Equitable Distribution: Can the court order the sale of marital property?

The duty of the trial court in an equitable distribution proceeding is to identify, value and distribute the marital and divisible property and debt of the parties. There is a presumption in favor of an 'in-kind' distribution of marital and divisible assets, meaning the law presumes the court will accomplish an equitable distribution by distributing the actual assets and debts between the parties rather than by distributing assets and debts to one and ordering the receiving party to pay the other a distributive award. Despite this presumption, however, distributive awards are common. The presumption in favor of an in-kind distribution is rebutted by evidence the property "is a closely held business entity or is otherwise not susceptible of division in-kind." G.S 50-20(e).

If the court can give all of the property to one and order that spouse to buy-out the other's interest with a cash distributive award, can the court instead order that property be sold with the cash proceeds distributed between the parties? The answer to that question in North Carolina became less clear last week.

Wall v. Wall

The first time the court of appeals addressed this issue directly, it held without extensive discussion that the trial court has the discretion to order the sale of marital property. In *Wall v. Wall*, 140 N.C. App. 303 (2000), the trial court classified and valued the marital home and ordered that it be sold and that the proceeds be used to pay the costs of the sale and to pay all encumbrances on the home. Any remaining proceeds were ordered to be distributed between the parties. The trial court did not offer any specific explanation for ordering the sale, other than to find that both parties agreed the house was marital but they strongly disagreed over value and both wanted the house in distribution.

The court of appeals affirmed the trial court order, stating:

"The defendant argues that the trial court must distribute the home to one of the parties, rather than ordering it sold. We disagree. …

While we have never expressly discussed the trial court's power to order the sale of marital assets as part of an equitable distribution, our prior decisions have implicitly recognized the power of the trial court to do so. *See, e.g., Dorton v. Dorton*, 77 N.C.App. 667, 336 S.E.2d 415 (1985) (trial court did not err in forbidding either party to receive a commission or broker's fee on the sale of the marital home after ordering the home sold); *Soares v. Soares*, 86 N.C.App. 369, 357 S.E.2d 418 (1987) (trial court erred in failing to value the marital home before ordering it sold); and *Thomas v. Thomas*, 102 N.C.App. 127, 401 S.E.2d 367 (1991) (citing *Soares*) for same proposition. We

continue to stress the importance of following the steps of first classifying, then valuing and distributing marital property. Each step is a prerequisite to the performance of the next, and failure to follow the prescribed order will result in a fatally flawed trial court disposition. “[O]nly those assets and debts that are *classified* as marital property and *valued* are subject to *distribution* under the Equitable Distribution Act (Act)....” *Grasty v. Grasty*, 125 N.C.App. 736, 740, 482 S.E.2d 752, 755, *disc. review denied,* 346 N.C. 278, 487 S.E.2d 545 (1997) (emphasis added). Here, there was no dispute over the classification of the marital home as marital property. Further, as we discussed above, the trial court properly valued the marital home prior to its distribution. Rather than distributing the home to one of the parties, the trial court ordered the parties to sell the property by 13 January 1998 and use the proceeds to pay off the costs of sale and the encumbrances on the home; any remaining funds from the sale were to be distributed to plaintiff-wife, with defendant-husband receiving a credit equal to one-half of these proceeds. The trial court classified and valued the Country Club Drive residence before distributing it, and we find no abuse of discretion in the trial court's order that the home be sold and proceeds divided between the parties.”

Several appellate cases after *Wall* remanded judgments where the trial court failed to value the marital home before ordering a sale, but until last week, no appellate opinion revisited the question of whether the court has the authority to order a sale as the method of distributing the marital property.

Miller v. Miller

Unlike the parties in *Wall*, neither party in *Miller v. Miller*, N.C. App (April 18, 2017), wanted the marital residence or another track of marital real property. The parties were able to stipulate to the value of the properties and wife asked the court to order that both properties be sold. The final ED judgment ordered that the properties be listed for sale at a price agreed upon by the parties with all net proceeds from the sale being distributed equally between the parties.

Husband argued on appeal that the trial court erred in ordering the sale and the court of appeals agreed, stating:

“The trial court’s role is to classify, value and distribute the property, not simply to order that it be sold. …

The trial court must value and distribute each parcel of real property to a party, and a distributive award may be needed to equalize the division or to make the distribution equitable. Then the party who receives distribution of the real property is free to keep it or sell it.”

The court in *Miller* did not mention the opinion in *Wall* and relevant distinctions between the facts of the two cases are not discernable from the published opinions.

What do other states do?

According to the treatise, Equitable Distribution of Property, written by Brett Turner and published by Thomson West, “a large majority of states” authorize the court to order the sale of marital assets. 3 Equitable Distribution of Property sec. 9:12, p. 49 (3rd Edition 2005). However, many of the cases cited by Turner indicate that an order for sale must be supported by findings to show that a distribution of the property to one party is not feasible or not equitable for some reason. *See e.g. In re Marriage of McDermott,* 827 N.W.2d 671, 684 (Iowa 2013)(“a forced sale is not a preferable method to divide marital assets because such a sale tends to bring lower prices,” so should not be done without a good reason); *Handy v. Handy*, 338 S.W.3rd 852 (Mo. Ct. App. W.D. 2011)(sale should not be ordered when house can be distributed to one and offsetting other property to the other). *But cf. Doyle v. Doyle*, 55 So. 3rd 1097 (Miss. Ct. App. 2010)(sale was appropriate where there was much dispute over the value of the property and the amount of equity, there was very little equity, many homes in the area were in foreclosure, and neither party could afford an outright purchase of the other’s interest); *Baldwin v. Baldwin*, 905 S.W.2d 521 (Mo. Ct. App. E.D. 1995)(home was most significant asset in the estate, too large for either party, and difficult and expensive to maintain; trial court concluded sale was necessary to protect both parties from extended financial drain).