

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

MARY P. ROTH,)	
)	
Appellant,)	
)	
v.)	Case No. 2D19-2559
)	
MARTIN R. ROTH,)	
)	
Appellee.)	
_____)	

Opinion filed March 3, 2021.

Appeal from the Circuit Court for
Hillsborough County; Chet A. Tharpe,
Judge.

Elizabeth S. Wheeler of Berg &
Wheeler, P.A., Brandon, for Appellant.

Martin R. Roth, pro se.

ROTHSTEIN-YOUAKIM, Judge.

Mary Roth (the Former Wife) appeals a final judgment dissolving her marriage to Martin Roth (the Former Husband), challenging various aspects of the equitable distribution scheme, the trial court's failure to award permanent periodic alimony, and the court's verbatim adoption of the Former Husband's proposed final judgment. We reject without discussion her challenge to the verbatim adoption of the Former Husband's proposed final judgment to the extent that she argues that it

indicates a failure by the court to exercise independent decision-making, but as set forth below, we reverse portions of the final judgment relating to equitable distribution and alimony. In all other respects, we affirm.

I. Background Facts

The parties married in 1987 and lived together until their separation on March 5, 2016. On August 30, 2017, the Former Wife filed a petition for dissolution. At the dissolution hearing in 2018, the Former Husband was seventy-four years old and the Former Wife was fifty-eight years old.

Both the Former Husband and the Former Wife had high school educations and had primarily worked in the automobile dealership industry. During the marriage, the Former Husband was the primary income earner. The Former Wife became a stay-at-home parent when their son was born and did not return to the workforce until he was in high school, when she began working part-time.

In 2014, the Former Husband suffered injuries resulting from a car accident. He and the Former Wife brought a personal injury action, ultimately netting \$28,154.64 in settlement funds. On March 4, 2016, the day before she left the marital home, the Former Wife withdrew approximately \$13,000 of those funds.

After leaving the marital home, the Former Wife moved into an apartment. She testified that she had been forced to dip into the settlement funds that she had taken to pay for living expenses and the fees associated with the underlying litigation. At the time of the dissolution hearing, she was working as an accounting clerk at a car dealership.

The Former Husband testified that he needed an operation for a neck injury that he had suffered in the accident but could not afford it. He testified that he had used a portion of the remaining settlement funds to cover living expenses, expenses related to the marital home, and other, unanticipated expenses. During the separation period, the Former Husband made numerous improvements to the marital home, where he has continued to live. At the time of the dissolution hearing, he was retired, receiving social security, and reselling cars to earn additional income.

In the final judgment of dissolution of marriage, the trial court awarded the marital home to the Former Husband. The Former Wife moved for rehearing on numerous issues. The court granted her motion only to the extent that it corrected certain scrivener's errors, such as discrepancies between the final judgment and the equitable distribution worksheet. This timely appeal follows.

II. Analysis

Equitable Distribution

We review de novo the trial court's characterization of assets as marital or nonmarital, see Tradler v. Tradler, 100 So. 3d 735, 738 (Fla. 2d DCA 2012), and we review for an abuse of discretion the court's distribution of marital assets and liabilities, see Cooley v. Cooley, 253 So. 3d 1223, 1226 (Fla. 2d DCA 2018) (citing Witt v. Witt, 74 So. 3d 1127, 1129 (Fla. 2d DCA 2011)).

Personal Injury Settlement Funds

The trial court found that the personal injury settlement funds totaled \$26,360 on the date of separation and classified the funds as the Former Husband's nonmarital asset. The court distributed \$13,000 of the funds to the Former Husband

and \$13,360 to the Former Wife, explaining that the latter figure represented the amount of funds the Former Wife had taken with her when she left the marital home. The Former Wife argues that the funds should have been classified as marital funds. She also argues that it was an abuse of discretion to include the funds in the equitable distribution in light of evidence establishing that they had dissipated by the time of the dissolution hearing. We agree with both arguments.

Section 61.075(1), Florida Statutes (2018), instructs the trial court to "set apart to each spouse that spouse's nonmarital assets and liabilities" and then "distribut[e] the marital assets and liabilities between the parties." Assets acquired by either spouse during the marriage are presumed to be marital, and the presumption is overcome only by a showing that the assets are nonmarital. See § 61.075(8).

In classifying personal injury awards acquired during the marriage, Florida follows the "analytical approach." See Weisfeld v. Weisfeld, 545 So. 2d 1341, 1346 (Fla. 1989) (adopting the "analytical approach," which considers the *purpose* of the portions of the personal injury award when classifying them as marital or nonmarital). Under the analytical approach, "the marital property subject to distribution includes the amount of the award for lost wages or lost earning capacity during the marriage of the parties and medical expenses paid out of marital funds during the marriage." Id. at 1345. The nonmarital property belonging to the injured spouse includes the portion of the damage award for pain and suffering. Id. In Weisfeld, our supreme court instructed that if there are any personal injury funds for which no allocation can be made, the funds should be classified as marital. See id.

Here, the trial court did not make any findings as to the portions of the personal injury award that, based on their purpose, could be classified as marital or nonmarital pursuant to Weisfeld. But the court cannot be faulted for failing to parse details it did not have; neither party introduced any evidence showing the components of the award.¹ Nevertheless, the funds should not have been classified as the Former Husband's nonmarital funds because the Former Husband did not overcome the statutory presumption that the funds are marital in nature. See § 61.075(8) (stating that there is a presumption that funds received during the marriage are marital assets); see also Weisfeld, 545 So. 2d at 1345 ("The marital property should also include those funds for which no allocation can be made."). While it was the Former Husband and not the Former Wife who was injured in the accident underlying the personal injury settlement, that fact alone does not transform the nature of the funds from marital to nonmarital. As the supreme court explained in Weisfeld, a personal injury award does not automatically become the nonmarital asset of the injured spouse. See 545 So. 2d at 1346 (rejecting the "unitary approach" which "determines that the entire award made is the separate property of the injured spouse because it is uniquely personal to that individual").² Accordingly, the personal injury award, which was received during the marriage, was a marital asset.

¹Unlike jury verdicts, which reflect a breakdown of the type of damages being awarded, settlement agreements generally do not. See, e.g., White v. White, 705 So. 2d 123, 124 (Fla. 2d DCA 1998).

²That the entire settlement amount should not have been awarded to the Former Husband as a nonmarital asset is further underscored by the fact that both the Former Husband and the Former Wife brought suit and both of them settled their interests pursuant to the settlement agreement.

The Former Wife further argues that it was an abuse of discretion to include the personal injury funds in the equitable distribution because they had been dissipated by the time of the dissolution hearing. In the amended final judgment, the trial court stated that it valued the funds as of the separation date. The trial court has discretion to select the valuation of a marital asset and value different assets as of different dates. See § 61.075(7). "The date of the valuation will of course dictate the amount by which [an] asset has been dissipated." Soria v. Soria, 237 So. 3d 454, 459 (Fla. 2d DCA 2018). "Generally, 'it is error to include assets in an equitable distribution scheme that have been diminished or dissipated during the dissolution proceedings.'" Tradler, 100 So. 3d at 740 (quoting Roth v. Roth, 973 So. 2d 580, 584 (Fla. 2d DCA 2008)). To include a dissipated asset in the equitable distribution scheme, the evidence must establish that a party engaged in intentional misconduct that resulted in the dissipation of the marital asset. Id. (citing Roth, 973 So. 2d at 585). "Without evidence and a specific finding of misconduct, the trial court abuses its discretion in including a dissipated asset in the equitable distribution scheme." Id. at 740–41.

Here, the evidence established that the settlement funds had dissipated by the date of the dissolution hearing, and the trial court did not make any findings as to either party's intentional misconduct. The parties testified that they had had to spend the personal injury funds on living expenses. The Former Husband testified that he had also spent a portion of the funds covering expenses related to the home, and the Former Wife testified that she had also used the funds to pay litigation expenses. Absent any evidence that the dissipation resulted from either party's intentional misconduct, it was an abuse of discretion to include the dissipated funds in the

equitable distribution scheme. See id.; see also Roth, 973 So. 2d at 585–86.

Accordingly, we reverse the amended final judgment and remand for the trial court to revisit the equitable distribution scheme without including the personal injury settlement funds.

Marital Home

The trial court valued the home on the date of separation at \$250,000 and awarded it to the Former Husband. The Former Wife raises various arguments relating to the marital home, and we address each in turn.

As an initial matter, we agree that it was an abuse of discretion to award the marital home—the parties' only significant remaining marital asset—to the Former Husband. "[T]he court must begin with the premise that the distribution should be equal, unless there is a justification based on all relevant factors" § 61.075(1); see § 61.075(1)(a)-(j) (listing factors relevant to justify an unequal distribution). Throughout the body of the amended final judgment, the trial court made various findings concerning the economic circumstances of the parties and other equitable factors. For example, with respect to their economic circumstances, the court found that while the Former Wife was earning income from her employment, the Former Husband had retired, was receiving social security, and was earning additional limited income by reselling cars. The court also found that the Former Husband had continued to live in the marital home after the Former Wife left and that the Former Husband had made significant improvements to it. But the court failed to make any specific finding of fact to justify the unequal distribution of the marital residence. See Feger v. Feger, 850 So. 2d 611, 615 (Fla. 2d DCA 2003) ("[T]he trial court erred by awarding the marital home, a

major asset, without making a specific finding of fact to justify the unequal distribution"). Moreover, to the extent that the court may have relied on its determination that when the Former Wife left the marital home, she had taken approximately half of "the Former Husband's" personal injury settlement funds, the court, as set forth above, erroneously concluded that those funds were a nonmarital asset of the Former Husband's.

The Former Wife also challenges the trial court's award of credit to the Former Husband for one half of the mortgage payments that he made since the date of the parties' separation and for the entire amount of the homeowner's association lien on the home that had been imposed before the date of separation. To the extent that she suggests that the court erred as a matter of law by awarding the Former Husband credit for postseparation payments on the marital home while valuing the marital home as of the date of separation, "[r]eimbursement or credit for a party's payment of marital property-related expenses during separation is a matter of judicial discretion in light of all relevant circumstances." Weininger v. Weininger, 290 So. 3d 928, 935 (Fla. 3d DCA 2019) (quoting Stock v. Stock, 693 So. 2d 1080, 1086 (Fla. 2d DCA 1997)). That said, however, the court gave no reason for awarding the Former Husband a credit for these payments, and although the testimony at trial established that the Former Wife would help out financially when she could, it generally is inappropriate to award such credits when the paying spouse had been responsible for making those payments all along, on the strength of his or her own income. See, e.g., Kranz v. Kranz, 737 So. 2d 1198, 1202–03 (Fla. 5th DCA 1999) ("Although . . . the trial court is given latitude to award [such credits] in fashioning an equitable decree, here the husband paid the mortgage during the marriage anyway. Indeed, the husband conceded at oral argument that had

the wife not moved out of the marital home, he would have made the mortgage payments, just as he had during the marriage."). In addition, here again, it is unclear to what extent the court's misapprehension that the Former Wife had taken nonmarital funds belonging to the Former Husband when she left may have factored into this balancing of the equities. Consequently, the court on remand should reconsider both the unequal distribution of the marital home to the Former Husband and the award of credit to the Former Husband for postseparation payments on the marital home, supporting its determinations with findings of fact as necessary.

We disagree, however, that the trial court abused its discretion by selecting the parties' date of separation as the valuation date of the marital home. Although this is also an equitable determination, see § 61.075(7) (providing that the date for determining the value of a marital asset is the date the court determines is "just and equitable under the circumstances"), the court expressly based its selection on its findings that the parties had been separated for three years and that since the separation, the Former Husband had continued to live in the marital home and make improvements to it without assistance from the Former Wife. The Former Wife argues that she should not be deprived of the increase in value of the home between the date of separation and the date of trial because the increase was due mostly to passive appreciation, not to the Former Husband's improvements. The Former Wife's expert, however, testified that his appraisal of the marital home had taken the Former Husband's improvements into account and that although houses in that market generally were worth more on the date of trial than they would have been on the date of separation, he could not opine as to the effect of the improvements on the relative value

of the marital home. Absent evidence to support her passive-appreciation argument, the Former Wife has failed to establish an abuse of discretion. See Norwood v. Anapol-Norwood, 931 So. 2d 951, 952–53 (Fla. 3d DCA 2006) (concluding that the trial court did not abuse its discretion in valuing the marital home as of the date of separation "[w]here the increase in value of the property or continued ownership of property is solely due to the work or efforts of the owner spouse" (emphasis omitted)).

Distribution of Liabilities

Next, the Former Wife raises two issues concerning the treatment of certain liabilities in the equitable distribution scheme. First, she points out that various marital liabilities were not addressed. Section 61.075(3) requires the court to make specific written findings clearly identifying the marital liabilities and the designation of which spouse is responsible for each liability. See § 61.075(3)(c); see also Roth, 973 So. 2d at 586. And section 61.075(1) requires the trial court to set apart to each spouse that spouse's nonmarital liabilities.

First, the Former Wife contends that the trial court erred in failing to identify and distribute various debts she had incurred during the marriage, which included a \$1000 loan from the parties' son and debt from at least four credit card accounts. None of those liabilities were identified in either the amended final judgment or in the equitable distribution worksheet attached to the judgment. "Because the trial court will be reconsidering the equitable distribution scheme on remand, we remind the trial court that it must address these liabilities in the new scheme." Roth, 973 So. 2d at 586.

Second, the Former Wife contends that the trial court erred in treating a \$2000 debt of the Former Husband's as a marital liability. At the dissolution hearing, the Former Husband testified that in 2018 he had taken out a \$2000 vehicle title loan. Because the Former Husband incurred the \$2000 debt *after* the petition was filed, we agree that it was error to treat it as a marital liability. See § 61.075(7) ("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, . . . or the date of the filing of a petition for dissolution of marriage."); see also Guelpa v. Guelpa, 885 So. 2d 409, 410 (Fla. 1st DCA 2004) ("The trial court erred here by including on the husband's side of the distribution, numerous liabilities incurred after the date of the filing of the petition.").

Alimony

Because the parties have been married for more than seventeen years, their marriage is considered a long-term marriage, see § 61.08(4), and there is a rebuttable presumption that permanent periodic alimony is appropriate, see Schomburg v. Schomburg, 845 So. 2d 257, 258 (Fla. 2d DCA 2003). The trial court declined to award permanent periodic alimony to the Former Wife, summarily concluding "that no form of alimony is appropriate" after considering the factors listed in section 61.08(2)(a)-(g). The amended final judgment, however, does not include any factual findings regarding need and ability to pay, and the Former Wife argues that those findings are statutorily required. We agree.

Section 61.08, Florida's alimony statute, provides in part, "In determining whether to award alimony or maintenance, the trial court *shall first* make a *specific*

factual determination as to whether either party has an actual need for alimony or maintenance and whether either party has the ability to pay" § 61.08(2) (emphasis added). It is only after the court makes findings regarding need and ability to pay that the court must then, in determining the type and amount of alimony to award, consider the factors listed in subsections (2)(a)-(g). § 61.08(2).

Even though the court ultimately decided that an alimony award was inappropriate, the mandatory statutory language in section 61.08(2) required the court to make factual findings regarding the threshold inquiry of whether either party had the need and ability to pay. And because such factual findings are statutorily required, the trial court shall make them on remand. See Keyser v. Keyser, 204 So. 3d 159, 160 (Fla. 1st DCA 2016) (reversing portion of final judgment that denied a request for alimony in part because there was "no reference to the preliminary inquiry mandated by the initial provisions of section 61.08(2)" regarding need and ability to pay).

Based on the foregoing, we reverse and remand for further proceedings in connection with the equitable distribution and alimony determinations consistent with this opinion.³ In all other respects, we affirm.

Affirmed in part; reversed in part; remanded.

NORTHCUTT and BLACK, JJ., Concur.

³The Former Wife asks that we remand with instructions that the marital home be partitioned. We decline to do so but note that that is certainly something that the trial court may consider.