

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e) (3) of the North Carolina Rules of Appellate Procedure.

NO. COA07-1542

NORTH CAROLINA COURT OF APPEALS

Filed: 4 November 2008

ROBERT BRUCE JONES,
Plaintiff-Appellant

v.

Brunswick County
No. 02 CVD 914

TAMELA S. JONES,
Defendant-Appellee

Court of Appeals

Appeal by plaintiff from order entered 7 June 2007 by Judge Nancy Phillips in Brunswick County District Court. Heard in the Court of Appeals 20 August 2008.

David M. Godwin, for plaintiff-appellant.

Slip Opinion

The Del Re' Law Firm, PLLC, by Benedict J. Del Re' Jr., for defendant-appellee.

CALABRIA, Judge.

Robert Bruce Jones ("plaintiff") appeals an equitable distribution order entered 7 June 2007 regarding real property, divisible property, and the valuation of the parties' closely held business. We affirm the trial court's order.

Plaintiff and Tamela Jones ("defendant") (collectively "the parties") were married on 25 July 1998, separated on 7 May 2001, and divorced on 25 July 2002. Plaintiff's divorce complaint included a claim for an equitable distribution of property with an unequal distribution in his favor.

Prior to the marriage, plaintiff owned a business that sold playground equipment. During the marriage, plaintiff incorporated his business, and changed the name from Southern Playgrounds to Playground Specialists, Inc. ("Playground Specialists"). The success of the business was attributed in part to the income generated from numerous military contracts. Subsequent to the parties' divorce, appellant changed suppliers and the business stopped receiving military contracts.

Prior to the marriage the defendant purchased three lots located on Oak Island, North Carolina. Three weeks after the parties' marriage, defendant sold two of the three lots. Both parties agreed that the Oak Island property was to remain defendant's separate property.

During the marriage, the parties acquired a lot in Moore's Creek Village that served as the marital residence. After the parties separated, the defendant lived in the residence and was responsible for the post-separation mortgage payments, as well as the insurance and property taxes. Defendant's payments totaled \$46,303.34. Plaintiff paid three mortgage payments for a total of \$1,860.96. The court found the appreciation of the marital residence was divisible property.

Standard of Review

"[T]he trial court is vested with wide discretion in family law cases, including equitable distribution cases." *Wall v. Wall*, 140 N.C. App. 303, 307, 536 S.E.2d 647, 650 (2000). "The distribution of the marital estate is left to the sound discretion

of the trial court and will not be disturbed on appeal absent an abuse of discretion." *Offerman v. Offerman*, 137 N.C. App. 289, 297, 527 S.E.2d 684, 689 (2000) (citations omitted).

A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason, or that its ruling could not have been the result of a reasoned decision. ... Only when the evidence fails to show any rational basis for the distribution ordered by the court will its determination be upset on appeal. Furthermore, for purposes of appellate review, the trial court's findings of fact are conclusive if supported by any competent evidence in the record.

Smith v. Smith, 111 N.C. App. 460, 471, 433 S.E.2d 196, 203 (1993) (citations omitted).

I. Valuation of Business

Plaintiff initially argues that the trial court erred by valuing the parties' closely held business as of the date of separation. Specifically, the plaintiff argues that the trial court should not have included the revenues attributable to military contracts in the calculation of his average annual revenues since plaintiff did not expect to receive future military contracts. We disagree.

"In valuing a marital interest in a business, the task of the trial court is to arrive at a date of separation value which 'reasonably approximates' the net value of the business interest." *Offerman*, 137 N.C. App. at 292, 527 S.E.2d at 686 (citing *Poore v. Poore*, 75 N.C. App. 414, 422, 331 S.E.2d 266, 272 (1985)). The valuation will not be disturbed on appeal "if it appears that the trial court reasonably approximated the net value of the practice

. . . based on competent evidence and on a sound valuation method or methods" *Id.* at 293, 527 S.E.2d at 686. "[E]vidence of preseparation and postseparation occurrences or values is competent as corroborative evidence of the value of marital property as of the date of the separation of the parties." N.C. Gen. Stat. § 50-21(b) (2007).

Plaintiff's expert in business valuation devoted four to seven hours appraising the business. He used the revenue multiple method approach and the capitalized earnings approach, based upon the normal and expected profit, to complete appraisals of both the date of marriage value and the date of separation value.

Defendant's appeal focuses on the use of gross sales in the valuation decision. Gross sales for the business were \$518,906 and \$576,350, in years 2000 and 2001, respectively. However, plaintiff's expert deducted the total value of all military contracts for years 2000 and 2001 and readjusted the gross sales basing the calculations on gross revenues of \$300,495 and \$294,257 and disregarded actual sales for the two years and the successive years. Using a revenue multiplier of 31.3% plaintiff's expert valued the business as of the date of separation at \$90,895. Plaintiff's expert chose not to use the 42% revenue multiplier he indicated was typical for contract installers, the category to which plaintiff's business fit. At the request of the defendant, plaintiff's expert calculated an alternative valuation using the actual sales for the two years given the same weight and the actual average revenue multiple for contract installers at 42% per

his report. For this alternative, he provided a valuation of \$234,024.84.

The trial court adopted the expert's testimony as to the value of the corporation based upon the *actual* sales for 2000 and 2001 using a revenue multiplier of 42%, disregarding the expert's preferred revenue multiple of 31.3%. The trial court accepted the alternate valuation and determined the fair market value of the corporation as of the date of separation was \$234,024. The court gave the plaintiff a credit of \$57,563, the value of the business at the date of marriage, yielding a net marital value of \$176,461.

While plaintiff does not assign error to the trial court's use of the higher revenue multiplier when arriving at the business value, plaintiff contends the trial court erred by using actual revenues for years 2000 and 2001 in the valuation of the company. Plaintiff argues that the trial court should have accepted the expert's appraisals upon discounting the actual revenue during 2000 and 2001 because the revenue generated by the military contracts during those years should have been eliminated in valuing the company. Due to a switch in suppliers in 2004 plaintiff's revenue would decrease since he was unlikely to receive large military contracts in the future.

Evidence that the plaintiff had severed his relationship with the supplier that provided access to military contracts was correctly considered by the trial court. However, the court found that Playground Specialists had gross sales of \$521,073.90 in 2003, two years after separation of the parties, and received a

military contract that same year. The trial court chose to use the actual sales for the years 2000 and 2001, rather than the sales excluding the revenue from military contracts for those two years, because the court found the expert was attempting to lower the value of the company. The court also found that valuation based on actual sales was a more accurate estimation of the value of the company.

The plaintiff contends that *Offerman* allows a court to consider the loss of contracts post-separation when determining the value of a business. In *Offerman*, prior to separation, the wife froze funds the husband needed to comply with a business contract which resulted in the termination of that business relationship. The Court held that the action on the part of the wife, and its effect on the business, could be considered in an appraisal of the business. *Offerman*, 137 N.C. App. at 297, 527 S.E.2d at 688. *Offerman* is distinguishable from the present case. In the case before us, the wife did not interfere with the business. The plaintiff chose to sever the relationship with the supplier that assisted him in obtaining military contracts, therefore *Offerman* is inapplicable.

The trial court based its valuation decision on several factors. Specifically, the valuation was based on evidence regarding gross sales, the assets owned by the company, the ability of the company to generate loans to the plaintiff, cash flow, and the ability to acquire new equipment during the marriage and post-separation. The court examined all of the evidence and

reasonably approximated the net value of Playground Specialists, based upon competent evidence using a sound valuation method. Plaintiff has failed to show any abuse of discretion, and the trial court's valuation of the business will not be disturbed by this Court.

II. Oak Island Property

Plaintiff next argues that the trial court erred in ordering plaintiff to pay defendant the value of a one-half interest in the remaining Oak Island lot ("the lot") in distributing the marital estate. The sole question is whether it was proper for the trial court to consider the ownership of the lot when distributing the marital estate.

When a trial court determines that an equal division of the marital estate would not be equitable, the court shall consider all the factors enumerated in N.C. Gen. Stat. § 50-20(c)(1) in dividing marital and divisible property equitably. The factors the court should consider include, among others: "(1) The income, property, and liabilities of each party at the time the division of property is to become effective," and "(12) Any other factor which the court finds to be just and proper." N.C. Gen. Stat. § 50-20(c)(1) (2007).

In the instant case, the trial court considered the statutory factors. Specifically, the trial court found that plaintiff's earnings were higher than defendant's during the marriage. The court made detailed findings concerning property belonging to both parties, as well as the nature of the property owned, the amount

of debt outstanding on the marital property, and the source of funds used to purchase and maintain the properties.

The three lots defendant acquired at Oak Island on 23 June 1998, were acquired in exchange for her separate property, *i.e.* funds from a separate bank account holding proceeds from an inheritance ("separate funds"). Plaintiff paid a deposit of \$500 and defendant paid the balance of \$29,693.17. The property was titled in the parties' separate names as tenants in common and remained so throughout the marriage, even though it was not the defendant's intention to include plaintiff's name on the deed, and plaintiff did not know how his name appeared on the deed.

After two of the three lots were sold, defendant received a total sum of \$27,000. Defendant retained the entire amount as her separate funds and used the separate funds to pay taxes on the lot during the marriage as well as the post-separation period. As a result of plaintiff's name erroneously appearing on the deed, the court found the value of the Oak Island lot increased plaintiff's separate estate.

The standard of review is abuse of discretion. "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). The court found that plaintiff's separate estate increased by the sum of \$82,500 without the plaintiff providing anything of value for the interest. Perhaps the trial court could

have given greater weight to different evidence, however this Court cannot reweigh the evidence. *Pegg v. Jones*, ___ N.C. App. ___, ___, 653 S.E.2d 229, 231 (2007). Therefore, we find that the award is not arbitrary, and is the result of a reasoned decision.

III. Divisible Property

Finally, plaintiff argues that the trial court erred in crediting defendant with post-separation mortgage payments as part of the equitable distribution during the time defendant was in possession of the residence. We disagree.

This Court has previously held that the trial court has the discretion to treat post-separation payments toward marital debt as a distributional factor. *Fox v. Fox*, 103 N.C. App. 13, 21, 404 S.E.2d 354, 358 (1991). Dollar-for-dollar credit for post-separation debt payments have been allowed. *Hay v. Hay*, 148 N.C. App. 649, 655, 559 S.E.2d 268, 273 (2002). However, the preceding cases relied upon the language in N.C. Gen. Stat. § 50-20 prior to the 2002 amendment. The definition of divisible property was amended to include decreases in marital debt. 2002 N.C. Sess. Laws ch. 159, § 33.5. Payments that decrease marital debt, "to the extent made after 11 October 2002-constitute[] divisible property." *Warren v. Warren*, 175 N.C. App. 509, 517, 623 S.E.2d 800, 805 (2006). However, "[t]here shall be an equal division by using net value of marital property and net value of divisible property unless the court determines that an equal division is not equitable." N.C. Gen. Stat. § 50-20(c) (2007). If this is the case, the court may "divide the marital property and divisible

property equitably." N.C. Gen. Stat. § 50-20(c) (2007). "[T]he law affords trial courts wide discretion in determining how to treat post-separation mortgage payments by one spouse." *Hay*, 148 N.C. App. at 655, 559 S.E.2d at 273.

In the case *sub judice*, the trial court made an in kind distribution of the parties' assets and debts. As a result of the non-liquid nature of the assets in the estate and the need to keep the assets intact and free from any interference from the other party, the court made a distributive award of \$30,000.

In addition to the trial court's division of the assets, plaintiff and defendant received a dollar-for-dollar credit for the respective amounts they paid towards the mortgage, post-separation. These payments made by each party decreased the marital debt, increased the equity in the marital residence, and were properly considered divisible property. The trial court made findings of fact valuing this divisible property.

The defendant also paid the taxes and insurance on the marital residence post-separation. The court considered these payments in dividing the estate and gave defendant credit for the payments. Since these payments are post-separation payments for the benefit of the marital estate, the trial court could properly consider them in an equitable distribution proceeding.

Plaintiff asserts that *Warren* indicates defendant's post-separation payments should be classified as divisible property, and in that regard there is no dispute. *Warren*, and the plain language of N.C. Gen. Stat. § 50-20(b)(4) indicate the same.

Warren, 175 N.C. App. at 517, 623 S.E.2d at 805. Plaintiff appears to argue, however, that because the post-separation payments are divisible property that *Warren* requires an equal distribution. This is not the holding in *Warren*. *Warren* neither indicates that the division of property must be equal, nor what should be done in instances where the division is not equal.

In the case *sub judice*, the trial court held that an unequal distribution of property would be equitable and chose to divide the property equitably, but did not divide the property equally. The trial court was vested with wide discretion in the equitable distribution proceeding. Plaintiff has failed to show the trial court's holding was not the result of a reasoned decision and was arbitrary. The trial court is affirmed.

Affirmed.

Judges TYSON and ELMORE concur.

Report per Rule 30(e).