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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-59

Filed: 2 October 2018

Mecklenburg County, No. 09-CVD-11064

CRAIG STEVEN SMITH, Plaintiff,

v.

VERA C. SMITH (McDERMOTT), Defendant.

Appeal by Plaintiff from order entered 2 June 2017 by Judge Donnie Hoover in Mecklenburg County District Court. Heard in the Court of Appeals 8 August 2018.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, G. Russell Kornegay, III, and John Paul Tsahakis, for plaintiff-appellant.

William L. Sitton, Jr. and Hull & Chandler, P.A., by Andrew S. Brendle, for defendant-appellee.

HUNTER, JR., ROBERT N., Judge.

Craig Steven Smith (“Plaintiff”) appeals an equitable distribution order entered on remand from this Court. Plaintiff argues the trial court (1) did not follow this Court’s appellate mandate in its consideration of Vera Cranford Smith’s (“Defendant”) paternal inheritance, and (2) improperly considered distributional factors when equitably distributing the marital estate because it misapplied the law

under N.C. Gen. Stat. § 50-20(c) (2017). We conclude the trial court's findings of fact on remand did not follow this Court's appellate mandate, and the trial court abused its discretion by misapplying the law.

I. Factual and Procedural Background

This case is Plaintiff's third appeal to this Court in the same action. This Court heard appeals on 25 August and 22 September 2015, in which both Plaintiff and Defendant appealed several orders regarding issues of child support, custody, equitable distribution, and contempt. This Court issued opinions on both appeals on 19 April 2016 and remanded with instructions to make further findings of fact as to Defendant's paternal inheritance valued at \$1,323,378.14 and other issues not pertinent to this appeal. *Smith v. Smith*, 247 N.C. App. 135, 786 S.E.2d 12 (2016) ("*Smith I*"); *Smith v. Smith*, 247 N.C. App. 166, 785 S.E.2d 434 (2016) ("*Smith II*").

On 22 July 2013, the trial court entered an equitable distribution order ("Original ED Order"), and made the following finding of fact concerning distributional factors, including Defendant's paternal inheritance:

260. Evidence was presented at trial in support of one or more factors specified under N.C.G.S. §50-20(c). Accordingly, the Court below makes findings of fact regarding these distributional factors. The Court notes that a number of factors which relate to the distributional factors to be considered by the Court in N.C.G.S. §50-20(c) are found in other sections of the findings of fact herein. The fact that these other distributional factors are not contained in this section of the findings of fact does not mean that the Court did not consider them as

distributional factors.

In *Smith I*, this Court held the above finding was error because the “general conclusion is simply not adequate to compensate for the total lack of findings to address defendant’s paternal inheritance.” *Smith I*, 247 N.C. App. at 161, 786 S.E.2d at 39 (citation omitted). On 12 April 2017, the trial court held a remand hearing to address the issues this Court raised in *Smith I* and *Smith II*. Plaintiff and Defendant appeared through counsel and proposed orders and findings of fact to the trial court in an attempt to follow this Court’s mandate. In its discretion, the trial court did not hear or accept additional evidence. On 2 June 2017, the trial court entered new orders regarding child support and equitable distribution (“ED Remand Order”), respectively. In the ED Remand Order, the trial court concluded Defendant’s paternal inheritance had no material effect on the prior equitable distribution between the parties, and did not alter the unequal distribution in favor of Defendant.

On remand, the trial court made the additional findings of fact to address this Court’s appellate mandate on Defendant’s paternal inheritance, in pertinent part:

23. Although Plaintiff/husband filed his complaint and equitable distribution affidavit in this matter two or more years after [D]efendant/wife received approximately \$916,000 from her mother’s estate, Plaintiff/husband chose not to contend to this court that Defendant/wife’s inheritance (paternal or maternal) is/was a distributional factor upon which the court should rely in his favor. (Equitable Distribution Judgment and Order paragraph 256, pg. 34; see also Equitable Distribution Pretrial Order – Plaintiff/Husband’s Unequal Distributional Factors

F11(A)).

...

25. Plaintiff/husband submitted a proposed equitable distribution judgment and order to the court at the end of the equitable distribution hearing. On page 30 of that proposed judgment, Plaintiff/husband itemized each item of paternal inheritance listed above and the approximate values that the parties have now stipulated to. (T. pp. 38-56)

26. Although the court did not itemize Defendant/wife's paternal inheritance in its July 22, 2013 judgment and order of equitable distribution, the court was aware of the extent and value of her paternal inheritance and did consider that inheritance in its determination of what division of marital, divisible and separate property was equitable.

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28. Defendant/wife's paternal inheritance, three years and ten months after the parties' separation, has no material effect on the distributional factors relied upon by this court in determining that an equal distribution is not equitable.

29. Plaintiff/husband never alleged that Defendant/wife's inheritance of separate property was a distributional factor that the court should consider and apply in his favor in making an equitable distribution of the marital and divisible property.

30. Defendant/wife's paternal inheritance, received almost four (4) years after the parties' separation, has no material effect on the fact that Defendant/wife donated \$916,000.00 of her maternal inheritance to the marriage and that Plaintiff/husband benefitted from her maternal inheritance.

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31. Defendant/wife's paternal inheritance has no material effect on the equitable division of marital and divisible property based upon the distributional factor of the parties' disparity in income. The court found that Plaintiff/husband's income was more than ten times greater than Defendant/wife's during the last four years of the marriage and for the four years subsequent to separation. (Judgment and Order ¶ 262. a. p.35)

32. Plaintiff/husband did not present evidence during the equitable distribution hearing in 2011 that Defendant/wife's paternal inheritance resulted in any material increase in her income in 2011 or subsequent years. Defendant/wife testified that the estate had earned an average of \$150.00 per month from non-retirement accounts (T. p. 60) and that she had received a one-time, annual distribution of \$30,000.00 from the Novartis 401(k) account, based upon her father's life expectancy. (T. p. 60)

33. Plaintiff/husband presented no evidence of what would constitute a reasonable return or a reasonable income from Defendant/wife's paternal inheritance in 2012 or subsequent years. No expert testimony from a certified or registered financial planner or advisor (either registered with the Central Registration Depository "CRD" or licensed by FINRA) was presented as to what would constitute a reasonable, reliable stream of income in 2012 and subsequent years.

34. Two-thirds of Defendant/wife's paternal inheritance (\$872,064.00) was in the form of retirement accounts.

35. In order to reduce the enormous disparity in the parties' earned incomes at the time the division becomes effective, Defendant/wife would have to liquidate both retirement accounts and pay a combined state and federal tax rate of 40%, based upon a hypothetical question put to Defendant/wife by her attorney (T. p. 69)

36. It is unreasonable for the court to impute income to

Defendant/wife that requires her to liquidate her separate inheritance and to pay a tax bill of approximately \$348,000 in doing so.

37. Even if Defendant/wife were to maximize her income from her inheritance in 2012 and subsequent years, that fact, alone, would not diminish the significance of the distributional factors relied upon by the court in equitably dividing the marital and divisible property. Plaintiff/husband's income would still be more than 10 times greater than Defendant/wife's, during the last four years of the marriage and the four years since separation.

38. Defendant/wife's inheritance has no impact or effect on the court's findings and conclusions that an equal division is not equitable based on the duration of the marriage and the age and health of the parties. (Equitable Distribution Judgment and Order, p. 36. ¶ 263.) Plaintiff/husband's career is well-established. Defendant/wife's career is beginning anew, while being a primary caregiver to the parties' three children in addition to a young son of her own.

39. Defendant/wife's paternal inheritance has no effect on the distributional factor that Plaintiff/husband has significant retirement and deferred compensation rights that are not marital property. (Equitable Distribution Judgment and Order, p. 36. ¶ 264) The court's division of marital and divisible property was originally done by dividing all increases in the marital retirement plans equally between the parties. By post-judgment motions, Plaintiff/husband was awarded one hundred percent (100%) of all divisible increases in the values of all marital retirement plans, which, in this case, covered a period of almost seven years.

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41. Defendant/wife's paternal inheritance has no effect on the distributional factor that Defendant/wife made

financial contributions to the acquisition of marital property and her contributions as a parent and homemaker. (Equitable Distribution Judgment and Order, p. 36. ¶ 266.)

42. Defendant/wife's paternal inheritance is irrelevant to the factor found and relied on by the court that Defendant/wife made direct contributions to develop the career potential of Plaintiff/husband, for almost a decade

43. Defendant/wife's paternal inheritance has no effect on the factor found and relied on by the court regarding the difficulty in evaluating Plaintiff/husband's equity partnership interest in PricewaterhouseCoopers, LLP. (Equitable Distribution Judgment and Order, p. 38. ¶ 268.)

44. Defendant/wife's paternal inheritance has no effect on the court's judgment and order that an equal division is not equitable as it does not change or diminish the fact that she invested her *entire* maternal inheritance into the marriage in a span of little more than three years, which resulted in numerous financial, economic advantages to Plaintiff/husband as enumerated by the court in its Judgment and Order, p. 39. ¶ 269.

The trial court made the following conclusions of law:

1. Pursuant to the opinion and order of the North Carolina Court of Appeals, the court has considered Defendant/wife's paternal inheritance of all real and personal property that she inherited as a result of the death of her father, Don A. Cranford, on March 29, 2011.
2. In the conclusion of the trial court, no additional evidence was necessary in the remand and the determination of this issue, in that the parties, through counsel, stipulated as to each item of real and personal property that Defendant/wife inherited from her father's estate.

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4. The court has carefully itemized and considered each item of real and personal property that constitutes Defendant/wife's paternal inheritance as well as its effect and impact on the court's determination of what constitutes an equitable distribution of marital and divisible property and debts.

5. Neither the form nor value of Defendant/wife's inherited property has any material impact on the specific distributional factors relied upon by the court or the court's determination that an equal distribution is not equitable.

Plaintiff timely appealed.

II. Standard of Review

“When reviewing an equitable distribution order, this Court will uphold the trial court’s written findings of fact as long as they are supported by competent evidence. However, the trial court’s conclusions of law are reviewed *de novo*.” *Bodie v. Bodie*, 239 N.C. App. 281, 284, 768 S.E.2d 879, 881 (2015) (citation and brackets omitted). “Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.” *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citations omitted). “The division of property in an equitable distribution is a matter within the sound discretion of the trial court.” *Petty v. Petty*, 199 N.C. App. 192, 197, 680 S.E.2d 894, 897 (2009) (citation omitted), *disc. review denied and appeal dismissed*, 363 N.C. 806, 691 S.E.2d 16 (2010).

III. Analysis

Plaintiff argues the trial court erred by failing to follow this Court's mandate from *Smith I* on remand by not adequately considering Defendant's paternal inheritance as a Section 50-20(c) distributional factor. Defendant specifically challenges Findings of Fact 26, 28, 30-39, 41-44 and Conclusion of Law 5 contending the trial court erred as a matter of law and abused its discretion in applying distributional factors. We agree.

When distributing property, "the court shall make written findings of fact that support the determination that the marital property and divisible property has been equitably divided." N.C. Gen. Stat. § 50-20(j) (2017). "If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably [by] considering fourteen enumerated factors." *Plummer v. Plummer*, 198 N.C. App. 538, 543, 680 S.E.2d 746, 750 (2009) (citation omitted).

The trial court must consider the following factors, in pertinent part:

- (1) The income, property, and liabilities of each party at the time the division of property is to become effective.
- (2) Any obligation for support arising out of a prior marriage.
- (3) The duration of the marriage and the age and physical and mental health of both parties.
- (4) 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.

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(5) The expectation of pension, retirement, or other deferred compensation rights that are not marital property.

(6) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker.

(7) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse.

(8) Any direct contribution to an increase in value of separate property which occurs during the course of the marriage.

(9) The liquid or nonliquid character of all marital property and divisible property.

(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.

(11) The tax consequences to each party, including those federal and State tax consequences that would have been incurred if the marital and divisible property had been sold or liquidated on the date of valuation. The trial court may, however, in its discretion, consider whether or when such tax consequences are reasonably likely to occur in determining the equitable value deemed appropriate for this factor.

(11a) Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert the

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marital property or divisible property, or both, during the period after separation of the parties and before the time of distribution.

...

(12) Any other factor which the court finds to be just and proper.

N.C. Gen. Stat. § 50-20(c)(1)-(12).

“[W]hen an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal[.]” *Hayes v. Wilmington*, 243 N.C. 525, 536, 91 S.E.2d 673, 681-82 (1956) (citations omitted). “On the remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation and departure from the mandate of the appellate court.” *Bodie*, 239 N.C. App. at 284, 768 S.E.2d at 881 (citation omitted). This Court ordered the trial court to make “findings of fact regarding defendant’s paternal inheritance.” *Smith I*, 247 N.C. App. at 161, 786 S.E.2d at 31. On remand of an equitable distribution order, this Court authorizes the trial court to recalculate related portions of the order impacted by the findings made on remand if necessary. *See Bodie*, 239 N.C. App. at 285, 768 S.E.2d at 882.

Plaintiff first contends the trial court erred in Findings of Fact 23, 26, and 29, by repeating the previous general conclusion in the Original ED Order this Court found insufficient. *See Smith I*, 247 N.C. App. at 161, 786 S.E.2d at 31. We agree.

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Finding of Fact 26 is substantially similar to the previous Finding of Fact 260 in the Original ED Order. Finding of Fact 26, and by extension, Findings of Fact 23 and 29, are insufficient and do not follow or apply this Court's mandate. *See Bodie*, 239 N.C. App. at 284, 768 S.E.2d at 881 (citation omitted). Findings of Fact 20 and 24 state the entirety of the paternal inheritance was entered and received into evidence with a stipulated valuation of \$1,323,378.14. Accordingly, the trial court erred in refusing to reconsider Defendant's paternal inheritance.

The trial court made several findings of fact concerning Defendant's paternal inheritance, but did not properly apply them under Section 50-20(c). Therefore, the trial court misapplied the law, and failed to follow this Court's mandate in the Remand ED Order. *See Bodie*, 239 N.C. App. at 284, 768 S.E.2d at 881 (citation omitted); *Smith I*, 247 N.C. App. at 161, 786 S.E.2d at 31. "An error of law is by definition an abuse of discretion." *Li v. Zhou*, ___ N.C. App. ___, ___, 797 S.E.2d 520, 523 (2017) (citation omitted).

In Findings of Fact 28 and 39, the trial court found Defendant's paternal inheritance has no material effect or impact "on the distributional factors relied on by this court in determining that an equal distribution is not equitable" because three years and ten months had passed since separation, and "Plaintiff/husband has significant retirement and deferred compensation rights that are not marital property." The trial court stated in Finding of Fact 41 "Defendant/wife's paternal

inheritance has no effect on the distributional factor that Defendant/wife made financial contributions to the acquisition of marital property and her contributions as a parent and homemaker.”

Findings of Fact 28, 39 and 41, and ultimately Conclusion of Law 5, constitute a misapplication of the law, as the trial 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) (citation omitted). Instead, the trial court weighed Defendant’s paternal inheritance as a distributional factor on its effect on other distributional factors found in Section 50-20(c) in the above findings. *See* N.C. Gen. Stat. § 50-20(c). The trial court’s consideration of the amount of time between separation and the date of the hearing is not supported by any Section 50-20(c) factor. The trial court did not state what evidence, if any, it relied upon to consider the passage of time in Finding of Fact 28. Instead, the trial court should have considered “[t]he income, property, and liabilities of each party at the time the division of property is to become effective.” N.C. Gen. Stat. § 50-20(c)(1). Finding of Fact 39 directly references Section 50-20(c)(5), referencing Plaintiff’s expectation of his separate retirement funds. *See* N.C. Gen. Stat. § 50-20(c)(5). Again, the trial court considered Defendant’s paternal inheritance in relation to Section 50-20(c)(5), another distributional factor, instead of whether the inheritance would impact the equitable distribution of marital and divisible property. Finding of

Fact 41 is in error for the same misapplication of law, where the trial court assessed the effect of the inheritance based on Section 50-20(c)(6) and (7). *See* N.C. Gen. Stat. § 50-20(c)(6), (7). The trial court also misapplied the law in Findings of Fact 42 and 43 when it weighed Defendant's paternal inheritance against distributional factors of "direct or indirect contribution made by one spouse to help educate or develop [Plaintiff's] career potential" and the "difficulty of evaluating any component asset" of the marital estate. N.C. Gen. Stat. § 50-20(c)(7), (10).

Plaintiff next contends the trial court improperly speculated on hypothetical tax consequences to make findings of fact about Defendant's paternal inheritance.

Section 50-20(c)(11) requires the trial court "to consider tax consequences that will result from the distribution of property that the court actually orders." *Plummer*, 198 N.C. App. at 547, 680 S.E.2d at 752-53 (citation and quotation marks omitted); N.C. Gen. Stat. § 50-20(c)(11).

On 22 December 2011, Defendant testified concerning possible liquidation and tax consequences of her assets:

[Defendant's Counsel:] Well, let's say that you've already taken that money out and using it to pay attorney fees and child support, the fact that it's in a qualified retirement account, you would have to pay taxes on that money, would you not?

[Defendant:] Yes, I would.

[Defendant's Counsel:] And the effective tax rate would be approximately what?

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[Defendant:] If I took all those funds out at one time, the effective tax rate, federal and state, it would put in a 40 percent tax bracket.

[Defendant's Counsel:] Okay. So \$871,000.00 point 40, appears that the – my math calculation, the tax would be \$348,400.00 and I think if we deduct that amount from the \$871,000.00, you're welcome to do this calculation, but to save time, it looks like that the net after tax would be \$522,600.00 –

[Defendant:] Yes, that's the number I get also.

[Defendant's Counsel:] Okay. Well let's say if you took the \$522,600.00, after you've withdrawn the money from the only retirement accounts that you apparently currently own, if you took the \$522,600.00 out and you added roughly the balances of the accounts Mr. Kornegay established through your earlier testimony, those other accounts would total approximately how much, in round numbers?

[Defendant:] They'd probably total up another \$500,000.00 –

[Defendant's Counsel:] Okay.

The trial court used Defendant's testimony as evidence for Findings of Fact 32-36. Finding of Fact 35 states, "Defendant/wife would have to liquidate both retirement accounts and pay a combined state and federal tax rate of 40%, based upon a hypothetical question put to Defendant/wife by her attorney." This finding improperly relies on, *inter alia*, "the occurrence of certain events, none of which had occurred on or before the date of separation or the date of the hearing" and seeks to "predict variables . . . requir[ing] the trial court to engage in impermissible

speculation.” *Wilkins v. Wilkins*, 111 N.C. App. 541, 553, 432 S.E.2d 891, 897 (1993); *see Plummer*, 198 N.C. App. at 547, 680 S.E.2d at 752-53; *Harvey v. Harvey*, 112 N.C. App. 788, 793, 437 S.E.2d 397, 400 (1993). Findings of Fact 32-34 and 36 all rely on Defendant’s testimony about hypothetical tax consequences and speculation, and go beyond the permissible consideration allowed under Section 50-20(c)(11).

The trial court’s order did not *actually order* liquidation or any action resulting in tax consequences for Defendant’s separate property. Therefore, the trial court’s consideration of the tax consequences was speculative and hypothetical. *See Plummer*, 198 N.C. App. at 547, 680 S.E.2d at 752-53; *Harvey*, 112 N.C. App. at 793, 437 S.E.2d at 400; *Wilkins*, 111 N.C. App. at 553, 432 S.E.2d at 897.

Plaintiff generally argues the trial court erred by conflating “property” and “income” regarding Defendant’s paternal inheritance in Findings of Fact 31-37, but do not specifically argue or allege error in Findings of Fact 37 and 38. Accordingly, these unchallenged findings are binding on appeal. *See Koufman*, 330 N.C. at 97, 408 S.E.2d at 731. Assuming, *arguendo*, Findings of Fact 37 and 38 were adequately challenged, both show proper consideration of Section 50-20(c)(1) and (3) factors in reaching an equitable distribution. *See* N.C. Gen. Stat. § 50-20(c)(1), (3); *see also Harris v. Harris*, 84 N.C. App. 353, 359, 352 S.E.2d 869, 873 (1987) (“[T]he legislature intended to grant the trial court the authority to consider the future prospects of the

parties, as well as their status at the time of the hearing, in determining whether an equal division of marital assets would be equitable.”).

Accordingly, we hold the trial court failed to follow our appellate mandate from *Smith I*. The trial court abused its discretion by misapplying the law in Findings of Fact 28, 35, 39, and 41-43 in the ED Remand Order. The instructions on remand in *Smith I* were for the trial court to consider Defendant’s paternal inheritance as a distributional factor to equitably distribute the marital estate. On remand, the trial court failed to do so. Further, our Court’s instructions did not specify or identify a particular share of marital property as equitable. Instead, our instructions were to consider Defendant’s paternal inheritance as a distributional factor to reach an equitable division of property. Therefore, we reverse the trial court’s order and remand for further findings of fact regarding how Defendant’s paternal inheritance affects the equitable distribution of the marital estate under Section 50-20(c).

IV. Conclusion

The trial court erred by not following this Court’s appellate mandate in the equitable distribution order on remand. The trial court abused its discretion by misapplying the law in an improper application of distributional factors. Therefore, we reverse and remand for further findings of fact to properly apply Defendant’s paternal inheritance as a Section 50-20(c) distributional factor to equitably divide the marital estate.

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REVERSED AND REMANDED.

Judges ELMORE and ZACHARY concur.

Report per Rule 30(e).