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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1030

Filed: 7 June 2016

Wake County, No. 13 CVD 10578

KELLYE J. BIBBS, Plaintiff,

v.

JAMES S. BIBBS, Defendant.

Appeal by Plaintiff from judgment entered 23 March 2015 by Judge Lori Christian in Wake County District Court. Heard in the Court of Appeals 11 February 2016.

*Nicholls & Crampton, PA, by Nicholas J. Dombalis, II, for Plaintiff.*

*No brief for Defendant.*

STEPHENS, Judge.

Plaintiff Kellye J. Bibbs appeals from the district court's equitable distribution judgment awarding an unequal distribution of the parties' marital estate in favor of Defendant James S. Bibbs. Because its findings of fact are insufficient to support such a distribution, we reverse and remand the district court's judgment.

*Factual Background and Procedural History*

The parties were married on 2 September 1994, separated on 24 May 2012, and divorced on 6 December 2013. Three children were born of the marriage: a

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daughter, Blaike, who was 17 years old at the time of the trial in this matter, and two sons, James, Jr., age 16, and Noah, age 14.

On 7 August 2013, Kellye filed a complaint in Wake County District Court alleging claims for absolute divorce, equitable distribution, postseparation support, alimony, and attorney fees. James filed an answer and counterclaims for equitable distribution, postseparation support, alimony, and attorney fees on 12 November 2013. Both parties sought an unequal distribution of the marital estate in their own favor. On 28 February 2014, the district court entered a consent order requiring James to pay postseparation support to Kellye in the amount of \$500 each month. On 2 September 2014, the court entered an initial pretrial order and an order compelling production by James after he failed to provide a completed equitable distribution inventory affidavit or any supporting documentation. James failed to timely comply with the court's production order, and after a hearing held 31 October 2014, the court entered another order compelling production on 19 November 2014 in which it ordered James to produce evidence of his recent paystubs, his 2013 federal and state tax returns, and statements from his IRA, 401(k) and various credit union accounts. That same day, the court entered an order directing "certain financial institutions and other entities who should have custody and control of the documentation that [James] has been ordered to produce, to produce such documentation as quickly as possible so that this matter can proceed to trial." On 24 November 2014, the court

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entered an order for final pretrial conference and an order allowing counsel for James to withdraw from representing him. A bench trial began the same day, with James appearing *pro se*. Due to James' failure to produce all required documents, the court was forced to hold the case open until 4 February 2015, when an additional hearing was held to conclude the matter.

The evidence presented at trial tended to show that during the marriage, the parties shared joint title to the home where they lived in Pittsboro, and were jointly obligated on a mortgage secured by its deed of trust. James was employed by Citigroup and Quintiles during the marriage, earning an annual salary of approximately \$120,000 to \$130,000 while also accruing a balance of \$138,886 in a Morgan Stanley IRA, certain stock options, a pension plan with a balance of \$4,630, and a 401(k) valued at \$47,518 as of the parties' date of separation. Although he stipulated the funds in these accounts were marital property, James acknowledged that after the date of separation, he fully or partially depleted all of them, purportedly in order to pay for legal bills and expenses associated with the parties' children. James also testified that after the parties' date of separation, he paid approximately \$5,700 for upgrades and repairs to prepare for the sale of the marital residence, which he resided in until March 2014, when he moved to Virginia, remarried, and started working for the Port of Virginia at a salary of approximately \$190,000 per year. In September 2014, James was awarded legal custody of the parties' children.

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Kellye testified that she had not worked outside the home since 2000, and had foregone various employment opportunities throughout the marriage in order to help advance James' career and to care for the parties' children, particularly their sons, who both suffer from autism. In July 2011, Kellye inherited separate property from her father's estate, including a house in Raleigh, a VALIC retirement account worth approximately \$400,000, two cars, and several bank and brokerage accounts. According to Kellye, prior to the parties' separation, she made several transfers from the VALIC account into the parties' joint checking account, which the parties utilized to pay bills, finance improvements to the marital home, and cover the costs of tuition for James to enroll in graduate courses at several universities. After the parties separated, Kellye moved into her father's home in Raleigh, which she subsequently transferred to the parties' daughter via quit-claim deed, reserving a life estate in the property for herself, and took on employment as a business consultant for First Data Corporation with a salary of approximately \$35,000 per year including anticipated bonuses and commissions. Kellye also testified that she suffered from a cerebral aneurysm which required regular medical treatments that were invasive and expensive. Kellye testified further that she relied on funds from her inherited VALIC account to cover the cost of her medical bills, living expenses, and various expenses associated with the parties' children, and that as a result, the value of the VALIC account had fallen to approximately \$184,174 by the time of trial.

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On 23 March 2015, the district court entered an equitable distribution judgment in which it ordered an unequal distribution of the parties' marital estate in James' favor. In its findings of fact, the court found that:

9. [Kellye] contends that she is entitled to an unequal distribution of the marital estate in her favor. The [c]ourt has considered all of [Kellye's] contentions. [Kellye] has her own substantial income and wealth from her inheritance.
10. [James] contends that he is entitled to an unequal distribution of the marital estate in his favor. The [c]ourt has considered all of [James'] contentions. The [c]ourt has determined that, pursuant to N.C. Gen. Stat. [§] 50-20 it is appropriate and equitable that the property be distributed unequally to [James]. The [c]ourt orders that [James] should receive 68% of the marital and divisible property.
11. [James] has been granted custody of the parties' children. The two boys live in group homes (autism). The daughter Blaike lives with [James] and stepmother in Virginia. Blaike graduates from high school in the spring of 2015. [James] has provided financial support for the minor children for several years. [Kellye] is paying child support to [James]. Neither party has day to day responsibility for the two boys. Both parties provide funds for the children as needed.
12. Based upon the distributional factors set forth above, [James] has received an appropriate unequal share of the marital [e]state in his favor. An equal division of the marital estate would not be equitable. The parties' marital and divisible property, as divided herein, and as reflected on Exhibit A attached hereto, represents a fair and equitable distribution of marital property.

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Based on these findings, the court concluded that James should receive sole possession of both the family home and its mortgage while indemnifying Kellye from further responsibility for the same, and that Kellye should receive the remaining funds from the partially depleted Morgan Stanley IRA and pension plan accounts. In addition, in lieu of an in-kind distribution, the court ordered James to pay a distributive award to Kellye of \$60,000 in 12 monthly installments. Kellye gave notice of appeal to this Court on 20 April 2015.

*Analysis*

Kellye argues that the district court erred by failing to make factual findings sufficient to support an unequal distribution of the parties' marital estate in favor of James. We agree.

As this Court's prior holdings demonstrate,

[t]he standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary.

The trial court's findings need only be supported by substantial evidence to be binding on appeal. We have defined substantial evidence as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

As to the actual distribution ordered by the trial court,

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[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.

The trial court's unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal.

*Peltzer v. Peltzer*, 222 N.C. App. 784, 786-87, 732 S.E.2d 357, 359-60 (citations and internal quotation marks omitted), *disc. review denied*, 366 N.C. 417, 735 S.E.2d 186 (2012).

Section 50-20(c) of our General Statutes provides that:

There 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. If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably. The court shall consider all of the following factors under this subsection[.]

N.C. Gen. Stat. § 50-20(c) (2015). The statute goes on to list twelve distributive factors including, *inter alia*, “[t]he income, property, and liabilities of each party at the time the division of property is to become effective”; “[t]he duration of the marriage and age and physical and mental health of both parties”; “[a]ny direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse”; “[a]cts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert the marital property or divisible property, or

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both, during the period after separation of the parties and before the time of distribution”; and “[a]ny other factor which the court finds to be just and proper.” N.C. Gen. Stat. § 50-20(c)(1), (3), (7), (11a), and (12). “Where the 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.” *Peltzer*, 222 N.C. App. at 788, 732 S.E.2d at 360 (citation omitted). In doing so, the trial court “must make specific findings of fact regarding each factor specified in [section 50-20(c)] on which the parties offered evidence.” *Id.* (citation and ellipsis omitted). “A blanket statement that the trial court considered or gave due regard to the distributional factors listed in [section 50-20(c)] is insufficient as a matter of law.” *Id.* (citation and internal quotation marks omitted).

In the present case, our review of the record indicates that Kellye presented evidence at trial regarding several of the distributive factors enumerated by section 50-20(c), including the disparity in income between the parties; the recurring medical and financial issues associated with treating her aneurysm; professional opportunities she sacrificed during the parties’ marriage in order care for their children and advance James’ career; contributions she made of separate property inherited from her father’s estate to improve the marital residence prior to the date of separation; and acts by James that depleted the marital estate after the date of separation while Kellye was forced to spend funds from her inheritance in order to



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cover her living expenses. However, the findings of fact provided in the district court's equitable distribution judgment to support an unequal distribution of the marital estate in favor of James do not specifically address any of these factors. Instead, the court simply stated that it had "considered all of [Kellye's] contentions" and noted Kellye's "substantial income and wealth from her inheritance." Our case law makes clear that a "blanket statement" that the court considered Kellye's evidence pertaining to the distributional factors set forth in section 50-20(c) is insufficient as a matter of law to support an unequal distribution of the marital estate. *See Peltzer*, 222 N.C. App. at 788, 732 S.E.2d at 360; *see also, e.g., Collins v. Collins*, 125 N.C. App. 113, 117, 479 S.E.2d 240, 243 (remanding equitable award of unequal distribution of marital estate where the court failed to provide specific findings concerning evidence the parties presented regarding disparities in their health and income), *disc. review denied*, 346 N.C. 277, 487 S.E.2d 542 (1997). We therefore conclude that the district court erred in failing to make factual findings sufficient to address the statutory distributional factors on which evidence was presented or to support an unequal distribution of the marital estate. Consequently, this matter must be remanded for entry of an order that adequately addresses the evidence both parties presented on the distributional factors the court is required to address pursuant to section 50-20(c).

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We note here that the district court also erred by relying on irrelevant considerations to support its award of an unequal distribution in favor of James. Specifically, although the court's finding of fact 11 lists James' custody of the parties' three children as a basis for awarding an unequal distribution in his favor, this Court has made clear that "custody of the children born of the marriage is not alone a proper distributional factor pursuant to [section] 50-20(c)." *Gum v. Gum*, 107 N.C. App. 734, 739, 421 S.E.2d 788, 791 (1992). Although section 50-20(c)(4) requires the court to consider "the need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects," our holding in *Gum* demonstrates that this factor does not apply if the parties have sold or left the marital residence prior to the equitable distribution trial. *See id.* (citation and brackets omitted). *Gum* also makes clear that custody is not an appropriate consideration under section 50-20(c)(12) because "[t]he only factors considered 'just and proper' within the meaning of that section are those relating to the source, availability, and use by a wife and husband of economic resources during the course of their marriage," whereas section 50-20(f) "specifically requires that the court provide for an equitable distribution without regard to alimony for either party or support of the children of both parties." *Id.* (citations and certain internal quotation marks omitted).

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While Kellye argues that the evidence in the record supported an unequal distribution of the parties' marital estate in her favor, our case law and statutes establish that such a determination is the district court's responsibility. *See Peltzer*, 222 N.C. App. at 787-88, 732 S.E.2d at 360. On remand, the district court must support its determination properly, based on the evidence presented by the parties and the distributional factors provided by section 50-20(c). While we are cognizant of the heavy caseloads under which our State's district courts labor, this Court cannot discharge its appellate responsibilities unless the district courts reach reviewable conclusions of law based upon findings of fact supported in the record. For these reasons, the district court's equitable distribution judgment is

REVERSED and REMANDED.

Judges HUNTER, JR., and INMAN concur.

Report per Rule 30(e).