STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. PEN-24-581

ANDREW D. CUNNINGHAM,

Plaintiff/Appellee

v.

KAREN CUNNINGHAM,

Defendant/Appellant

ON APPEAL FROM AN ORDER ENTERED BY THE NEWPORT DISTRICT COURT, DOCKET NO. NEWDC-FM-2023-00017

REPLY BRIEF OF APPELLANT KAREN CUNNINGHAM

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I. THE DISTRICT COURT ERRED IN FINDING THAT KAREN'S ENTIRE WORKERS' COMPENSATION SETTLEMENT WAS MARITAL PROPERTY.

Appellee Andrew Cunningham ("Andrew") suggests that Appellant Karen Cunningham ("Karen") is stuck with the trial court's finding that her workers' compensation lump sum settlement was marital property because she failed to file a post-judgment motion for additional findings of fact and conclusions of law under M.R.Civ.P. 52(b). Red Brief, p. 7. That is not the case. "The purpose of motions for findings of additional facts pursuant to M.R.Civ.P. 52(b) is to seek specific fact-findings to support conclusions not already addressed by facts found in the court's opinion." *Wandishin v. Wandishin*, 2009 ME 73, ¶ 18, 976 A.2d 949. "Requests for additional fact-findings pursuant to M.R.Civ.P. 52(b) should not be used to attempt to require the court to explain its reasoning in reaching a particular result or to reargue points that were contested at trial and that have been resolved by the court's decision." *Id.* at ¶ 19. Here, the trial court already made specific findings of fact regarding the lump sum settlement (Appendix (hereinafter "App."), pages 16-17) and it would not have been proper to file a motion for further findings of fact under Rule 52(b) to reargue that issue.

The court's findings specifically concluded that "neither party here has presented sufficient evidence to show that specific components of their settlement moneys were nonmarital…." App. at 19, ¶ 23. However, that finding is in direct contradiction to the court's earlier finding that Karen "received a total of $365,570.79 in a lump sum cash payment as well as a 'guaranteed' medical set aside benefit of $199,538.00, to be paid to her in annual installments of $8,652.00 through May of 2030. She may also receive continued annual payments of $8,652.00 after May of 2030 for another 12 years, if living." App. at 16, ¶ 14. Given the fact that the court specifically found that a certain portion of Karen's lump sum settlement was for future benefits through at least May of 2030, it was legal error, under *Doucette v. Washburn*, 2001 ME 38, ¶ 13, 766 A.2d 578, for the court to conclude that Karen had failed to carry her burden of proving that a portion of the settlement was nonmarital.[1] Since the parties separated in 2022 and the divorce judgment was entered in September 2024, any annual payments made after that time are, by definition, not marital property. The District Court erred as a matter of law in ruling

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[1] Karen also presented evidence of the lump sum settlement disbursement sheet, Plaintiff's Exhibit 20, which delineated separate amounts for medical payments ($199,538.00) versus wage replacement benefits ($320,000.00). As to the latter, it also delineated what portion was paid for past due wage replacement benefits from January 31, 2006 to the date of the settlement, December 8, 2010 ($79,917.17). By implication, the remainder of the wage replacement benefits paid in the lump sum ($240,082.83) were forward-looking over the remainder of Karen's working life, which, given her date of birth of August 6, 1969, will obviously continue for many years after the parties' separation and divorce.

that the entirety of Karen’s lump sum settlement was marital property, and the judgment must be reversed on that ground.

Andrew argues that even though the court erred in failing to find that a portion of Karen’s workers’ compensation settlement was nonmarital, it was harmless error because the court awarded the remainder of Karen’s annuity to her in any event so the “net result is the same”. Red Brief, page 9, fn. 2. That is a serious misstatement of the law. There is a three-step process that courts must follow for distributing property in a divorce. *Moran v. Moran*, 2022 ME 43, ¶ 12, 279 A.3d 385. The trial court must first distinguish marital property from nonmarital property, then set aside the nonmarital property before making a just division of marital property. *Id.* “The trial court has no discretion in the allocation of the nonmarital property; it must be transferred to the spouse to whom it belongs.” *Id.*, 2022 ME 42 at ¶ 13 (quoting *Laqualia v. Laqualia*, 2011 ME 114, ¶ 15, 30 A.3d 838). Since the court here failed to set aside the nonmarital portion of the workers’ compensation settlement to Karen before making an equitable distribution of the marital property, it erred as a matter of law. The court’s subsequent distribution of marital property was flawed because it then erroneously considered the remainder of the lump sum settlement to be part of the equitable distribution of marital property. As such, the court’s order must be vacated, and this case must be remanded to the District Court for further proceedings consistent with this Court’s decision.

II. THE DISTRICT COURT ERRED IN FINDING THAT THE REAL ESTATE AT 761 LEBANON ROAD WAS MARITAL PROPERTY, SINCE IT WAS PAID FOR WITH KAREN'S WORKERS' COMPENSATION SETTLEMENT.

Andrew does not dispute that Karen purchased the real estate at 761 Lebanon Road with a portion of her workers' compensation lump sum settlement. See Red Brief, page 5 ("Karen used the Wells Fargo annuity to purchase the Lebanon Road Property."). Because a significant portion of that annuity was intended to compensate Karen for future wage replacement benefits, the District Court erred in failing to set aside that real estate to Karen as her nonmarital property. Karen further made significant improvements to that property, increasing the value of that property by over $40,000.00. Transcript (hereinafter "Tr."), pages 122-124. Karen purchased the house for $36,500, Tr. at 122, and the court valued it at the time of the divorce at $93,100. App. at 17, ¶ 17. Andrew does not dispute Karen's claim that she paid for that property and that her efforts were responsible for the increase in value, nor does he argue that he provided any labor or funds to increase the value of the property. Because Karen purchased the Lebanon Road property with nonmarital funds and also made improvements to the property with "sweat equity" and nonmarital funds, the court erred in holding that the Lebanon Road house was marital property.

III. THE DISTRICT COURT ERRED IN DENYING KAREN'S MOTION FOR A NEW TRIAL BASED ON THE COURT'S PREVIOUS ATTORNEY-CLIENT RELATIONSHIP WITH KAREN.

Andrew argues, without citation to authority, that Karen's motion for a new trial was untimely. Red Brief, page 14. Andrew is incorrect. M.R.Civ.P. 59(b) provides that "[a] motion for a new trial shall be filed not later than 14 days after the entry of the judgment." The divorce judgment was entered on September 16, 2024. App. at 8. Karen's motion for a new trial was filed eleven days later, on September 27, 2024. App. at 9. Thus, Andrew's waiver argument is incorrect as a matter of law. Although Karen did not make an earlier motion for recusal of the trial judge, the court nonetheless reviews the denial of a motion for recusal for obvious error. *Samsara Mem'l Trust v. Kelly, Remmel & Zimmerman*, 2014 ME 107, ¶ 25, 102 A.3d 757.

Karen has acknowledged that she didn't file a motion for recusal earlier, as she did not recognize the judge until she saw his name on the divorce judgment. Although Andrew points to previous hearings held in the case where he argues Karen should have recognized Judge Ociepka (Red Brief, page 14), those hearings appear to have been discovery conferences or status conference hearings which are routinely handled by counsel in the absence of their clients. App. at 6 (9/1/23 "other hearing" appears to have been a discovery dispute; 10/31/23 was a pretrial/status conference); App. at 7 (1/11/24 hearing appears to have been a discovery dispute);

3/25/24 hearing was a pretrial/status conference). Contrary to Andrew's arguments, this does not "necessarily" mean that there "were at least four orders bearing the trial judge's signature that would have been shared with Karen." Red Brief, page 14. Again, routine orders on scheduling or discovery disputes are not necessarily shared with a client, and there is no evidence that Karen saw Judge Ociepka's signature on any order at an earlier time. Thus, this case is unlike *Charette v. Charette*, 2013 ME 4, 60 A.3d 1264, where the fact of the prior representation was known to the attorneys and parties. Here, Karen did not know her former lawyer was now a judge who would be hearing her divorce case. As such, the court's decision that Karen had waived her objection by failing to raise it sooner was an abuse of discretion. At the very least, the prior representation raises the appearance of impropriety, and it was an abuse of discretion for the court to deny Karen's motion for a new trial before an impartial judge.

IV. THE DISTRICT COURT ERRED IN VALUING THE 127 BOSTON ROAD PROPERTY AT $237,500 DESPITE UNREFUTED TESTIMONY REGARDING EXTENSIVE DAMAGE AND DISREPAIR THAT SIGNIFICANTLY REDUCED THE VALUE OF THAT PROPERTY.

Andrew again suggests that Karen cannot now complain about the judge's valuation of the 127 Boston Road property because she failed to file a motion for further findings of fact. As set forth above in Section I, such a motion is unnecessary and improper where the court's decision already makes specific factual findings, as was the case here.

Andrew testified, based solely on the tax-assessed value of the house, that he believed the house to be valued at $237,500; however, he did not dispute that there was significant damage to the property and that it could not be sold for its assessed value in its present condition. Tr. at 43-45, 48-49, 104-05. Moreover, Andrew had not seen the home since he moved out in November 2022, so his opinion of value was not based on the present condition of the house but the condition as it had existed two years earlier, which is contrary to the requirement that "[t]he value of the parties' property is determined as of the time it is to be distributed…." *Littell v. Bridges*, 2023 ME 29, ¶ 10, 293 A.3d 445 (citation omitted).

In contrast, Karen, who has prior experience as a carpenter and builder, testified to extensive damage to the home in need of significant repairs, as outlined in her primary brief on appeal. Her testimony was confirmed by the parties' son, Jarrod, who is working on repairs to the house with his roommate, who does not do the work for free as Andrew suggests, Red Brief, page 17, but in lieu of paying rent to live in the 761 Lebanon Road property. Tr. at 244. Given the unrefuted testimony that the 127 Boston Road residence was in a serious state of disrepair, it was clear error for the court to simply accept the assessed tax valuation of that property and find that the property's value was $237,500.

V. THE DISTRICT COURT ERRED IN FAILING TO MAKE A JUST AND FAIR DISTRIBUTION OF THE MARITAL PROPERTY.

Andrew argues that the District Court's erroneous finding that the parties had only one child together is insignificant, speculating on what the court may have "intended" to say rather than what it actually did say. Red Brief, page 18. The court's conclusion that the parties had only one child is clearly erroneous, as there were three children born of the marriage and Karen had a child from a previous relationship. Raising four children is exponentially more difficult than raising just one; however, Karen also managed to contribute to the parties' finances while at the same time raising their children while Andrew worked as a truck driver. Karen received money from Social Security Disability, as well as from plowing driveways, growing, canning, and selling vegetables, making and selling pickles, and babysitting.

Both the court and Andrew imply nefarious intent by Karen in managing the parties' finances; however, that arrangement was with Andrew's express agreement. It is certainly not uncommon for one spouse to manage a family's household expenses. Karen and Andrew talked about purchases, and Karen would determine whether they could afford them. Tr. at 112-13. Andrew purchased a Harley-Davidson after the couple's third child was born. *Id.* Indeed, Andrew has had several motorcycles over the course of the marriage, Tr. at 94-95, and the parties have purchased a number of other vehicles. See Tr. at 25-31 (2019 Chevy Silverado, 1946 Chevy RatRod, 1969

Cougar, 1984 Chevy Camaro, 2014 Honda Accord, 2012 Subaru Impreza, Kubota Tractor); Tr. at 81 (ATV Rancher purchased new in 2001). While the court expressed its belief that some of the money decisions that both parties made were not financially wise (Tr. at 18), that does not amount to misconduct.

As far as the parties' respective contributions to the family finances, Karen contributed some funds from her workers' compensation lump sum settlement received in 2010. Karen testified that from that settlement, she got $27,000 "seed money" and then could withdraw up to $600 per month. Tr. at 119-120. She testified that she spent some of it on vacations with the kids, bought the 761 Lebanon Road property with it, and paid $24,000 to have a solarium installed on the family home at 127 Boston Road (although the company never built the solarium and kept the $24,000). Tr. at 120. Andrew contributed a much smaller amount of funds from the settlement of a Roundup lawsuit in 2022. Karen did not, as Andrew's brief alleges (Red Brief, page 19), refuse to tell Andrew what she spent the Roundup money on; rather, Andrew testified that Karen told him that she spent the money on paying bills.[2]

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[2] Andrew's brief alleges that Karen spent $68,000 of the Roundup settlement funds and refused to tell Andrew where she spent it. Red Brief, page 19. That is not true. The settlement funds came in two checks: one for $48,300.48 in February 2022 and the second for $20,132.54 in July 2022. Exhibit 19. Andrew knew about the first check, but testified he was unaware of the second until he called his lawyers. Tr. at 20. Karen and Andrew discussed the first check of $48,000 and Andrew signed it. Tr. at 114-115. At that time, those funds went into a joint account and the parties bought cars for two of their sons and paid other bills. Tr. at 115-116.

Tr. at 20. It is undisputed that Andrew voluntarily signed a power of attorney in favor of Karen before he was hospitalized with COVID-19 in 2021. Tr. at 20, 61-62. It is not improper, as both Andrew and the court suggest, for Karen to have used that power of attorney to purchase a vehicle for the household. Andrew and the court both appear to imply that Karen used Andrew's Roundup settlement funds to purchase that vehicle (see Tr. at 20-21); however, that is impossible. Andrew was hospitalized from April to June 2021 (App. at 16, ¶ 11) and the vehicle was purchased in June 2021 (App. at 16, ¶ 12). Andrew did not receive his settlement checks from the Roundup litigation until February 4, 2022 and July 5, 2022 respectively. Exhibit 19. Despite Karen's alleged misuse of Andrew's power of attorney, of which Andrew became aware when he was released from the hospital two days after the car was purchased, Andrew made no effort to change their financial arrangements until after the couple had separated. Tr. at 68-69. That fact belies his self-serving assertions that he was unhappy with the couple's financial arrangements at the time.

In addition to failing to consider Karen's significant contributions to the marital property both in acting as homemaker, raising the parties' four children, and in contributing a large portion of her 2010 workers' compensation settlement funds to the parties' finances over the years, the District Court also erred in failing to consider Karen and Andrew's relative economic circumstances at the time of the divorce.

Andrew largely ignores Karen's argument on this issue,[3] again focusing on the Roundup settlement and ignoring the specific errors made by the Court in arriving at its conclusions as to the parties' economic circumstances. Andrew does not dispute Karen's point that Andrew receives $609 per month more in Social Security than does Karen. Andrew fails to even discuss the fact that Karen has been paying the mortgage on the marital home since November 2022 and thus, by the time of the divorce hearing, had paid nearly $22,000 toward the mortgage, to the benefit of both parties. The court made no adjustment in its calculations to take that significant contribution by Karen into consideration.

Andrew also does not deny that Karen's monthly expenses going forward are significantly higher than his own. The mortgage on the Boston Road home is $981.62 per month, whereas Andrew lives with his girlfriend and does not have a mortgage payment. Exhibit 3 at p. 8. Andrew's total monthly household expenses are $672.19, Exhibit 3, p. 9, while Karen's are $1,779.52.

Andrew also does not address the fact that after the parties separated, Karen had an accident in which she broke her back in February 2023. Tr. at 107. That injury

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[3] Andrew again argues that Karen cannot complain about the court's judgment because she failed to file a motion for further findings of fact. Because Karen has already addressed that argument twice herein, she will not do so again. Likewise, Karen will not rehash her previous response to Andrew's repeated false claim that Karen "deceived Andrew and spent his entire personal injury settlement without his consent or knowledge ($68,000+)." Red Brief, page 20.

makes it much more difficult for Karen to sustain her income either plowing snow or driving for Penquis CAP.

Andrew argues only that Karen has benefitted because she will retain physical possession of the marital home due to the "inherent value of real estate as a long-term investment." Red Brief, page 20. There is no evidence suggesting that the marital home is a good real estate investment that is likely to produce future income; on the contrary, the undisputed testimony was that the home is in very poor condition and needs extensive repair work to be marketable. Andrew argues that Karen's $200 per week income from the Lebanon Road property is additional income; however, that argument fails to take into account any maintenance expenses for the upkeep of that property, as well as the taxes, insurance, utilities and other expenses. Andrew also argues that Karen's medical set aside of $8,652 annually must be considered; however, a medical set aside by definition is intended to defray the medical expenses that Karen must incur as a result of her serious work-related injuries and subsequent surgeries, treatment and medication. Given the great disparity in the parties' economic circumstances, the District Court's division of marital property was neither fair nor equitable, and should be vacated.

CONCLUSION

For the foregoing reasons, the trial court's decision as to marital versus nonmarital property and division of marital property must be reversed. This Court should vacate the Judgment of Divorce and remand this matter to the District Court for a new trial before a different judge, given Judge Ociepka's previous attorney-client relationship with Karen. In the alternative, the Judgment should be vacated and the matter remanded to the trial court for further proceedings consistent with this Court's opinion.

Dated at Bangor, Maine this 28th day of July, 2025.

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of July, 2025, I caused one electronic copy of the Reply Brief to be served upon Appellee by sending it via electronic mail to the following address:

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