

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-0016

RODNEY STEWART, Former
Husband,

Appellant,

v.

DARLA JANE STEWART, Former
Wife,

Appellee.

On appeal from the Circuit Court for Santa Rosa County.
David Rimmer, Judge.

February 3, 2020

BILBREY, J.

This is Mr. Stewart's third appeal stemming from the parties' dissolution of marriage proceedings.¹ Here, Mr. Stewart appeals

¹ After the affirmance in part and reversal in part in the first appeal, *Stewart v. Stewart*, 237 So. 3d 450 (Fla. 1st DCA 2018), the trial court entered its order on remand and second amended final judgment of dissolution. Mr. Stewart thereafter brought his second appeal. *Stewart v. Stewart*, 275 So. 3d 845 (Fla. 1st DCA 2019). Based on a concession of error by Ms. Stewart, the

the trial court's order awarding \$20,780.00 in appellate attorney's fees to Ms. Stewart following our provisional grant of appellate attorney's fees in *Stewart v. Stewart*, 237 So. 3d 450 (Fla. 1st DCA 2018). Because the order contains insufficient findings to support the award of Ms. Stewart's appellate attorney's fees, the order is reversed, and the matter remanded for further proceedings.

Mr. Stewart should have challenged the trial court's grant of fees by a motion for review under rule 9.400(c), Florida Rules of Appellate Procedure rather than by appealing. *See Pellar v. Granger Asphalt Paving, Inc.*, 687 So. 2d 282 (Fla. 1st DCA 1997). Under the authority of *Pellar* and rule 9.040(c), Florida Rules of Appellate Procedure, we treat this appeal as a motion for review.

The parties' short-term marriage was dissolved by the final judgment entered December 19, 2014. Following the entry of an amended final judgment, Mr. Stewart appealed the equitable distribution scheme to this court. This court affirmed in part, reversed in part, and remanded for certain adjustments to the equitable distribution calculation. *Stewart*, 237 So. 3d at 453. Ms. Stewart incurred appellate attorney's fees to defend that appeal, and she timely moved for an award of these fees based on section 61.16(1), Florida Statutes. On February 5, 2018, this court entered its order citing to *Dresser v. Dresser*, 350 So. 2d 1152 (Fla. 1st DCA 1977), provisionally granting Ms. Stewart's motion for her appellate attorney's fees.² We remanded for the trial court to determine a reasonable fee for appellate counsel's services and the portion, if any, that Mr. Stewart should pay because of continuing disparity in the parties' needs and abilities to pay.

classification of one asset as marital property was reversed in the second appeal and remanded for correction. *Id.* at 846.

² Although immaterial here, the parties and trial courts may be better served if we were to cite to *Rosen v. Rosen*, 696 So. 2d 697 (Fla. 1997), in these orders provisionally granting appellate attorney's fees. *See Lamolinara v. Lamolinara*, 85 So. 3d 1147 (Fla. 1st DCA 2012) (noting that our orders citing to *Dresser* have caused confusion in light of *Rosen*).

After a hearing to consider the parties' relative financial resources, the trial court found Ms. Stewart's appellate counsel's hourly rates and number of hours expended to be reasonable. Mr. Stewart does not appeal that finding.

At issue here is the trial court's award of \$20,780.00, the entire amount of appellate counsel's fees, based on the court's determination that Mr. Stewart had the ability to pay the fees due to his ownership of an airplane and ownership of an investment account. The court did not acknowledge that these assets had previously been equitably distributed to Mr. Stewart, and the investment account was subject to an equalization payment of \$11,835.38 to Ms. Stewart in the distribution scheme. As a result of the various distributions there was an equal distribution of assets and liabilities to the parties.

The trial court made no findings to support Mr. Stewart's superior financial position from income or other source outside the equitable distribution scheme. The grant or denial of a motion for attorney's fees must avoid "the inequitable diminution' of a spouse's share of an equitable distribution." *Von Baillou v. Von Baillou*, 959 So. 2d 821, 823 (Fla. 4th DCA 2007) (quoting *Bagley v. Bagley*, 720 So. 2d 582, 583 (Fla. 4th DCA 1998)). If the equitable distribution scheme places the parties in substantially the same financial positions with equal abilities to pay attorney's fees, it is an abuse of discretion to award attorney's fees to one former spouse. See *Kurtanovic v. Kurtanovic*, 248 So. 3d 247, 253 (Fla. 1st DCA 2018); *Hutchinson v. Hutchinson*, 185 So. 3d 528, 529 (Fla. 1st DCA 2015).

In addition, the court made no written findings that after the equitable distribution in this case, Ms. Stewart needed assistance from Mr. Stewart to pay her appellate attorney to ensure that her ability to retain competent appellate counsel was similar to Mr. Stewart's ability. See *Schwartz v. Schwartz*, 965 So. 2d 832, 833 (Fla. 1st DCA 2007) (requiring statutory findings and noting that purpose of § 61.16(1), Fla. Stat., is to ensure that both parties have similar ability to obtain competent legal counsel). Even if Ms. Stewart established her need for such assistance, the order on appeal lacks any indication that the trial court considered whether Ms. Stewart was able to pay "some portion of her [appellate] fees

without suffering an inequitable diminution of her assets.” *Burnett v. Burnett*, 237 So. 3d 447, 450 (Fla. 1st DCA 2018) (quoting *Von Baillou*, 959 So. 2d at 825).

Because the order on appeal requires Mr. Stewart to pay all Ms. Stewart’s appellate attorney’s fees based only on the court’s finding that Mr. Stewart has the ability to pay if he liquidates certain equitably distributed assets, the order granting Ms. Stewart’s appellate attorney’s fees in full is reversed. The issue of Ms. Stewart’s appellate attorney’s fees incurred in her defense of the first appeal is remanded to the trial court for consideration of the parties’ relative financial resources, including their financial situations after the equitable distribution. *See* § 61.16(1), Fla. Stat. If the trial court determines that Ms. Stewart demonstrates a need for assistance to compensate her appellate counsel so that the parties’ ability to obtain competent counsel is similar, the trial court shall then determine if Mr. Stewart has the ability to pay all or any portion of Ms. Stewart’s appellate attorney’s fees based on their respective financial resources.

REVERSED and REMANDED.

ROBERTS and WINOKUR, JJ., concur.

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

E. Jane Brehany, Pensacola, for Appellant.

No appearance for Appellee.