FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-3674

DENISE JOHNSON YON, Wife,

Appellant,

v.

TERRELL EDWARD YON,
Husband,

Appellee.

On appeal from the Circuit Court for Leon County.
Kevin J. Carroll, Judge.

November 5, 2019

WOLF, J.

The former wife challenges a final judgment of dissolution of marriage as it relates to equitable distribution. While we commend the trial court for a herculean effort to come up with a fair equitable distribution scheme, especially in light of the dearth of evidence presented by the parties as to certain assets, we still must reverse. Under Florida family law, the trial court erred by applying the wrong cut-off date for determining whether assets were marital or nonmarital. Because this error permeates throughout the final judgment, we reverse and remand for a redetermination in accordance with the statutory dictates and definitions in section 61.075, Florida Statutes. We also address the trial court's treatment of certain specific assets.

I. General Facts

On May 30, 2009, the parties were married in Leon County, Florida. No children were born of this marriage; both parties had adult children by prior marriages. Both parties had significant assets prior to the marriage, and both were self-supporting in their respective careers: The former wife was employed as an account manager at Cisco Systems, and the former husband was a retired pharmacist with several business interests. There was no prenuptial agreement and no disclosure of the parties' assets prior to the marriage.

On September 30, 2013, the parties separated. There was no separation agreement.

On May 29, 2015, nearly two years after the parties' separation, the former wife filed a petition for dissolution of marriage. The petition sought an equitable division of "all assets, including real and personal property acquired by the parties" and an equitable division of marital debts and obligations.

On May 8, 2017, the trial court conducted a hearing on the petition for dissolution, at which the only issues had to do with the distribution of the parties' assets and liabilities. While the former husband asserted that the marital financial matters were essentially a wash, the former wife asserted entitlement to half of the marital estate, including a number of assets determined by the court to be non-marital.

On May 22, 2017, the court entered Final Judgment.

II. The Final Judgment

In the Final Judgment, the court identified the numerous assets of both parties and identified the "premarital/nonmarital" assets to be excluded from equitable distribution, frequently referencing the date of separation as the date for determining whether an asset was nonmarital. The issues in this appeal mainly concern assets determined by the court to be the former husband's non-marital property. The court identified the following six assets as nonmarital assets belonging to the former husband:

1. Terrell E. Yon Revocable Trust;
2. A $250,000 "Archstone" deposit to the Revocable Trust account;
3. Terry Yon and Associates, Inc, including a $802,128 check from BP (on a 2010 oil spill claim), which was received in 2012;
4. DocKits company and income derived from sales made by that company;
5. Miramar Beach property; and
6. IRA account with SEI.

Under the heading "Other Property," the trial court awarded to the former husband a lot in South Walton County (the "Santa Rosa" property), and the "partially completed residence and debt encumbering same." The court found that the lot was purchased and the "partially completed residence" was built "after the parties separated."

III. CLASSIFICATION DATE

Section 61.075(7), Florida Statutes, provides a clear rule for determining the date to be used in classifying marital assets and liabilities for equitable distribution:

> The cut-off date for determining assets and liabilities to be identified or classified as marital assets and liabilities is the *earliest of the date the parties enter into a valid separation agreement, such other date as may be expressly established by such agreement, or the date of the filing of a petition for dissolution of marriage.*

(Emphasis added.) Under section 61.075(7), if there is no valid separation agreement, the cut-off date is the date on which the petition for dissolution of marriage was filed. *See Willman v. Willman*, 944 So. 2d 1151 (Fla. 1st DCA 2006); *Rao-Nagineni v. Rao,* 895 So. 2d 1160, 1161 (Fla. 4th DCA 2005).

In *Rao-Nagineni*, the Fourth District reversed a trial court's equitable distribution scheme where the trial court used the date of the parties' separation as the cut-off for determining marital assets, even though the parties had no separation agreement. 895 So. 2d at 1161. There, the trial court used the date of separation

based on its finding that the parties had "effectively separated all of their joint activities" years before the petition of dissolution was filed. *Id.* In reversing, the court held that the cutoff date for determining marital assets must be controlled by the plain language of section 61.075(7). *Id.* Likewise, in *Willman*, this court held that in the absence of a valid separation agreement, a married couple's assets remain marital until the date dissolution papers are filed. 944 So. 2d at 1151.

Here, the trial court made an initial finding that "[t]he Parties lived as Husband and Wife in an intact marriage until on or about September 30, 2013," the date of the parties' separation. For purposes of equitable distribution, that finding is not relevant. An "intact marriage" is not the standard for determining what assets are marital or nonmarital. Rather, section 61.075(7) requires the trial court to use the date of a separation agreement or, in the absence of a separation agreement, the date a petition for dissolution is filed as the starting point for determining what assets are excluded from equitable distribution. As in *Rao-Nagineni* and *Willman,* because the parties here had no separation agreement, the trial court erred by failing to identify which assets and liabilities were marital as of May 29, 2015, the date the former wife filed her petition for dissolution.

The trial court's error in failing to properly classify the marital assets as they existed on the date the petition was filed is repeated throughout the Final Judgment, affecting the trial court's equitable distribution determinations:

- The trial court referenced the "separation date" of September 2013 when determining the nonmarital characterization of a $250,000 Archstone transaction, affecting the former husband's revocable trust account which was managed by SEI. In that transaction, *following a liquidation event, Archstone wired $250,000 to a joint account of the parties*, which the former husband transferred into his revocable trust by writing a check on the parties' joint account. The trial court found the former husband entitled to the $250,000 as a nonmarital asset, stating that "*the parties were separated at the time and the marriage was already irretrievably broken at the time of*

this transaction…." The trial court also found that because the former husband "had no intention of gifting half of the $250,000 to his estranged wife . . . the presumption of a gift to a spouse" did not apply in this case.[1]

- The trial court applied the September 2013 date to classify the former husband's DocKits company as nonmarital even though it had been started during the marriage. The court found that the company had "*significant post separation income*." The court acknowledged that $578,575.05 of DocKits funds were used by the former husband to purchase a lot in South Walton after the separation, but again the court found that because this all occurred *after the separation*, no "gift" was intended. The court found the DocKits money and the South Walton property to be nonmarital assets belonging to the former husband.

- The trial court ruled that 2013-2014 proceeds from Terry Yon & Associates, Inc. and DocKits and assets purchased with the proceeds were nonmarital funds, even though $558,515 of that income was used by the former husband to purchase real estate during the marriage — $57,563 was used by the former husband to purchase two vehicles for himself; and $100,000 of that money was transferred to another company account. Referring to the former husband's purchase of a lot in South Walton County the court found, "both the *income* and the lot purchase appear to occur *after separation when there was no evidence of an intent to gift the funds* to the marriage although some funds were used to pay some marital debt."

- The trial court found that the $805,000 from the BP claim money was marital, but the court concluded that the money was not going to be counted as a marital asset because

[1] The issue of whether the $250,000 received as a result of the Archstone liquidation continued to be non-marital in character or whether its receipt during the marriage or its subsequent commingling with marital assets converted it into a marital asset is addressed later in this opinion.

some of it was used to pay expenses related to the marital residence "*even after the separation.*"

The justification of "the parties were separated" and "no gift was intended" was used throughout the court's findings to support nonmarital assets in favor of the former husband.[2] As to all these assets and liabilities mentioned by the trial court, it is immaterial that they were received or incurred after separation in making the original determination concerning their marital versus nonmarital status.

The former husband, however, urges this court to affirm the trial court's classification of marital assets as nonmarital based upon a "donative intent" theory, relying on *Hooker v. Hooker*, 220 So. 3d 397 (Fla. 2017). In *Hooker*, the Supreme Court reviewed a trial court's determination of "whether a spouse had donative intent to establish that property was an interspousal gift"; however, *Hooker* dealt with that issue under a very different set of facts and a different rule of law than we have in this case. *Id.* at 402.

The legal issue in *Hooker* dealt with an uncontested prenuptial agreement which established that the parties had no interest in each other's assets, and thus all assets were presumptively nonmarital. *Id.* at 399. In *Hooker*, the Supreme Court found it was necessary to look to donative intent to determine whether the parties had given any interspousal gifts during the marriage, which would subject the gift to equitable distribution under the terms of the parties' prenuptial agreement. *Id.* at 402-03. The *Hooker* analysis is not helpful to our review of this case where there was no agreement that the assets and liabilities were initially nonmarital.

Section 61.075(1), Florida Statutes, sets forth the law regarding a trial court's distribution of marital assets after the trial court has first properly established which assets are

---

[2] Although the court frequently found lack of donative intent, the former wife never argued that she was entitled to a portion of these assets as gifts. Rather, she testified that she believed she was entitled to a portion of the funds as marital assets because they were acquired during the time the parties were married.

nonmarital and not subject to distribution. Under section 61.075(1), it is not until *after* the nonmarital assets are properly identified that the trial court can exercise its discretion in determining the value of the marital assets "as the judge determines is just and equitable under the circumstances." *Rao-Nagineni,* 895 So. 2d at 1161. In *Rao-Nagineni,* the court pointed out that the discretion given to trial courts arises *after* the assets and liabilities are first characterized as marital or non-marital in accord with the provisions of section 61.075(7). *Id.* Here, as in *Rao-Nagineni*, the trial court erred by exercising its discretion "too early in the process." *Id.* at 1161.

IV. ISSUES AS TO THE TERRELL E. YON, JR. REVOCABLE TRUST

As to this asset, the trial court made the following finding:

> The unrefuted evidence was that the Husband established and funded the Terrell E. Yon, Jr. Revocable Trust dated April 10, 2008, prior to the marriage. The Terrell E. Yon, Jr. Revocable Trust was funded in 2008 with approximately $5,075,000.00, managed by Morgan Keegan. As set forth above the Husband followed Mr. Knowles, transferring his accounts from Morgan Keegan to SEI. Further the Husband testified he never added the Wife to any of the Trust accounts, he never intended to gift any of the Trust funds to the Wife, he did not make any withdraws from the trust funds for any purpose and that he did not make any deposits of marital funds into the Trust Accounts. Mr. Yon gave exclusive control to Edward Knowles and the SEI professional money managers defaulting to their judgment in managing the accounts investing and reinvesting funds and assets during the marriage.

The former wife asserts that the trust account became marital when the funds transferred from one investment company to another during the marriage and that co-mingled funds were added to the parties' joint account, thus switching the burden to the former husband to demonstrate the extent the account remained nonmarital.

The switching of assets from one investment company to another is not the acquisition of new assets during the marriage as contemplated by section 61.075(6)(a)1.a., Florida Statutes. It is simply transferring management of an existing asset. In addition, section 61.075(6)(b)1., Florida Statutes, identifies nonmarital assets as "[a]ssets acquired . . . by either party prior to the marriage, and assets . . . acquired . . . in exchange for such assets . . . ." Therefore, this transaction does not convert the nonmarital asset into a marital one.

Our analysis, however, does not stop at this point. Prior to the petition for dissolution being filed, $250,000 was added to this account from a joint account of the husband and wife. The trial court based its ruling that the funds were nonmarital on the fact that they were received after the separation of the parties. As previously discussed, this constituted error. A different analysis must be utilized to determine whether the nonmarital assets were converted to the marital assets and the effect on other assets if the $250,000 in question became a marital asset.

In accordance with the above analysis, the Archstone nonmarital asset did not become marital merely because it was liquidated. The placement of the $250,000 received in a joint account upon liquidation is more problematic.

The general rule of when nonmarital assets may become marital assets was laid out in *Dravis v. Dravis*, 170 So. 3d 849 (Fla. 2d DCA 2015):

> Nonmarital assets may lose their nonmarital character and become marital assets where, as here, they have been *commingled* with marital assets. *Abdnour v. Abdnour*, 19 So. 3d 357, 364 (Fla. 2d DCA 2009). This is especially true with respect to money because "[m]oney is fungible, and once *commingled* it loses its separate character." *Pfrengle v. Pfrengle*, 976 So. 2d 1134, 1136 (Fla. 2d DCA 2008); *see also Belmont v. Belmont*, 761 So. 2d 406, 408 (Fla. 2d DCA 2000) ("Money loses its nonmarital character when it is *commingled* with marital money. . . .").

Id. at 852 (emphasis added).

Thus, as a matter of law, the $250,000 placed in the parties' joint account became marital. *Abdnour*, 19 So. 3d at 364. Neither party directs us to any case where this general rule has not been applied.

The trial court found, and appellee urges us to find, no commingling because it was not appellant's intent or choice to place the money into the joint account. The trial court found that Archstone would not send the money to the former husband's separate brokerage account, but instead wired the money into the parties' joint account. There are several problems with the approach taken by the trial court:

> 1. It is not clear from the evidence or the findings that the former husband could not have directed that the money be sent to a separate, non-brokerage account in his own name;
>
> 2. The former husband let the money remain in the joint account for over three months. The trial court made no findings as to why this occurred; therefore, even if the original commingling was not voluntary, only the immediate removal from the commingled account would support the trial court's reasoning.
>
> 3. Determining intent is difficult. The bright line rule for commingled funds adopted by the courts of this state appears to be the best approach in this limited area.

While this approach may seem to be somewhat harsh, after properly classifying the assets as marital or nonmarital, the court may consider the totality of the circumstances in determining whether an unequal distribution of marital assets is justified. *See McMonagle v. McMonagle*, 617 So. 2d 373 (Fla. 5th DCA 1993).

The former wife requests that we go further and determine that once the $250,000 from the joint account was placed into the nonmarital investment account that the entire investment account became a marital asset. Based on the scant record concerning the makeup and nature of this account, as well as lack of findings by the trial court in this regard, we cannot determine whether commingling resulted in the entire investment account becoming

a marital asset. Deposit of the funds does not necessarily make the entire account marital. The former husband may be able to meet his burden of proof to establish what portion of the account remains nonmarital. *See Abdnour*, 19 So. 3d at 361. We remand to the trial court to take further evidence and make the initial determination concerning what portion of the account remains nonmarital. Once the trial court determines the classification of this asset, it may make findings concerning whether an unequal distribution is justified.

V. OTHER DISPUTED ASSETS

Because the trial court appears to have applied the wrong classification dates, it is difficult to know the extent this error permeated the trial court's determinations. We, therefore, remand the entire equitable distribution scheme to be reevaluated using the date that the petition for dissolution was filed. For guidance to the trial court in making this determination, the statutory definitions of marital and nonmarital assets contained in subsections 61.075(6)(a)1. and 61.075(6)(b), Florida Statutes, must be followed. We briefly discuss the trial court's classification of certain assets.

Terry Yon & Associates, Inc. (TYA), DocKits, and the BP Claim

The former husband created Terry Yon & Associates, Inc. before the parties married. The company was wholly owned by the former husband. As with other assets, the trial court did not make any findings regarding the value of the company on the date of the marriage or the date the dissolution petition was filed. The trial court noted in the final judgment that the company ceased making money by 2010, but it was making money again by 2013 with the former husband's new venture, DocKits, which was controlled through Terry Yon & Associates, Inc. It appears that the company may have had no value at the time the divorce petition was filed. The trial court, however, should indicate whether there was an increase in value of this solely owned company during the marriage.

BP Money and DocKits Income

In 2010, the former husband filed a BP claim for TYA, and in 2013, about two months after separation of the parties, TYA received a compensation check in the amount of $802,128.05. Under this asset, as with others at issue in this case, the former husband argues that because the BP money was received after the parties separated it should be considered nonmarital. As previously discussed, this general hypothesis is incorrect. Sections 61.075(6)(a) and (6)(b) define marital and nonmarital assets. The DocKits and BP funds as well as all assets need to be specifically reassessed in accordance with the statutory definitions.

Miramar Beach Property

The trial court found that the former husband owned real property in Miramar Beach, Florida (the "St. Tropez" house) before the marriage. The trial court also found that the property was encumbered by a $500,000 mortgage, but the court did not make any findings regarding the use of marital funds to pay the mortgage debt, although the court did acknowledge the former husband spent "most of the BP Claim money" on debt service. The court did not make any findings regarding the value of the property and the mortgage debt on the date of marriage and the date of the filing of the petition for dissolution of marriage. As with other assets at issue in this case, the court awarded all of the property and its debt to the former husband, without findings regarding the value of the asset on the date of the marriage, the value on the date of filing, and the amount of mortgage debt paid down with marital funds. When marital assets are used during the marriage to reduce the mortgage on non-marital property, the increase in equity is a marital asset subject to equitable distribution. *Ballard v. Ballard*, 158 So. 3d 641, 643 (Fla. 1st DCA 2014).

Santa Rosa Beach Property

The trial court found that during the marriage the former husband purchased real property located in Santa Rosa Beach, Florida (the "South Walton" property). The trial court also found that the property was encumbered with $1,500,000 in mortgage debt. The former husband testified that he was building a

$2,000,000 home on the Santa Rosa lot during the parties' separation, and that he used funds from the BP Claim to pay for the design and the improvements he was building on the property. It was purchased during the marriage before the petition was filed, and regardless of title, some marital funds may have been used on its improvement. It thus appears a portion of this property may be a marital asset. Nevertheless, the trial court did not engage in the statutory analysis for classifying the asset.

A trial court's findings should reflect an understanding that if one party's nonmarital property appreciates due to the efforts of either party during the marriage or the "contribution or expenditure thereon of marital funds or other forms of marital assets," the amount of appreciation is marital property and should be accounted for in the equitable distribution scheme. *Winney v. Winney*, 979 So. 2d 396, 400 (Fla. 1st DCA 2008) (quoting section 61.075(5)(a)2., Florida Statutes). As with other issues discussed in this case, if a trial court's failure to include the required factual findings hampers effective appellate review, remand is necessary. *Id.*; *see also Shoffner v. Shoffner,* 744 So. 2d 1157, 1158 (Fla. 1st DCA 1999) (reversing in part a judgment entered in the trial court due to the trial court's failure to make findings of fact in support of its determination in regard to equitable distribution of property).

Setoffs

The former wife also asks this court to reverse the amount of setoffs granted to the former husband against the wife's equitable distribution. On remand the trial court should reassess its determination of setoffs in light of this opinion.

We REVERSE the equitable distribution award and REMAND for a redetermination of the equitable distribution scheme.

M.K. THOMAS, J., and DUNCAN, J. SCOTT, ASSOCIATE JUDGE, concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

James M. Durant, Jr., B.C.S. of Boyd & Durant, P.L., Tallahassee; and Kristin Adamson, B.C.S., Tallahassee, for Appellant.

William Ketchersid of Ward & Ketchersid, P.A., Destin; Bryan S. Gowdy and Thomas A. Burns of Creed & Gowdy, P.A., Jacksonville, for Appellee.