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NO. COA14-748
NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

DONNIE ANDERSON,
Plaintiff,

v.

Surry County
No. 12 CVD 460

CHARMAN ANDERSON,
Defendant.

Appeal by plaintiff from order entered 19 March 2014 by Judge Charles M. Neaves, Jr. in Surry County District Court. Heard in the Court of Appeals 19 November 2014.

STEVENS AND BRINTLE, PLLC, by Sarah Stevens, for plaintiff.

No brief was filed on behalf of defendant.

ELMORE, Judge.

Donnie Anderson (plaintiff) appeals from the entry of the trial court's equitable distribution order. We remand for additional findings of fact and for the correction of certain calculations in the equitable distribution order.

I. Background

Plaintiff and Charman Anderson (defendant) were married on 1 May 1998. Two children were born of the marriage, the first

child in 2001 and the second child in 2003. The parties separated on 11 January 2012. Plaintiff and defendant entered into an equitable distribution pre-trial order on 9 October 2013. After reviewing the parties' pre-trial order, the trial court entered a final order of equitable distribution on 19 March 2014.

II. Appellate Rule Violations

As an initial matter, we address plaintiff's violations of the North Carolina Rules of Appellate Procedure (the rules) to determine whether this appeal should be dismissed under our Supreme Court's holding in *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 657 S.E.2d 361 (2008) (*Dogwood I*). In *Dogwood I*, our Supreme Court recognized that the occurrence of default under the appellate rules stems from the existence of one or more of the following circumstances: "(1) waiver occurring in the trial court; (2) defects in appellate jurisdiction; and (3) violation of nonjurisdictional requirements." *Id.* at 194, 657 S.E.2d at 363. In this case, plaintiff's noncompliance falls within the third category, violation of the nonjurisdictional requirements of the appellate rules.

The third category of default involves a party's failure to comply with one or more of the nonjurisdictional requisites prescribed by the appellate rules. *Id.* at 198, 657 S.E.2d at 365.

These nonjurisdictional requirements have been enacted "primarily to keep the appellate process flowing in an orderly manner." *Id.* (citation and quotation omitted). One example of such a rule is Rule 28(b), which governs the content of an appellant's brief. Noncompliance with the appellate rules of this kind, "while perhaps indicative of inartful appellate advocacy, does not ordinarily give rise to the harms associated with review of unpreserved issues or lack of jurisdiction. And, notably, the appellate court faced with a default of this nature possesses discretion in fashioning a remedy to encourage better compliance with the rules." *Id.* at 198, 657 S.E.2d at 365. Thus, "[w]e stress that a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal." *Id.*; see also *Hicks v. Kenan*, 139 N.C. 337, 338, 51 S.E. 941, 941 (1905) (noting this Court's preference to hear the merits of the appeal rather than dismissing for noncompliance with the rules); 5 *Am.Jur.2d Appellate Review* § 804, at 540 (2007) ("[I]t is preferred that

an appellate court address the merits of an appeal whenever possible. . . . [A]n appellate court has a strong preference for deciding cases on their merits; and it is the task of an appellate court to resolve appeals on the merits if at all possible.”).

Appellate Rules 25 and 34 provide a framework for addressing violations of the nonjurisdictional requirements of the rules. *Id.* at 199, 657 S.E.2d at 366. Rule 25(b) allows the appellate court to “impose a sanction against a party or attorney or both when the court determines that such a party or attorney or both substantially failed to comply with these appellate rules[.]” N.C. R. App. P. 25(b) (2013). Rule 34(a)(3) provides that the appellate court may impose a sanction “when the [C]ourt determines that an appeal or any proceeding in an appeal was frivolous because . . . a petition, motion, brief, record, or other paper filed in the appeal was grossly lacking in the requirements of propriety, grossly violated appellate court rules, or grossly disregarded the requirements of a fair presentation of the issues to the appellate court.” N.C. R. App. P. 34(a)(3). Rule 34(b) permits as possible sanctions monetary damages, dismissal, and “any other sanction deemed just and proper.” N.C. R. App. P. 34(b).

In the instant case, plaintiff violated Rule 28(b) sections (1)-(5). Rule 28 sets forth the guidelines for the contents of a party's brief. Notably, plaintiff's brief is devoid of (1) a cover page, followed by a subject index and table of authorities; (2) a statement of the issues presented for review; (3) a statement of the procedural history of the case; (4) a statement of the grounds for appellate review; and (5) a statement of facts. Each of these items is required to be contained in an appellant's brief in order for an appellant to be in compliance with Rule 28. In addition, plaintiff's brief is single spaced in direct violation of Rule 26(g)(1), which explicitly provides that "[t]he body of text shall be presented with double spacing between each line of text." N.C. R. App. P. 26(g) (2013).

We must examine whether defendant's noncompliance with Rule 28 and Rule 26(g) constitutes a substantial failure or gross violation of the appellate rules. *Dogwood*, 362 N.C. at 199, 657 S.E.2d at 366. In determining whether a party's noncompliance with the appellate rules rises to the level of a substantial failure or gross violation, this Court "may consider, among other factors, whether and to what extent the noncompliance impairs the court's task of review and whether and to what

extent review on the merits would frustrate the adversarial process. . . . The court may also consider the number of rules violated[.]” *Id.* at 200, 657 S.E.2d at 366-67 (internal citations omitted).

We conclude that plaintiff’s noncompliance with the rules does in fact constitute a substantial failure or a gross violation of the appellate rules. Plaintiff’s brief fails to comply with essentially all of the requirements for an appellate brief. Most egregious is the fact that plaintiff’s brief is devoid of an issue statement(s) and a statement of the standard of review. By failing to include these items, plaintiff has essentially asked this Court to do his job for him, since we are now charged with identifying plaintiff’s issues and determining how to review them.

However, we conclude that plaintiff’s violations, although substantial, are insufficient to warrant dismissal. We will hear the merits of his appeal only because the violations do not impair our ability to review the case. Therefore, as directed by *Dogwood*, we elect to carry out the primary function of the appellate court and review the merits of the appeal.

Again, it is well-settled that in lieu of dismissal, “some other sanction may be appropriate, pursuant to Rule 25(b) or

Rule 34 of the Rules of Appellate Procedure.” *State v. Hart*, 361 N.C. 309, 311, 644 S.E.2d 201, 202 (2007). As a sanction for plaintiff’s substantial non-compliance with our appellate rules, we order plaintiff’s counsel to pay double the printing costs of this appeal pursuant to Rule 34(b). *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 192 N.C. App. 114, 123, 665 S.E.2d 493, 500 (2008) (*Dogwood II*) (sanctioning defendant’s attorney by way of ordering him to pay double the printing costs). We instruct the Clerk of this Court to enter an order to this effect.

III. Analysis

A. Distributive Award

On appeal, plaintiff contends that the trial court erred in ordering him to pay a distributive award to defendant. Plaintiff contends that the order contains insufficient findings of fact to establish that plaintiff had the ability to pay the distributive award. In addition, plaintiff argues that the trial court’s order is devoid of findings of fact concerning whether plaintiff rebutted the presumption in favor of an in-kind distribution. We agree.

The trial courts are afforded great discretion in equitably distributing marital property. *Urciolo v. Urciolo*, 166 N.C.

App. 504, 505, 601 S.E.2d 905, 907 (2004). The trial court's order will not be upset on appeal absent a clear abuse of discretion. *Id.*

Previous decisions of this Court have held that the trial court can properly order the payment of a distributive award instead of an in-kind distribution only when an in-kind distribution was found to be impractical. *Heath v. Heath*, 132 N.C. App. 36, 38, 509 S.E.2d 804, 805 (1999) (holding that the trial court must make a finding that an equitable distribution of the marital property in-kind would be impractical). In 1997, N.C. Gen. Stat. § 50-20(e) was amended to "create a rebuttable presumption that an in-kind distribution of property is equitable." *Urciolo*, 166 N.C. App. at 506, 601 S.E.2d at 908 (quoting 1997 N.C. Sess. Laws 302 § 1). When there is a presumption in the law, the finder of fact is bound by the presumption unless it finds that the presumption has been rebutted. *Alexander v. Alexander*, 68 N.C. App. 548, 552, 315 S.E.2d 772, 775-76 (1984). If the trial court has determined that the presumption in favor of an in-kind distribution has been rebutted, it must make findings of fact and conclusions of law in support of that determination. *Heath*, 132 N.C. App. at 38, 509 S.E.2d at 805.

Further, N.C. Gen. Stat. § 50-20(c) enumerates distributional factors to be considered by the trial court. One of those factors is "[t]he liquid or nonliquid character of all marital property and divisible property." N.C. Gen. Stat. § 50-20(c)(9) (2013). The trial court is required to make findings concerning whether a defendant has sufficient liquid assets from which he could pay a distributive award. *Embler v. Embler*, 159 N.C. App. 186, 188, 582 S.E.2d 628, 630 (2003). In the instant case, the trial court ordered plaintiff to pay a distributive award to defendant in the amount of \$68,932 in the following fashion:

- a. \$35,000.00 payable in certified funds on or before November 1, 2013, which the parties have indicated to the Court has been paid within the requisite period of time;
- b. the remaining of \$33,932.00 payable directly to the Defendant in equal monthly installments of \$688.02, beginning November 1, 2013, and continuing thereafter on or before the 1st day of each successive month, for a total of sixty (60) months. This remaining \$33,932.00 amount is subject to interest at the rate of eight percent (8.0%) per annum from November 1, 2013.

In its order, it appears that the trial only accounted for one source of liquid assets from which defendant could pay the distributive award. That liquid asset is a BB&T checking

account in the name of Virginia Carolina Utilities totaling \$21,962. Although plaintiff's share of the marital estate is \$117,752, there is no indication that plaintiff had access to other liquid assets aside from the \$21,000 in the checking account from which he could pay the distributive award. In addition, it appears the trial court arbitrarily selected an interest rate of eight percent without making a finding concerning the tax consequences to plaintiff. N.C. Gen. Stat. § 50-20(c)(9), (11) (in determining whether an equal division of property is equitable, the court must consider the liquid or nonliquid character of all marital property and the tax consequences to each party). The trial judge neither made findings concerning whether plaintiff had other sufficient liquid assets to pay the distributive award nor considered the tax consequences to plaintiff. Therefore, it is unclear whether plaintiff had the ability to pay the distributive award. "Although defendant may in fact be able to pay the distributive award, [the] defendant's evidence is sufficient to raise the question of where [plaintiff] will obtain the funds to fulfill this obligation." *Urciolo*, 166 N.C. App. at 507, 601 S.E.2d at 908 (citation and quotation omitted). Accordingly, we must remand this matter for additional findings of fact concerning

whether the presumption in favor of an in-kind distribution has been rebutted and whether defendant has sufficient liquid assets to pay the distributive award to defendant.

B. Credits

In Schedule J of the pre-trial equitable distribution order, plaintiff requested credits and setoffs relating to defendant's personal and business expenses that plaintiff allegedly paid. The expenses totaled approximately \$9,755. The trial court found that plaintiff was entitled to a credit in the amount of \$4,338. Plaintiff recognizes that the allowance of credits is within the discretion of the trial court. However, he contends that the trial court was required to identify the expenses for which it granted plaintiff a credit in its findings of fact. Without specific findings of fact as to which credits were allowed, plaintiff argues that he is unable to challenge finding #14. We agree and remand for additional findings of fact concerning which of the credits listed in schedule J the trial court allowed.

C. Marital Liabilities

Lastly, plaintiff argues that the trial court erred in calculating the parties' total marital liabilities. We agree.

Finding of fact #12(b) provides that the total marital liabilities distributed to plaintiff as listed on Schedule H amounted to \$70,408. It also provides that the total marital liabilities distributed to defendant on Schedule H is \$6,598. However, conclusion of law #4 states that the total marital liabilities distributed to plaintiff pursuant to Schedule H is \$63,408 and that the total marital liabilities distributed to defendant pursuant to Schedule H is \$13,598. Clearly, there is a discrepancy in the trial court's calculations of the parties' marital liabilities. We remand the equitable distribution order to the trial court with instructions to re-calculate the sum of the parties' marital liabilities. To the extent that this correction affects other calculations in the order, we order the trial court to make all necessary adjustments.

In sum, this Court remands the equitable distribution order to the trial court for additional findings of fact and for the correction of certain calculations.

Remanded.

Judges ERVIN and DAVIS concur.

Report per Rule 30(e).