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MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

KEVIN ORTIZ, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 MICHELE L. ORTIZ, )  
 )  
 Appellee. )  
 \_\_\_\_\_ )

Case No. 2D19-587

Opinion filed April 7, 2021.

Appeal from the Circuit Court for  
Hillsborough County; Lisa D. Campbell,  
Judge.

Elaine L. Thompson, Brandon, for  
Appellant.

Mark A. Neumaier, Tampa, for  
Appellee.

ATKINSON, Judge.

Kevin Ortiz, the husband, appeals from an amended final judgment dissolving his marriage to Michele Ortiz, the wife. Because the trial court erred in its equitable distribution of marital debts and its child support determination, we reverse the

amended final judgment in part and remand for entry of a second amended final judgment consistent with this opinion.

The parties were married in May 2010 and have three minor children from the marriage. Although the parties lived in Tennessee for most of their marriage and their relationship had already begun to deteriorate, they moved to Riverview, Florida, in January 2015 and purchased a house together to raise their children. To finance their home, the parties used the husband's VA loan. After relocating, the wife got a job to support the family, and the husband attended culinary school, commuting to Orlando for classes.

In October 2016, the husband's culinary school closed, and he decided to transfer to a culinary school in Miami. He paid down the parties' Discover credit card and moved to Miami. The wife and the parties' children continued to live in the marital home in Riverview, and the wife continued to make the mortgage payments on the home after the husband's relocation.

On November 19, 2016, the wife filed a petition for dissolution of marriage in which she requested sole use and possession of the marital home until the parties' youngest child turned eighteen or until she remarried. Alternatively, the wife requested partition of the marital home. On February 6, 2017, the husband filed an answer and counterpetition for dissolution. He did not request partition and sale of the marital home in his counterpetition. In her final financial affidavit, the wife disclosed that her monthly net income was \$3,621.00. The parties proceeded to trial on November 16, 2017, and August 16, 2018. In his argument, the husband requested that the trial court partition the marital home because it was financed with the husband's veteran's benefits and, if

the wife has exclusive use and possession, he would be unable to use his veteran's benefits to finance a home for himself until his youngest child turns eighteen.

On December 13, 2018, the trial court entered an amended final judgment of dissolution which incorporated a parenting plan and child support worksheets. Pursuant to the trial court's equitable distribution scheme, the wife was awarded exclusive use and possession of the marital home until the parties' youngest child turned eighteen or the wife remarried. The trial court concluded that it was without jurisdiction to consider the husband's request to partition the marital home because the husband did not plead for partition in his counterpetition for dissolution. The trial court did not classify the husband's credit card debt as marital or nonmarital and allocated the entire amount to husband. The trial court classified the wife's credit card debt as marital and distributed this debt between the parties. In its child support determination, the trial court found the wife had a monthly net income of \$2,959.48 and calculated child support accordingly. The trial court's child support determination did not include any factual findings or explanation for its conclusion regarding the wife's net income. In its parenting plan, the trial court allocated all transportation costs to the husband without making any findings concerning the parties' respective ability to pay. The trial court also allocated fifty percent of uncovered healthcare expenses to each party.

#### **I. The Marital Home**

The classification of an asset or liability as marital or nonmarital is reviewed de novo, but the factual findings necessary to make this legal conclusion are reviewed for competent, substantial evidence. Gudur v. Gudur, 277 So. 3d 687, 690 (Fla. 2d DCA 2019) (quoting Dravis v. Dravis, 170 So. 3d 849, 852 (Fla. 2d DCA 2015)).

"The standard of review for the equitable distribution of marital assets and liabilities is abuse of discretion." Van Maerssen v. Gerdts, 295 So. 3d 819, 823 (Fla. 4th DCA 2020) (citing Canakaris v. Canakaris, 382 So. 2d 1197, 1202-03 (Fla. 1980)).

The marital home, like any other marital asset, is subject to equitable distribution. See § 61.075(6)(a)2, Fla. Stat. (2018). However, a trial court may deviate from the presumption of equal distribution and award one party exclusive use and possession of the marital home if it is "desireab[le] [to] retain[] the marital home as a residence for any dependent child of the marriage . . . when it would be equitable to do so, it is in the best interest of the child[,] . . . and it is financially feasible for the parties to maintain the residence until the child is emancipated . . . ." § 61.075(1)(h); see also Walker v. Walker, 274 So. 3d 1156, 1162 (Fla. 2d DCA 2019); Coristine v. Coristine, 53 So. 3d 1204, 1204 (Fla. 5th DCA 2011).

The trial courts' conclusion that it did not have jurisdiction to consider the request for partition is erroneous because the trial court has the power to divide and distribute the marital home under the equitable distribution statute, regardless of whether the party specifically pled for partition. See Riley v. Edwards-Riley, 963 So. 2d 829, 830–31 (Fla. 3d DCA 2007) (holding that the equitable distribution statute allows the trial court to divide and distribute all marital assets, including the marital home, and, as a result "it is no longer necessary to seek partition as part of dissolution action to divide or distribute a parcel of property owned by a husband and a wife"); see also § 61.075(6)(a)2.

Although we conclude the trial court's rationale was erroneous, we nevertheless affirm the trial court's decision to award the wife exclusive use and

possession of the marital home. See Goodman v. State, 280 So. 3d 537, 541 (Fla. 2d DCA 2019) ("Under the tipsy coachman doctrine, an appellate court can 'affirm a trial court that reaches the right result, but for the wrong reasons so long as there is any basis which would support the judgment in the record.' " (quoting Robertson v. State, 829 So. 2d 901, 906 (Fla. 2002))). "As a general rule, a trial court should award the primary residential parent exclusive use and possession of the marital residence until the youngest child reaches majority or is emancipated, or the primary residential parent remarries, unless there are special circumstances." Walker, 274 So. 3d at 1162 (quoting Coristine, 53 So. 3d at 1204). " 'Special circumstances' exist where the parties' incomes are inadequate to meet their debts, obligations, and normal living expenses, as well as the expenses of maintaining the marital residence." Id. (quoting Coristine, 53 So. 3d at 1205)).

Both of the parties' incomes are insufficient to meet all of their expenses. However, the trial court made sufficient findings that are supported by substantial competent evidence to justify awarding the wife exclusive use and possession of the marital home. The trial court found that the wife has consistently been able to make mortgage payments for the marital home since the parties' separation. There was also evidence that the children had consistently attended local schools close to the marital home and that, if the marital home were to be sold or refinanced, the wife and children would have to move out of the area to find affordable housing. Further, the husband and his fiancée rent a comparable home five minutes away from the marital home and the children's schools. The trial court did not abuse its discretion in awarding the wife exclusive use and possession of the marital home because the wife presented evidence

that she could continue to make mortgage payments on the marital home as it is currently financed, continuing to live in the marital home would be in the best interests of the children, and the husband has been able to find comparable affordable housing close to the children and their schools.

## II. Credit Card Debts

Florida's equitable distribution statute provides the following in pertinent part:

- (a) 1. "Marital assets and liabilities" include:
- a. Assets acquired and liabilities incurred during the marriage, individually by either spouse or jointly by them.
- ....
- (b) "Nonmarital assets and liabilities" include:
- 1. Assets acquired and liabilities incurred by either party prior to the marriage, and assets acquired and liabilities incurred in exchange for such assets and liabilities;
  - 2. Assets acquired separately by either party by noninterspousal gift, bequest, devise, or descent, and assets acquired in exchange for such assets.

§ 61.075(6).

"A final judgment that fails to identify and value all of the parties' marital assets and liabilities and that fails to distribute them equitably between the parties must be reversed." Tritschler v. Tritschler, 273 So. 3d 1161, 1163 (Fla. 2d DCA 2019); see § 61.75(3) ("The distribution of all marital assets and liabilities, whether equal or unequal, shall include specific written findings of fact as to the following: . . . (c) Identification of the marital liabilities and designation of which spouse shall be responsible for each liability; (d) Any other findings necessary to advise the parties or the reviewing court of the trial court's rationale for the distribution of marital assets and allocation of liabilities.").

At trial, the husband testified that he had two credit cards, one with USAA and one with Capitol One. He also testified that he did not want the trial court to consider his Capitol One credit card to be a marital debt because he opened that card after he moved out of the marital home in late October 2016. The wife testified that she had two credit cards, one with SunTrust and one with Discover. On appeal, the wife conceded that the SunTrust credit card debt should not have been classified as marital debt.

The trial court's fact findings and conclusions regarding the wife's credit cards in its amended final judgment are inconsistent and unclear. The trial court classified the wife's credit card debt as marital but ordered the wife to pay the credit card debt listed solely in her name without specifying which portion of the credit card debt is marital and subject to equitable distribution and which portion of the credit card debt is nonmarital and for which the wife is solely responsible. Because it is not possible to determine to what extent the wife's credit card debts were determined to be marital liabilities and why they were so considered in light of the trial court's finding that the wife be solely responsible for the credit card debt listed solely in her name, we reverse this aspect of the amended final judgment and remand for further proceedings. See Keurst v. Keurst, 202 So. 3d 123, 127 (Fla. 2d DCA 2016) ("If the trial court fails to make findings sufficient to permit a reviewing court to determine what it did with respect to each step [of the equitable distribution scheme] and why, reversal is required.").

The trial court's amended final judgment failed to classify the husband's credit card debts as marital or nonmarital. The trial court also did not include any findings of fact to support its decision to allocate the husband's entire credit card debt to

the husband alone. See Pignataro v. Rutledge, 841 So. 2d 636, 638 (Fla. 2d DCA 2003) (reversing and remanding the trial court's equitable distribution scheme because the trial court failed to classify assets and liabilities as marital or nonmarital and provide adequate factual findings supported by competent, substantial evidence). Thus, we also reverse this aspect of the trial court's amended final judgment and remand for further proceedings. See id.

### III. Child Support

"A trial court is required to determine the net income of each parent when determining a child support award under section 61.30 . . . and the court must include adequate findings of such in the final judgment." Carmack v. Carmack, 277 So. 3d 185, 186 (Fla. 2d DCA 2019). "A trial court's failure to include factual findings regarding the parties' incomes for purposes of child support calculations renders a final judgment facially erroneous." Id. (quoting M.M. v. J.H., 251 So. 3d 970, 972 (Fla. 2d DCA 2018)).

Here, the amended final judgment states, "Based upon the most recent financial affidavits submitted by both parties, the Court finds that the Mother has a monthly net income of \$2,959.48 . . . ." However, the wife's most recent financial affidavit lists her monthly net income as \$3,621.00.<sup>1</sup> The trial court did not make any findings or provide any explanation for reducing the wife's monthly net income to \$2,959.48. Therefore, we reverse the trial court's prospective child support award with

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<sup>1</sup>The wife argues her monthly net income had increased because of a tax return (or a "tax obligation [that was] positive \$499"). However, even if the \$499 per month tax return is removed from the wife's monthly net income, her net income would be greater than \$2,959.48.



directions to determine the wife's monthly net income and recalculate the parties' child support obligations based on the wife's actual monthly net income.

In its child support determination, the trial court must also recalculate the parties' responsibility for uncovered healthcare expenses. See § 61.30(8) ("[A]ny noncovered medical, dental, and prescription medication expenses of the child, shall be added to the basic [child support] obligation unless these expenses have been ordered to be separately paid on a percentage basis."). The trial court must also revisit the portion of its parenting plan that allocates all transportation costs to the husband without making any findings concerning the parties' respective ability to pay. See Aranda v. Padilla, 216 So. 3d 652, 654 (Fla. 4th DCA 2017) (" 'The expense of transporting the minor child for visitation is a childrearing expense like any other,' which 'should be shared by the parents in accordance with their financial means.' " (quoting Drakulich v. Drakulich, 705 So. 2d 665, 667 (Fla. 3d DCA 1998))).

#### **IV. Attorney's Fees**

The husband argues the trial court erred by finding the wife was entitled to an award of reasonable attorney's fees because the trial court did not make any findings regarding the wife's ability to pay and the parties' relative financial circumstances. A portion of a final judgment that determines a party's entitlement to attorney's fees but reserves jurisdiction to determine the amount of fees to be awarded is nonfinal and nonappealable. Card v. Card, 122 So. 3d 436, 437 (Fla. 2d DCA 2013) (citing McIlveen v. McIlveen, 644 So. 2d 612, 613 (Fla. 2d DCA 1994)). Thus, we dismiss for lack of jurisdiction the husband's challenge to the attorney's fee award because the trial court reserved jurisdiction to determine the amount of reasonable attorney's fees. See id.

## **Conclusion**

We affirm the trial court's amended final judgment in part, reverse in part, and dismiss in part. We remand for further proceedings not inconsistent with this opinion.

Affirmed in part; reversed in part; dismissed in part; remanded.

SILBERMAN, J., Concurs.

VILLANTI, J., Concurs in result only.