

NO. COA14-382

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

HARVEY LYNWOOD MONTAGUE, JR.,
Plaintiff,

v.

Wake County
No. 10 CVD 4524

TERESA MONTAGUE,
Defendant.

Appeal by Defendant from judgment entered 15 August 2013 by Judge Debra S. Sasser in Wake County District Court. Heard in the Court of Appeals 21 October 2014.

Sandlin Family Law Group, by Deborah Sandlin, for Plaintiff-appellee.

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

DILLON, Judge.

Defendant Teresa Montague appeals from a trial court's equitable distribution judgment which awarded an unequal division of marital and divisible assets. For the following reasons, we affirm in part and reverse and remand in part.

I. Background

In 1986, Harvey Lynwood Montague, Jr. ("Husband") and Teresa Montague ("Wife") were married. Husband is active in the commercial real estate business.

In 2010, Husband commenced this action seeking absolute divorce and equitable distribution. Wife filed her answer and asserted counterclaims. The parties were granted a divorce.

In 2012, a bench trial on the equitable distribution claim was conducted with the parties presenting testimony and evidence regarding certain assets. On 15 August 2013, the trial court entered its equitable distribution judgment/order granting unequal distribution in favor of Husband. Wife filed timely notice of appeal from this judgment.

II. Standard of Review

In its judgment, the trial court entered extensive findings of fact and conclusions of law with regard to the classification, valuation, and distribution of assets. Our standard of review of such judgments is well-settled: "[W]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Lee v. Lee*, 167 N.C. App. 250, 253, 605 S.E.2d 222, 224 (2004) (citation and

quotation marks omitted). "While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable *de novo*." *Id.* (citation omitted). The trial court's unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal. *Best v. Gallup*, ___ N.C. App. ___, ___, 715 S.E.2d 597, 598 (2011) (citation omitted), *appeal dismissed and disc. review denied*, 365 N.C. 559, 724 S.E.2d 505 (2012). The trial court is the sole judge of the weight and credibility of the evidence. *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994). "[W]hen reviewing an equitable distribution order, the standard of 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." *Peltzer v. Peltzer*, ___ N.C. App. ___, ___, 732 S.E.2d 357, 359-60 (citations omitted), *disc. review denied*, 366 N.C. 417, 735 S.E.2d 186 (2012).

III. Analysis

"The trial court must classify, value, and distribute marital property and divisible property in equitable distribution actions." *Ubertaccio v. Ubertaccio*, 161 N.C. App.

352, 353-54, 588 S.E.2d 905, 907 (2003). On appeal, Wife argues that the trial court erred in its judgment in its classification and distribution of certain property. We address each one in turn below.

A. L.T. Montague Properties, LLC

In Wife's first two arguments, she contends that the trial court misclassified as Husband's separate property certain property associated with a limited liability company, known as L.T. Montague Properties, LLC (the "LLC"). This LLC was formed by Husband and Wife during their marriage - with Husband owning 51% and Wife owning 49% - for the purpose of owning and operating a multi-tenant commercial building known as the Montague Center which was being transferred to them by Husband's parents.

Specifically, Wife argues that the trial court misclassified two assets. She contends that the trial court erred in treating two post-separation distributions made by the LLC to Husband totaling \$31,210.00 as Husband's separate property. Further, she contends that the trial court erred in classifying \$32,063.53 of the post-separation appreciation of

the Montague Center (and, therefore, of the LLC)¹ as Husband's separate property.

1. Post-Separation Distributions to Husband

Wife contends that the trial court erred in treating two post-separation distributions made to Husband by the LLC as his separate property by characterizing these distributions as "management fees" he earned for managing the Montague Center after the parties separated. Specifically, the trial court treated as Husband's separate property a \$5,010.00 distribution made to him in 2009 and a \$26,200.00 distribution made to him in 2010. The key finding in the judgment with regard to these distributions states as follows:

48. [Husband] actively manages the commercial property (negotiates all leases, collects rent payments, arranges for any "fit-up" required for a tenant, handles maintenance calls, does the landscaping, touch-up painting) and has done so since prior to the parties' separation. *Plaintiff pays himself a management fee for this work in the form of a distribution.*

(Emphasis added.)

¹ The trial court found that the Montague Center appreciated \$127,063.53 post-separation; that \$95,000.00 of this appreciation was passive and, therefore, divisible property; but that \$32,063.53 was due to Husband's efforts and, therefore, his separate property.

We agree with Wife that our holding in *Hill v. Hill*, ___ N.C. App. ___, 748 S.E.2d 352 (2013), compels us to conclude that the trial court should have classified these distributions as divisible property rather than treating them as Husband's separate property. As divisible property, they must be distributed by the trial court. Accordingly, we reverse the trial court's classification of these distributions and remand the matter, directing the trial court to reclassify these distributions as divisible property and to make a distribution of this property.

In *Hill*, the parties set up a Subchapter S corporation as a vehicle for the wife's speech pathology practice. *Id.* at ___, 748 S.E.2d at 357. The corporate tax returns showed that the wife took money from her practice in two ways: (1) in the form of a low salary; and (2) in the form of shareholder distributions. *Id.* at ___, 748 S.E.2d at 358. Evidence was presented that she took shareholder distributions for the purpose of avoiding federal taxes for Social Security and Medicare. *Id.* The trial court re-characterized the post-separation shareholder distributions to the wife as salary that she earned and, therefore, classified them as her separate property. *Id.* On appeal, however, our Court reversed, stating

that "[t]he parties are bound by their established methods of operating the corporation." *Id.* Our Court essentially determined that since the parties elected to treat a portion of the money paid to the wife as shareholder distributions, rather than treating it as salary expenses of the corporation, these funds were part of the retained earnings of the corporation. *Id.* Our Court then held that since "[t]he retained earnings of a Subchapter S corporation, upon distribution to shareholders, are marital property[,] " the wife was bound by the treatment of these shareholder distributions to her as divisible property. *Id.*

In the present case, the LLC is taxed as a partnership. The two distributions to Husband at issue here are treated on the LLC's 2009 and 2010 federal tax returns as withdrawals of partnership capital, and *not* as expenses of the partnership for property management services. Therefore, these distributions were part of the capital of the LLC and, therefore, belonged to the LLC. Had the distributions been treated as "management fees" on the federal tax returns, they would have been LLC expenses, which would have reduced the LLC's net income for 2009

and 2010 by \$31,210.00, which potentially would have reduced Wife's personal tax liability.²

We note that Husband may have, in fact, earned these distributions as management fees; however, we are compelled by *Hill* to conclude that Husband, being the majority owner and a manager of the LLC, is "bound" by the manner in which these post-separation distributions to him were characterized on the LLC tax returns. Accordingly, we strike the trial court's finding that Husband was paid for his efforts in managing the LLC, reverse the portion of the judgment treating the post-separation distributions from the LLC to Husband as his separate property, and remand the matter to the trial court to classify them as divisible property and to distribute this property.

2. Post-Separation Appreciation of the Montague Center

Wife argues that the trial court erred in classifying a portion of the post-separation appreciation of the Montague Center (and, therefore, of the LLC) as Husband's separate property. We disagree.

Our General Assembly has determined that all appreciation of marital property which occurs "after the date of separation"

² We note that, like in *Hill*, Husband's motivation here to treat the distributions as withdrawals of capital rather than as earned management fees may have been to avoid payment of federal taxes for Social Security and Medicare.

shall be classified as "divisible property" EXCEPT that any appreciation resulting from the post-separation "actions or activities of a spouse" shall not be classified as divisible property. N.C. Gen. Stat. § 50-20(b)(4)(a) (2011). We have recognized that this statute creates a rebuttable presumption that post-separation appreciation and diminution in marital property is divisible property:

[A]ll appreciation and diminution in value of marital and divisible property is *presumed* to be divisible property *unless the trial court finds* that the change in value is attributable to the postseparation actions of one spouse. Where the trial court is unable to determine whether the change in value of marital property is attributable to the actions of one spouse, this presumption has not been rebutted and must control.

Wirth v. Wirth, 193 N.C. App. 657, 661, 668 S.E.2d 603, 607 (2008) (emphasis in original).

In the present case, the trial court found that Husband had rebutted this presumption in that \$32,063.59 of the post-separation appreciation of the Montague Center "was due to [post-separation] activities" of Husband. The only post-separation "activities" of Husband described in the judgment are contained in the trial court's Finding of Fact No. 48, in which the court found that Husband "actively manages the [Montague Center] (negotiates all leases, collects all rent payments,

arranges for "fit-ups" required for a tenant, handles maintenance calls, does the landscaping, touch-up painting) and has done so since prior to the parties' separation."

In the context of N.C. Gen. Stat. § 50-20(b)(4)(a), active appreciation "refers to the 'financial or managerial [post-separation] contributions' of one of the spouses" and would not be classified as divisible property. *Brankney v. Brankney*, 199 N.C. App. 375, 386, 682 S.E.2d 401, 408 (2009). We note that in the present case, though, the trial court also found that the Husband was paid "a management fee for *this work*." We further note that there is no finding that Husband performed any post-separation activities for which he was not paid a fee or that the amount of the fee did not represent fair compensation to perform these services. However, it is not necessary to determine whether under N.C. Gen. Stat. § 50-20(b)(4)(a) the post-separation appreciation of a marital asset caused by the activities of a spouse should be treated as the separate property of that spouse *where the spouse was paid a fee from marital assets to perform the very services causing the post-separation appreciation to occur*. Rather, we believe that in this case Wife - like Husband - is "bound" by the manner in which these distributions to Husband were treated on the LLC tax

returns. Specifically, as the trial court found, Wife is a manager of the LLC; and, further, Wife has only argued in this appeal that the post-separation distributions to Husband should not be treated as fees he earned for managing the LLC, but rather as unearned distributions of LLC capital.

Accordingly, after striking the trial court's finding that Husband was paid for his efforts in managing the LLC, we are left with the trial court's findings that Husband performed post-separation activities with respect to the Montague Center - without any finding that he was paid to perform these activities - and that his activities resulted in a portion of the LLC's post-separation appreciation. We believe that these findings support the trial court's treatment of a portion of the LLC's post-separation appreciation as Husband's separate property, and, therefore, Wife's argument is overruled.

B. Classification of Lawnmower

Wife argues that the trial court erred classifying the Kubota lawnmower as Husband's separate property because it found that the mower was paid for with LLC funds.

Here, the trial court found that the mower was purchased post-separation in Husband's name for \$14,433.12, with the entire purchase price being financed. The trial court also

found that the LLC made the loan payments for the mower. "Under the source of funds rule, an asset purchased after separation with marital funds is marital property to the extent that marital funds were used toward its purchase." *Freeman v. Freeman*, 107 N.C. App. 644, 657, 421 S.E.2d 623, 630 (1992) (citation omitted). Therefore, as the LLC was marital property, it might appear that at least some portion of the mower would qualify as divisible property since the loan payments were made from marital funds. However, missing from the evidence is the amount of debt still owed on the mower at the date of distribution. Further, there was no evidence as to how much the mower had depreciated in value. In an equitable distribution action, the court is required to classify, value, and distribute marital and divisible property. *Ubertaccio*, 161 N.C. App. at 353-54, 588 S.E.2d at 907. We have also noted that "divisible property must be valued as of the date of distribution." *Helms v. Helms*, 191 N.C. App. 19, 31, 661 S.E.2d 906, 914, (citing N.C. Gen. Stat. § 50-21(b) and emphasis in original), *disc. review denied*, 362 N.C. 681, 670 S.E.2d 233 (2008). Without these valuations in the record, the trial court was not required to distribute the mower and, accordingly, did not abuse its discretion in not including it within the equitable distribution

scheme, as he testified that it was titled in his name. *Albritton v. Albritton*, 109 N.C. App. 36, 40-41, 426 S.E.2d 80, 83 (1993) (holding that the burden of proof on valuation rests on the spouse seeking to have the property classified as marital or divisible property); *Grasty v. Grasty*, 125 N.C. App. 736, 738-39, 482 S.E.2d 752, 754 (1997) (holding that to meet her burden the spouse must offer credible evidence of value and if fails to do so, the trial court has no obligation to find the value). The trial court did not err in treating the loan payments on the mower as distributions to Husband from the LLC from which he made the loan payments on the mower. We note that the trial court considered in its judgment as a distributional factor under N.C. Gen. Stat. § 50-20(c)(12) that the LLC had "paid certain personal expenses of Husband since the parties separated."

C. Distributional Factor-Transfer by Husband's parents

Next, Wife contends that the trial court erred in considering the intent of Husband's parents to transfer the Montague Center commercial building to the LLC as part of their estate planning as a distributional factor. We disagree.

Our General Assembly has provided by statute that a trial court shall divide the net value of marital and divisible

property equally between divorcing spouses “unless the court determines that an equal division is not equitable.” N.C. Gen. Stat. § 50-20(c). This statute also provides that if the trial court “determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably” and “shall consider” the distributive factors enumerated therein. *Id.* We have held that where a trial court decides that an unequal distribution is equitable, the court must exercise its discretion to decide how much weight to give each factor supporting an unequal distribution. *Mugno v. Mugno*, 205 N.C. App. 273, 278, 695 S.E.2d 495, 499 (2010).

Here, the trial court determined that an unequal distribution was equitable and applied several statutory distributional factors in reaching its award. In this appeal, Wife challenges the trial court’s application of the factors contained in N.C. Gen. Stat. § 50-20(c)(10) and (12) regarding the Montague Center and the LLC:

e. N.C. Gen. Stat § 50-20(c)(10). The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party. Specifically, the Court considered . . . [t]he history and acquisition of the building call for [Husband] to retain this asset rather than

[Wife].

. . . .

g. **N.C. Gen. Stat. § 50-20(c)(12).** **Any other factor which the court finds to be just and proper.** Specifically, the Court considered the following:

i. The commercial building owned by [the] LLC was conveyed to the LLC by the [Husband's] parents. The conveyance of the commercial building owned by the LLC was intended to be part of [Husband's] parents' estate planning. The purchase price [paid by the LLC for] the property was significantly less than the appraised value of the property at the time of the conveyance.

ii. [Wife] did not make any contributions to or provide services to the acquisition of [the] LLC and its assets. The equity in the building was a gift from [Husband's] parents

(Emphasis in original.)

This Court has determined that a trial court can consider a donor's intentions regarding estate plans and the manner in which property is acquired in making equitable distribution determinations. For instance, in *Hunt v. Hunt*, in determining whether checks written by a wife's grandmother to both the wife and her husband used to purchase a home was the wife's separate property, this Court held that the trial court could consider

the origin of the funds and the donor's intent in determining whether an equal division would be equitable. 85 N.C. App. 484, 488-89, 355 S.E.2d 519, 522 (1987). Therefore, we believe that it was within the trial court's discretion to consider Husband's parents' estate plans in making its equitable distribution determination.

Wife further challenges the trial court's finding that she did not "contribute" to the LLC, noting that she signed a loan guaranty along with Husband for the loan which financed the purchase of the Montague Center from Husband's parents. However, we read the trial court's reference to "contributions" in this finding as "equity" contributions toward the LLC. It is undisputed that neither party made any equity contributions to effect the acquisition of the Montague Center from Husband's parents. Notwithstanding, we believe the trial court's application of the factors and the findings it made, which are supported by record evidence, supported the trial court's distribution of the LLC to Husband in the equitable distribution order.

Wife also makes a general argument that the trial court did not fully explain in its findings its unequal distribution in favor of Husband. However, the trial court is not required to

show how it balanced the factors; the weight given to each factor is in the trial court's discretion; and there is no need to show exactly how the trial court arrived at its decision regarding unequal division. *Fox v. Fox*, 103 N.C. App. 13, 21-22, 404 S.E.2d 354, 358 (1991). After thorough review of the trial court's order and the eighty-nine findings of fact, including those specific findings related to the unequal division of marital property, we find that the trial court properly considered and balanced the factors upon which evidence was presented supporting an unequal division. Wife's arguments are overruled.

D. Distributional Factor of Husband's interest in certain assets

Lastly, Wife contends that the trial court erred in failing to distribute the value of Husband's interest in two entities he co-owns with his father, namely HLM Builder Group and Braxton Village. The trial court found that there was not sufficient evidence for it to value these assets. However, as stated above, it was Wife's burden of proof to value these companies to have the property classified as marital or divisible property. *Albritton*, 109 N.C. App. at 40-41, 426 S.E.2d at 83. Contrary to her arguments, the record shows that throughout this proceeding Wife failed to list a value for these companies on

her Equitable Distribution Inventory Affidavit and failed to supplement discovery requests with these valuations. Even after continuances and the filing of motions to compel, she failed by the time of trial to offer a value of these businesses during argument on the motion *in limine*. Even in her amended equitable distribution affidavit, served four days before trial, she failed to provide estimated values for these assets. Wife failed to meet her burden in valuing these companies, and the trial court did not abuse its discretion in granting Husband's motion *in limine* to prohibit the introduction of evidence regarding these assets.

In conclusion, we note that the trial court did account for these assets in its unequal division. Accordingly, Wife's arguments are overruled.

For the foregoing reasons, the trial court's order is AFFIRMED in part, and REVERSED AND REMANDED in part.

Judge HUNTER, Robert C. and Judge DAVIS concur.