

19CA0098 Marriage of Winick 10-31-2019

COLORADO COURT OF APPEALS

Court of Appeals No. 19CA0098
Weld County District Court No. 17DR591
Honorable W. Troy Hause, Judge

In re the Marriage of

Barbara Leoda Winick,

Appellant,

and

Robert Lee Winick,

Appellee.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE LIPINSKY
Webb and Dunn, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced October 31, 2019

Kraemer Golden O'Brien, LLC, Michael M. O'Brien, Fort Collins, Colorado, for
Appellant

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¶ 1 Barbara Leoda Winick (wife) appeals the property division portion of the district court’s permanent orders entered in connection with the dissolution of her marriage to Robert Lee Winick (husband). We reverse and remand for additional proceedings.

I. Relevant Facts

¶ 2 In 2018, the district court dissolved the parties’ eleven-year marriage.

¶ 3 In its permanent orders, the district court found that

- it was undisputed that husband’s inherited rental property was his separate property;
- it was also undisputed that the rental property had appreciated in value by \$100,000 during the marriage;
- the parties brought into the marriage separate retirement accounts;
- the marital appreciation in value of wife’s retirement accounts was \$63,000; and
- the marital appreciation in value of husband’s retirement account was \$374,000.

¶ 4 From these findings, the district court determined that it was equitable to (1) award the entire \$100,000 in marital appreciation in the rental property to husband; (2) allocate to wife \$109,250 or 25% of the total marital appreciation in value of the parties' retirement accounts; and (3) order husband to make an equalization payment to wife in the amount of \$16,350.

¶ 5 Wife now appeals.

II. Property Division

A. Husband's Rental Property

¶ 6 Wife first contends that the district court should have awarded her a portion of the marital appreciation in husband's rental property and its failure to do so resulted in an inequitable property division. We conclude that additional findings are necessary on this issue.

¶ 7 Marital property includes the appreciation of separate assets during the marriage. See § 14-10-113(4), C.R.S. 2019 (An asset acquired by a spouse prior to marriage shall be considered marital property "to the extent that its present value exceeds its value at the time of marriage."); see also *In re Marriage of Balanson*, 25 P.3d 28, 42 (Colo. 2001).

¶ 8 Under section 14-10-113(1), a district court must equitably divide the marital property. *In re Marriage of Thornhill*, 232 P.3d 782, 787 (Colo. 2010); *see also In re Marriage of Burford*, 26 P.3d 550, 556 (Colo. App. 2001) (property division does not have to be mathematically equal, just equitable). To that end, the court must consider all relevant factors, including each spouse's contribution to the acquisition of the marital property, the value of each spouse's separate property, each spouse's economic circumstances, and any increases or decreases in the value of separate property during the marriage or the depletion of separate property for marital purposes. § 14-10-113(1)(a)-(d); *see also In re Marriage of Cardona*, 2014 CO 3, ¶ 11, 316 P.3d 626, 630. Weighing these factors is within the court's discretion, and it need not make specific findings as to each factor if its findings indicate which factors it found persuasive. *In re Marriage of Powell*, 220 P.3d 952, 959 (Colo. App. 2009); *see Burford*, 26 P.3d at 556-57.

¶ 9 The district court has considerable latitude to equitably divide the marital property based on the facts and circumstances of the case. *Balanson*, 25 P.3d at 35. We will not disturb its decision absent a showing of a clear abuse of discretion. *Id.* The court

abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair. *In re Marriage of Roddy*, 2014 COA 96, ¶ 23, 338 P.3d 1070, 1076.

¶ 10 It is undisputed that husband's rental property was his separate property and that it had appreciated \$100,000 during the marriage.

¶ 11 The record shows that husband inherited the rental property from his mother before the parties married. Husband testified that, from the time of their marriage to the date of the hearing, there were no debts associated with the property. Husband further testified that, since inheriting the property, he has been renting it and using the rental income to cover insurance, real estate taxes, moderate renovations, maintenance, and other expenses. He recalled that he would perform basic repairs, such as re-carpeting and replacing the furnace filters. And he emphasized that the significant increase in the value of the property was due to the highly favorable conditions in the real estate market and not to any contribution from the parties.

¶ 12 Wife admitted that during the marriage the rental property was essentially self-sustaining as the rent "paid for everything

needed.” When asked whether she would agree that “the only increase in the value of the property comes from the market,” she replied, “correct.” She testified, however, that she assisted in maintaining the property by cleaning it between renters, staining the fence, accompanying repairmen on several occasions, and replacing the icemaker, washer and dryer, garbage disposal, and furnace filters.

¶ 13 On this record, the district court found that husband inherited the rental property debt-free; “no indebtedness ha[d] been attached [to the property] during the term of the marriage”; “the property was maintained by the income that was provided by the property”; “no marital funds or contributions were made to maintain or improve the property”; and the rise in value of the property was caused solely as the result of real estate market factors. In the end, the court awarded the entire \$100,000 in marital appreciation to husband.

¶ 14 It appears that the primary basis for the district court’s decision was the parties’ contributions, or lack thereof, to the marital increase in value of the property. See § 14-10-113(1)(a); see also *Santilli v. Santilli*, 169 Colo. 49, 52-53, 453 P.2d 606, 608

(1969) (a spouse's contribution to an increase in the value of separate property is a relevant factor to be considered in making an equitable distribution of property). However, it does not appear that the court considered or weighed any other relevant factors. *See In re Marriage of Casias*, 962 P.2d 999, 1003 (Colo. App. 1998) (Case remanded for the district court to enter findings on the statutory factors and "any other factors that form the basis for its property division."); *see also In re Marriage of Piper*, 820 P.2d 1198, 1201 (Colo. App. 1991) (district court must make findings reflecting its consideration of the factors enumerated under section 14-10-113).

¶ 15 We recognize that the district court is not required to set out specific findings as to each of the section 14-10-113 factors. *See Powell*, 220 P.3d at 959. However, without more explicit findings explaining its disproportionate award of the marital appreciation, we cannot determine whether the award constitutes an abuse of discretion. *See In re Marriage of Rozzi*, 190 P.3d 815, 822 (Colo. App. 2008) (district court must make sufficiently explicit findings of fact to give the appellate court a clear understanding of the basis of its order). Thus, we reverse this portion of the order and remand

the case for additional findings and, if necessary, based on those findings, for reconsideration of the overall property division.

B. Parties' Retirement Accounts

¶ 16 Next, wife next contends that the district court abused its discretion in dividing the marital appreciation in the parties' retirement accounts. Again, we conclude that additional findings are necessary.

¶ 17 The record reflects the following:

- the parties entered their 2007 marriage with retirement accounts and did not use the accounts for marital purposes;
- at the time of the marriage, husband's retirement accounts were worth approximately \$230,000 and wife's retirement accounts were worth approximately \$145,000;
- husband contributed to his retirement accounts for eighteen years before the parties married and for seven years during the marriage; and
- wife contributed to her retirement accounts for only two years during the marriage.

¶ 18 The district court found that wife's retirement accounts were her separate property and had appreciated by \$63,000 during the

marriage. In addition, the court found that husband's retirement accounts were his separate property and had appreciated by \$374,000 during the marriage. After adding these amounts together, the court awarded wife 25% of the total marital appreciation, or \$109,250. The court explained:

Neither party contributed to the respective retirement in any significant amount during the marriage and therefore, again, these assets increased based upon primarily the market, even though there were some minor contributions made, but the large majority were made prior to the marriage.

. . .

[I]t's not fair and equitable to divide the increases in the funds on a 50/50 shared basis, as argued by . . . [w]ife, based upon the fact that the majority of the contributions, the vast majority, were prior to the marriage and the increase in value came based upon the interest made on these investments.

¶ 19 The district court's allocation of 25% of the total marital appreciation to wife was based on its findings that husband's retirement accounts were significantly greater in value than wife's retirement accounts at the time of the marriage and that, during the marriage, husband contributed to his retirement accounts for seven years compared with wife's two years of contributions during

the marriage. But again, the court did not make sufficiently explicit findings showing consideration of the other relevant statutory criteria. See § 14-10-113(1); see also *Rozzi*, 190 P.3d at 822. So, on remand, the district court is directed to make additional findings on this issue. For assistance on remand, we note that marital appreciation as a result of market forces is not immune from equitable distribution. See § 14-10-113(4).

III. Conclusion and Remand Instructions

¶ 20 The judgment is reversed. The case is remanded to the district court for additional findings as directed in the opinion. See *Rozzi*, 190 P.3d at 822. If the court determines, based on the new findings, that it is necessary to change the distribution of the marital appreciation of the rental property or retirement accounts, the court must then also reconsider the entire property and debt division to achieve an overall equitable result. See *In re Marriage of Vittetoe*, 2016 COA 71, ¶ 38, ___ P.3d at ___. And it must base such reconsideration on the parties' economic circumstances at the time of the remand. See *Powell*, 220 P.3d at 961.

JUDGE WEBB and JUDGE DUNN concur.