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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-728

Filed: 6 August 2019

Catawba County, No. 16 CVD 1496

FRANCES SIGMON FOXX, Plaintiff,

v.

GARY DWAYNE FOXX, Defendant.

Appeal by defendant from order entered 4 January 2018 by Judge Sherri W. Elliott in Catawba County District Court. Heard in the Court of Appeals 26 March 2019.

*Young Morphis Bach & Taylor, LLP, by James R. Hawes, for plaintiff-appellee.*

*Wesley E. Starnes for defendant-appellant.*

DIETZ, Judge.

Defendant Gary Dwayne Foxx appeals the trial court's equitable distribution order. He contends that the court ignored two post-separation distributions from a business jointly owned by the parties and improperly classified portions of a workers' compensation award and personal injury settlement.

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We vacate and remand the trial court's order for further findings. As explained below, the court's findings ignored undisputed evidence of two post-separation distributions from a corporation that the court classified as marital property. Under our precedent, those distributions are divisible property that must be accounted for in appropriate findings by the court. Likewise, with respect to the workers' compensation and personal injury awards, the parties agree that the trial court applied the wrong legal standard. This Court cannot weigh the evidence and make findings under the proper standard; that is a task solely for the trial court as fact-finder.

Accordingly, we vacate the trial court's order and remand this matter. On remand, the trial court, in its discretion, may enter a new order based on the existing record or may conduct any further proceedings that the court deems necessary in the interests of justice.

### **Facts and Procedural History**

Plaintiff Frances Sigmon Foxx and Defendant Gary Dwayne Foxx married in 1995. In 1999, they formed Foxx Appraisals, Inc., a business primarily used for Plaintiff's real estate appraisal work. In 2011, Defendant was injured in the course of his employment for a city government.

The parties separated on 14 July 2014. Shortly after the separation, Defendant settled his workers' compensation claim for \$16,000, netting \$12,000. Months later,

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Defendant settled a third-party personal injury claim related to his workplace injury for \$28,000, netting \$18,646.18.

After the parties separated, Plaintiff continued her real estate appraisal work through Foxx Appraisals, Inc. and received \$22,153 from the business in 2014 and \$19,060 in 2015.

On 16 June 2016, Plaintiff filed a complaint for divorce and equitable distribution. Defendant filed an answer and counterclaims on 25 August 2016. After a hearing, the trial court entered its written equitable distribution order on 4 January 2018. Defendant timely appealed that order.

**Analysis**

**I. Funds from Foxx Appraisals, Inc.**

Defendant first argues that the trial court erred by failing to classify and distribute certain post-separation funds that Plaintiff received from the couple's business, Foxx Appraisals, Inc. We agree that the trial court failed to make sufficient findings and therefore vacate and remand for further findings.

In an equitable distribution proceeding, the trial court must classify the parties' property into one of three categories—marital, divisible, or separate—and then distribute the parties' marital and divisible property. N.C. Gen. Stat. § 50-20. The trial court's classification of property "must be specific and detailed enough to

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enable a reviewing court to determine what was done and its correctness.” *Robinson v. Robinson*, 210 N.C. App. 319, 323, 707 S.E.2d 785, 789 (2011).

Here, the trial court found that Plaintiff worked as a licensed real estate appraiser both before and after the marriage. In the early years of her business, Plaintiff was a sole proprietor, presumably paying personal income taxes on the profits earned from her business. In 1999, roughly five years into the parties’ marriage, Plaintiff incorporated her business as Foxx Appraisals, Inc. on the advice of her accountant. The business became a marital asset.

During the trial, Defendant introduced evidence that Foxx Appraisals made two post-separation distributions, one for \$22,153.00 in 2014, and one for \$19,060.00 in 2015. Plaintiff concedes that she received these funds from Foxx Appraisals and that Defendant submitted evidence of them to the trial court. Nevertheless, those funds are not mentioned in the trial court’s order. This, Defendant contends, is reversible error.

Plaintiff responds that these post-separation funds are simply “ordinary business income” from Foxx Appraisals due to Plaintiff’s work after separation. She then argues that this income is not a “distribution” because it is, in effect, compensation for Plaintiff’s post-separation work for the company.

Plaintiff’s argument is squarely precluded by our precedent. *See Hill v. Hill*, 229 N.C. App. 511, 519, 748 S.E.2d 352, 358 (2013). In *Hill*, a married couple formed

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a corporation for the wife's work as a speech pathologist. *Id.* The trial court found that certain distributions from that corporation (which was a marital asset) should not be treated as marital or divisible property because the distributions "merely reflect the corporation's method of paying a salary" to the wife for her speech pathology work. This Court reversed, holding that "the parties set up the corporation as a Subchapter S corporation, and then used the shareholder distributions to avoid payment of federal withholding taxes for Social Security and Medicare. The parties are bound by their established methods of operating the corporation. The retained earnings of a Subchapter S corporation, upon distribution to shareholders, are marital property." *Id.*; see also *Montague v. Montague*, 238 N.C. App. 61, 65, 767 S.E.2d 71, 74–75 (2014).

Under *Hill*, the post-separation distributions of Foxx Appraisals, Inc. are divisible property that must be classified and distributed by the trial court. Because the trial court made no findings concerning these distributions, we vacate and remand for further proceedings.

We pause to observe a logical inconsistency in this outcome. In its order, the trial found that, as of the date of separation, there "is no value to [Foxx Appraisals, Inc.] other than Plaintiff's personal services. There is nothing to market other than the Plaintiff's personal skills and talents. This is a personal service business, and the

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Plaintiff is the business. Without the Plaintiff, the company has no value.” Based on this finding, the trial court found “the value of Foxx Appraisals, Inc. to be \$0.”

Of course, a corporation that in two consecutive years makes tens of thousands of dollars in distributions to shareholders ordinarily would not be valued at zero. Indeed, even if a great deal of the company’s value is non-transferable human capital, as the trial court found here, one would expect the corporation itself to be worth *something*. We also acknowledge, however, the trial court here was constrained by the valuation evidence (or lack thereof) presented by the parties. *See Quesinberry v. Quesinberry*, 210 N.C. App. 578, 585, 709 S.E.2d 367, 373 (2011) (“In an equitable distribution proceeding, the trial court is to determine the net fair market value of the property based on the evidence offered by the parties.”). Moreover, “[o]n appeal, if it appears that the trial court reasonably approximated the net value of the [business] and its goodwill, if any, based on competent evidence and on a sound valuation method or methods, the valuation will not be disturbed.” *Id.* at 585, 709 S.E.2d at 374.

But, in any event, the parties have not challenged the trial court’s valuation on appeal and, thus, this issue is not before us. We are concerned only with the two post-separation distributions that are the subject of this appeal. Because the trial court’s order does not address those distributions, we vacate and remand for further proceedings. *See Hill*, 229 N.C. App. at 519, 748 S.E.2d at 358.

## II. Personal Injury and Workers' Compensation Awards

Defendant next challenges the trial court's classification of his personal injury and workers' compensation awards as marital property. As Plaintiff concedes in her appellate brief, the trial court used an incorrect legal standard and burden of proof in its findings on this issue. We therefore vacate and remand for the trial court to apply the correct legal standard.

When a spouse is injured during the marriage and receives a personal injury award or workers' compensation award, the classification of that award as separate or marital property depends on the purpose of the compensation. "A personal injury claim settlement, to the extent that it represents compensation for pain and suffering and loss of capacity is peculiarly personal to the party who receives it." *Johnson v. Johnson*, 317 N.C. 437, 449, 346 S.E.2d 430, 437 (1986). "However, to the extent that the settlement amount represents compensation for medical expenses or lost wages during the marriage, the settlement may be considered an asset of the marriage." *Id.* Similarly, "whether all or any portion of a workers' compensation award constitutes the separate property of the injured spouse in North Carolina depends on the purpose of such awards under our workers' compensation law." *Freeman v. Freeman*, 107 N.C. App. 644, 653, 421 S.E.2d 623, 628 (1992).

When a spouse is injured during the marriage and the compensation award also is received during the marriage, the *injured spouse* has the burden to show by a

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preponderance of the evidence what portion of the total award is the injured spouse's separate property. *Johnson*, 317 N.C. at 454, 346 S.E.2d at 439–40. But when a spouse is injured during the marriage and the compensation award is received *after* the parties have separated, “the non-injured spouse will not have the benefit of the marital property presumption, and instead must, in order to support classification of the award as marital, prove by a preponderance of the evidence that all or some portion of the award is compensation for economic loss occurring during the marriage and before separation.” *Freeman*, 107 N.C. App. at 654, 421 S.E.2d at 628–29.

Here, Defendant was injured during the marriage but did not receive the compensation awards until after the date of separation. Thus, the marital presumption does *not* apply and the burden of proof should have been on the Plaintiff to prove what portion of the awards was marital property. *Id.*

But in its order, the trial court classified both awards as entirely marital property because “[t]he Court finds that the Defendant has not met the burden of proof necessary to establish a separate portion of the proceeds of the mediated settlement agreement are his separate property” and “the Defendant has not met the burden of proof necessary to show what portion of the personal injury settlement was to compensate for loss to his separate property.”

In her brief, Plaintiff concedes that “the incorrect standard of review was announced by the trial court.” But she argues that the evidence supports the trial



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court's findings and conclusions under the proper legal standard. That is not a determination this Court can make. The trial court is the sole fact-finder in these equitable distribution proceedings. When the trial court makes findings under the wrong burden of proof, this Court cannot step in and weigh the evidence under the correct standard. Our only recourse is to vacate and remand for the trial court to apply the correct legal standard. *Stanback v. Stanback*, 270 N.C. 497, 507, 155 S.E.2d 221, 229 (1967); *Orren v. Orren*, \_\_ N.C. App. \_\_, \_\_, 800 S.E.2d 472, 474 (2017).

Accordingly, we vacate and remand for the trial court to evaluate Defendant's compensation awards and make appropriate findings after placing the burden on Plaintiff to prove by a preponderance of the evidence that some or all of the award is compensation for economic loss occurring during the marriage and before separation. *Freeman*, 107 N.C. App. at 654, 421 S.E.2d at 628–29.

### **Conclusion**

For the reasons discussed above, we vacate the trial court's equitable distribution order and remand for the trial court to make additional findings of fact and, if appropriate, corresponding conclusions of law. In its discretion, the trial court may enter a new order based on the existing record or may conduct any further proceedings that the court deems necessary in the interests of justice.

VACATED AND REMANDED.

Judges TYSON and HAMPSON concur.

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Report per Rule 30(e).