

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

EMORY NELSON SUMLIN,

Appellant,

v.

Case No. 5D18-2701

NORMA JEAN SUMLIN,

Appellee.

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Opinion filed January 10, 2020

Appeal from the Circuit Court
for Orange County,
Tanya Davis Wilson, Judge.

Moses R. Dewitt, of Dewitt Law Firm, P.A.,
Orlando, for Appellant.

Jennifer R. Dixon and Crystal Buit, of
Lowndes, Drosdick, Doster, Kantor & Reed,
P.A., Orlando, for Appellee.

ORFINGER, J.

Emory Nelson Sumlin, the former husband, appeals the trial court's final judgment of dissolution of marriage. We affirm the trial court's order striking the former husband's answer and counterpetition without further discussion. See Ries v. Ries, 984 So. 2d 612 (Fla. 4th DCA 2008) (holding that trial court could prevent husband from presenting evidence regarding equitable distribution, alimony, and attorney fees where husband did

not file financial affidavit, and failed to respond to discovery). We also affirm the dissolution of the parties' marriage, but reverse the plan of equitable distribution and remand for the trial court to consider the tax consequences of the former husband's retirement account and to account for the full marital portion of the former wife's 401(k) withdrawal.

The parties were married in December 2001 and had no children together. After the former wife filed the petition for dissolution of marriage, the trial court conducted a trial at which the former wife introduced numerous documents concerning the parties' finances, including bank, brokerage, and retirement account statements. The former wife also testified as to the marital and nonmarital assets and liabilities. In addition, the former wife presented an accounting expert to testify as to the value of certain accounts and assets, including the former husband's business, and submitted into evidence an equitable distribution worksheet, which proposed an equitable distribution scheme that resulted in an equalizing payment to the former wife. The trial court subsequently entered a final judgment that adopted the accountant's valuations. The court also set forth the equitable distribution scheme proposed by the former wife, and ordered the equalizing payment to be secured by a piece of property distributed to the former husband, which was the former husband's primary residence during the dissolution proceedings. The former husband contends that there are errors in the equitable distribution plan that should be corrected. We agree and remand for further proceedings.

The former husband argues that the trial court erred when it considered the tax consequences applicable to the former wife's pension and 401(k) account, assets that she received as part of equitable distribution, but failed to similarly consider the tax

consequences related to the former husband's Merrill Lynch retirement account, which he received as part of equitable distribution. The former husband is correct.

"Consideration of the consequences of income tax laws on the distribution of marital assets . . . is required and failure to do so is ordinarily reversible error." Miller v. Miller, 625 So. 2d 1320, 1321 (Fla. 5th DCA 1993); see Diaz v. Diaz, 970 So. 2d 429, 432 (Fla. 4th DCA 2007) (determining that trial court erred in failing to consider tax consequences to former husband's pension and DROP account when dividing parties' assets). The purpose of considering tax consequences is to ensure that one party is not "charged with the full value of an asset that is burdened with an inevitable payment of taxes." Vaccaro v. Vaccaro, 677 So. 2d 918, 922 (Fla. 5th DCA 1996). The trial court should consider the effect of the burden so that neither party gains an unfair advantage or suffers an unfair burden because he or she receives a particular asset in distribution. Id. Accordingly, we reverse for the trial court to consider the tax consequences of the Merrill Lynch retirement account to the former husband, taking evidence if necessary. See Kvinta v. Kvinta, 277 So. 3d 1070, 1073 (Fla. 5th DCA 2019) (reversing and remanding for consideration of consequences of income tax laws on distribution of former husband's pension).

Likewise, the former husband correctly argues that the equitable distribution worksheet contains an error regarding the former wife's withdrawal of a portion of her 401(k) account. The former wife testified that she withdrew \$133,945.07 from her 401(k) in 2015 to make a down payment on her non-marital residence and to pay the penalties and taxes associated with the early withdrawal. The amount withdrawn was 53.60%

marital, equaling \$57,459.20 after applying a 20% tax rate.¹ However, the equitable distribution worksheet credited the former wife with only \$28,730. Because the former wife testified that she utilized the full marital portion for her own use, the entire \$57,459 marital value of the 401(k) withdrawal should have been allocated to the former wife. Accord Marshall-Beasley v. Beasley, 77 So. 3d 751, 759 (Fla. 4th DCA 2011) (finding that in equitable distribution, former wife properly received \$351,112 credit for net amount of former husband's withdrawal from 401(k) account to purchase property because 401(k) account necessarily was going to be taxed).

Accordingly, we reverse the portions of the final judgment relating to the equitable distribution of the parties' marital assets and liabilities, and remand for a recalculation of the equitable distribution award. Because we must remand, we decline to address the former husband's claim regarding the trial court's order that he secure the money awarded to the former wife against the property awarded to him.²

AFFIRMED in part, REVERSED in part, and REMANDED with instructions.

TRAVER, J., concurs.

EISNAUGLE, J., concurring in part and dissenting in part with opinion.

¹ This tax rate is consistent with the tax rate applied to other retirement accounts.

² When addressing the equitable distribution plan, the trial court should consider the homestead status, if any, of the former husband's property, if the court again considers a lien on this property.

I agree that the equitable distribution plan must be reversed for the trial court to consider the tax consequences of the former husband's Merrill Lynch retirement account. However, I dissent from the portion of the majority's opinion reversing the error in the equitable distribution worksheet relating to the former wife's 401(k) account because it is unpreserved. Eagleman v. Korzeniowski, 924 So. 2d 855, 860 (Fla. 4th DCA 2006) ("In order to be preserved for appellate review, the specific argument made on appeal must have been raised when the party objected in the trial court." (citation omitted)).