FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-3979

DENNIS K. BURNS, Former Husband,

Appellant,

v.

CYNTHIA S. COLE, Former Wife,

Appellee.

On appeal from the Circuit Court for Walton County.
Kelvin C. Wells, Judge.

November 26, 2019

PER CURIAM.

Dennis Burns, the former husband, appeals from the final judgment of dissolution, arguing that the trial court correctly determined that a sum of money received during the parties' marriage was a loan, but erred in ruling that the former wife, Cynthia Cole, had no obligations as to the loan. We agree and reverse.

In this largely uncontested divorce proceeding, the parties filed a stipulated agreement stating that they had agreed as to alimony, attorney's fees, equitable distribution of marital assets and debts, and other relevant provisions. The only issue the parties asked the trial court to resolve regarded $125,000 they received

from the former husband's mother. The agreement stated that the "Husband claims it is a loan," while "the Wife asserts that it was a gift to the parties," and "reserve[d] this one issue for determination by the Court."

At an evidentiary hearing, the former husband, his brother, and his mother provided testimony and documents establishing that the money was a loan. The former wife, a real estate agent, discovered a condominium and suggested that the couple ask the former husband's mother to invest in it with them, but the mother decided instead to make a loan to the parties without buying an ownership stake in the home. A promissory note was prepared requiring interest payments to begin immediately after the closing, the former wife managed the joint bank account that made monthly checks to the mother, and the former wife listed the payments as mortgage payments in records she maintained. The parties sold the condominium for a net profit and the former husband believed that the $125,000 loan should be repaid before the parties split the remaining profit, while the former wife believed the entire sale price should be split evenly without accounting for the mother's "gift."[1]

When the former wife moved for a directed verdict, the trial court found that "[o]bviously, based on the testimony, there was a loan made." However, the trial court continued, finding that the promissory note was not properly attached to the condominium and may not be enforceable, and ruling that any obligation to pay the loan back would stand only with the former husband.

The former wife's argument at trial is not clear from the record. In arguing that the money was "a gift to the parties," she appeared to argue that it was a marital asset rather than a marital liability; that is, that the sale proceeds could be divided between the parties without accounting for repayment to the former husband's mother. On appeal, the former wife states that her position below was that the money was "a noninterspousal gift, not

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[1] The former wife also took the stand, but provided no substantive testimony, stating only that the marriage was irretrievably broken and confirming that her legal argument, as stated in the stipulation, was that the money was a gift.

subject to equitable distribution." Neither position has merit. First, as was shown clearly and found by the trial court (and which the former wife does not dispute on appeal), the $125,000 was a loan rather than a gift. Second, the argument that the money was a noninterspousal gift and thus not subject to equitable distribution is meritless as the wife maintained below that the money was a gift "*to the parties*." *Cf. §* 61.075(6)(b)2., Fla. Stat. (nonmarital assets include "[a]ssets acquired *separately by either party* by noninterspousal gift" (emphasis added)). If the money was a "gift to the parties," it would simply be a marital asset subject to equitable distribution. *See* § 61.075(6)(a)1.a., Fla. Stat.

The former wife contends that, after finding that the money was a loan, the trial court allocated the loan to the former husband, despite the parties never asking the court to do so. *See Goley v. Goley*, 272 So. 3d 800, 802 (Fla. 1st DCA 2019) ("The trial court 'may make an unequal distribution of assets, provided the court supplies a specific finding of fact to justify its unequal distribution.'"); § 61.075(1), Fla. Stat. (listing relevant factors that could justify an unequal distribution). While "conced[ing that] this is not a hallmark or prototypical fraud example," the former wife contends that there is sufficient evidence of a "deceitful scheme" or other misconduct to justify the allocation. However, the trial court did not find misconduct[2] and the evidence the former wife points to—including that the funds were provided before the promissory note was executed, the mother had a trust that offset any outstanding loans at the time of her death, and the mother did not move to enforce the note when the former wife stopped making payments during the dissolution proceedings—would not support such a finding. The trial court did not consider the factors listed in section 61.075(1) or articulate a sufficient justification to allocate the loan solely to the former husband. As such, the trial court must treat the debt as a marital liability and order distribution of it accordingly.

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[2] *See Sarazin v. Sarazin*, 263 So. 3d 273, 274 (Fla. 1st DCA 2019) (holding that an unequal distribution will not be affirmed due to misconduct if the trial court does not make a finding of misconduct).

If reversal is required, the former wife argues, we should remand for the trial court to "determine the true value of the note" and how it should be distributed. *See Jones v. Jones*, 51 So. 3d 547, 550 (Fla. 1st DCA 2010). In *Jones*, the wife contended that the promissory note was worthless, the husband contended that it was worth its face value of $225,000, the trial court found that the true value was somewhere in between after accounting for the likelihood that the creditor would receive the full amount, and this Court held that the trial court did not abuse its discretion in its valuation. *Id.* While there may have been merit in the argument that the true value of the note here was a valid issue for consideration, the former wife did not ask the trial court to make this determination. On appeal of the one issue the trial court was asked to rule on, we will not remand for consideration of an issue not previously put before the court.

REVERSED.

WOLF, KELSEY, and WINOKUR, JJ., concur.

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

James C. Campbell of the Law Office of James C. Campbell, P.A., Shalimar, for Appellant.

Clay B. Adkinson of Adkinson Law Firm, LLC, DeFuniak Springs, for Appellee.