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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3459-16T1

LUYEN D. NGUYEN,

Plaintiff-Appellant,

v.

CHI T. DUONG,

Defendant-Respondent.

Submitted April 17, 2018 - Decided May 3, 2018

Before Judges Hoffman and Mayer.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Hudson County,
Docket No. FM-09-0407-16.

Luyen D. Nguyen, appellant pro se.

Steven H. Nguyen, attorney for respondent.

PER CURIAM

Plaintiff Luyen D. Nguyen appeals from a February 14, 2017
order of the Family Court granting the counterclaim for divorce
filed by defendant Chi T. Duong and equitably distributing the
marital property. We affirm.

I.

The parties were married in February 2008, when plaintiff was fifty-nine years old and defendant was twenty-nine years old. The parties separated in September 2013. Plaintiff filed his complaint for divorce on the grounds of extreme cruelty and desertion, N.J.S.A. 2A:34-2(b) and (c). Defendant filed a counterclaim for divorce based on irreconcilable differences, N.J.S.A. 2A:34-2(i).

According to plaintiff, defendant used him to obtain United States citizenship and conspired with her sister to defraud him of \$230,000 through the creation of fake promissory notes. Plaintiff declined to consent to a divorce based on irreconcilable differences despite the judge explaining that the equitable distribution determination would be the same regardless of the reasons for the divorce. Thus, a trial was held on the grounds for divorce as well as the equitable distribution issues. The assets subject to equitable distribution included plaintiff's retirement fund, a parcel of land in Virginia, the parties' tax refunds for the years 2008 through 2012, and a \$230,000 loan to defendant's sister.

Beginning in 2000, plaintiff contributed to a fifteen-year 401(k) plan through his employer. When the parties married in 2008, the value of the 401(k) was approximately \$182,500. When plaintiff retired in 2012, the 401(k) was rolled over into a

Vanguard IRA and the value of the account at that time was approximately \$300,000. On the date the parties separated, the retirement account value was approximately \$114,600.

In determining equitable distribution of the plaintiff's retirement fund, plaintiff testified that he took approximately \$255,000 from that account. After considering the evidence and the testimony, the judge awarded defendant one-third of the increase in the account's value during the marriage, factoring in the amount withdrawn by plaintiff.

In determining equitable distribution of property in Falls Church, Virginia (Property), the judge heard testimony that the parties bought the Property in May 2012, intending to build their "dream home." The Property was purchased using five separate checks to satisfy the total purchase price. Two checks were provided by plaintiff, totaling \$101,200; one check came from defendant in the amount of \$77,366.67; and two checks were issued by defendant's sister, Thuy Bich Duong, and her husband, Chinh Phan, in the total amount of \$30,000.

At trial, defendant testified that the \$30,000 from her family was a loan. According to plaintiff, in October 2012, he transferred \$30,000 from his individual bank account to an account belonging to Chinh Phan, representing repayment of the loan. However, the evidence presented to the court only showed a \$30,000

transfer to an account number with no evidence that the account belonged to Chinh Phan, or that the transfer was repayment for the loan to purchase the Property.

At the time the parties separated, the Property was valued at \$250,000. Based on the testimony and evidence at trial, the judge awarded each party a share of the value of the Property proportionate to their respective financial contribution toward the purchase price, with the \$30,000 from defendant's family considered to be a part of defendant's contribution.

In determining equitable distribution of the parties' tax refunds, the judge found that the parties filed joint tax returns from 2008 through 2012. For each of those years, the parties received refund checks, which were deposited into plaintiff's bank account. The total tax refund amount deposited into plaintiff's bank account was \$41,073. The trial judge awarded one-half of the total tax refund amount to defendant.

The parties testified there was a loan in the amount of \$230,000 to another of defendant's sisters, Tam Tue Duong. At trial, defendant presented two signed, notarized promissory notes identifying Tam Tue Duong as the borrower and defendant as the lender. One note was for \$80,000 and the other note was for \$150,000. Plaintiff testified that the promissory notes presented to the court were fake. He claimed the original notes listed

himself as the lender, and defendant must have destroyed them and conspired with her sister to create the "fake" notes.

The judge heard conflicting testimony about the amounts and sources of the funds. The bank records introduced at trial showed the parties exchanging sums of money to each other at the same time the parties were sending money to defendant's sister. The trial judge calculated the total amount transferred from defendant's bank account to Tam Tue Duong was \$145,000 and the total amount transferred from plaintiff's bank account to Tam Tue Duong was \$85,000. Therefore, in her equitable distribution of this asset, the judge awarded \$85,000 to plaintiff.

II.

As an initial matter, before we address the issues appealed, we note that appellants are required to provide all "parts of the record . . . as are essential to the proper consideration of the issues." R. 2:6-1(a)(1)(I). The record on appeal consists of "all papers on file in the [trial] court . . . , with all entries as to matters made on the records of such court[] . . . , [and] the stenographic transcript or statement of the proceedings therein." R. 2:5-4(a). "Without the necessary documents, we have no basis for determining" the issues on appeal, and may be left with "no alternative but to affirm." Soc'y Hill Condo. Ass'n, Inc. v. Soc'y Hill Assocs., 347 N.J. Super. 163, 177-78 (App. Div.

2002); see also Cipala v. Lincoln Tech. Inst., 179 N.J. 45, 54-55 (2004) (affirming the appellate court's refusal to address an argument raised by appellant, where appellant failed to include an order or transcript relating to the argument).

Nor is an appellant permitted to include "documentary material which was not before the trial court," as doing so is "a gross violation of appellate practice." Middle Dep't Inspection Agency v. Home Ins. Co., 154 N.J. Super. 49, 56 (App. Div. 1977). We may elect to dismiss an appeal if the briefs and appendix do not comply with the court rules. See Cherry Hill Dodge, Inc. v. Chrysler Credit Corp., 194 N.J. Super. 282, 283 (App. Div. 1984) (dismissing appeal for procedural deficiencies, including "documents . . . presented in the appendix which were not in evidence below").

Plaintiff misunderstands the purpose of an appellate appendix as he submitted improper new "evidence" on appeal. In addition, plaintiff fails to designate which portions of the appendix were presented to the family court, rendering it extraordinarily difficult for this court to determine the records submitted as part of the evidence considered by the judge in rendering her decision. While we have the discretion to dismiss plaintiff's appeal on the basis of numerous procedural deficiencies, we elect to review plaintiff's claims on the merits.

III.

A family court's order pertaining to equitable distribution is reviewed "to determine whether the court has abused its discretion." La Sala v. La Sala, 335 N.J. Super. 1, 6 (App. Div. 2000). In other words, "[w]e must determine 'whether the trial court mistakenly exercised its broad authority to divide the parties' property or whether the result reached was bottomed on a misconception of law or findings of fact that are contrary to the evidence.'" Sauro v. Sauro, 425 N.J. Super. 555, 573 (App. Div. 2012) (quoting Genovese v. Genovese, 392 N.J. Super. 215, 223 (App. Div. 2007)).

In conducting such a review, we balance "the need for a check on unbridled discretion in the trial court against affording a trial de novo in this court. An equitable distribution will be affirmed even if this court would not have made the same division of assets as the trial judge." Perkins v. Perkins, 159 N.J. Super. 243, 247–48 (App. Div. 1978). "Because of the family courts' special jurisdiction and expertise in family matters, appellate courts should accord deference" to the factual findings of the family judge. Cesare v. Cesare, 154 N.J. 394, 413 (1998). "Deference is especially appropriate 'when the evidence is largely testimonial and involves questions of credibility.'" Id. at 412 (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117

(1997)). We reverse only if the family judge's conclusions are "clearly mistaken" or "wide of the mark," to "ensure that there is not a denial of justice." Parish v. Parish, 412 N.J. Super. 39, 48 (App. Div. 2010) (quoting N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008)).

On appeal, plaintiff argues the family judge erred by (1) improperly distributing marital property, and (2) denying his complaint for divorce based on extreme cruelty and desertion. As to the equitable distribution award, plaintiff claims the family judge erred by awarding defendant: (1) a portion of his 401(k); (2) a portion of the value of the Property; (3) a portion of the parties' joint tax refunds; and (4) a portion of the \$230,000 loan the parties made to defendant's sister.

Plaintiff's arguments regarding equitable distribution are flawed based on his erroneous belief that money earned by him during the marriage is not a marital asset. A marital asset "is that which was earned, or otherwise acquired, during the period in which the parties acted in pursuit of the shared enterprise of a marriage." Thieme v. Aucoin-Thieme, 227 N.J. 269, 285 (2016). "[R]un of the mill marital assets [generally include] real estate . . . [and] bank accounts" Whitfield v. Whitfield, 222 N.J. Super. 36, 41 (App. Div. 1987). Property that was individually owned by one spouse prior to the marriage may become

a marital asset when gifted to the other spouse or comingled with marital assets. See Winer v. Winer, 241 N.J. Super. 510, 522 (App. Div. 1990) (citing Painter v. Painter, 65 N.J. 196, 211 (1974)).

N.J.S.A. 2A:34-23h authorizes the trial court to divide marital assets by "mak[ing] such award or awards to the parties, . . . to effectuate an equitable distribution of the property." In accordance with this statute, "[i]t shall be a rebuttable presumption that each party made a substantial financial or nonfinancial contribution to the acquisition of income and property while the party was married." N.J.S.A. 2A:34-23.1. Thus, "all property, regardless of its source, in which a spouse acquires an interest during the marriage shall be eligible for distribution in the event of divorce." Winer, 241 N.J. Super. at 525 (quoting Kikkert v. Kikkert, 177 N.J. Super. 471, 474 (App. Div.), aff'd o.b., 88 N.J. 4 (1981)).

Plaintiff argues his retirement account, the Property, the parties' tax refunds, and the \$230,000 loan are not subject to equitable distribution because the money constituting these assets originated from plaintiff. Plaintiff's argument is contrary to the governing statute and case law, as well as the documentary and testimonial evidence presented at trial. According to the trial evidence, there was a continuous flow of money between plaintiff

and defendant, and between the parties and members of their families. Based on the trial judge's review of the evidence and testimony over the course of the seven day trial, we find no abuse of discretion in her equitable distribution award. Plaintiff fails to present any basis to overturn the trial judge's factual findings, and fails to meet his burden of proving any of the disputed assets are immune from equitable distribution.

We reject plaintiff's argument that the judge's equitable distribution of the \$230,000 loan to defendant's sister was flawed because the promissory notes presented at trial were "fake." Rather than cite to a specific error in the judge's reasoning on this issue, plaintiff seeks a trial de novo from this court and requests that we retrace the money flowing among the parties regarding this transaction. Plaintiff's position is procedurally improper as our review is limited to the record developed at trial before the family court judge. See Genovese, 392 N.J. Super. at 222 ("[I]t is not the appellate function to . . . substitute our judgment for that of the lower court." (quoting Gittleman v. Cent. Jersey Bank & Trust Co., 103 N.J. Super. 175, 179 (App. Div. 1967), rev'd on other grounds, 52 N.J. 503 (1968))).

Plaintiff also contends the judge erred by denying his complaint for divorce based on extreme cruelty and desertion and granting defendant's counterclaim for divorce based on

irreconcilable differences. Plaintiff fails to present any argument in support of this claim. Plaintiff merely states he "would like to leave these issues on hold and . . . come back at an appropriate time."

To prove extreme cruelty as a grounds for divorce, the plaintiff must show "physical or mental cruelty which endangers the safety or health of the plaintiff or makes it improper or unreasonable to expect the plaintiff to continue to cohabit with the defendant." N.J.S.A. 2A:34-2(c). For desertion, plaintiff must show "[w]illful and continued desertion for the term of [twelve] or more months, which may be established by satisfactory proof that the parties have ceased to cohabit as man and wife." N.J.S.A. 2A:34-2(b). As plaintiff presents no argument on appeal, and there is sufficient evidence in the record that the parties had irreconcilable differences, there is no basis to overturn the judge's decision. See Welch v. Welch, 35 N.J. Super. 255, 255-56 (App. Div. 1955) (declining to reverse trial court's finding that plaintiff failed to establish extreme cruelty).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION