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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-538

Filed 7 May 2024

Pitt County, No. 20 CVD 2234

KYLE FRANKLIN BLACKMON, Plaintiff,

v.

NANCY ANDERSON BLACKMON, Defendant.

Appeal by Defendant from order entered 28 June 2022 by Judge Wendy S. Hazelton in Pitt County District Court. Heard in the Court of Appeals 20 March 2024.

Jonathan McGirt, for the Plaintiff-Appellee.

Law Office of W. Gregory Duke, by W. Gregory Duke, for the Defendant-Appellant.

DILLON, Chief Judge.

Plaintiff Kyle Franklin Blackmon (“Husband”) and Defendant Nancy Anderson Blackmon (“Wife”) were married in 2003, separated in 2021, and divorced in 2022. The trial court equitably distributed a net marital estate of \$1,132,816.00, which included an order for Wife to pay Husband a cash distributive award of \$245,526.00. Wife appeals from the order.

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I. Analysis

The record does not show that Wife's claims for post-separation support and alimony have been resolved. However, the order being appealed which finally determined the issue of equitable distribution, though interlocutory in nature, is, nonetheless, immediately appealable under N.C. Gen. Stat. § 50-19.1.

On appeal, Wife asks this Court to reverse the trial court's equitable distribution order and remand the matter for a new hearing on the issue. She essentially makes five arguments, which we address in turn.

A. Admission of Evidence of Wife's Marital Fault

Wife contends that the trial court committed reversible error by admitting evidence which tended to show noneconomic "marital fault" by Wife.

During the hearing, Husband was allowed to elicit testimony, over Wife's objection, concerning possible marital misconduct by Wife. However, our Supreme Court has held that "[w]hile noneconomic marital fault is [] relevant to alimony, it is irrelevant to the equitable distribution of marital property." *Smith v. Smith*, 314 N.C. 80, 88, 331 S.E.2d 682, 687 (1985).

While the testimony may have been improper, we conclude that Wife has failed to meet her burden of showing that she was prejudiced by the testimony. Rather, the order does not contain any finding or conclusion regarding Wife's purported

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noneconomic marital fault. And the trial court, otherwise, determined that an equal division of the marital property was equitable. Accordingly, we conclude this present case is distinguishable from the cases cited by Wife where we held that testimony of marital fault was prejudicial in an equitable distribution order. For instance, in *Hinton v. Hinton*, 70 N.C. App. 665, 670–72, 321 S.E.2d 161, 164–65, (1984), in ordering a new hearing on equitable distribution, we cited the trial court’s findings and conclusions regarding the husband’s abuse and the court’s determination that an equal distribution was not equitable. And in *Phillips v. Phillips*, 73 N.C. App. 68, 71, 326 S.E.2d 57, 59 (1985), we cited the trial court’s findings regarding marital fault in holding that the admission and consideration of such evidence was prejudicial. In the present case, though, while the record shows that the trial court admitted improper evidence, there is no showing that the trial court considered it.

B. Sanction

Wife argues that the trial court improperly imposed a sanction on her for her failure to produce certain discovery documents regarding her pension plan. Specifically, she argues that the sanction was improper for lack of notice and for insufficient findings of fact and conclusions of law.

In an equitable distribution action, the trial court may impose sanctions on a party for willfully obstructing or unreasonably delaying discovery proceedings, including failure to make discovery, and may do so either upon a motion of the other party or on its own initiative. N.C. Gen. Stat. § 50-21(e) (2023).

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Here, Husband had sought discovery from Wife regarding the value of her State teacher's pension so that this asset could be considered by the trial court in valuing the marital estate. Wife failed to provide that information prior to the hearing. The trial court found that during a morning session of the hearing, Wife told the trial court she would print off a copy of her pension statement during the lunch break but then failed to do so. The trial court, therefore, did not consider Wife's pension in making an equitable distribution of the marital estate, as the trial court had no evidence its value. The trial court, though, further found that Husband moved for sanctions based on Wife's failure to provide information regarding her pension. There is no indication in the record, nor has Wife made any argument on appeal, that Wife objected to the trial court's consideration of the sanctions issue. Though the trial court ultimately did not include the pension as part of the marital estate, it did sanction Wife \$5,000.00 for her failure to provide the pension information.

On appeal, Wife argues that she was not given adequate notice that she might be sanctioned and that the trial court otherwise failed to make findings that her failure to comply was willful.

We conclude the trial court did not commit reversible error in awarding Husband sanctions. The trial court found that Wife had stated she would comply during the lunch break by simply logging onto her account on the State pension website but that she failed to do so and that she did not act in good faith in complying with the discovery request. And she otherwise did not object to the trial court's

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consideration. We note that Wife has otherwise made no argument regarding *the amount* of the sanction.

C. Valuation

Wife next argues that the trial court improperly valued the marital asset Sunland Financial Services, LLC (“SFS”), a business engaged in selling insurance products started by Husband prior to the marriage. “The task of a reviewing court on appeal is to determine whether the approach used by the trial court reasonably approximated the net value of the partnership interest. If it does, the valuation will not be disturbed.” *Poore v. Poore*, 75 N.C. App. 414, 419, 331 S.E.2d 266, 270 (1985).

Here, both parties stipulated that Husband owned the business prior to marriage; that the LLC had a market value of \$124,500.00 on the date of marriage; and that, therefore, the amount of \$124,500.00 was Husband’s separate property. The parties also stipulated that any *increase in value* over \$124,500.00 between the date of marriage and the date of separation was marital property.

Husband and Wife each hired a valuation expert. Husband’s expert valued the LLC at \$725,000.00, which included a 25% discount for lack of marketability (“DLOM”). That is, Husband’s expert valued the business at \$914,971.00, but discounted this value to come up with his final value, based on his view that the LLC business was not readily marketable. Wife’s expert valued the LLC at \$1,388,000.00, without any DLOM.

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The trial court adopted the value of Husband's expert. On appeal, Wife concedes that the initial \$915,000.00 value by Husband's expert was appropriate but that it was inappropriate for the expert to discount this value by 25%, contending that this discount was based on incompetent evidence.

We have reviewed the findings of the trial court and conclude that the trial court did not err by relying on the opinion of Husband's expert. In so holding, we note that an expert may rely on facts or data not otherwise admissible in evidence in deriving his valuation, provided that they are of the type reasonably relied upon by experts. N.C. Gen. Stat. § 8C-1, Rule 703. We further note that Husband's expert (1) had direct access to Husband during the entirety of the valuation process (and therefore, had significantly more data regarding the operations of the business); (2) explained why and how he was applying a DLOM; and (3) explained that applying a DLOM was rational because "the shares . . . have no ready market[.]" The trial court also agreed with the application of the DLOM in finding that SFS is exposed to numerous risks based on its organizational structure, and SFS "is a unique and unusual business because [Husband] does not own the bulk of his business." Therefore, we conclude that the trial court's findings were based on competent evidence, and the approach adopted by the trial court reasonably approximated the net value of the partnership interest.

D. Failure to Distribute the Marital Portion of Husband's IRA

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Wife argues that the trial court erred both in classifying Husband's Southern Investments IRA as a "mixed asset" and in failing to distribute it.

The IRA, which Husband obtained prior to marriage, had a value of \$209,384.79 as of the date of separation. During the marriage, Husband contributed \$9,000.00 to the account, which he concedes is marital property. The trial court determined that the IRA was a "mixed asset" but did not distribute any part of the account. The reason that the trial court gave for not distributing was that Husband did not present evidence as to "what percentage of the date of separation value belonged to him (while considering the contributions he made during the marriage and the appreciation that attributed to those contributions)."

We have reviewed the record and conclude there was sufficient evidence from which the trial court could determine which portion of the IRA was marital. Indeed, the evidence of the IRA is quite extensive, including 95 pages of IRA statements from over the years. We, therefore, vacate the portion of the order regarding the IRA and remand with instructions to determine which amount was separate, including any appreciation of the balance as of the date of marriage which grew, due to passive appreciation, and which amount of the IRA is marital, including the amount contributed by Husband during marriage and any appreciate of those contributions.

E. Classification as Separate Property

Lastly, Wife argues that the trial court erred in classifying Husband's interest in Brushy Mountain Properties, LLC, as separate property of Husband.

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When the trial court sits without a jury, the standard of review on appeal with regard to the classification of divisible and marital property in equitable distribution “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.” *See Romulus v. Romulus*, 215 N.C. App. 495, 498, 715 S.E.2d 308, 311 (2011). The appellate court reviews the trial court’s distribution of property for an abuse of discretion. *See id.* (citing *Embler v. Embler*, 159 N.C. App. 186, 187, 582 S.E.2d 628 (2003)).

In North Carolina, there is a shifting burden of proof between marital and separate property, as follows:

The party seeking to classify the property as marital must show by a preponderance of the evidence that the property: (1) was acquired by either spouse or both spouses; and (2) was acquired during the course of the marriage; and (3) was acquired before the date of the separation of the parties; and (4) is presently owned. If the party meets this burden, the opposing party seeking to show that the property is separate must then prove by a preponderance of the evidence that the property was: (1) acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage (third-party gift provision); or (2) acquired by gift from the other spouse during the course of marriage and the intent that it be separate property is stated in the conveyance (inter-spousal gift provision); or (3) was acquired in exchange for separate property and no contrary intention that it be marital property is stated in the conveyance (exchange provision).

Comstock v. Comstock, 240 N.C. App. 304, 314, 771 S.E.2d 602, 610 (quotation marks and citation omitted).

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The trial court found the following facts. Husband purchased an interest in Brushy Mountain for \$75,000.00 during the marriage; he purchased his interest using \$46,558.51 in cash proceeds inherited from his grandfather's estate, and paid the rest of the balance, \$28,441.49, with liquidated mutual funds that he acquired prior to the marriage that were his separate property.

Since Brushy Mountain was purchased during the marriage and was presently owned as of the date of separation, Brushy Mountain initially fell within the "marital property" classification. We agree with the trial court that Husband satisfied his burden of proving that the source of funds for the purchase was entirely his separate property. (There is no argument that any appreciation of this property occurring during the marriage was not passive.) Therefore, we conclude the trial court did not err in classifying Husband's interest in Brushy Mountain as his separate property.

II. Conclusion

The trial court erred in failing to determine the portion of Husband's IRA to be marital and then in failing to distribute that portion. We conclude that the trial court otherwise did not err. We, therefore, vacate the order and remand to the trial court with instructions to determine the portion of the IRA to be marital and to enter a new equitable distribution order or otherwise modify the existing order to incorporate the marital portion of the IRA.

VACATED AND REMANDED.

Judges COLLINS and GORE concur.

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Report per Rule 30(e).