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NO. COA08-78

NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2008

CARROLL DOUGLAS SMITH,
Plaintiff-Appellant,

v.

Union County
No. 04 CVD 483

MELISSA BERNARD SMITH,
Defendant-Appellee.

Court of Appeals

Appeal by Plaintiff from order and judgment entered 19 April 2007 by Judge Christopher W. Bragg in District Court, Union County.

Heard in the Court of Appeals 26 August 2008.

Cheshire, Parker, Schneider, Bryan & Vitale, by Jonathan McGirt, for Plaintiff-Appellant.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, for Defendant-Appellee.

McGEE, Judge.

Carroll Douglas Smith (Plaintiff) and Melissa Bernard Smith (Defendant) were married on 5 November 1989. Plaintiff and Defendant separated on or about 7 February 2004 and were divorced on 25 May 2005. Plaintiff filed a complaint on 12 March 2004 seeking an equitable distribution of marital and divisible property pursuant to N.C. Gen. Stat. § 50-20. Defendant filed an answer and counterclaim to Plaintiff's complaint on 30 April 2004, also requesting an equitable distribution. A hearing was held on the equitable distribution claims in February 2006.

Plaintiff testified at the hearing that on 21 April 2003, he purchased a pontoon boat and motor that were valued at \$14,660.00 on the date of separation. Plaintiff testified that he had purchased the boat with funds given to him by his mother and stepfather. Plaintiff also testified that he purchased the boat for his stepfather because his stepfather did not want to shop for the boat and because his stepfather could avoid paying Georgia sales tax if Plaintiff purchased the boat on his stepfather's behalf. Plaintiff further stated he never believed himself to be the owner of the boat. Plaintiff introduced evidence of Georgia ad valorem tax records showing that his stepfather was listed as the owner of the boat as of 30 August 2005. However, Plaintiff testified he did not have any documentation showing how he paid for the boat or that his mother and stepfather gave him the money for the purchase.

Defendant testified that although the boat was stored at Plaintiff's stepfather's shop in Georgia, the boat was always intended to belong to Plaintiff and Defendant. According to Defendant, the boat was stored with Plaintiff's stepfather only because of restrictions on having boats in driveways in the neighborhood where Plaintiff and Defendant lived, and because Plaintiff's mother and stepfather lived near a lake. Defendant testified that she and Plaintiff took the boat out with friends and with Plaintiff's mother and stepfather, and that she never heard Plaintiff refer to the boat as belonging to his mother and stepfather. Moreover, Defendant testified that Plaintiff told his

stepfather in Defendant's presence "that [Plaintiff's stepfather] could use the boat anytime that he wanted to."

Plaintiff also testified that he had a 401(k) account with his employer, Bayer, during his marriage to Defendant. On the date of separation, Plaintiff's account had a closing balance of \$179,401.67 and an outstanding loan balance of \$138,527.59, consisting of two fifteen-year loans borrowed against Plaintiff's retirement plan and secured by a third mortgage on Plaintiff's and Defendant's residence.

Kelly Schmid (Ms. Schmid), a certified public accountant, testified on behalf of Defendant that the marital residence would have a tax basis of \$853,000.00. Ms. Schmid also testified that the residence could be sold for up to \$250,000.00 more than the tax value without triggering any capital gains tax. The trial court entered an equitable distribution final order and judgment on 19 April 2007.

In its findings of fact, the trial court found that "Plaintiff purchased the . . . boat and motor . . . and no credible consideration was shown for the transfer of title to [Plaintiff's] stepfather[.]" Thus, the trial court concluded that Plaintiff failed to meet his burden of establishing that the boat and motor were separate property. The trial court also found Defendant's testimony to be credible and noted that her testimony was supported by documentation and photographs. The trial court found Plaintiff's credibility lacking, stating that:

The [c]ourt [finds] that most, if not all, of the items which . . . Plaintiff listed as,

"H[usband] does not have", did in fact exist at the value determined by . . . Defendant. . . . Defendant, based on her occupation, has a basis for her opinion of the home furnishings and the Court also finds that she was primarily responsible for decorating the . . . residence. In addition, Plaintiff's actions at the time of the date of separation, for example by writing, "slut" on . . . Defendant's wedding dress garment bag, and [Plaintiff's] assertions that items did not exist which were later seen in photographs of the [residence] taken by Vivian Riegelman, lessen [Plaintiff's] credibility.

Because of Plaintiff's greater contribution of separate property to the marital estate that was used to purchase the parties' residence, the trial court found an equal distribution would not be equitable and ordered a sixty percent to forty percent division of marital property in Plaintiff's favor. The trial court distributed in-kind net assets totaling \$369,074.00 to Plaintiff and \$61,759.00 to Defendant, which was an eighty-six percent to fourteen percent in-kind division of the total net marital estate of \$430,833.00. Thus, in order to effectuate an equitable distribution, the trial court awarded Defendant a distributive award of \$110,574.52, which the trial court made payable in four equal annual installments, beginning 1 January 2007 and continuing until 1 January 2010. Plaintiff appeals.

I.

In his first argument on appeal, Plaintiff contends that the trial court erred by identifying, classifying, valuing, and distributing the boat and motor as marital property. We disagree.

In *White v. White*, 312 N.C. 770, 324 S.E.2d 829 (1985), the North Carolina Supreme Court set forth the standard of review for

equitable distribution awards:

Historically our trial courts have been granted wide discretionary powers concerning domestic law cases. The legislature also clearly intended to vest trial courts with discretion in distributing marital property under N.C.G.S. 50-20, but guided always by the public policy expressed therein favoring an equal division. The legislative intent to vest our trial courts with such broad discretion is emphasized by the inclusion of the catch-all factor codified in N.C.G.S. 50-20(c)(12).

It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. 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.

Id. at 777, 234 S.E.2d at 833 (internal citations omitted).

In North Carolina, 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, and presently owned, except property determined to be separate property or divisible property in accordance with subdivision (2) or (4) of this subsection. . . . It is presumed that all property acquired after the date of marriage and before the date of separation is marital property This presumption may be rebutted by the greater weight of the evidence.

N.C. Gen. Stat. § 50-20(b)(1) (2007).

"The burden of showing the property to be marital is on the party seeking to classify the asset as marital and the burden of

showing the property to be separate is on the party seeking to classify the asset as separate." *Atkins v. Atkins*, 102 N.C. App. 199, 206, 401 S.E.2d 784, 787 (1991). The party claiming the property to be marital must show the property was acquired during the course of the marriage pursuant to N.C. Gen. Stat. § 50-20(b)(1). *Id.* If the party claiming the property to be marital makes this showing, then the burden shifts to the other party to rebut the presumption that the property is marital. *Id.* at 206, 401 S.E.2d at 787-88.

In the present case, the trial court concluded that Plaintiff did not meet his burden to establish that the boat and motor were separate property. Plaintiff and Defendant agreed that Plaintiff purchased the boat on 21 April 2003, a date which was after their marriage but before the date of separation. Defendant testified that the boat had always been considered to belong to Plaintiff and Defendant. Defendant also testified that the boat was stored at Plaintiff's stepfather's shop because of restrictions on keeping boats in driveways in the neighborhood where Plaintiff and Defendant lived, and because Plaintiff's mother and stepfather lived near a lake.

Plaintiff's argument that the boat and motor were separate property was based primarily on his own testimony, which the trial court found to be less credible than Defendant's testimony. Furthermore, Plaintiff could not remember how he purchased the boat, nor did he present any documentation showing his mother and stepfather had given him the funds to buy the boat and motor.

Plaintiff presented tax documents listing his stepfather as the owner of the boat and motor, but these documents were dated after the date of separation.

Plaintiff asserts that the trial court's finding of fact that "no credible consideration was shown for the transfer of title [of the boat] to his stepfather" is tantamount to a factual finding that the transfer did occur. We disagree. Plaintiff failed to meet his burden of showing by a preponderance of the evidence that the transfer of title occurred before the date of separation. As stated above, Plaintiff presented no evidence that the title to the boat and motor was transferred prior to the date of separation. Furthermore, Plaintiff could not remember how he paid for the boat and motor, and he presented no evidence that the boat and motor were purchased with anything other than marital funds. Based on the above stated facts and the insufficiency of Plaintiff's evidence, we agree with the trial court's conclusion that Plaintiff failed to rebut the presumption that the boat and motor were marital property. Plaintiff's assignment of error is overruled.

II.

Plaintiff also argues the trial court erred by failing to make the required findings of fact and conclusions of law supporting its order to pay a cash distributive award and in its calculations of the award. We agree with Plaintiff that the trial court failed to make the required findings of fact and conclusions of law in awarding a cash distributive award to Defendant and we remand for additional findings.

In order to effectuate the unequal division of property of sixty percent to Plaintiff and forty percent to Defendant, the trial court found it was necessary to make a cash distributive award of \$110,574.52 to Defendant, payable in four annual installments of \$27,643.63. The trial court ordered a distributive award despite the statutory preference for an in-kind distribution of marital property. N.C. Gen. Stat. § 50-20(e) (2007) states:

[I]t shall be presumed in every action that an in-kind distribution of marital or divisible property is equitable. This presumption may be rebutted by the greater weight of the evidence, or by evidence that the property is a closely held business entity or is otherwise not susceptible of division in-kind. In any action in which the presumption is rebutted, the court in lieu of in-kind distribution shall provide for a distributive award in order to achieve equity between the parties. The court may provide for a distributive award to facilitate, effectuate or supplement a distribution of marital or divisible property.

"[I]n equitable distribution cases, if the trial court determines that the presumption of an in-kind distribution has been rebutted, it must make findings of fact and conclusions of law in support of that determination." *Urciolo v. Urciolo*, 166 N.C. App. 504, 507, 601 S.E.2d 905, 908 (2004).

In *Urciolo*, the trial court failed to follow the statutory presumption that favors an in-kind distribution in equitable distribution cases and ordered a distributive award. This Court held that the trial court's order was "devoid of any finding of fact or conclusions of law pertaining to this presumption" of an in-kind distribution, and we remanded the "matter for additional findings of fact on whether the presumption of an in-kind

distribution [had] been rebutted[.]" *Urciolo*, 166 N.C. App. at 507, 601 S.E.2d at 908.

The trial court's findings in the present case were also insufficient to support the rebuttal of the presumption in favor of an in-kind distribution. Here, the trial court's findings as to the distributive award were as follows:

While the statute favors in-kind distributions, the [c]ourt also finds that a like kind distribution/exchange of property is not feasible due to the nature of the property. In order to accomplish a 60/40 split of marital assets, Plaintiff shall make a cash distributive award of One-Hundred Ten-Thousand Five-Hundred and Seventy-four dollars and 52/100 (\$110,574.52) to . . . Defendant. The [c]ourt orders . . . Plaintiff to pay to Defendant four (4) annual payments of Twenty-seven Thousand Six Hundred Forty-three and 63/100 Dollars (\$27,643.63), by January 1, 2007, 2008, 2009, and 2010. Plaintiff has the option of paying Defendant in full any time sooner tha[n] the prescribed schedule.

As in *Urciolo*, the trial court failed to make sufficient findings to support its determination that the presumption that an in-kind distribution was equitable had been rebutted. The trial court's statement that "a like kind distribution/exchange of property is not feasible due to the nature of the property" is insufficient to allow this Court to determine whether the trial court properly exercised its discretion in ordering the distributive award instead of an in-kind distribution. Accordingly, we remand this matter for additional findings of fact on whether the presumption of an in-kind distribution was rebutted.

In light of this holding, the trial court should also reconsider the current payment schedule for the distributional

award and set an appropriate schedule upon further findings. Plaintiff did not argue his remaining assignments of error and they are therefore abandoned. See N.C.R. App. P. 28(b)(6).

Affirmed in part and remanded in part.

Judges JACKSON and STROUD concur.

Report per Rule 30(e).