IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

BENJAMIN M. BATHKE,

Appellant/Cross-Appellee,

v.

Case No. 5D20-2522
LT Case No. 2017-DR-7441-O

MARY ELIZABETH COSTLEY F/K/A MARY ELIZABETH BATHKE,

Appellee/Cross-Appellant.
_____/

Opinion filed December 30, 2021

Appeal from the Circuit Court
for Orange County,
Tanya Davis Wilson, Judge.

Brandon M. Tyson, of Tyson Law Firm, LLC, Winter Park, for Appellant/Cross-Appellee.

M. Shannon McLin, Erin Pogue Newell and William D. Palmer, of Florida Appeals, Orlando, for Appellee/Cross-Appellant.

SASSO, J.

In this appeal and cross-appeal, Benjamin M. Bathke ("Husband") and Mary Elizabeth Costley ("Wife") separately appeal the final judgment that

dissolved the parties' marriage. Among the several issues presented on appeal and cross-appeal, we find two issues raised in Husband's appeal merit reversal. First, we agree with Husband that the trial court erred in its consideration of the tax consequences relating to Husband's businesses, and Wife has not sustained her burden of demonstrating this error was harmless. Second, we agree with Husband that the trial court erred in imposing a 6.33% interest rate in its order awarding attorneys' fees to Wife. In all other respects we affirm without discussion.

On February 7, 2019, the parties entered into a partial marital settlement agreement ("MSA"). Within that agreement, the parties reserved the issue of alimony for the court's resolution but "fully resolved all issues related to equitable distribution of the marital assets and liabilities except the sole issue regarding the tax consequences related to the business entities . . . ."

Specifically, paragraph K of the MSA was entitled "Tax Consequences for BCB Industries, Inc. [("BCB")] and Petroleum Equipment, Inc. [("PEC")]," referencing two closely held entities of which Husband was the president and majority shareholder. Paragraph K provided:

> The parties will submit to the Court for consideration whether the capital gain tax considerations related to a hypothetical sale of each of these entities is to be considered [in] determining equitable distribution of marital assets and liabilities. If the Court

> determines that the tax consequences are to be considered in determining the equitable distribution of the marital assets and liabilities, then the Husband shall not owe the Wife any further sums of equitable distribution.
>
> If the Court determines that the tax consequences are not to be considered in determining the equitable distribution of the marital assets and liabilities, then the Husband shall owe the Wife for purposes of equitable distribution the sum of $304,118. Should this payment become due, then the Court shall decide the equalizing payment.

Shortly before trial, each party submitted a memorandum of law discussing the tax consequences. Husband argued that the court was required to consider the tax consequences because capital gains tax would be unavoidable when Husband sells his interests in either entity. Wife, on the other hand, argued that the court should not consider the consequences of a hypothetical sale because there was no evidence of any imminent sale of the businesses or that Husband would incur any immediate tax liability, primarily relying on *England v. England*, 626 So. 2d 330 (Fla. 1st DCA 1993).

At trial, both parties offered experts who provided testimony as to potential tax consequences associated with the businesses. Significantly, both experts testified Husband could not avoid the tax impact when he sells the assets. However, both experts also agreed that the capital gains tax only arises if and when Husband sells his interests, and they acknowledged that, while Husband testified he planned on retiring and selling the businesses in

approximately five years, Husband had no concrete plan to sell the businesses.

After hearing testimony, the court determined that there was no evidence of an "imminent" sale of either business and no evidence that Husband was negotiating terms of a sale as of the hearing. In light of this lack of evidence, in an October 3, 2019 final judgment, the trial court specifically determined "[t]here was no evidence that sale of either business was imminent, or even contemplated. As the sale of [Husband]'s businesses was hypothetical, [Husband] can receive no capital gains tax consideration."

Following entry of this final judgment and an amended final judgment, the trial court entered a separate order on Wife's request for attorneys' fees. Relevant to this opinion, the trial court found that "[d]espite the monthly equitable distribution payments, . . . the Petitioner is in need of $239,495.15 for the costs of attorney fees and costs." The court ordered Husband to pay $239,495.15 and prescribed that the award "shall bear interest at the statutory rate of 6.33% until paid."

Husband subsequently moved for rehearing, arguing, inter alia, the trial court had applied the wrong statutory interest rate. On November 30, 2020, the court entered its Order on Motion for Rehearing. The Order provided that Husband pay the attorneys' fees and costs awarded in accordance with an

amortization schedule, which utilized an interest rate of 6.33%, without addressing Husband's argument that a 6.33% interest rate was inconsistent with the statutory rate.

## ANALYSIS

*a. Equitable distribution*

Here, Husband argues the trial court abused its discretion in its equitable distribution because it failed to consider the tax consequences related to the parties' businesses. We review this issue for an abuse of discretion and agree that, under the facts of this case, the trial court abused its discretion. *See Lovelass v. Hutchinson*, 250 So. 3d 701, 705 (Fla. 4th DCA 2018).

Section 61.075, Florida Statutes, instructs courts to distribute assets equitably, unless there is a justification for unequal distribution, based on the "individual valuation of significant assets." § 61.075(1), (3)(b), Fla. Stat. (2020). In determining the value of assets, including closely held corporations, this court has observed that a valuation of assets, without taking into account the tax consequences of the assets, is not fairly reflective of the market value of the assets to the parties. *See, e.g.*, *Miller v. Miller*, 625 So. 2d 1320, 1321 (Fla. 5th DCA 1993) (citing *Nicewonder v. Nicewonder*, 602 So. 2d 1354, 1358 (Fla. 1st DCA 1992) (Zehmer, J., concurring)).

In *Miller*, this court noted the pitfalls in failing to consider the tax consequences of a specific asset, even if a sale is not pending at the time equitable distribution is made. As part of the equitable distribution, the wife in *Miller* was awarded the marital home and the husband was awarded all of the stock of a corporation producing the income on which the parties depended for living expenses. *Id.* at 1321. Noting the disparate tax basis of the two assets, this court concluded that a valuation of the assets that failed to account for this reality did not accurately reflect the assets' value. *Id.*

In this case, the trial court took testimony regarding tax liability presented by both parties' experts but ultimately concluded that, because there was no evidence that a sale of the properties was "imminent" or that Husband was in negotiations to sell the businesses, the trial court could not account for such tax liabilities in its equitable distribution. This was error. A trial court is not forbidden from accounting for future tax consequences simply because there is no evidence a sale of that asset is imminent. If it were, courts would be required to treat assets with varying tax liabilities as equivalent, as the trial court in *Miller* did, when the tax basis presented by the assets creates value that is undoubtedly inequivalent.

Because the trial court's decision was based on an improper application of the law, we are constrained to conclude the trial court abused

its discretion under these circumstances. *See McDuffie v. State*, 970 So. 2d 312, 326 (Fla. 2007) (holding that trial court "abuses its discretion if its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence"). Furthermore, because Wife has not sustained her burden of demonstrating this error was harmless, we reverse the final judgment and remand for additional proceedings consistent with this opinion. We emphasize that our decision is only that the trial court is not prohibited from accounting for a future tax liability. Thus, on remand, the trial court may consider whether there is competent evidence regarding the tax consequences and, if so, the amount.

*b. Attorneys' fees order*

Finally, we agree with Husband that the trial court erred in applying a 6.33% interest rate in its order awarding Wife attorneys' fees, as this rate did not reflect the statutory interest rate found in section 55.03, Florida Statutes (2020). *See also* § 687.01, Fla. Stat. (2020) ("In **all** cases where interest shall accrue without a special contract for the rate thereof, the rate is the rate provided for in s. 55.03." (emphasis added)). Accordingly, we also reverse the award of attorneys' fees for entry of a corrected order and amortization schedule reflecting the correct statutory interest rate.

In all other respects, we affirm.

AFFIRMED, in part; REVERSED, in part; REMANDED.

WOZNIAK, J., and JACOBUS, B.W., Senior Judge, concur.