NO. COA11-1350
NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2012

CHARLES MICHAEL CURTIS,
Plaintiff,

v. Caldwell County
No. 07 CVD 216

LORI ELLEN CURTIS,
Defendant.

Appeal by defendant from order entered 5 May 2011 by Judge Sherri W. Elliott in Caldwell County District Court. Heard in the Court of Appeals 21 March 2012.

Bruce L. Cannon for the plaintiff.

Wesley E. Starnes for the defendant.

THIGPEN, Judge.

Lori Ellen Curtis ("Defendant") appeals from an equitable distribution order. After a review of the record, we reverse and remand the portions of the trial court's order (1) calculating Defendant's share of Charles Michael Curtis' ("Plaintiff") 401(k) plan; (2) valuing Defendant's former business, Mind Body Connection, at $5,000.00; and (3) finding that Defendant's personal injury settlement was marital

property. For all other issues, we affirm.

I. Factual and Procedural History

Plaintiff and Defendant were legally married on 12 September 1992. The parties subsequently separated, and, on 9 February 2007, Plaintiff filed this action seeking an absolute divorce and equitable distribution of marital property. The parties divorced on 15 June 2007. For purposes of valuation, the parties stipulated to a valuation date of 9 January 2006.

Plaintiff filed bankruptcy on 14 August 2006, during the separation of the parties. Plaintiff was granted a discharge under Title 11 of the Bankruptcy Code, and his bankruptcy concluded on 11 April 2008. On 13 July 2010, the parties entered into a Consent Order to peremptorily set this action for an equitable distribution hearing on 10 August 2010. After the hearing, the trial court entered an order on 5 May 2011. In the order, the trial court concluded that an equal division of marital property was equitable and granted each of the parties certain items of marital property. Defendant appeals from this order.

On appeal, Defendant contends the trial court erred (I) in its calculation of Defendant's portion of Plaintiff's BellSouth 401(k) savings plan; (II) by finding that $50,000 withdrawn by

Plaintiff from his 401(k) was used to satisfy a marital debt; (III) by ordering 55.64 acres of real property be sold on the open market; (IV) by failing to consider the use of marital funds to satisfy Plaintiff's separate debt on the South Carolina home; and (V) by making certain findings of fact that are not supported by competent evidence.

II. Standard of Review

The following is a summary of our standard of review:

> On appeal, 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*. Finally, this Court reviews the trial court's actual distribution decision for abuse of discretion.

Mugno v. Mugno, 205 N.C. App. 273, 276, 695 S.E.2d 495, 498 (2010) (citations and quotation marks omitted).

III. 401(k) Account

Defendant first contends the trial court erred in its calculation of Plaintiff's BellSouth 401(k) savings plan because the calculation is contrary to N.C. Gen. Stat. § 50-20.1. We agree.

Pursuant to N.C. Gen. Stat. § 50-20.1(d) (2011), an award of retirement benefits:

> shall be determined using the proportion of time the marriage existed (up to the date of separation of the parties), simultaneously with the employment which earned the vested and nonvested pension, retirement, or deferred compensation benefit, to the total amount of time of employment. The award shall be based on the vested and nonvested accrued benefit, as provided by the plan or fund, calculated as of the date of separation, and shall not include contributions, years of service, or compensation which may accrue after the date of separation. . . .

"The numerator of this fraction, termed a coverture fraction, represents the total number of years of marriage, up to the date of separation, which occurred simultaneously with the employment which earned the vested and nonvested pension. The denominator represents the total years of employment during which the pension accrued." *Robertson v. Robertson*, 167 N.C. App. 567, 572, 605 S.E.2d 667, 670 (2004) (quotation and quotation marks omitted). The valuation method prescribed by N.C. Gen. Stat. § 50-20.1(d) is known as the "fixed percentage method." *Gagnon v. Gagnon*, 149 N.C. App. 194, 198, 560 S.E.2d 229, 231 (2002) (citations omitted). "Under this method if, after valuing the marital estate, the court finds a distributive award of retirement benefits necessary to achieve an equitable distribution, the nonemployee spouse is awarded a percentage of [the retirement benefits] . . . based on the total portion of

benefits attributable to the marriage." *Seifert v. Seifert*, 319 N.C. 367, 370, 354 S.E.2d 506, 509, *rehearing denied*, 319 N.C. 678, 356 S.E.2d 790 (1987). "The portion of benefits attributable to the marriage is calculated by multiplying the net . . . [retirement] benefits by" the coverture fraction. *Id.* (citation omitted).

In this case, the trial court made the following unchallenged findings of fact:

> 17. That the plaintiff had $23,114.04 in a BellSouth 401(K) plan on the date of separation with a loan balance of $5,186.00, which has been paid in full by the plaintiff.
>
> 18. That the plaintiff had $9,000.00 in his 401(K) plan on the date of marriage.
>
> 19. That as of August 6, 2010, the balance in the 401(K) plan was $36,790.00 and subject to no loans.
>
> 20. That the marital and divisible portion of the 401(K) plan is $27,790.00, which asset is divided between the parties.
>
> 21. Defendant is entitled to $7,225.40 of Plaintiff's Bellsouth 401(K) savings plan.
>
> | | | |
> |---|---|---|
> | Calculation: | | $36,790.00 |
> | Less | - | $ 9,000.00 |
> | | | (agreed value at DOM) |
> | Total | | $27,790.00 |
> | Wife's entitlement | | 26% |
> | **Total award** | | **$7,225.40** |

> Parties were married 52% of the time the Plaintiff was employed with Bellsouth. 52% x 50% = 26%. Thus by the percentage accrual method, a Qualified Domestic Relations Order would award $7,225.40 of this account to Defendant which the Court does so award to the defendant via that method.

Here, Defendant contends "the trial court should have applied the coverture fracture to the entire [401(k)] amount of $36,790.00" instead of subtracting Plaintiff's separate interest of $9,000 and then applying the coverture fracture. We reject this argument because $36,790.00 was the balance in the 401(k) plan as of 6 August 2010, approximately 4.5 years after the date of separation. *See Cooper v. Cooper*, 143 N.C. App. 322, 327, 545 S.E.2d 775, 778 (2001) (holding that "[t]he trial court erred in assigning a marital estate value to the 401(k) account other than its value on the date of separation").

However, we agree the trial court erred in its calculation of Defendant's portion of Plaintiff's 401(k). Pursuant to N.C. Gen. Stat. § 50-20.1(d), the trial court should have applied the coverture fracture to the "accrued benefit . . . calculated as of the date of separation[.]" N.C. Gen. Stat. § 50-20.1(d); *see also Seifert*, 319 N.C. at 370, 354 S.E.2d at 509. Accordingly, we reverse the portion of the order calculating Plaintiff's 401(k) plan and remand for the trial court to make calculations

regarding Plaintiff's 401(k) plan that are consistent with this opinion.

IV. Use of $50,000 to Satisfy Marital Debt

Defendant next contends the trial court erred by finding that $50,000 withdrawn by Plaintiff from his 401(k) plan was used to satisfy a marital debt. Related to this argument, Plaintiff argues findings of fact numbers 16 and 23 are not supported by competent evidence. We disagree.

"A trial court's findings of fact in an equitable distribution case are conclusive if supported by any competent evidence." *Williamson v. Williamson*, __ N.C. App. __, __, 719 S.E.2d 628, 631 (2011) (quotation omitted). "The credibility of the evidence in an equitable distribution trial is for the trial court." *Quesinberry v. Quesinberry*, __ N.C. App. __, __, 709 S.E.2d 367, 373 (2011) (quotation omitted). "The trial court, as the finder of fact in an equitable distribution case, has the right to believe all that a witness testified to, or to believe nothing that a witness testified to, or to believe part of the testimony and to disbelieve part of it." *Id.*

In this case, the trial court made the following relevant findings of fact:

> 12. That the plaintiff was relieved from numerous debts, marital and separate, by the

bankruptcy in an amount of approximately ONE HUNDRED THOUSAND DOLLARS ($100,000.00). The defendant benefited from the plaintiff's bankruptcy filing specifically as it related to the Greer, South Carolina property and unsecured debt. As Schedule F in Plaintiff's Exhibit #2 indicates, all the debts were incurred after the parties' marriage except approximately $9,000.00 which was prior to 1992.

13. That the plaintiff sought release of FIFTY THOUSAND DOLLARS ($50,000.00) from his 401(K) plan to comply with his bankruptcy plan.

. . .

16. That the debts discharged in the bankruptcy were primarily marital debt as all but $9,000.00 was incurred during the parties' marriage so very little was plaintiff's separate debt.

. . .

23. That the plaintiff began receiving the $896.00 per month [from Plaintiff's defined benefit plan with Bell South] in February 2008. That as of the date of this hearing on August 10, 2010, the plaintiff has received 30 monthly payments for a total of $26,880.00. The marital portion of these payments is $13,977.60. Defendant's marital share of the payments is calculated as follows: $896.00 X 26% = $232.96 per month. This amount is actually high since the plaintiff contributed to Pension Plan for 10 years prior to marriage, but equitable since some amount of the $50,000 withdrawn to satisfy the bankruptcy may have been the defendant's and neither party provided the Court with any other evidence which it could consider.

Defendant does not challenge findings of fact numbers 12 or 13; thus, they are binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("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.") (citations omitted).

Plaintiff testified as follows regarding the debt incurred during the parties' marriage:

> Q. Did you have other debts [other than the mortgage on the home in Greer, South Carolina] prior to your marriage, individual debts?
>
> A. I'm sure I had some . . . but it wasn't very much because at that time we didn't really live off of credit cards.
>
> . . .
>
> Q. . . . When you married Ms. Curtis, did you and she begin accumulating debt?
>
> A. Yes, sir.
>
> Q. What kind of debt did you accumulate?
>
> A. Various types of revolving credit, car – I mean, almost all credit cards, Visa, Mastercard, gas cards, Home Depot, Lowe's.
>
> . . .
>
> Q. Did both of you use these cards?
>
> A. Yes, sir.

Additionally, Plaintiff testified as follows regarding the money withdrawn from his 401(k) plan to pay off his bankruptcy:

> A. . . . I petitioned the bankruptcy court to be allowed to draw that money . . . [t]o pay off the bankruptcy.
>
> . . .
>
> Q. And was that from the funds distributed from Telco.
>
> A. Yes[,] [s]ir.
>
> Q. $50,000.00
>
> A. The [amount of] funds distributed was $37,000.00.
>
> Q. And why was that, [s]ir?
>
> A. Well, there's penalties from withdrawing the money in the first place.
>
> Q. Okay, and you used that - that money that you used to pay the bankruptcy was to - were to pay off the debts that you've already indicated were joint debts -
>
> A. Yes, sir.
>
> Q. - of you and your wife, is that correct?
>
> A. Yes, sir.

Based on Plaintiff's testimony and the unchallenged findings of fact, we conclude there was competent evidence to support the trial court's findings "that the debts discharged in the bankruptcy were primarily marital debt" and that "some

amount of the $50,000 withdrawn to satisfy the bankruptcy may have been the defendant's." Accordingly, this argument has no merit.

V. 55.64 Acres Sold on Open Market

In her next argument on appeal, Defendant contends the trial court erred by ordering 55.64 acres of real property be sold on the open market instead of ordering an in-kind distribution. Defendant concedes that "the trial court has the authority to order the [sale] of property[,]" but cites N.C. Gen. Stat. § 50-20(e) in support of her argument that there were no findings of fact or evidence to overcome the presumption that property be divided in-kind. We disagree.

N.C. Gen. Stat. § 50-20(e) (2011) provides in relevant part as follows:

> Subject to the presumption of subsection (c) of this section that an equal division is equitable, it shall be presumed in every action that an in-kind distribution of marital or divisible property is equitable. *This presumption may be rebutted by the greater weight of the evidence, or by evidence that the property is a closely held business entity or is otherwise not susceptible of division in-kind*. In any action in which the presumption is rebutted, the court in lieu of in-kind distribution shall provide for a distributive award in order to achieve equity between the parties. . . .

(Emphasis added).

Here, the following unchallenged findings of fact rebut the presumption of in-kind distribution:

> 32. That the parties purchased real estate, 55.64 acres on Log Cabin Place, in Caldwell County, North Carolina on January 27, 1999 for a purchase price of $67,500.00, which is titled to the parties as tenants by the entireties.
>
> 33. That the property is on the Middle Little River, which divides the property in half.
>
> 34. That one-half of the property is not accessible, except by crossing the Middle Little River. In order to make practical use of the property a bridge would have to be constructed.
>
> . . .
>
> 37. The parties acquired financing in the amount of $50,000.00 from South Carolina Telco Credit Union. The Plaintiff's paycheck was debited monthly until his retirement. The plaintiff has continued to pay the monthly mortgage payment each and every month since the date [of] separation.
>
> . . .
>
> 39. That there is an existing mortgage secured by the 55.64 acres, which is a marital debt in the amount of $21,178.99 as of August 10, 2010. The plaintiff made payments on this mortgage following the date of separation, which reduced the principal debt by $17,948.42 as well as any amount paid by him subsequent to this trial. The plaintiff paid $13,520.25 in interest,

> taxes, insurance, fees, etc., as well as any additional amounts paid by him subsequent to this trial to preserve this asset.
>
> 40. That the date of separation and present value of the 55.64 acres is $90,000.00 as agreed between the parties. The net value of the 55.64 acres is $68,821.01 as of August 10, 2010. This property shall be sold on the open market. The equity shall be determined by the final sales price less remaining South Carolina Telco Credit Union lien and all assessments and fees associated with the sale or against the property. The Plaintiff shall receive the first $17,948.42 plus half of all other amounts he has expended to preserve this asset subsequent to August 10, 2010 until the property is sold. Any remaining equity shall be divided equally between the plaintiff and defendant.

Because the unchallenged findings of fact rebut the presumption of an in-kind distribution with regard to the 55.64 acres of real property, we conclude the trial court did not abuse its discretion in ordering the property sold on the open market. *See Pellom v. Pellom*, 194 N.C. App. 57, 67, 669 S.E.2d 323, 329 (2008) (holding that the trial court did not abuse its discretion in allocating the stock in the business to the plaintiff and requiring him to pay $175,000.00 as a distributive award because the defendant rebutted the presumption of in-kind distribution), *disc. review denied*, 363 N.C. 375, 678 S.E.2d 667 (2009).

VI. South Carolina Home

Defendant next contends the trial court erred by failing to consider or make findings about the use of marital funds to satisfy Plaintiff's separate debt on the South Carolina home. Specifically, Defendant contends Plaintiff's monthly mortgage payments of $2,400.00 from the date of marriage until the date of separation were direct contributions to his separate property that the the trial court failed to consider. We disagree.

In making an equitable division of marital property, a court must consider all of the factors listed in N.C. Gen. Stat. § 50-20(c), including "[a]ny direct contribution to an increase in value of separate property which occurs during the course of the marriage." N.C. Gen. Stat. § 50-20(c)(8) (2011). Defendant contends the trial court failed to consider this factor in relation to Plaintiff's mortgage payments on the South Carolina home.

The trial court made the following unchallenged findings of fact:

> 28. That the plaintiff owned a home in Greer, South Carolina prior to the parties' marriage. Plaintiff, defendant and defendant's children resided there until they moved to Caldwell County in 2003.
>
> 29. That there was a first and second mortgage owing on the Greer, South Carolina home totaling $182,000.00. The value of this home was only $97,000.00.

> 30. That the Greer, South Carolina house was foreclosed upon after the date of separation and surrendered in the bankruptcy proceedings.

Here, there was no evidence presented that Plaintiff's mortgage payments led to an "increase in value" of the South Carolina property. *See Chandler v. Chandler*, 108 N.C. App. 66, 73, 422 S.E.2d 587, 592 (1992) (stating that the court must make findings about and consider the factors listed in N.C. Gen. Stat. § 50-20(c) "when evidence concerning them is introduced") (citation omitted). Rather, Plaintiff testified that there was "considerable" debt on the South Carolina home; that during the marriage he paid the mortgage payment of approximately $2,400.00 per month; that there was about $187,000.00 of debt on the home; and that the home was foreclosed upon because it was "economically unfeasible" to continue to pay for it.

Furthermore, although the South Carolina property was only in Plaintiff's name and Defendant testified that money earned by both parties was used to make the mortgage payments, Defendant also testified as follows:

> Q. Now the 201 North Miller, Greer, South Carolina property.
>
> A. Yes.
>
> Q. That's the property that your husband

owned prior to the date of marriage correct?

A. Yes, we bought it together.

Based on the evidence before the trial court, including Defendant's own testimony that the parties bought the South Carolina property together, and the trial court's unchallenged findings of fact, we cannot conclude the trial court failed to consider or make findings about whether Plaintiff's mortgage payments on the South Carolina home during the parties' marriage was a "direct contribution to an increase in value of separate property." N.C. Gen. Stat. § 50-20(8). This argument is without merit.

VII. Errors in the Trial Court's Findings of Fact

Defendant lastly contends the trial court erred by making certain findings of fact that are not supported by competent evidence. Specifically, Defendant challenges findings of fact numbers 43, 51, 62, 63, and 65. We will address each argument in turn.

A. Finding of Fact Number 43

Defendant first challenges finding of fact number 43, which states as follows:

> That the return authorized a federal refund of $5,255.00 and a state refund of $593.00. These refunds were the result of the earnings of the parties during the marriage

> and prior to separation. These refunds are marital property. Plaintiff gave the defendant $2,900.00 of the returns. From the remaining funds, plaintiff paid the American Express bill, which was a marital debt, leaving him to possess $1,748.00.

Defendant notes that Plaintiff and Defendant gave conflicting testimony about whether Plaintiff gave Defendant a portion of the tax refund, but argues finding number 43 is not supported by the testimony of either party.

The transcript shows, however, that Plaintiff testified as follows regarding the tax refund:

> A. I gave [Defendant] $1,700 . . . .
>
> . . .
>
> Q. Well[,] [s]ir, what happened to the remaining of the funds above the $1,700.00 you gave her.
>
> A. When - when those refunds came in, there was a $794 adjustment for 2003 off of the federal. There was a $193 adjustment for 2003 off of state. Subsequent to that, when she moved out, I allowed her American Express, which she charged things on that and said, "Just take it off of the tax return when it come[s] in." Those totaled $1200.00. . . .

We reiterate that "[t]he trial court, as the finder of fact in an equitable distribution case, has the right to believe all that a witness testified to, or to believe nothing that a witness testified to, or to believe part of the testimony and to

disbelieve part of it." *Quesinberry*, __ N.C. App. at __, 709 S.E.2d at 373. Accordingly, we hold Plaintiff's testimony is competent evidence to support finding of fact number 43, specifically the finding that Plaintiff gave Defendant $2,900.00 of the federal tax return.

B. Finding of Fact Number 51

Defendant next argues finding of fact number 51 is not supported by competent evidence because Plaintiff "did not testify to a value" for the business and Defendant said it had no value and denied receiving $5,000 for it. We agree.

"In appellate review of a bench equitable distribution trial, the findings of fact regarding value are conclusive if there is evidence to support them." *Petty v. Petty*, 199 N.C. App. 192, 197, 680 S.E.2d 894, 898 (2009) (quotation omitted), *disc. review denied*, 363 N.C. 806, 691 S.E.2d 16 (2010). "This Court is not here to second-guess values of marital and separate property where there is evidence to support the trial court's figures." *Id.* (quotation omitted). However, "[t]he trial court's findings of fact regarding the value of a business should be specific, and the trial court should clearly indicate the evidence on which its valuations are based, preferably noting the valuation method or methods on which it relied."

Williamson, __ N.C. App. at __, 719 S.E.2d at 630 (quotation omitted).

Here, finding of fact number 51 states:

> That the defendant operated a small business in partnership with another called Mind [B]ody Connection. As of the date of separation, the defendant's interest in this business was $5,000.00 and this item is distributed to the [d]efendant.

We agree the record does not contain competent evidence to support the trial court's valuation of Mind Body Connection. On Schedule D attached to the Pretrial Order for Equitable Distribution stipulated to by the parties, Mind Body Connection is listed as "marital property upon which there is a disagreement as to distribution and disagreement as to value[,]" and neither party provided a value for the business. Moreover, on direct examination, Defendant testified that she did not receive any assets associated with Mind Body Connection, and the business did not have any value on the date of separation. On cross-examination, Defendant further testified:

> A. The studio closed. Then [Defendant's co-owner] and somebody else opened something completely different.
>
> Q. And they actually paid you some money for it, didn't they?
>
> A. No, sir.

> Q. They actually paid you $5,000, didn't they?
>
> . . .
>
> A. No. That's what I'm trying to tell you. There was no money in the Mind-Body Connection, ever.
>
> Q. Because you told [the co-owner] that you wouldn't allow her to continue to use your good name and this name if she didn't pay you for it, didn't you?
>
> . . .
>
> A. A, there was no my good name. B, the Mind-Body Connection didn't have a great reputation. It was just a little hole in the wall studio that we made an attempt at. It didn't work and we shut it down.

Other than Defendant's denial of receiving $5,000 for Mind Body Connection, the record does not contain evidence of the value of the business. Accordingly, we remand for further findings of fact as to the value of Mind Body Connection. *See id.* at __, 719 S.E.2d at 631 (remanding for further findings of fact as to the value of the parties' machine business because this Court was "unable to determine how the trial court arrived at the value of $26,500.00").

C. Finding of Fact Number 62

Defendant next challenges finding of fact number 62, which states:

> The defendant received a personal injury settlement during the marriage and prior to the date of separation. The defendant did not submit any documentation or testify that any portion of the settlement was her separate property so the presumption is marital. Further, it appears the monies were placed in a joint account and used as such.

Defendant contends this finding is contrary to Defendant's testimony, and the trial court erred by finding that there is a presumption that the personal injury settlement was martial property rather than separate property. We agree.

"Initially, the party claiming that property is marital has the burden of proving beyond a preponderance of the evidence that the property was acquired: by either or both spouses; during the marriage; before the date of separation; and is presently owned." *Finkel v. Finkel*, 162 N.C. App. 344, 346, 590 S.E.2d 472, 474 (quotation and quotation marks omitted), *cert. denied*, 358 N.C. 234, 595 S.E.2d 150 (2004). "Once a party meets this burden, the burden shifts to the other party to show by a preponderance of the evidence that the property is best characterized as separate." *Id.* (citation omitted).

Our Supreme Court has adopted the analytic approach in determining whether personal injury awards are appropriately classified as separate, marital, or divisible property. *Id.* Under the analytic approach,

> the pertinent question is what are the benefits or proceeds at issue intended to replace. Courts that have adopted the analytic approach in classifying property for the purpose of equitable distribution have consistently held that the portion of a personal injury award representing compensation for non-economic losses — i.e., personal suffering and disability — is the separate property of the injured spouse; the portion of an award representing compensation for economic loss during the marriage is marital property.

Id. at 346-47, 590 S.E.2d at 474 (citations and quotation marks omitted).

In this case, Plaintiff testified that Defendant's personal injury settlement was deposited into the parties' joint bank account, and a portion of it was used to purchase another vehicle. Additionally, Defendant testified as follows about her personal injury settlement:

> Q. . . . The $10,800 check that you received, was it – any of that compensation for an automobile that was damaged?
>
> A. Yes, but I couldn't tell you what the percentage of that was.
>
> . . .
>
> Q. You don't recall what portion of that . . . $10,800 was for the property damage?
>
> . . .
>
> A. The car got fixed first, and then the check they cut was for my loss of work and

> personal injury. . . . I believe that they paid for the car to be repaired directly. . . . I don't believe I received that check [for the car repairs] at all. . . .
>
> Q. Now, the $10,800 check you received, you said part of it was for your lost wages. What part of it was for your lost wages?
>
> A. Again, I tried to get a copy of the check and of the settlement, but too much time had passed.
>
> . . .
>
> Q. Is it fair to say that no more than $4,000 of that would have been compensation for your lost wages?
>
> A. Right.
>
> Q. The rest would have been for your pain and suffering, correct?
>
> A. Yes.

Although Defendant did not specifically state that the settlement was her separate property, she testified that a portion of it was for her pain and suffering, and Plaintiff did not provide evidence to the contrary. *See id.* (stating that "the portion of a personal injury award representing compensation for non-economic losses — i.e., personal suffering and disability — is the separate property of the injured spouse"). Accordingly, we remand for further findings of fact regarding what portion, if any, of Defendant's personal injury

settlement was her separate property representing compensation for her pain and suffering and/or other non-economic losses.

D. Finding of Fact Number 63

Defendant next challenges finding of fact number 63, which states:

> The parties had a Bank of America account on the date of separation with a date of separation balance of $4,828.22, which funds were marital. This account remained open for approximately three months after the parties' separation to pay marital debts and as the plaintiff contends for the defendant's personal use. The account was then closed with a zero balance. The Court is without sufficient evidence from which it can determine what amount was used for marital debt and what amount was used by the defendant, and/or plaintiff, for personal use after the date of separation. Thus, the Court will not assess a value for this asset as each benefited from its use and consumed the monies after the date of separation.

Defendant does not challenge the trial court's valuation of the Bank of America account, but contends the account should have been distributed to Plaintiff as separate property because Plaintiff removed funds after the date of separation. We disagree.

Here, Defendant testified that Plaintiff kept "all bank accounts separate from" her, and she "wasn't allowed any access[.]" However, Plaintiff testified Defendant was accessing

the Bank of America account after the parties separated, and he closed the account in March 2006 "because I couldn't get her to stop taking money out of it." Plaintiff also stated the following:

> Q. And you took all the funds out of that account totaling $4,828.22 when you closed that account [in March], didn't you?
>
> A. Yes, sir, and after separation, I did make money and used my checking account. So there are deposits, there are debits. There's a lot of accounting on that - that account in those two, two-and-a-half months [after the parties' separation in January]. As I said before, I closed it out to keep her from drawing money out of it.

The trial court had the right to believe Plaintiff's testimony that both parties used the bank account after the date of separation. *See Quesinberry*, __ N.C. App. at __, 709 S.E.2d at 373 (stating that "[t]he trial court, as the finder of fact in an equitable distribution case, has the right to believe all that a witness testified to, or to believe nothing that a witness testified to, or to believe part of the testimony and to disbelieve part of it") (quotation omitted). Thus, we conclude Plaintiff's testimony is competent evidence to support this finding of fact.

E. Finding of Fact Number 65

Defendant lastly challenges finding of fact number 65,

which states:

> The plaintiff received $11,412.00 in a single check prior to the parties' date of separation. These funds were back compensation earned by the plaintiff during the marriage. The Defendant first contended said funds were a loan plaintiff had taken from his 401-K, but no evidence of that existed as no[] loans were taken during that period and no loans are currently due. The defendant then contended the plaintiff hid the monies somehow, but no evidence supports that contention either. The plaintiff testified the monies were consumed during the marriage for debts etc.

Defendant contends because Plaintiff failed to give an accounting of the $11,412.00, Defendant met her burden of showing it was a martial asset that therefore should have been distributed to Plaintiff. Defendant also contends the finding is inadequate because the trial court merely restated Plaintiff's testimony. We disagree.

Plaintiff testified as follows regarding the check made payable to him from BellSouth in the amount of $11,412.59:

> Q. . . . Isn't it true that shortly before the date of separation you took $11,412.50 out of your retirement?
>
> A. No sir, I did not.
>
> . . .
>
> A. This check is for - for several years I worked as - I'm sorry. For several years the job I was performing at BellSouth was a

> higher rated job, and they were supposed to be paying me a higher rate than what I was making. I filed a grievance in early 2005 with Communication Workers of America to make up that amount of money[.]
>
> . . .
>
> Q. . . . So these were funds that were earned during the marriage.
>
> A. [The check] says '05.
>
> . . .
>
> Q. . . . And what did you do with the $11,412.59?
>
> A. It went in the bank and I couldn't tell you after that.
>
> Q. What account do you contend that you put these funds in?
>
> A. Probably the joint account.
>
> Q. Well, I'm not asking you probably. Do you know whether you put these into the joint account or not?
>
> A. I must have. I don't have any other account.

Defendant confirmed the $11,000 check went into the parties' joint bank account because she testified that "I saw the check stub when I got our bank records for this case."

The evidence shows that the check was dated 7 October 2005, before the parties' date of separation, and both parties testified the check went into their joint bank account. This is

competent evidence to support the trial court's finding of fact. Thus, this argument has no merit.

In conclusion, we hold the trial court erred by (1) calculating Plaintiff's 401(k) plan; (2) valuing Mind Body Connection at $5,000.00; and (3) finding that Defendant's personal injury settlement was marital property. Accordingly, we reverse and remand for the trial court to make additional calculations and findings of fact that are consistent with this opinion.

AFFIRMED in part; REVERSED and REMANDED in part.

Judges CALABRIA and ERVIN concur.

Report per Rule 30(e).