THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2019-0003, In the Matter of Shannon Badger and Benjamin Badger, the court on October 16, 2019, issued the following order:

The respondent, Benjamin Badger (husband), appeals an order of the Circuit Court (Love, R., approved by Ryan, J.), ruling on post-final-decree motions in his divorce from the petitioner, Shannon Badger (wife). He argues that, by "correcting," sua sponte, certain language in the final decree relative to the distribution of several properties, the trial court impermissibly modified the property distribution. We agree, and reverse that portion of the trial court's order that modified the final property distribution.

The parties' divorce became final on September 13, 2018. See Fam. Div. R. 1.31. At the time of the divorce, they owned seven real properties, including the marital home, an undeveloped parcel in Barrington, and five other investment properties. One of the investment properties, located on Bourne Drive in Bedford, was leased by the husband's mother through December 30, 2020.

The trial court distributed the properties through two successive paragraphs of the final decree. Paragraph 15 provided:

> Benjamin is awarded all right, title and interest in the [marital home] free and clear of any right title or interest of Shannon. Benjamin shall refinance the mortgage within 60 days to remove Shannon's name. The fair market value of [the marital home] is $382,000. The mortgage balance is $246,406. The equity in this property is $135,594. Shannon's equitable interest is 40% of the net equity.

Paragraph 16 distributed each of the remaining six properties through seven subparagraphs. With respect to the Barrington property, paragraph 16 included a subparagraph that awarded it to the husband, without making any findings as to its value or any indebtedness. With respect to the Bourne Drive property, paragraph 16 included a subparagraph stating its value, indebtedness, and equity, and providing that, following the termination of the lease, the property would be sold with the husband receiving 60% of the profits and the wife receiving 40% of the profits. As to the remaining properties, paragraph 16 included four subparagraphs stating the value, indebtedness, and equity in each property, and awarding two of the properties to the husband and two of the properties to the wife. A final subparagraph of paragraph 16 followed:

> G. The parties shall execute . . . quitclaim deeds for the properties awarded to the other party and shall finance any joint mortgage accounts within 90 days. Excluding the undeveloped land in Barrington, NH, Benjamin's equitable interest in the aforementioned properties is 60% of the net equity. Shannon's equitable interest in these properties is 40% of the net equity.

On September 26, 2018, the husband filed an ex parte motion "for [e]mergency [o]rders," claiming that the wife was not cooperating with his efforts to refinance the marital home. Specifically, he asserted that the wife refused to convey her interest in the marital home to him on the basis that he would not agree to pay her equitable interest at the time of refinancing. He contended that nothing in the final decree required him to pay the wife her 40% interest in the marital home at the time that he refinanced the mortgage. The wife objected, asserting that she refused to convey her interest in the marital home because the husband would not "provid[e] any assurances or information as to when and how he actually intend[ed] to pay [her the] equitable interest in the property," and that he had stated that he did not have the ability to pay the equitable interest at the time of refinancing. The trial court ordered the wife to provide the husband with a quitclaim deed, to be held in escrow, conveying her interest in the marital home within two days, and ordered the husband, "[c]ontemporaneous with the refinance, [to] pay [the wife] her 40% interest in the sum of $52,237.60."

The wife moved to correct a "scrivener's error" in the order, asserting that her 40% interest in the marital home amounted to $54,237.60, not $52,237.60. The husband agreed that the wife's interest in the marital home was $54,237.60, but moved for reconsideration, arguing that, because the wife was required to pay him for his 60% equitable interest in the properties awarded to her under paragraph 16 of the decree, the total amount that he owed the wife was $35,863, "not the full 40% of the" marital home. He asserted that he would have no ability to pay the wife her equitable interest until the parties had sold the Bourne Drive property. He requested that the court "[c]larify that the net real estate division requires [that he] pay [the wife] $35,863," and that it "remove the new provision for payment at the time of the marital home refinance." The wife objected, asserting that paragraphs 15 and 16 of the final decree were "separate and distinct" provisions, that she was "in the process of complying with Paragraph 16 of the Final Decree and will . . . pay the [husband his] equitable interest within the ninety (90) day timeframe provided within the Final Decree," and that the requirement that the husband pay the wife her equity in the marital home at the time of refinancing merely clarified the trial court's original intent.

The trial court held a hearing on the motions. At the hearing, the husband contended that he would not be able to obtain funds from the refinancing of the marital home to pay the wife her interest in it, and that he otherwise lacked the means to pay either $35,863 or $54,237.60 at the time of refinancing. He requested that the trial court allow him to pay the wife $35,863 out of the sale

proceeds for the Bourne Drive property, and offered to execute an agreement or promissory note to that effect. The wife countered that paragraphs 15 and 16 of the decree were separate and distinct, and that "any monies that are received as a result of any refinancing and that are being paid to [the husband] . . . should be within the realm of paragraph 16" because, she claimed, the paragraph 16 properties, unlike the marital home, were subject to capital gains taxes. She further asserted that she needed the cash payment of $54,237.60 so that she could pay down her debt and qualify to refinance one of the properties awarded to her under paragraph 16. The wife conceded, however, that "[t]o the extent that [she] owes any funds to" the husband, $18,372 "[i]s what [she] owes to [the husband] to do a 60/40 division on the properties that are awarded in paragraph 16."[1] At no point did the wife argue that the husband was not entitled to payment of 60% of the equity in the properties awarded to her in paragraph 16.

The trial court granted the wife's motion to correct the "scrivener's error," "accept[ing] [the husband's] representation that he is unable to obtain funds from the refinancing," but noting that he "has the means to liquidate assets awarded to him including the Barrington land." As to the husband's motion for reconsideration, the court denied the motion, reasoning that "[p]aragraphs 15 and 16 of the divorce decree are two separate and distinct paragraphs," and that the "[r]efinancing and payment of the equity of the former marital home is a separate transaction from the refinancing and payment of the equity of the other properties in the former marital estate." The trial court then stated:

> Moreover, the Court *sua sponte* corrects paragraph 16 G to read:
>
> The parties shall execute . . . quitclaim deed[s] for the properties awarded to the other party and shall finance any joint mortgage accounts within 90 days. Excluding the undeveloped land in Barrington, NH, Benjamin's equitable interest in the aforementioned properties is *approximately 55% of the net equity. Shannon's equitable interest in these properties is approximately 45% of the net equity.*

[1] Excluding the Bourne Drive property, which was to be sold with the husband receiving 60% of the profits and the wife receiving 40% of the profits, and excluding the undeveloped parcel in Barrington, which was expressly excluded from the wife's equitable interest in paragraph 16, the total equity in the two remaining properties awarded to the husband in paragraph 16 was $193,998 and the total equity in the two remaining properties awarded to the wife was $159,956. A payment of 40% of $193,998 by the husband to the wife would amount to $77,599.20, and a payment of 60% of $159,956 by the wife to the husband would amount to $95,973.60. The difference between these figures, or the amount required to divide the equity in those properties in accordance with paragraph 16, would result in the wife paying the husband $18,374.40, approximately the amount that she conceded she would owe him "to do a 60/40 division on the" paragraph 16 properties. Subtracting $18,374.40 from $54,237.60 results in a total liability of the husband of $35,863.20, approximately the amount he requested that he be ordered to pay her to accomplish a "global" property settlement.

The husband moved to reconsider, arguing that, by so "correcting" paragraph 16, the trial court had impermissibly modified the final property distribution. He requested that, if the court denied his motion, it explain "why the Court made this modification." The trial court denied the motion without explanation.

We have long held that a final property distribution in a divorce decree is not subject to judicial modification based upon changed circumstances. See, e.g., In the Matter of Birmingham & Birmingham, 154 N.H. 51, 57 (2006). A final property distribution may be modified only upon a showing that it is invalid due to fraud, undue influence, deceit, misrepresentation, or mutual mistake. Id. The husband argues that the "correction" of paragraph 16 had the effect of reducing his equitable interest in the paragraph 16 properties, other than the Barrington property, from 60% to 55%, resulting in a total loss of approximately $25,000, and that there were no allegations or findings of fraud, undue influence, deceit, misrepresentation, or mutual mistake that would have justified the reduction.[2] Thus, he argues that the "correction" amounted to an impermissible modification of the final property award. He further argues that, by modifying the award without prior notice to him, the trial court violated his state constitutional right to due process, and that it erred by not making specific findings of fact, upon his request, explaining why it had modified the division of equity.

The wife does not dispute that the "correction" of paragraph 16G had the effect of reducing the husband's equitable interest in the properties distributed under paragraph 16. She does contest, however, that the "correction" constituted a modification of the property award. Relying upon In the Matter of Stapleton & Stapleton, 159 N.H. 694, 696-97 (2010), and Croteau v. Harvey & Landers, 99 N.H. 264, 267 (1954), she argues that the trial court was simply exercising its inherent power to correct an error that it had discovered. Specifically, she claims that "the trial court's original intention" was to divide the properties in paragraph 16 on a 55%-45% basis, and that it discovered and corrected its error so as to "relieve[] the need for either party to pay to the other party any equity from the investment properties."[3] We note that, absent specific

---

[2] The husband's assertion that the change to paragraph 16G results in a total loss to him of $25,000 assumes that by reducing his interest in the "aforementioned properties" to "approximately 55% of the net equity," the trial court reduced his interest in the Bourne Drive property to 55%, notwithstanding the separate language in paragraph 16 stating that the Bourne Drive property would be sold with the profits divided on a 60%-40% basis. Because we agree with the husband that the trial court's "correction" effected an impermissible modification of the property division regardless of whether it applied to the Bourne Drive property, we need not decide what effect, if any, the "correction" would have had on the disposition of the Bourne Drive property.

[3] The total equity in the properties, other than the Barrington parcel and Bourne Drive, in paragraph 16 was $353,954. See supra n.1. Thus, the $193,998 of equity in the two properties awarded to the husband constituted 54.8% of the total equity in the four properties, while the $159,956 of equity in the two properties awarded to the wife was 45.2% of the total equity in the four properties. By changing the language in paragraph 16G to state that the husband's interest "in the aforementioned properties is *approximately 55% of the net equity*,"

findings of fact explaining the trial court's rationale, this argument is based upon speculation.

The wife is correct that, even after a property distribution in a divorce has become final, the trial court retains the "common law power to correct [the property distribution] under the proper circumstances." Erdman v. Erdman, 115 N.H. 380, 381 (1975) (emphasis added). We note that in both Stapleton and Croteau, the ruling at issue had not yet gone to final judgment. See Stapleton, 159 N.H. at 696; Croteau, 99 N.H. at 266 (observing that "[t]he matter had not gone to judgment"). Indeed, in support of its proposition that "there can be no question of the inherent power of the Court to review its own proceedings to correct error or prevent injustice," Croteau expressly relied upon Redlon Co. v. Corporation, 91 N.H. 502 (1941). Croteau, 99 N.H. at 267. Redlon Co., in turn, stands for the proposition that "the trial court's discretionary powers are continuous," and "may be exercised, and prior exercise may be corrected, as discretion may require, at any time prior to final judgment." Redlon Co., 91 N.H. at 505 (emphasis added). These cases, therefore, support the trial court's broad authority "to reverse itself at any time prior to final judgment." Stapleton, 159 N.H. at 696 (emphasis added); see also Goudreault v. Kleeman, 158 N.H. 236, 249 (2009) (citing Redlon Co., 91 N.H. at 506) (observing that the trial court has the power to reconsider an issue at any time prior to final judgment).

Once a decree has gone to final judgment, however, the trial court's exercise of the power to vacate, modify, or amend it generally requires proof of some substantial ground, outside a party's control, amounting to good cause, such as fraud, accident, mistake, or misfortune in the judgment's procurement. See, e.g., In the Matter of Harman & McCarron, 168 N.H. 372, 375 (2015); Knight v. Hollings, 73 N.H. 495, 502 (1906). See generally, 5 G. J. MacDonald, Wiebusch on New Hampshire Civil Practice and Procedure § 57.16, at 57-8 (4th ed. 2014). As noted above, within the context of final property distributions, we have specifically held that modifying or amending a final property distribution requires a showing that the distribution is invalid due to fraud, undue influence, deceit, misrepresentation, or mutual mistake. Birmingham, 154 N.H. at 57.

In this case, the trial court's "correction" had the effect of reducing the husband's interest in the properties divided under paragraph 16 by 5% and, thus, substantially increasing the ultimate amount that he owed the wife to effectuate the division of property under the terms of the decree. Accordingly, the trial court modified the property division after the decree had gone to final judgment. Regardless of whether the decree, as modified, reflected the trial court's original intent, there was no evidence of fraud, undue influence, deceit, misrepresentation, or mutual mistake underlying the original decree that would

---

and that the wife's interest "*in these properties is approximately 45% of the net equity*," the trial court virtually eliminated the wife's obligation to pay the husband any cash to settle his equitable interest in the properties awarded to her.

have justified the modification. Accordingly, we reverse the trial court's order to the extent that it "corrected" paragraph 16G of the final decree, and need not address the husband's remaining arguments. We otherwise affirm the remaining portions of the trial court's order, which the parties do not challenge.

Affirmed in part and
reversed in part.

HICKS, BASSETT, and HANTZ MARCONI, JJ., concurred.

Eileen Fox,
Clerk