in *Poore*] apply to valuation of other business entities as well, and we have extended the *Poore* standards to the valuation of a marital interest in a closely held corporation." *Id.* (alterations in original) (citations omitted). "A mere recitation of the factors the trial court considered in its valuation of the corporation is not sufficient; the trial court must also indicate the value it attaches to each of the enumerated factors." *Locklear v. Locklear*, 92 N.C. App. 299, 302, 374 S.E.2d 406, 407–08 (1988) (citation omitted).

In reviewing the valuation of a business, this Court must be able to determine how the trial court arrived at its valuation. *See Williamson v. Williamson*, 217 N.C.

App. 375, 377–78, 719 S.E.2d 628, 630–31 (2011) (remanding where this Court was unable to determine how the trial court arrived at the value of $26,500.00 of a business, where the trial court indicated that it relied on the plaintiff's valuation of the company, but the record showed that the plaintiff did not value the company at $26,500.00 and gave conflicting testimony).

In the instant case, the trial court found as follows with regard to the valuation and classification of TS Henson Builders, Inc.:

> T S Henson Builders, Inc. is a corporation owned by the Plaintiff which has substantial debt and personal property including golf carts, boat motors, booked which [sic] the debt far exceeds the asset value; the Plaintiff's certified public accountant testified that in his opinion the company had no value; the corporation has a debt to Bank of America for a boat that left a $192,512.42 deficiency for which the Plaintiff is personally liable; it is a debt that was contracted in 2007 for a partnership that owned a Wellcraft boat; that is an obligation which was clearly incurred during the marriage and guaranteed by the Plaintiff during the marriage; and the Court finds that the corporation has no value and is distributed to Plaintiff.

The trial court also made clear that it was relying on the testimony of plaintiff's certified public accountant ("CPA"), who the trial court found testified that "in his opinion the company had no value[.]" Unlike in *Williamson*, where the witness's testimony on which the trial court purported to rely did not support its ultimate finding regarding valuation, *see id.*, here, there was no such contradictory testimony. We note that plaintiff's exhibits 8 and 9, balance sheets for TS Henson Builders, Inc.,

dated 31 October and 31 December 2010, respectively, show total assets and total liabilities and equity canceling each other out, for a total value of $0.00. Further, the CPA's testimony supports the trial court's finding that "the debt far exceeds the asset value" of TS Henson Builders, Inc.:

> Q. . . . [D]oes the debt exceed the value of the assets that you had placed on --
>
> A. If you look at fixed assets at [$230,000] and the land at [$55,000] and then subtract out the installment debt, which was right at [$]309,000 plus, and the mortgages payable, which were right at [$]58,000 – [$]57,000 plus or less, minus, . . . you'd come up with a number that is considerably more than what the fixed assets are owned by the corporation.
>
> Q. So the company has a negative net worth?
>
> A. Once you look at the accounts receivable trade, cash, the -- and if you take the officer loans as an asset, fixed assets, at their liquidation value, land and what the bank says it's worth, subtract out payables, which are a whole lot easier to determine, you come up with retained earnings of [$]95,141, that you have common stock of a thousand dollars, for net equity of [$]96,141, but in order -- my -- if somebody was to give me this balance sheet and say, "What can we do borrowing-wise or anything else," I'd say the first thing I'm going to do is take that [$]96,141 and subtract that [$]108,327 that's shown in loan to officer and I'm going to end up with a negative number of right at $12,000.
>
> . . . .
>
> Q. What did the company make in 2010?
>
> . . . .

> A. In 2010 the company made $18,251.00.
>
> . . . .
>
> A. And that was -- [plaintiff] was paid a compensation of $18,210.00 for that year.
>
> Q. Is there any stretch that you can make of these numbers to bring this corporation up to a value of $441,306.00?
>
> A. No.

In addition, defendant failed to present any evidence regarding the valuation of TS Henson Builders, Inc., so there was no competing valuation evidence for the trial court to consider. In fact, defendant does not argue that the trial court should have found the company to be valued at any other particular value; she argues only that the findings are inadequate to support the valuation.

Accordingly, because it is clear from the trial court's findings as to how it arrived at its valuation of the business, and competent evidence supports those findings, the trial court did not err in distributing TS Henson Builders, Inc., to plaintiff at no value.

IV

Defendant next argues the trial court reversibly erred in valuing the Midland residence at $325,00.00 on the date of separation when this finding is not supported by competent evidence. We disagree.

"The trial court must make a finding on the value of the marital asset on the date of separation." *Williamson*, 217 N.C. App. at 379, 719 S.E.2d at 631 (quoting *Cooper v. Cooper*, 143 N.C. App. 322, 327, 545 S.E.2d 775, 778 (2001)). In *Williamson*, "the trial court relied on [the] [p]laintiff's testimony that the marital residence had a gross fair market value of $189,000.00." *Id.* However, "because the record [was] devoid of any evidence as to the value of the residence at the date of separation[,]" it could not be determined that the $189,000.00 valuation was tied to the date of separation. *Id.* at 379, 719 S.E.2d at 631–32. Accordingly, this Court remanded the case for the trial court to determine its value on the date of separation. *Id.* at 379, 719 S.E.2d at 632.

In the instant case, the trial court found that the Midland residence "is encumbered by a first mortgage and a HELOC in the total amount of $209,262.00 and a value of $325,000.00. . . . The Midland home has a net value of $115,738.00 and is distributed to the Defendant, together with the debt thereon." Unlike the trial court's finding in *Williamson*, here, the finding of valuation of the Midland residence was supported by evidence of its valuation related to the date of separation. Plaintiff, a general contractor, testified as follows:

> Q. On the date of separation, what was the fair market value of that house?
>
> A. Well, my opinion is it was probably worth about 325, [$]325,000. I've looked on line [sic]. I've looked at recent sales. I did that as far back as 2011. It wouldn't let me go

> back to 2010 . . . . And the home I built, it's a nice place; it's a nice, big lot. It's nothing exceptional, but it's as good as anything that's built in that area. And they were averaging from, you know, three to four fifty, 300 to 450. Obviously some of the homes are probably brick and that was some of the higher priced ones, so in an effort to be fair, I think 325, [$]325,000 would be a fair market value for that house.
>
> Q. On the date of the separation?
>
> A. Yes; I think so.

As the trial court's finding as to the value of the Midland residence is supported by competent evidence—plaintiff's testimony regarding the residence's value as of the date of separation—it is conclusive on appeal. *See Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 419, 588 S.E.2d 517, 521 (2003) ("A trial court's findings of fact in an equitable distribution case are conclusive if supported by any competent evidence." (citation omitted)). Defendant's argument is overruled.

V

Next, defendant argues the trial court committed reversible error in valuing the Bald Head Island residence at its 2011 tax appraised value ($816,300.00) instead of its tax value on 1 October 2010, the date of separation ($1,284,100.00). We disagree.

The trial court found as follows regarding the value of the Bald Head Island residence:

> 5. The parties currently own . . . [a residence on] Bald Head Island, North Carolina which is encumbered by a first

> mortgage of $753,319.00 and a HELOC of $602,000.00. The tax value of the Bald Head Island property at the time of separation in October, 2010 was $1,284,100.00 and in January 2011 after revaluation that property had a value of $816,300.00. The Plaintiff testified that values at Bald Head Island were depressed and the tax value set for January 2011 and since 2008 when economic conditions caused drastic drops in real property values and the Court finds the value of the property as of the date of separation to be $816,300.00 . . . .

Contrary to plaintiff's assertion otherwise, this finding is supported by competent evidence. Plaintiff testified about the eroding market conditions as they related to the valuation of the Bald Head Island residence:

> Q. What had happened to market conditions by the day y'all separated?
>
> A. They had eroded to -- I don't even know the dollars or penny on the dollar. They had -- the values had declined tremendously.
>
> Q. And when the tax value [of the Bald Head Island residence] was reassessed in 2011, it went down substantially?
>
> A. It went down to -- I believe it was about 816,000.
>
> Q. And that was the value that you placed on this property as of the date of the separation?
>
> A. That's what I used. I also spoke with several realtors and, you know, they would market the house at eight, nine hundred, but I would expect to get somewhere south of eight hundred, actually, but I felt like 816, in an effort to be fair, was fair, using the tax -- using the reassessed tax valuation.

Indeed, plaintiff also testified that at some point he tried to list the Bald Head Island residence for $1.3 million, but that it would not sell at $1.3 million because plaintiff "couldn't find somebody stupid enough to spend that on that house. That's exactly why. But we tried."

Accordingly, where the trial court's finding is supported by the evidence, the trial court was well within its discretion to determine that the Bald Head Island residence had a value of $816,300.00 on the date of separation. Defendant's argument is overruled.

VI

Defendant next argues the trial court committed reversible error in failing to identify, classify, and distribute as marital property the $10,000.00 cash in plaintiff's possession on the date of separation. We agree.

In an equitable distribution proceeding, the trial court "must identify and classify *all* property as marital or separate based upon the evidence presented regarding the nature of the asset." *Smith v. Smith*, 111 N.C. App. 460, 470, 422 S.E.2d 196, 202 (1993) (emphasis added) (citation omitted), *rev'd in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994). "A distribution order failing to list all the marital property is fatally defective[.]" *Cornelius v. Cornelius*, 87 N.C. App. 269, 271, 360 S.E.2d 703, 704 (1987) (citation omitted); *see Little v. Little*, 74 N.C. App. 12, 17, 21, 327 S.E.2d 283, 288, 290 (1985) (vacating and remanding where the trial court

"neglected entirely to list, value, or award the second house and lot," an item of marital property, in its equitable distribution order). "If the judgment refers to only some of the marital and divisible property, and the record reveals that the party with the burden of proof offered credible evidence of additional marital or divisible property, the appellate court must vacate and remand." 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 12.142, at 378 (5th ed. 2002).

In the instant case, plaintiff testified as follows regarding the $10,000.00 cash:

> Q. Now, Mr. Henson, there is -- prior to us winding up in court, there was discussion about some cash that you had. Do you recall that?
>
> A. Vaguely, yes.
>
> Q. And on the date of the separation, did you have some cash?
>
> A. Oh, yes. I did have, I think I testified in my deposition with Mr. Ferguson, I believe about $10,000 was my guess at that time and I will stand by that.
>
> Q. And that $10,000 is not reflected anywhere in these schedules, is it?
>
> A. No; I haven't seen anything that says "cash on hand" or anything of that nature.
>
> Q. After the date of the separation, did you give any of that $10,000 to Ms. Henson?
>
> A. No, not direct payments to her, no.
>
> Q. Did you have any other cash anywhere?

A. I don't know of any I had anywhere; no.

The omission of the $10,000.00 in cash from the trial court's distribution order and about which plaintiff testified seems particularly noteworthy where, as here, the trial court appeared to rely largely on plaintiff's testimony in determining the valuation of marital and divisible property in almost every other instance. *See supra* Sections I, II, and IV. In addition, this cash was in the plaintiff's possession, not the defendant's, so his admission to possessing this cash would be against his own interest. Also, plaintiff acknowledged that the cash was not listed on the property schedules attached to the pretrial order, so it is possible this asset was overlooked when the order was being prepared. In any event, we are unable to determine if the trial court accounted for this asset; it appears to have been omitted.

Accordingly, where, as here, there is evidence of additional marital property (the "about $10,000" cash in plaintiff's possession), we reverse and remand for the trial court to determine the classification and value of this cash, to the extent it has not already been accounted for in the equitable distribution order, and to distribute it accordingly.

VII

Lastly, defendant argues the trial court reversibly erred in finding as follows: "The total value of the marital personal property is $368,102.51 and the net value of

the real property is negative $(423,281) which results in a net marital estate of minus $(55,178.49)." In other words, because of the assignments of error defendant makes above, defendant argues this Court should remand for the trial court to calculate the net value of the marital estate based upon appropriate findings as to the matters set forth in this appeal. Because we agree with defendant only to the extent that the trial court erred in failing to account for, classify, value, or distribute the "about $10,000" in cash which plaintiff testified was in his possession, we remand for a recalculation of the marital estate based on its findings regarding the $10,000 in cash which was in plaintiff's possession on the date of separation, as well as the distribution of the $10,000.00 as appropriate based upon the trial court's findings and conclusions on remand.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges STROUD and DAVIS concur.

Report per Rule 30(e).