

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA12-1364
NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2013

SHANNON ALLEN WASHBURN,
Plaintiff,

v.

Onslow County
No. 11 CVD 43

LYNN MARIE WASHBURN,
Defendant.

Appeal by plaintiff from judgment entered 6 June 2012 by Judge W. M. Cameron, III in Onslow County District Court. Heard in the Court of Appeals 22 April 2013.

Shannon Washburn, pro se, plaintiff-appellant.

No brief filed on behalf of defendant-appellee.

DAVIS, Judge.

Shannon Allen Washburn ("plaintiff") appeals from the trial court's equitable distribution judgment. After careful review, we vacate and remand.

Factual Background

Plaintiff and Lynn Marie Washburn ("defendant") were married on 20 May 2005, separated on 17 February 2010, and divorced on 11 May 2011. The parties have no children together.

On 4 January 2011, plaintiff filed this action against defendant seeking equitable distribution of the parties' marital property, interim allocations of the marital assets and debts, attorney's fees, and a temporary restraining order enjoining defendant from "transferring, damaging, encumbering or disposing of any items of marital property."

On 18 May 2011, defendant filed an answer and counterclaim also seeking equitable distribution and attorney's fees. Before the equitable distribution hearing, the trial court entered two consent orders. The first order granted plaintiff sole use, possession, and ownership of the parties' 2001 Dodge Dakota automobile. The second order ordered the sale of the marital home and the payment of certain marital debts from the proceeds of the sale.

An equitable distribution hearing was held, and the trial court entered a judgment of equitable distribution on 6 June 2012. Plaintiff gave timely notice of appeal.

Analysis

I. Standard of Review

We review a trial court's order of equitable distribution under an abuse of discretion standard. *Wieneck-Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992). "Only a finding that the judgment was unsupported by reason and could not have been a result of competent inquiry or a finding that the trial

judge failed to comply with the statute will establish an abuse of discretion." *Id.* (internal citations omitted).

On appeal, plaintiff argues that the trial court abused its discretion by: (1) distributing his military pension without first assigning value to it; (2) omitting defendant's laptop computer and 401(k) pension plan from the classification and distribution scheme; and (3) failing to take into account (a) plaintiff's post-separation payments for repairs and maintenance of the marital home and (b) plaintiff's post-separation payments to reduce the parties' marital debts. We address each of these contentions in turn.

II. Plaintiff's Military Pension

Initially, plaintiff claims that the trial court erred in distributing his military pension without first calculating the value of the pension. We agree. "Equitable distribution is governed by N.C. Gen. Stat. § 50-20 (2011), which requires the trial court to conduct a three-step process: (1) classify property as being marital, divisible, or separate property; (2) calculate the net value of the marital and divisible property; and (3) distribute equitably the marital and divisible property." *Finney v. Finney*, ___ N.C. App. ___, ___, 736 S.E.2d 639, 641 (2013). Under § 50-20, "[m]arital property includes all vested and nonvested pension, retirement, and other deferred compensation rights, and vested and nonvested military pensions

eligible under the federal Uniformed Services Former Spouses' Protection Act." N.C. Gen. Stat. § 50-20(b)(1) (2011).

Pension plans typically fall into one of two categories: defined benefit plans or defined contribution plans. *Cochran v. Cochran*, 198 N.C. App. 224, 227, 679 S.E.2d 469, 472 (2009).

In a defined benefit plan the employee's pension is determined without reference to contributions [by the employee] and is based on factors such as years of service and compensation received. Conversely, a defined contribution plan is essentially an annuity funded by periodic contributions from the employee, the employer, or both.

Id. (internal citations and quotation marks omitted). The proper method of valuation depends upon the type of plan. *Bishop v. Bishop*, 113 N.C. App. 725, 730, 440 S.E.2d 591, 595 (1994).

Here, plaintiff - who serves in the United States Navy - is entitled to a military pension upon completion of at least 20 years of active service. 10 U.S.C. § 6323 (2012). This Court has previously determined that such military pensions are defined benefit plans. *Cunningham v. Cunningham*, 171 N.C. App. 550, 557, 615 S.E.2d 675, 681 (2005); accord *Seibert v. Seibert*, 82 N.C. App. 329, 333, 346 S.E.2d 504, 506 (1986) ("Defendant's military pension and benefits fall within the category of defined benefit plans. The military retirement system is noncontributory Military retirement pay commences at

the time of retirement with the amount calculated on the basis of years served and rank achieved"), *aff'd*, 319 N.C. 367, 354 S.E.2d 506 (1987).

In *Bishop*, we noted that the valuation of defined benefit plans is "fraught with uncertainties" and stressed the importance of a uniform and consistent method for our trial courts to utilize. *Bishop*, 113 N.C. App. at 730, 440 S.E.2d at 595. We then adopted the following method of valuation for defined benefit plans:

First, the trial court must calculate the amount of monthly pension payment the employee, assuming he retired on the date of separation, will be entitled to receive at the later of the earliest retirement age or the date of separation. This calculation must be made as of the date of separation and "shall not include contributions, years of service or compensation which may accrue after the date of separation." The calculation will however, include "gains and losses on the prorated portion of the benefit vested at the date of separation." Second, the trial court must determine the employee-spouse's life expectancy as of the date of separation and use this figure to ascertain the probable number of months the employee-spouse will receive benefits under the plan. Third, the trial court, using an acceptable discount rate, must determine the then-present value of the pension as of the later of the date of separation or the earliest retirement date. Fourth, the trial court must discount the then-present value to the value as of the date of separation. In other words, determine the value as of the date of separation of the sum to be paid at the later of the date of separation or the earliest retirement date. This

calculation requires mortality and interest discounting. The mortality and interest tables of the Pension Benefit Guaranty Corporation, a corporation within the United States Department of Labor, are well suited for this purpose. Finally, the trial court must reduce the present value to account for contingencies such as involuntary or voluntary employee-spouse termination and insolvency of the pension plan. This calculation cannot be made with reference to any table or chart and rests within the sound discretion of the trial court.

Id. at 731, 440 S.E.2d at 595-96 (internal citations omitted).

In the present case, the trial court did not calculate the pension's value in accordance with the method outlined in *Bishop*. Instead, it concluded that defendant was entitled to a marital portion of the military pension pursuant to the following formula:

$$\frac{1}{2} \times A/B \times C$$

"A" equals 54 months, which is the number of months that the marriage coincided with military service creditable for retired pay purposes.

"B" equals the number of months of Plaintiff's total creditable military service at retirement and shall be determined at retirement.

"C" equals the Plaintiff's disposable retired pay. The term "disposable" is defined in 10 U.S.C. 1408 and shall be determined at retirement.

We believe that the trial court erred in distributing plaintiff's military pension in this manner as its method of

distribution does not comport with our caselaw regarding the valuation and distribution of defined benefit plans. Therefore, this matter must be remanded. The question remains, however, whether the trial court is required to value the pension on remand or, alternatively, remove it from the distribution scheme.

In *Cunningham*, we remanded an equitable distribution order where the trial court failed to assign value to a defined benefit retirement plan. *Cunningham*, 171 N.C. App. at 558, 615 S.E.2d at 681. We instructed the trial court to conduct an appropriate valuation analysis using the method established in *Bishop*. In so doing, however, we relied on the fact that the record "contained evidence regarding the value of . . . [the] military pension as of the date of separation." *Id.*

Here, conversely, the record is devoid of any evidence, presented by either party, as to the value of the military pension. Neither party addressed the value of the pension during the hearing, and no such valuation is included in the ledger the trial court used in determining how the parties' assets were to be classified, valued, and distributed.

It is well established that the trial court's obligation "to make specific findings regarding the value of any property classified as marital . . . exists only when there is credible evidence supporting the value of the asset." *Grasty v. Grasty*,

125 N.C. App. 736, 738-39, 482 S.E.2d 752, 754 (1997); *Miller v. Miller*, 97 N.C. App. 77, 80, 387 S.E.2d 181, 184 (1990) ("The requirements that the trial court (1) classify and value all property of the parties, both separate and marital, (2) consider the separate property in making a distribution of the marital property, and (3) distribute the marital property, necessarily exists only when evidence is presented to the trial court which supports the claimed classification, valuation and distribution.").

We are guided by our decision in *Albritton v. Albritton*, 109 N.C. App. 36, 40-41, 426 S.E.2d 80, 83 (1993), where we determined that there was "no reason to remand th[e] case on the basis that the trial court failed to make a specific finding as to the . . . value of the defendant's pension plan when it was plaintiff who failed to provide the trial court with the necessary [actuarial and plan-specific] information." We explained that

the party claiming an interest in the pension plan . . . ha[s] the burden of proof as to the value of the pension plan on the date of the parties' separation. . . . With this background, the burden was clearly on plaintiff as the one seeking an interest in defendant's pension plan, to provide the trial court with evidence of the pension plan's value as of the date of separation. The record indicates that both parties submitted to pretrial depositions. In addition, defendant took the stand and was available for questioning as to the value of

the pension plan. . . . Also, plaintiff had the opportunity to seek the necessary information as to defendant's participation in the pension plan from [his employer], but again plaintiff failed to pursue this opportunity.

Id. at 40-41, 426 S.E.2d at 83.

Similarly, in the present case, defendant – the party claiming an interest in the pension plan – failed to provide the trial court with any evidence of the military pension's value on the date of separation. Defendant had the opportunity both to cross-examine plaintiff as to the value of the pension during the hearing and to obtain the necessary information from plaintiff's employer. However, defendant failed to take advantage of either of these opportunities.

As such, we conclude that remanding the case for the taking of new evidence on the value of the pension plan is not appropriate. *Id.* at 41, 426 S.E.2d at 83-84 ("Remanding the matter for the taking of new evidence as to the value of the pension plan, in essence granting the party a second opportunity to present evidence, would only protract the litigation and clog the trial courts with issues which should have been disposed of at the initial hearing.") (alterations, citation, and quotation marks omitted). Thus, upon remand, plaintiff's military pension must instead be removed and excluded from the equitable distribution scheme. See *Grasty*, 125 N.C. App. at 740, 482

S.E.2d at 755 (“[O]nly those assets and debts that are classified as marital property *and valued* are subject to distribution under the Equitable Distribution Act”) (emphasis added).

III. Defendant’s 401(k) Pension Plan and Laptop Computer

We also agree with plaintiff that the trial court erred in failing to classify, value, and distribute defendant’s laptop computer and 401(k) pension plan despite the competent evidence produced at trial regarding the value of those items.

The first step of the equitable distribution process requires the trial court to classify *all* of the marital and divisible property – collectively termed distributable property – in order that a reviewing court may reasonably determine whether the distribution ordered is equitable. In fact, to enter a proper equitable distribution judgment, the trial court must specifically and particularly *classify and value all assets and debts maintained by the parties at the date of separation*.

Robinson v. Robinson, 210 N.C. App. 319, 323, 707 S.E.2d 785, 789 (2011) (citations and quotation marks omitted) (emphasis in original).

An equitable distribution judgment that fails to list all of the marital property is fatally defective. *Stone v. Stone*, 181 N.C. App. 688, 693, 640 S.E.2d 826, 829 (2007); *see also* 3 Suzanne Reynolds, *Lee’s North Carolina Family Law* § 12.142, at 378 (5th ed. 2002) (“If the judgment refers only to some of the

marital and divisible property, and the record reveals that the party with the burden of proof offered credible evidence of additional marital or divisible property, the appellate court must vacate and remand.”).

Here, the parties presented evidence at trial regarding a 401(k) pension plan that was opened in defendant’s name and a laptop computer purchased for defendant. The evidence indicated that both of these events occurred during the parties’ marriage and before the date of separation. Neither of these assets, however, appears on the trial court’s equitable distribution ledger. Nor were they accounted for, classified, or distributed by the court in its judgment.

When a trial court fails to list and distribute all of the marital property, this Court must vacate the judgment below and remand so that “all real and personal property falling within the scope of the statute” is equitably distributed. *Little v. Little*, 74 N.C. App. 12, 17, 327 S.E.2d 283, 288 (1985); see *Bowman v. Bowman*, 96 N.C. App. 253, 255, 385 S.E.2d 155, 156 (1989) (vacating judgment and remanding where “evidence of both parties indicates that they own other dining room, living room, and bedroom furniture not accounted for in the judgment”); *Cornelius v. Cornelius*, 87 N.C. App. 269, 271, 360 S.E.2d 703, 704 (1987) (vacating and remanding when trial court “failed to list or determine the status of” several bank accounts and stock

plans in plaintiff's name). We thus vacate and remand for the trial court to determine the status and value of the 401(k) pension plan and laptop computer and distribute them accordingly.

IV. Post-Separation Payments on Marital Debts and Post-Separation Repairs to the Marital Home

Plaintiff's final contention is that the trial court erred in failing to give proper consideration to certain payments he made on marital debts and various repairs he made to the marital home after the date of separation. Plaintiff's financial affidavit and trial testimony suggest that he continued – after the date of separation – to make payments on (1) defendant's Chevrolet Suburban; (2) the first mortgage on the marital home; and (3) defendant's car insurance. Defendant's testimony corroborated plaintiff's assertion that he continued to make mortgage and car payments post-separation. Plaintiff also presented evidence at trial regarding the cost of repairs he made to the marital home after the date of separation to prepare it for sale. Plaintiff contends that all of these expenditures benefited the marital estate and that the trial court should have considered the expenses either as a distributional factor or in the form of a direct credit.

Here, the trial court made the following finding concerning the parties' marital debt:

c. Waste of marital or divisible property after date of separation[:] Plaintiff contends that the Defendant's failure to better utilize his income earned while overseas to pay down debts, stabilize the parties financial situation, and ensure that he would maintain his security clearance necessary to further his career amounted to waste and should be considered by the court as a significant distributional factor. The Court declines to do so finding instead that substantial debt payments were made by the Defendant during this period of time and that the Plaintiff by his own conduct contributed to the financial problems of the parties. The court therefore gives no weight to this factor.

This finding addresses the trial court's determination that defendant made "substantial debt payments" and did not commit waste, but it does not discuss or analyze *plaintiff's* post-separation payments to repair the marital home and reduce the marital debt.

Our Court recently addressed post-separation payments made for the benefit of the marital estate, stating as follows:

A spouse is entitled to some consideration, in an equitable distribution proceeding, for any post-separation payments made by that spouse (from non-marital or separate funds) for the benefit of the marital estate. . . . For that reason, the trial court may, after classifying post-separation debt payments as divisible property, distribute the payments unequally. Plaintiff has not cited any cases, and we know of none, holding that a spouse is entitled to a "credit" for post-separation payments made using marital funds. As a result, in order to properly evaluate the trial court's treatment of post-separation marital debt payments, the

source of the funds used to make the payments should be identified.

Bodie v. Bodie, ___ N.C. App. ___, ___, 727 S.E.2d 11, 15-16 (2012) (internal citations and quotation marks omitted).

Such payments may include those made for the upkeep and repair of the marital home. See *Walter v. Walter*, 149 N.C. App. 723, 732, 561 S.E.2d 571, 577 (2002) (recognizing that trial court can, within its discretion, allow or deny a party credit for repairs made to the marital home).

Here, the trial court did not make any findings regarding the source of the funds used to pay the marital debts or for the repairs to the marital home. Indeed, the trial court failed to address *plaintiff's* payments at all. We are, therefore, unable to determine whether plaintiff was entitled to some consideration, either as a distributional factor or as a direct credit, for these payments.

In *Bodie*, the trial court made a finding of fact that the plaintiff "paid \$216,000 towards the mortgage, insurance, upkeep and taxes on the marital residences after the date of separation." *Id.* at ___, 727 S.E.2d at 16. The trial court in *Bodie* failed, however, to address "the extent to which specific post-separation debts were paid using Plaintiff's separate property or the manner in which any payments made using Plaintiff's separate property should be recognized in the

equitable distribution process." *Id.* at ____, 727 S.E.2d at 16. We thus concluded that we could not evaluate the trial court's treatment of the post-separation marital debt payments without first remanding to the trial court for the entry of additional findings as to "the classification, value, and distribution of Plaintiff's post-separation payments on marital debt, including the extent to which these payments were made with marital or separate funds." *Id.* at ____, 727 S.E.2d at 21.

Guided by our decision in *Bodie*, we instruct the trial court to make findings regarding the source of the funds used to pay for the post-separation repairs and to reduce the marital debt. If the trial court determines that these payments were made with plaintiff's separate, non-marital funds, it must then decide on the appropriate level of consideration to give plaintiff for these payments. *Edwards v. Edwards*, 110 N.C. App. 1, 12-13, 428 S.E.2d 834, 839-40, *disc. review denied*, 335 N.C. 172, 436 S.E.2d 374 (1993). While we express no opinion on what the outcome of the trial court's analysis should be on this issue, we note that we have previously "approved of: ordering one spouse to reimburse the other for post-separation payments made toward marital debt, considering the post-separation payments as a distributional factor, and crediting a spouse in an appropriate manner for post-separation payments" as appropriate options for the trial court to consider under such

circumstances. *Id.* at 13, 428 S.E.2d at 840 (internal citations omitted).

Conclusion

For the reasons stated above, we vacate the trial court's equitable distribution judgment and remand the case for further proceedings as set out herein.

VACATED AND REMANDED.

Chief Judge MARTIN and Judge BRYANT concur.

Report per Rule 30(e).