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NO. COA09-1037

NORTH CAROLINA COURT OF APPEALS

Filed: 1 June 2010

DIANE S. WIRTH,
Plaintiff,

v.

Mecklenburg County
No. 03-CVD-20151

PETER J. WIRTH,
Defendant.

Appeal by defendant from equitable distribution judgment on remand entered 29 January 2009 by Judge Rebecca T. Tin in District Court, Mecklenburg County. Heard in the Court of Appeals 3 December 2009.

Horack Talley Pharr & Lowndes, P.A., by Kary C. Watson, for defendant-appellant.

M. Clark Parker, P.A. by M. Clark Parker, for plaintiff-appellee.

STROUD, Judge.

Defendant appeals equitable distribution judgment on remand. As we conclude that the trial court complied with both the instructions of the Court of Appeals upon remand and the law, we affirm.

I. Background

As this case has previously been before this Court, remanded to the trial court, and has now been appealed again, we refer to

the original case before this Court, *Wirth v. Wirth*, 193 N.C. App. 657, 668 S.E.2d 603 (2008) ("Wirth I"), to summarize the pertinent facts. In *Wirth I*,

Diane S. Wirth (plaintiff) filed this action against her husband, Peter J. Wirth (defendant), on 24 November 2003 seeking equitable distribution of the parties' marital property, postseparation support, alimony, injunctive relief, interim distribution, appointment of a receiver, divorce from bed and board, and attorneys' fees. Defendant filed a counterclaim also seeking equitable distribution.

On 18 June 2007, Judge Tin entered an Equitable Distribution Judgment and also a Judgment and Order dealing with alimony, plaintiff's claim for attorneys' fees, and contempt. The Equitable Distribution Judgment made an unequal distribution of marital property, awarding defendant 54.27% of the net fair market value of the marital property, and 45.73% to plaintiff. This judgment ratified, confirmed, and incorporated by reference certain of the findings of fact contained in the 16 February 2007 order, and made some additional findings as to the parties' business interests. Defendant appeals only the Equitable Distribution Judgment.

Wirth v. Wirth, 193 N.C. App. 657, 659-60, 668 S.E.2d 603, 605-06 (2008).

This Court affirmed all of the trial court's Equitable Distribution Judgment, except for a portion regarding a "[d]ecrease in [v]alue of Testa & Wirth, Inc. of North Carolina" ("TWNC"). See *Wirth*, 193 N.C. App. 657, 668 S.E.2d 603. As to the decrease in value of TWNC, this Court reversed and remanded. *Id.* at 662, 668 S.E.2d at 607 (citation omitted). This Court determined:

Testa & Wirth, Inc. of North Carolina ("TWNC") is a North Carolina corporation engaged in the business of general

contracting. As of the date of separation ("DOS") and the date of distribution ("DOD"), defendant was the sole shareholder. The trial court found that defendant remained in control of TWNC both before and after DOS and concluded that the losses incurred by TWNC were not divisible property. The final order valued TWNC at \$0.00 as of DOD and TWNC was distributed to defendant with a value of \$403,340.00 as of DOS. In paragraph 48(j) of the order, the court treated the decrease in value as a distributional factor.

Neither party contests that TWNC was marital property. Instead, defendant argues that Judge Tin erred in failing to classify the decrease in TWNC's value as divisible property. Defendant contends that the decrease in value was due to economic conditions and other circumstances which were beyond his control, and that the decrease should thus have been classified as divisible property and distributed to both parties. Defendant cites to paragraph 48(h) of the final order in support of his position:

["]Husband remained in control of TWNC after DOS and was the person responsible for managing its affairs. Notwithstanding facts demonstrating that the seeds of destruction of TWNC were in motion well prior to DOS, and stemmed, in large part, from events that were out of the control of Husband, the Court nonetheless finds that the decrease in the value of Husband's interest in TWNC after DOS is not divisible property. It is impossible to separate losses incurred due to Husband's active control over the company from losses which were incurred due to forces beyond his control. Contracts that went sour were nonetheless contracts and obligations taken on by Husband. ["]

Defendant contends that this finding necessitated a holding by the trial court that the decrease in the value of TWNC was divisible property.

We agree with defendant. N.C. Gen. Stat. § 50-20 provides that, in an equitable distribution proceeding, the trial court "shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties[.]" N.C. Gen. Stat. § 50-20(a)

(2007). Subsection (b)(1) defines "marital property" to include "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties." N.C. Gen. Stat. § 50-20(b)(1) (2007). Divisible property is defined in subsection (b)(4)(a) to include:

["]All appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution, except that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse shall not be treated as divisible property. ["]

N.C. Gen. Stat. § 50-20(a)(b)(4)(a) (2007).

Under the plain language of the statute, all appreciation and diminution in value of marital and divisible property is presumed to be divisible property *unless* the trial court finds that the change in value is attributable to the postseparation actions of one spouse. Where the trial court is unable to determine whether the change in value of marital property is attributable to the actions of one spouse, this presumption has not been rebutted and must control. See *Allen v. Allen*, 168 N.C. App. 368, 371-72, 607 S.E.2d 331, 334-35 (2005).

In the instant case, the trial court's finding clearly states that it was impossible to determine what portion of the decrease in value of TWNC was due to forces which were beyond defendant's control, and what amount was attributable to defendant's active postseparation management of the company. Thus, the presumption created by N.C. Gen. Stat. § 50-20(b)(4)(a) was not rebutted, and the trial court's finding does not support its conclusion that the decrease in value was not divisible property.

We hold that the trial court erred in failing to classify the decrease in the value of TWNC as divisible property and in treating the decrease as a distributional factor. This portion of the Equitable Distribution Judgment is reversed and remanded to the trial court. See *Robertson v. Robertson*, 167 N.C. App. 567, 575, 605 S.E.2d 667, 672 (2004). The diminution in value of TWNC is to be treated

as divisible property and not as a distributional factor. The court is to recompute its equitable distribution award in accordance with these principles.

Id. at 660-62, 668 S.E.2d at 606-07 (emphasis in original) (ellipses and brackets omitted).

On remand, the trial court found that "TWNC . . . had a net [fair market value] of \$403,340.00 as of DOS, but is worthless today[.]" The trial court further found that "[i]t is impossible to separate losses incurred due to Husband's active control over the company from losses which were incurred due to forces beyond his control[.]" and thus "the decrease in value of TWNC after DOS is divisible property." The trial court also found that

[h]usband funneled large sums of marital money and assets into TWNC both prior to and after DOS. . . . The company's subsequent divisible loss in value impacted both Husband and Wife because marital assets were substantially depleted by Husband's unsuccessful efforts to keep TWNC afloat. Accordingly, the Court finds it equitable to distribute the [-\$403,340.00] divisible loss in value of the company by apportioning it between the parties with Husband receiving [-\$219,000.00] and Wife receiving [-\$184,340.00].

Defendant appeals the equitable distribution judgment on remand.

II. Standard of Review

The division of property in an equitable distribution is a matter within the sound discretion of the trial court. When 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.

Petty v. Petty, ___ N.C. App. ___, ___, 680 S.E.2d 894, 897-98 (2009) (citations and quotation marks omitted), *disc. review denied and appeal dismissed*, 363 N.C. 806, ___ S.E.2d ___ (2010).

III. General Law of Equitable Distribution

Upon application of a party, the court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties. .

. . . Under N.C. Gen. Stat. § 50-20(c) (2003), equitable distribution is a three-step process; the trial court must (1) determine what is marital and divisible property; (2) find the net value of the property; and (3) make an equitable distribution of that property. . . . A trial court must value all marital and divisible property-collectively termed distributable property-in order to reasonably determine whether the distribution ordered is equitable.

Cunningham v. Cunningham, 171 N.C. App. 550, 555-56, 615 S.E.2d 675, 680 (2005) (citation, quotation marks, ellipses, and brackets omitted). "If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably." N.C. Gen. Stat. § 50-20(c) (2007).

IV. Court of Appeals' Mandate

Defendant first contends that the equitable distribution judgment on remand does not conform to the Court of Appeals' mandate because "Judge Tin made the completely arbitrary decision to divide the divisible property between the parties so that the distributive award could remain virtually untouched." Defendant claims that "Judge Tin was directed to classify the loss as divisible property, value it at \$403,340.00, and re-compute the

resulting distributive award. If Judge Tin had adhered to this Court's mandate, the distributive award payment to . . . [defendant] would have increased to \$404,989.00." We disagree.

"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." *Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 667, 554 S.E.2d 356, 363 (2001) (citations and quotation marks omitted), *disc. review denied and appeal dismissed*, 355 N.C. 348, 563 S.E.2d 562 (2002). The Court of Appeals ordered the trial court to treat "[t]he diminution in value of TWNC . . . as divisible property and not as a distributional factor[, and] . . . to recompute its equitable distribution award in accordance with these principles." *Wirth* at 662, 668 S.E.2d at 607. In its equitable distribution judgment on remand the trial court treated "[t]he diminution in value of TWNC . . . as divisible property and not as a distributional factor." *Id.* The trial court also "recompute[d] its equitable distribution award in accordance with these principles" by dividing the loss between the two parties in the same percentages as the trial court originally determined was equitable. *Id.* We do not read this Court's opinion as mandating that the trial court award all of the loss to defendant, as he contends; rather, the Court of Appeals' opinion required the trial court to recompute the equitable distribution award based upon the loss being considered divisible property; that is exactly what the trial court did. Accordingly,

we conclude that the trial court complied with the Court of Appeals' mandate, and this argument is overruled.

V. Distribution to Both Parties

Defendant next contends the trial court erred in distributing the divisible loss to both parties, rather than solely to him. Defendant directs our attention to finding of fact 48(j) and the fact that TWNC as an asset was distributed solely to him. However, in Wirth I this Court noted defendant was arguing that the TWNC loss in value should have been "classified as divisible property and *distributed to both parties.*" *Id.* at 660, 668 S.E.2d at 606 (emphasis added). As the trial court did exactly as defendant requested by reclassifying the loss in value of TWNC "as divisible property and distribut[ing] it to both parties[,]" *id.*, defendant is now contradicting himself in arguing that the loss in value should be solely his.

A. Finding of Fact 48(j)

Defendant directs our attention to finding of fact 48(j) which provided that

[h]usband funneled large sums of marital money and assets into TWNC both prior to and after DOS. (See Findings of Fact 128 & 130). The company's subsequent divisible loss in value impacted both Husband and Wife because marital assets were substantially depleted by Husband's unsuccessful efforts to keep TWNC afloat. Accordingly, the Court finds it equitable to distribute the [-\$403,340.00] divisible loss in value of the company by apportioning it between the parties with Husband receiving [-\$219,000.00] and Wife receiving [-\$184,340.00].

Defendant argues "this finding is not supported by the evidence presented at the original trial" or the hearing on remand. However, the trial court clearly cites findings of fact 128 and 130 in finding of fact 48(j). These findings were:

128. Husband's sale of the Scherer Building and his expenditure of the proceeds of such sale, prior to DOS, did not constitute marital waste. A substantial portion of the sale proceeds was deposited into the bank account of TWNC, and an additional \$415,000 was invested in Buck & Bear Wilderness Adventures, Ltd.

130. While Husband liquidated a number of assets after DOS, this was during a time when TWNC was experiencing financial problems and Husband was experiencing a reduction in income, and he utilized the proceeds of the liquidation of these assets to try to keep his businesses afloat and to pay the expenses of this litigation. The Court does not consider these actions to be a waste of marital property. In particular, Husband's post-DOS infusion of the proceeds of marital property into TWNC was a last-ditch effort to preserve the business which had been the parties' "cash cow" for a number of years prior to DOS.

Both findings of fact 128 and 130 can be found verbatim in the original Equitable Distribution Judgment and were upheld by this court in Wirth I. Thus, the trial court simply reinstated these earlier uncontested findings upon reclassifying the divisible loss, and defendant is incorrect in his contention that no evidence was presented for finding of fact 48(j).

B. TWNC as Defendant's Asset

Lastly, defendant contends that "[w]hen dealing with divisible property consisting of post date of separation diminution in value of an asset, the trial court should always distribute the divisible property to the same party to whom the marital asset is

distributed." Defendant directs our attention to *Robertson v. Robertson*, 167 N.C. App. 567, 605 S.E.2d 667 (2004), which determined that because both parties contributed to the diminution in value of a house, the diminution in value must be treated as divisible property and shared between the parties. *Id.* at 574-75, 605 S.E.2d at 671-72. However, defendant's reliance on *Robertson* is misplaced, as here the trial court has not determined that both parties contributed to the diminution in value. Defendant also argues that in contrast to the diminution of value in *Robertson*, the loss of value to TWNC was passive and thus the entire loss must be distributed to the party who has received the depreciated asset. Defendant cites no authority for this proposition.

We note that the distribution of TWNC and the divisible loss related to TWNC is a relatively small portion of the distribution of a complex marital estate valued at \$7,075,747.00. The trial court was required to consider the estate in its totality, including many types of assets such as business interests and commercial real estate. We reiterate that the equitable distribution of marital and divisible property is within the trial court's sole discretion, and in the absence of a legal error in the classification or valuation of the property, the trial's court's decision is reversible only for an abuse of discretion. See *Petty* at ___, 680 S.E.2d at 897-98. We also reiterate that the goal of equitable distribution is that it be, as the name implies, equitable. See N.C. Gen. Stat. § 50-20(c). Equitable is defined as, *inter alia*, "consistent with

principles of justice and right." Black's Law Dictionary 617 (9th ed. 2004).

Judge Tin determined that an equal distribution of property was not equitable, and thus distributed to defendant "54.27% of the net [fair market value] of the marital and divisible property and debts" and plaintiff 45.73%; these are the same distributional percentages which were used in the original order, and defendant has not challenged the distributional factors as found by the trial court in setting these percentages in this appeal or in Wirth I. In distributing the divisible loss from TWNC, the trial court used the same percentages to give defendant \$219,000.00 of the divisible loss and plaintiff \$184,340.00. In some circumstances, it is certainly most appropriate that a divisible loss should be distributed to the party who has received the related asset. However, in light of the entire equitable distribution judgment, the previous opinion of this Court, and the record before us, we cannot now say that the trial court abused its discretion in its distribution of the TWNC loss. Accordingly, this argument is overruled.

VI. Conclusion

For the foregoing reasons, we conclude that the trial court followed this Court's mandate and did not abuse its discretion thereby creating reversible error in its equitable distribution judgment on remand through its distribution of the TWNC loss. Accordingly, we affirm.

AFFIRMED.

Judges HUNTER, JR. and ERVIN concur.

Report per Rule 30(e).