

DISTRICT COURT OF APPEAL OF FLORIDA  
SECOND DISTRICT

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ILANA MARKS,

Appellant,

v.

CLAY SHAFTON,

Appellee.

No. 2D20-1044

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October 15, 2021

BY ORDER OF THE COURT:

Appellant's motion for rehearing is denied. Appellee's motion for clarification of written opinion is granted in part to the extent that the opinion dated August 6, 2021, is withdrawn and the attached opinion correcting a scrivener's error related to the location of out-of-state real property and redacting certain account information is substituted therefore. In all other respects, appellee's motion is denied. No further motions for rehearing will be entertained in this proceeding.

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER.

MARY ELIZABETH KUENZEL  
CLERK

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Appeal from the Circuit Court for Sarasota County; Donna M. Padar, Judge.

Margaret H. White-Small, Longboat Key, for Appellant.

Leslie Telford Kettring, Sarasota, for Appellee.

SMITH, Judge.

Ilana Marks, the former wife, challenges the final judgment of dissolution of her marriage to Clay Shafton, the former husband.

Specifically at issue within this appeal is the determination of marital property and the equitable distribution of those assets. We

affirm the final judgment in most respects and reverse only on certain matters of equitable distribution as specified in this opinion. Because the nature of the trial court's findings regarding certain disputed assets is not clearly and sufficiently articulated in the record, we remand for reconsideration of the equitable distribution as necessary in that regard.

### I.

The parties were married in 1985, separated on December 12, 2012, and filed for dissolution in 2015. They have three children, only one of whom was still a minor at the time of the dissolution. The parties operated a home rental business together, and at the time of the separation, the parties owned numerous parcels of real property for those purposes in both Florida and Massachusetts.<sup>1</sup> These properties, along with numerous joint and individual financial accounts, comprised the main portion of the assets under consideration in regard to the equitable distribution portion of the dissolution. *See* § 61.075, Fla. Stat. (2015).

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<sup>1</sup> The former husband substantially continued to operate this rental business after they filed for dissolution, and the former wife shifted her focus to the creation of a film project.

A major focus of the parties' dispute over these assets related to which assets were subject to marital and nonmarital classification and whether certain assets were dissipated.<sup>2</sup> As a result, the trial court took testimony and evidence and considered numerous issues with regard to the classification and division of assets. But despite the numerous hearings, the findings ultimately contained in the final judgment were relatively limited apart from the trial court's adoption of the former husband's equitable distribution worksheet attached to the final judgment. That two-page worksheet contains an itemized list of assets and values shown as an equal division between the parties, including, as

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<sup>2</sup> It is undisputed that the parties received financial assistance from both of their extended families during the 2008 housing crisis, and as specifically related to the issues on appeal, the former wife's parents often deposited money in joint accounts held with the former wife. Funds from those joint accounts were used for various reasons, including to purchase real property and provide money to the parties' children. The source of the funds within the joint accounts varied by deposit, and the nature of the funds and reasons for the various deposits related significantly to the question of what could be classified as marital property. Her parents died before the dissolution was final, and nothing in this appeal placed the issue of how her parents labeled this property and money for their own financial and estate planning purposes before this court. Furthermore, we have not been given information regarding the status of any ongoing probate matters in regard to the death of the former wife's parents.

relevant to this opinion, several bank accounts designated by bank and account number, two Jackson Annuity accounts, the business interests and accounts related to the former wife's movie project (The Umbrella Project, LLC), the Birchwood house, and several personal assets, as well as certain dissipated funds. In addition to this itemized worksheet, the trial court specifically made findings in regard to the marital nature and distribution of the Birchwood house, five bank accounts, and The Umbrella Project.

## **II.**

Ultimately, the issues raised on appeal center around what the trial court classified as marital and distributable assets, whether those classifications are supported by the evidence, and whether there was an unequal distribution as a result. "This court reviews a trial court's classification 'of an asset as marital or nonmarital de novo and any factual findings necessary to make this legal conclusion for competent, substantial evidence.'" *Street v. Street*, 303 So. 3d 1253, 1256 (Fla. 2d DCA 2020) (quoting *Dravis v. Dravis*, 170 So. 3d 849, 852 (Fla. 2d DCA 2015)). We conclude that the trial court's findings pertaining to the distribution of some assets are supported by competent substantial evidence, while

others are not.<sup>3</sup> See § 61.075(3) ("In any contested dissolution action wherein a stipulation and agreement has not been entered and filed, any distribution of marital assets or marital liabilities shall be supported by factual findings in the judgment or order based on competent substantial evidence with reference to the factors enumerated in subsection (1).").

Section 61.075(6) outlines what constitutes a marital or a nonmarital asset. See also *Street*, 303 So. 3d at 1256.

All assets acquired and liabilities incurred by either spouse subsequent to the date of the marriage and not specifically established as nonmarital assets or liabilities are presumed to be marital assets and liabilities. Such presumption is overcome by a showing that the assets and liabilities are nonmarital assets and liabilities.

§ 61.075(8). Dissipated assets must not be included in equitable distribution unless the trial court makes a specific finding that the spending spouse caused the dissipation through intentional

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<sup>3</sup> In regard to the division and distribution of real property, the former wife claims, for various reasons, that including the Birchwood house as a marital asset was error because it was purchased using funds from her parents and was for their use. In short, we conclude without further comment that the record contains competent substantial evidence supporting the trial court's classification of the Birchwood property as a marital asset.

misconduct. *Roth v. Roth*, 973 So. 2d 580, 584–85 (Fla. 2d DCA 2008).

### III.

The former wife maintains that she overcame any burden to show that certain assets that were included as marital and subject to distribution were not marital. We first address the Bank of America account the former wife held with her parents titled "w/parents" on the worksheet (the BOA account).<sup>4</sup> The record here supports that it was opened during the marriage in the names of the former wife and her parents. "Although . . . noninterspousal gifts like those from [a parent] are treated as nonmarital assets, see § 61.075(6)(b)(2), that does not end the inquiry. Nonmarital assets may lose their nonmarital character and become marital assets where . . . they have been commingled with marital assets." *Dravis*, 170 So. 3d at 852. "In the absence of a settlement agreement, the cut-off date to determine which assets are marital is the date the

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<sup>4</sup> The references to the accounts described in this opinion, although identified by the parties and in the trial record using the last four digits of the account numbers, are instead identified by description in this opinion to comply with Florida Rules of General Practice and Judicial Administration 2.420 and 2.425.



petition for dissolution was filed." *Tradler v. Tradler*, 100 So. 3d 735, 743 (Fla. 2d DCA 2012).

The former wife claims that after her parents' deaths, she converted the funds remaining in the BOA account to a cashier's check, which she held awaiting a determination of any estate taxes owed, and that the trial court erred in determining those funds were marital. According to her, \$92,000 was traceable to an amount placed in the account in early 2016 by her father, after the petition was filed. The remaining \$30,000 was the result of three checks given to her by her father in the name of each of his grandchildren on what he thought was his death bed in 2015, deposited after separation but prior to the filing of the petition. The remaining amount from the BOA account, to reach the total \$123,463, was identified by the former wife as interest or the result of Amazon sale proceeds for a self-published book written by her father.

There was much dispute between the parties at trial over the timing and source of these monies. The former husband maintains that all funds are either commingled or clearly marital. Specifically, there was testimony regarding a check in the amount of \$100,000 in marital funds that the former wife had provided to a nonmarital

brokerage source, Wolff, prior to the filing of the petition and whether the \$92,000 from the BOA account was actually the return of what remained from that brokerage money after it was given to the former wife's father, who then placed it in the BOA account. The former husband's theory, as offered to the trial court, was that the former wife had funneled marital assets to her father through the Wolff check and that the \$92,000 represented its return when that amount was discovered as missing during the initial gathering of financial information after the filing of the dissolution petition.

However, no finding was made by the trial court in that regard, and making such a finding is not the role of this court. See *Featured Props., LLC v. BLKY, LLC*, 65 So. 3d 135, 137 (Fla. 1st DCA 2011). Nor are we in a position to do so on the record that is before us. We note that the Wolff entry on the worksheet shows no value, and it is unclear whether the trial court adopted the former husband's theory in treating the \$92,000 as the marital funds from Wolff or did so for another reason. Likewise, the worksheet includes the approximately \$30,000 that the former wife claimed was money gifted by her father to his grandchildren and held by her until after his death. Although the entire \$123,000 cashier's check

from the BOA account is shown as marital on the worksheet, absent from the final judgment are any findings the trial court made as to the specific sources of those funds.

Without specific record findings with respect to the timing and classification of funds comprising the BOA account, we cannot determine whether the trial court's findings regarding its classification were indeed supported by the evidence. "It is extremely difficult, if not impossible, to analyze the equitable distribution scheme in this case due to the lack of findings on the critical elements at issue here. The lack of findings thus precludes meaningful appellate review." *Santiago v. Santiago*, 51 So. 3d 637, 639 (Fla. 2d DCA 2011); *see also* § 61.075(3). We therefore must reverse the equitable distribution as to this specific account. *See Santiago*, 51 So. 3d at 639.

#### **IV.**

The worksheet also reflects an amount of \$13,819 in the former wife's portion of the distribution that she claims stemmed from money that was already spent. Specifically, the former wife claims that the account showing a balance of \$11,003 on the worksheet (originally held in a cashier's check and then given to one

of the parties' adult daughters) was drawn from one closed account that held only funds the former wife's father had paid to the parties' adult daughter for \$15,000 in paintings the daughter had done for her grandparents in 2013, after the parties' separation but before filing. The former wife claims that the parties' daughter had previously spent \$5,000 of this money on frames for a then upcoming art exhibit and left the remainder in the account until 2017. After the former wife's father died, and when the parties' adult daughter was ready to use the remaining funds to purchase a car, the remaining amount, plus interest, was converted to a cashier's check by the former wife and given to her daughter and son-in-law.

The former wife further claims that \$1,700 from another Bank of America account listed on the worksheet was the result of an account that was inadvertently opened by the bank and immediately closed upon discovery of the error and were from the account reflecting an amount of \$4,750 on the worksheet. She claims these funds were used to pay living expenses during the course of the dissolution and thus should not be counted in her portion of the equitable distribution.

Regarding the two accounts reflected on the worksheet as a single entry for an amount of \$1,116, she claims that refers to two Chase bank accounts opened by each party, respectively, to take advantage of a bank promotion and then closed. She complains of inconsistencies in the worksheet in that the money remaining in her closed account, which was spent at the time of the hearing, was charged to her equitable distribution share, while the money from the former husband's closed account was not.

The former wife also claims that as the extended dissolution proceedings were ongoing, the parties, whenever they needed to make a withdrawal from an asset, would simply notify the other party to make an in-kind withdrawal to keep the scales balanced in regard to those assets. She claims that any time she made such a withdrawal, she deposited it in one of two places—either her Jackson annuity or the account used to fund The Umbrella Project movie she had financed (the TUP account). She claims that the trial court distributed both of these assets equally—which erroneously resulted in the former husband receiving back one-half of the half she had withdrawn during the dissolution and placed in those

assets—and that although the TUP account was created prior to the separation, it was not funded until after the filing.<sup>5</sup>

To the extent that the trial court did not make any findings from which we can fully review these claims in regard to the closed accounts or the dissipated assets, "[a]s a general proposition, it is error to include assets in an equitable distribution scheme that have been diminished or dissipated during the dissolution proceedings." *Roth*, 973 So. 2d at 584.<sup>6</sup> "Our cases have consistently held . . . that misconduct [in the dissipation of marital assets] must be supported not only by the record evidence, but also by specific factual findings made by the trial court." *Dravis*, 170 So. 3d at 854; *see also Tradler*, 100 So. 3d at 740–41 ("Without evidence and a specific finding of misconduct, the trial court abuses

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<sup>5</sup> Although the TUP account and annuity findings were included in the final judgment, there are no findings regarding the former wife's claim that certain funds that were attributed fully to her in equalizing the distribution were sourced from marital funds already distributed between the parties for expenses and equalization during the pendency of the dissolution. *See Dravis*, 170 So. 3d at 855 (reversing where the evidence supported the funds from a closed bank account had been double counted).

<sup>6</sup> In each instance, the former husband counters that the trial court did not find the former wife credible in regard to these assets. If true, however, such findings are absent from the final judgment.

its discretion in including a dissipated asset in the equitable distribution scheme."). "Those findings are absent from this case. Neither the final judgment, nor the trial transcript, nor any other document in the record contains the factual findings of misconduct required to include the dissipated funds . . . in the equitable distribution scheme." *Dravis*, 170 So. 3d at 854.

## V.

For these reasons, as in *Dravis* and *Santiago*, we reverse those portions of the equitable distribution identified in this opinion related to classification, dissipation, and double-counting of assets that require additional findings and remand for such proceedings as are required to adjust and recalculate the equitable distribution once such findings are made. *See Dravis*, 170 So. 3d at 855 ("We nevertheless reverse the equitable distribution award because the trial court included the dissipated proceeds of the CenterState account in the equitable distribution calculation and double-counted the \$33,392 in the closed bank account. We therefore remand for the trial court to recalculate the equitable distribution and to make any necessary factual findings as to whether the dissipation of the CenterState account proceeds was caused by the

former wife's misconduct, adjusting the equitable distribution and alimony calculations as necessary in light of those findings, and for further proceedings consistent with this opinion."); *Santiago*, 51 So. 3d at 639 ("Failure to include the statutorily required findings of fact makes appellate review of the distribution scheme difficult, if not impossible, and requires reversal." (quoting *Guida v. Guida*, 870 So. 2d 222, 224 (Fla. 2d DCA 2004))). As it is clear that the trial court should have made more specific findings in regard to some of the distributed property as identified in this opinion, the requisite scope of remand following this reversal should necessarily allow for further reconsideration of the distribution scheme as needed in this regard. *See Santiago*, 51 So. 3d at 639 ("We therefore reverse the equitable distribution scheme in the final judgment of dissolution. On remand, consistent with this opinion, the trial court shall either make specific findings that support the distribution of assets and liabilities already made in the final judgment of dissolution or reconsider the equitable distribution scheme and make specific findings that support a new scheme.").

Affirmed in part; reversed in part; remanded.



MORRIS, C.J., and KHOUZAM, J., Concur.