

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-966

LISA MCGOWAN, n/k/a Lisa
Miller,

Appellant,

v.

BOBBY RAY MCGOWAN,

Appellee.

On appeal from the Circuit Court for Nassau County.
Lester Bass, Judge.

August 17, 2022

ROWE, C.J.

Lisa McGowan, Former Wife, appeals a final judgment dissolving her marriage to Bobby Ray McGowan, Former Husband. She argues that the trial court erred when it distributed the parties' assets and liabilities and when it ruled on her requests for alimony and attorney's fees. Because the trial court reversibly erred in several respects, we reverse.

Facts

The parties were married in 2012. It was the second marriage for both, and no children were born of the marriage. Both parties entered the marriage with significant assets and successful

careers: Former Wife was an executive at CSX and Former Husband was a senior vice president at People's Capital & Leasing. Six years after they married, Former Wife filed to dissolve the marriage.

In the dissolution proceeding, the trial court heard four days of testimony about the parties' assets and liabilities and considered Former Wife's request for alimony and attorney's fees.

Three months later, the trial court entered the final judgment. In its distribution of assets and liabilities, the court described the net value of each marital asset and debt. The court distributed several assets and liabilities to Former Wife: the loan on her 2015 Infiniti, the balance on her AAdvantage MasterCard, accounts at First Florida, accounts at Jax Federal, Publix stock, an Empower Rollover IRA, an Empower Roth IRA, and a Merrill Lynch account.

The court distributed other assets to Former Husband: accounts at Wells Fargo, a home in Fayetteville, Georgia, a People's United 401(k), a People's United ESOP, and a Fidelity Roth IRA.

After determining it would unequally distribute the parties' assets and liabilities, the court ruled that Former Wife owed Former Husband \$4,430.50. The court then denied Former Wife's requests for alimony and attorney's fees.

Former Wife moved for rehearing, arguing that the trial court misclassified the parties' assets and liabilities, designating certain nonmarital assets and liabilities as marital and vice versa. She also argued that the trial court misvalued assets and liabilities. Finally, she argued that the trial court erred in denying her requests for alimony and attorney's fees. The trial court denied the rehearing motion. This timely appeal follows.

Standard of Review

This Court reviews de novo a trial court's determination that an asset is marital or nonmarital. *Martin v. Martin*, 276 So. 3d 393, 395 (Fla. 1st DCA 2019). But we review the trial court's factual findings required to support that determination for

competent, substantial evidence. *Sturms v. Sturms*, 226 So. 3d 1004, 1006 (Fla. 1st DCA 2017). We review a trial court’s valuation of marital assets and liabilities for an abuse of discretion. *Tritschler v. Tritschler*, 273 So. 3d 1161, 1165 (Fla. 2d DCA 2019).

Analysis

We observe at the outset that the trial court adopted Former Husband’s proposed final judgment in toto. As we will explain, this case reveals the peril of a trial court adopting a proposed order verbatim. See *Perlow v. Berg-Perlow*, 875 So. 2d 383, 390 (Fla. 2004) (cautioning trial courts against adopting proposed orders verbatim); *D.R. v. Dep’t of Child. & Fams.*, 236 So. 3d 1175, 1176–77 (Fla. 1st DCA 2018) (explaining that reversal is required when the circumstances “create an appearance that the judgment does not reflect the judge’s independent decision-making” (quoting *In re T.D. v. Dep’t of Child. & Fam. Servs.*, 924 So. 2d 827, 831 (Fla. 2d DCA 2005))).

In no way did the final judgment show the exercise of independent judgment by the trial court. The trial court made no oral findings before entering the judgment. And its wholesale adoption of Former Husband’s proposed judgment caused the trial court to make multiple, easily avoidable errors. As conceded by Former Husband’s counsel at oral argument, the proposed judgment was riddled with errors in classifying and valuing the parties’ assets and liabilities. By adopting Former Husband’s proposed judgment verbatim, the trial court repeated those errors in the final judgment.

What is more, along with the errors conceded by Former Husband, the final judgment reveals several other errors in classifying and valuing the parties’ assets and liabilities. Even so, at oral argument, Former Husband’s counsel suggested that these errors can be overlooked because the dissolution statute permits the trial court to consider “[a]ny factors necessary to do equity and justice between the parties.” § 61.075(1)(j), Fla. Stat. (2018). Former Husband argues in essence that the multiple errors in the final judgment “come out in the wash.” We disagree. As explained below, the trial court had to consider and correctly apply the steps outlined in the dissolution statute when distributing the parties’

assets and liabilities. A court cannot simply skip to the end of the process and render judgment based on its authority to consider “[a]ny factors necessary to do equity and justice between the parties.” *Id.*

Statutory Requirements for Equitable Distribution

Section 61.075, Florida Statutes, spells out in great detail the steps a trial court must take in equitably distributing the assets and liabilities of parties seeking to dissolve their marriage.

In the first step, the trial court “set[s] apart to each spouse that spouse’s nonmarital assets and liabilities.” § 61.075(1), Fla. Stat. (2018). Section 61.075 defines those terms and explains how the trial court is to distinguish marital assets and liabilities from those that are nonmarital. Assets acquired during the marriage by either spouse individually or by both spouses jointly are marital assets. § 61.075(6)(a)1.a., Fla. Stat. But assets acquired by either party before the marriage are nonmarital assets. § 61.075(6)(b)1., Fla. Stat. In distinguishing between marital and nonmarital assets and liabilities, the trial court must make written findings of fact. § 61.075(3), Fla. Stat.

After the trial court has sorted the nonmarital assets and liabilities from the marital assets and liabilities, the trial court must then determine the value of the marital assets and liabilities. *Keurst v. Keurst*, 202 So. 3d 123, 127 (Fla. 2d DCA 2016) (“[E]quitable distribution of marital assets is a three-step process: (1) identification of marital and nonmarital assets, (2) valuation of marital assets, and (3) distribution of marital assets as statutorily prescribed.”).

Finally, the trial court must distribute the marital assets as prescribed by statute. *Id.* Although there is a presumption in favor of an equal distribution, a trial court may unequally distribute the marital assets and liabilities after considering the ten factors set out in section 61.075(1)(a)-(j), Fla. Stat.

The Distribution of Assets and Liabilities in this Case

Here, the trial court erred at the outset, in the first step. It misclassified certain nonmarital assets as marital and included those assets in the distribution plan. The trial court's inclusion of nonmarital assets in the equitable distribution scheme was error. *See Vinson v. Vinson*, 282 So. 3d 122, 140 (Fla. 1st DCA 2019) (on motion for rehearing) (explaining that nonmarital property is not subject to equitable distribution). The court also misclassified certain marital liabilities as nonmarital and erroneously excluded them from the distribution plan. Further, the classification of the parties' assets and liabilities as marital and nonmarital in the final judgment was internally inconsistent and not supported by competent, substantial evidence.

Nonmarital Assets Classified as Marital Assets

The trial court erroneously classified two nonmarital assets as marital: Former Wife's Jax Federal Account and her Publix stock. The trial court determined that the Jax Federal Account was a marital asset even while acknowledging that the account contained funds from a nonmarital inheritance and had not been comingled with marital funds. *See* § 61.075(6)(b)2., Fla. Stat. (2018). The trial court also classified Former Wife's Publix stock as a marital asset even though Former Wife acquired the stock in her first divorce and no efforts were expended during the marriage to increase the value of the stock. *Id.* Because no competent, substantial evidence supports the trial court's treatment of these assets as marital, the trial court erred in including them in the equitable distribution plan. *See Vinson*, 282 So. 3d at 140.

Partially Marital and Partially Nonmarital Assets Classified as Marital Assets

The trial court also misclassified several retirement and investment accounts as marital assets only even though those accounts included both nonmarital and marital portions. Former Husband and Former Wife entered the marriage with significant nonmarital assets consisting of retirement and investment funds. Although assets acquired before the marriage are generally nonmarital, "[t]he enhancement in value and appreciation of nonmarital assets resulting from the efforts of either party during the marriage or from the contribution to or expenditure thereon of

marital funds or other forms of marital assets, or both” is considered a marital asset. § 61.075(6)(a)1.b., Fla. Stat. (2018); *see also Yon v. Yon*, 286 So. 3d 322, 330 (Fla. 1st DCA 2019).

The trial court distributed Former Wife’s First Florida Credit Union accounts without considering the increase in value of these assets resulting from the contribution of marital funds. This was error. This distribution also contradicted the court’s earlier factual finding that the First Florida Credit Union accounts included both marital and nonmarital funds. At oral argument, Former Husband’s counsel conceded error on the trial court’s classification of these accounts as exclusively marital.

The trial court also classified as exclusively marital assets Former Wife’s Empower Rollover IRA, Empower Roth IRA, and Merrill Lynch account. Former Wife opened her rollover IRA while married to Former Husband, but she funded the IRA by closing out a retirement account that she opened before the marriage—in 2001. In 2017, Former Wife opened a Roth IRA. She opened the Merrill Lynch account in 2012, also before the marriage. Thus, the record evidence shows that these three accounts include both marital and nonmarital funds. But only the marital portions of these accounts are subject to distribution. *See* § 61.075(6)(a)1.e., Fla. Stat. (2018) (defining marital assets as “[a]ll vested and nonvested benefits, rights, and funds accrued during the marriage in retirement, pension, profit-sharing, annuity, deferred compensation, and insurance plans and programs”); *Murphy v. Murphy*, 313 So. 3d 237, 238–39 (Fla. 2d DCA 2021) (discussing the distribution of the marital portions of retirement accounts). The trial court erred by not excluding the nonmarital portions of these accounts from the equitable distribution.

The trial court similarly treated as exclusively marital assets Former Husband’s Wells Fargo accounts, People’s United 401(k), and People’s United ESOP. These accounts were opened before the marriage. Former Husband deposited his paychecks into the Wells Fargo checking account. And Former Husband deposited to the Wells Fargo savings account the proceeds from his deceased wife’s life insurance. Although Former Husband used both accounts throughout the marriage, Former Wife stipulated that portions of Former Husband’s 401(k) and ESOP accounts were nonmarital.

Even so, the trial court did not exclude the nonmarital portions of the accounts and instead included the entire value of the accounts in the equitable distribution scheme.

The trial court went on to misclassify as exclusively nonmarital Former Husband's home in Fayetteville, Georgia. It did so, even while acknowledging that Former Husband used marital funds to pay the mortgage on the Fayetteville home. The trial court should also have considered the passive appreciation of the Fayetteville home that accrued during the marriage and a share of the increased equity from Former Husband using marital funds to pay down the mortgage on that home. *See Kaaa v. Kaaa*, 58 So. 3d 867, 870 (Fla. 2010) (holding that the passive appreciation of a nonmarital asset is considered a marital asset where marital funds contributed to the appreciation); *Somasca v. Somasca*, 171 So. 3d 780, 782 (Fla. 2d DCA 2015) (holding that equity in nonmarital property gained from the use of marital funds to pay down a mortgage is a marital asset subject to distribution).

Marital Liabilities Misclassified as Nonmarital

Along with misclassifying assets, the court erroneously classified certain marital liabilities as nonmarital. Former Wife asked the court to equitably distribute two liabilities: the loan on her 2015 Infiniti and the balance on a MasterCard. The trial court found that neither debt was marital and that Former Wife should be solely responsible for their repayment. But as conceded by Former Husband's counsel at oral argument, the trial court's findings were erroneous. The parties bought the car during the marriage with marital funds and the car was titled in both parties' names. Thus the loan balance is a marital liability. *See Distefano v. Distefano*, 253 So. 3d 1178, 1182 (Fla. 2d DCA 2018).

As to the Mastercard, Former Wife opened the credit card account during the marriage, and all expenses charged to the card occurred during the marriage. Thus, the trial court should have classified the credit card debt as a marital liability and included the liability in its equitable distribution. *See* § 61.075(6)(a)1.a., Fla. Stat. (2018) (defining a marital liability as one incurred during the marriage by either spouse individually or jointly).

Valuation of Assets

Along with misclassifying assets and liabilities, the trial court erred in the second step of the equitable distribution process—valuing the parties’ assets. The court erred by using different valuation dates for similar assets. It also used several valuations in the distribution scheme that do not match the court’s specific findings of value.

First, the trial court erred when it determined the date for valuation of similar assets. The date for determining the value of marital assets and liabilities is “the date or dates as the judge determines is just and equitable under the circumstances. Different assets may be valued as of different dates, as, in the judge’s discretion, the circumstances require.” § 61.075(7), Fla. Stat. (2018). Although a trial court has discretion in establishing the date for valuation, it abuses that discretion when it uses “different valuation dates for similarly situated assets resulting in values favoring one party over the other without explanation or record evidence to justify the different treatment.” *Tritschler*, 273 So. 3d at 1165 (quoting *Struble v. Struble*, 787 So. 2d 48, 50 (Fla. 2d DCA 2001)).

Here, the trial court used a valuation date of December 30, 2018, for Former Husband’s 401(k). But the court used June 30, 2020, to value Former Wife’s Roth IRA and Former Husband’s ESOP. The court explained that it used the June 2020 date to value Former Husband’s ESOP because the account’s value had diminished due to the COVID-19 pandemic. But this pandemic-based reasoning for establishing the date of valuation would have applied equally to Former Wife’s accounts.

The final judgment also includes several inconsistencies between the court’s factual findings and the valuations in the equitable distribution plan. For example, the court found that Former Wife’s Publix stock was worth \$441,509.41, but the chart in the final judgment values the stock at \$386,895.28. A similar error occurred with Former Wife’s Empower Roller IRA, Empower Roth IRA, and Merrill Lynch accounts. The values assigned to these assets in the chart are internally inconsistent with the court’s factual findings. See *Bolden v. Bolden*, 263 So. 3d

216, 217 (Fla. 1st DCA 2019) (reversing dissolution order that contained internally inconsistent findings).

Unequal Distribution

After making these errors in classification and valuation, the trial court determined that it was appropriate to distribute the marital assets and liabilities unequally. The trial court made an unequal distribution of the parties' assets and liabilities in favor of Former Husband. Former Husband argues that the trial court's unequal distribution should be affirmed based on the trial court's authority to do equity between the parties. We disagree.

Section 61.075(1) begins with the presumption that distribution of marital assets and liabilities will be equal. *Goley v. Goley*, 272 So. 3d 800, 802 (Fla. 1st DCA 2019). Notwithstanding this presumption, at times, a court may distribute assets and liabilities unequally based on "all relevant factors." See § 61.075(1); *Rawson v. Rawson*, 264 So. 3d 325, 331 (Fla. 1st DCA 2019) (affirming an unequal distribution of a pension plan as lump-sum alimony when former husband dissipated assets, withheld income, and threatened to kill former wife to avoid supporting her). And when making an unequal distribution, the court must make factual findings to justify the disparity. *Legere v. Legere*, 304 So. 3d 811, 813 (Fla. 1st DCA 2020). Those findings must be supported by competent, substantial evidence. *Id.*

Among the "relevant factors" a court may consider when deciding whether an unequal distribution is justified are "[a]ny other factors necessary to do equity and justice between the parties. See § 61.075(1)(j), Fla. Stat. But even though it had authority to unequally distribute the parties' assets and liabilities, the trial court had to first properly classify and value those assets and liabilities. Unless the assets and liabilities were properly classified and valued, the trial court would have no way of knowing whether its distribution was equal or unequal. For this reason, we disagree with Former Husband that the trial court's authority to do justice and equity rendered harmless its errors in classification and valuation. See *Wagner v. Wagner*, 61 So. 3d 1141, 1143 (Fla. 1st DCA 2011) ("Close enough' is not the applicable standard for

justifying an unequal distribution of marital and non-marital assets.”).

Alimony and Attorney’s Fees

Former Wife also appeals the portion of the final judgment denying her requests for attorney’s fees and alimony. We need not address these rulings because the trial court must reconsider on remand whether to award alimony or attorney’s fees. When an equitable distribution scheme is reversed, the trial court must consider on remand the other financial aspects of the judgment. *See Branch v. Branch*, 775 So. 2d 406, 408 (Fla. 1st DCA 2000). Alimony and attorney’s fees awards are based on one party’s need and the other party’s ability to pay. *See* §§ 61.08(2), 61.16(1), Fla. Stat. (2018). A trial court cannot make the necessary assessments of need and ability to pay until it has distributed the parties’ assets and liabilities. Thus, on remand, the trial court must reconsider its rulings on alimony and attorney’s fees as both depend on the distribution of the marital assets and liabilities. *See Nolan v. Nolan*, 188 So. 3d 977, 978 (Fla. 1st DCA 2016).

Conclusion

The trial court erred in several respects in classifying the parties’ assets and liabilities as nonmarital and marital and in valuing those assets and liabilities. On remand, the trial court must make factual findings supporting its classification of the parties’ assets and liabilities as marital or nonmarital, and then set aside the nonmarital assets or liabilities or the nonmarital portions of marital assets before valuing and distributing the marital assets and liabilities between the parties. Further, in considering distribution, the court should begin with the statutory presumption that the distribution should be equal. Finally, after distributing assets and liabilities, the trial court should reconsider Former Wife’s requests for alimony and attorney’s fees after evaluating the parties’ need and ability to pay.

REVERSED and REMANDED.

B.L. THOMAS and OSTERHAUS, JJ., concur.

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

Rebecca Bowen Creed of Creed & Gowdy, P.A., Jacksonville, for Appellant.

Arthur I. Jacobs, Richard J. Scholz, and Douglas A. Wyler of Jacobs Scholz & Wyler, LLC, Fernandina Beach, for Appellee.