NO. COA03-1256

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2004

DONNIE DIANNE CLODFELTER,
Plaintiff-Appellee,

v. Guilford County
No. 96 CvD 11358

ROGER DEAN CLODFELTER, SR.,
Defendant-Appellant.

Appeal by defendant from judgment entered 10 March 2003 and from order dated 14 May 2003 by Judge Joseph E. Turner in District Court, Guilford County. Heard in the Court of Appeals 9 June 2004.

Marilyn Cahoon and Robert S. Cahoon, for plaintiff-appellee.

Woodruff & Associates, P.A., by Carolyn J. Woodruff, for defendant-appellant.

McGEE, Judge.

Donnie Dianne Clodfelter (plaintiff) filed a complaint on 13 December 1996 against Roger Dean Clodfelter, Sr. (defendant) seeking an absolute divorce and equitable distribution. Plaintiff filed an amended complaint on 20 December 1996 to reflect defendant's correct name. Defendant filed an answer and counterclaim on 19 February 1997 seeking alimony, attorney's fees, and equitable distribution. Plaintiff filed a reply to defendant's counterclaim and an amendment to her complaint on 10 March 1997. In an order filed 10 March 1997, the trial court granted plaintiff

an absolute divorce from defendant.

The trial court entered a pre-trial order regarding equitable distribution of the parties' marital property on 6 March 2002. The trial court held an equitable distribution hearing on 26 March, 27 March, and 4 April 2002. Defendant filed a motion pursuant to Rules 52, 59, and 60 on 15 August 2002 for additional findings or, in the alternative, for a new trial on a specific issue. The trial court entered an equitable distribution judgment on 10 March 2003. In an order dated 14 May 2003, the trial court denied defendant's Rule 52, 59, and 60 motion. Defendant appeals the equitable distribution judgment. Defendant also filed notice of appeal from the trial court's order denying his Rule 52, 59, and 60 motion; however, defendant did not perfect that appeal.

The evidence before the trial court tended to show that plaintiff and defendant were married on 5 September 1969 and separated on 1 December 1995. At the time of separation, defendant was employed by AT&T and had a 401(k) retirement plan (401(k)) valued at approximately $191,275.00. The trial court divided this amount equally between plaintiff and defendant. Defendant testified that after the separation, he made "daily trades on investment decisions in the [401(k)]." Defendant testified that he did his own research and did not use a broker or an investment advisor for his trades. Rather, defendant made "individual trades via the Internet[.]" The trial court found that defendant's activities increased the value of the 401(k) by $141,207.00. The trial court awarded ten percent of this post-separation increase to

plaintiff and ninety percent of the increase to defendant.

Defendant also had an AT&T pension plan (pension plan) on the date of separation. The trial court valued this pension plan at $53,770.00. In the equitable distribution judgment, the trial court referred to this pension plan as the "AT&T (now Lucent) Pension." However, on the exhibit attached to the judgment, this pension plan is referred to only as the "Lucent Tech. Pension." The trial court found that the marital portion of this pension plan would be divided equally through a qualified domestic relations order (QDRO).

We first note defendant has failed to present an argument in support of assignment of error number three and it is deemed abandoned pursuant to N.C.R. App. P. 28(b)(6).

Defendant's first two arguments are general in nature in that they challenge how the trial court classified marital property and applied distributional factors. Because these general arguments are encompassed within arguments three and four, we find it appropriate to address defendant's latter two arguments regarding the classification of specific assets.

Defendant argues in assignments of error numbers one, four, five, and six that the trial court erred in including post-separation active appreciation of defendant's 401(k) in the marital estate. For the reasons stated below, we agree.

The complaint for divorce and equitable distribution in this case was filed on 13 December 1996. Accordingly, the applicable equitable distribution statute is N.C. Gen. Stat. § 50-20 (1995).

"In an equitable distribution case filed before 1 October 1997, the trial court must undergo a three-step analysis: (1) identify what is marital property and what is separate property; (2) calculate the net value of the marital property; and (3) distribute the marital property in an equitable manner." *O'Brien v. O'Brien*, 131 N.C. App. 411, 417, 508 S.E.2d 300, 304-05 (1998), *disc. review denied*, 350 N.C. 98, 528 S.E.2d 365 (1999). In the case before our Court, we are concerned with the first step, the classification of the 401(k) appreciation.

Under N.C. Gen. Stat. § 50-20(a), the trial court must decide what constitutes marital property and "provide for an equitable distribution of the marital property between the parties[.]" Marital property is defined as "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties[.]" N.C. Gen. Stat. § 50-20(b)(1). "Property is not part of the marital estate unless it is owned by the parties on the date of separation." *Chandler v. Chandler*, 108 N.C. App. 66, 68, 422 S.E.2d 587, 589 (1992). "The statute provides no authority to distribute non-marital property or separate property." *Id.*

In this case, the trial court found as a fact that

> b. *After the date of separation*, Defendant routinely and regularly used the funds in the AT&T 401(k) held in Defendant's name to invest and reinvest in active day trading. Said active trading through decisions made by Defendant increased the value of the funds because of his active efforts.
>
> . . .

> 3. By Defendant's activities in trading, investing and reinvesting the fund, the account has increased in value by one hundred forty-one thousand two hundred seven dollars ($141,207.00).

(emphasis added). Although the trial court found that this appreciation occurred after the parties separated, the trial court nonetheless included this $141,207.00 in the $653,046.30 it determined to be the marital estate.

We note that the trial court did not explicitly state that it included the post-separation appreciation as part of the marital estate. However, by examining the exhibit attached to the equitable distribution judgment (the exhibit), it is clear that the $141,207.00 was included in the amount the trial court deemed to be the "marital estate." The exhibit listed plaintiff's total value as $326,523.15 and defendant's total value as $326,850.34. Because the values differed slightly, the trial court designated $163.60 as the "[e]qualizer." This amount was derived by dividing the difference in plaintiff's and defendant's totals by two. The "marital estate" as designated by the trial court consists of plaintiff's total and defendant's total minus the difference between these totals. A simple calculation reveals that this "marital estate" amount, $653,046.30, includes the $141,207.00 of post-separation appreciation.

"The post-separation appreciation of marital property is itself neither marital nor separate property." *Truesdale v. Truesdale*, 89 N.C. App. 445, 448, 366 S.E.2d 512, 514 (1988). "Post-separation appreciation of a marital asset, whether passive

appreciation or appreciation due to the efforts of an individual spouse, is not therefore marital property and cannot be distributed by the trial court." *Gum v. Gum*, 107 N.C. App. 734, 737-38, 421 S.E.2d 788, 790 (1992). When marital assets increase between the date of separation and the date of the equitable distribution, this "is a factor which the [trial] court must consider in its determination of what constitutes an equitable distribution of the marital estate pursuant to N.C.G.S. §§ 50-20(c)(1), (c)(11a), or (c)(12)[.]" *Id.* at 738, 421 S.E.2d at 790 (citing *Mishler v. Mishler*, 90 N.C. App. 72, 77, 367 S.E.2d 385, 388, *disc. review denied*, 323 N.C. 174, 373 S.E.2d 111 (1988)).

Plaintiff responds to defendant's argument by asserting that the trial court properly classified and distributed the post-separation 401(k) appreciation. Plaintiff points to the fact that the trial court listed the 401(k) date of separation value and the 401(k) post-separation increase separately. Plaintiff further points to the fact that line 35 of the exhibit specifies that the increase is a "distrib[utional] factor." Plaintiff also notes a portion of the transcript where the trial court correctly stated that

> you have to conclude that the increase in value of the marital portion of the AT&T 401(k), which was controlled by the defendant, affected by his investment strategies, is a factor considered by the [trial] [c]ourt in determining that unequal distribution is an equitable distribution [in this] case.

Despite the trial court's stated intentions, the $141,207.00 post-separation increase was included in the amount the trial court

considered to be the "marital estate." This violates prevailing case law and the mandate in N.C. Gen. Stat. § 50-20(a) that the trial court can only distribute marital property. Thus, we hold that the trial court abused its discretion in considering this appreciation as part of the marital estate and subsequently dividing it between the parties.

Defendant next argues in assignments of error numbers two, four, five, and six that the trial court erred in dividing the Lucent Retirement Income Plan (Lucent Plan) as marital property. Within this argument, defendant first asserts that the benefits under the Lucent Plan cannot be considered marital property because these benefits did not exist at the date of separation. Defendant is correct in his assertion that the Lucent Plan was not in existence on 1 December 1995. On this date, defendant was still employed by AT&T and Lucent Technologies was not yet in existence. According to plaintiff's contentions, at the time of separation, defendant's position was being transferred from AT&T to Lucent Technologies. We recognize that there is uncertainty as to whether the plan should be called the Lucent Plan or the AT&T plan. However, the specific label placed on the plan is not relevant in light of the fact that plaintiff and defendant stipulated in a pre-trial agreement that the Lucent Plan was marital property. Although the parties disagreed about the value and the appropriate distribution of the Lucent Plan, there was no protest regarding the classification of the Lucent Plan as marital property. Accordingly, in light of this stipulation, defendant's argument

that the Lucent Plan was not marital property is without merit.

Defendant notes in his second argument that the trial court correctly valued the AT&T pension plan at $53,770.00. However, defendant asserts that the trial court erred by not including this amount as part of the marital estate. For the reasons stated below, we agree.

As explained above, the trial court must identify the marital property, calculate its value, and then distribute the martial property equitably. *O'Brien*, 131 N.C. App. at 417, 508 S.E.2d at 304-05. In this case, the trial court properly identified the pension plan as partly marital and valued it as of the date of separation. However, the trial court failed to include the $53,770.00, the value of the pension plan, in the amount it found to be the net value of the marital estate. The exhibit shows that even though a portion of the pension plan was deemed marital, it was erroneously not included in the net value of the martial estate.

Accordingly, we reverse the judgment and remand to the trial court with the instruction to remove the $141,207.00 of active 401(k) appreciation from the marital estate and to include the $53,770.00 attributable to the AT&T pension plan in the marital estate. Based on these changes, the trial court is then to make a new distribution order.

Reversed and remanded.

Judges McCULLOUGH and ELMORE concur.

Report per Rule 30(e).