

NO. COA14-731

NORTH CAROLINA COURT OF APPEALS

Filed: 7 April 2015

ASHLEY COMSTOCK,

Plaintiff,

v.

Mecklenburg County

No. 10 CVD 12874

CHRISTOPHER COMSTOCK,

Defendant.

Appeal by defendant from orders entered 10 February 2014 and 7 March 2014 by Judge Ronald L. Chapman in Mecklenburg County District Court. Heard in the Court of Appeals 21 January 2015.

*Krusch & Sellers, P.A., by Rebecca K. Watts, for plaintiff-appellee.*

*Christopher Comstock, Pro Se.*

ELMORE, Judge.

Defendant appeals *pro se* from an injunction order freezing his IRA account, an equitable distribution order, and a domestic relations order. After careful consideration, we dismiss, in part; affirm, in part; and reverse, in part.

**I. Facts**

Ashley Comstock (plaintiff) and Christopher Comstock (defendant) married on 6 May 2002 and separated on 10 June 2010. Plaintiff filed a complaint for divorce from bed and board, child custody, child support, equitable distribution, and attorney's fees on 17 June 2010. The parties divorced on 16 December 2011 by a Judgment of Divorce entered in Mecklenburg County.

On 27 November 2012 and 22 March 2013, the trial court heard evidence and arguments related to the equitable distribution of the parties' marital and divisible property. The property and debt at issue during the hearing and on appeal include: a 2009 Ford Expedition acquired during the marriage, a USAA Investments brokerage account ending in 3120 acquired during the marriage and in defendant's sole name, plaintiff's wedding ring stipulated as marital property, a USAA whole life insurance policy owned by the parties during the marriage, a home equity line of credit (HELOC) on the date of separation on marital property located at 7505 Torphin Court in Charlotte, post-separation payments made by defendant on marital property located at 9630 Blossom Hill Drive in Huntersville, debt acquired through a USAA Mastercard ending in 5755 and a USAA Rewards American Express card both in defendant's individual name, and a U.S. Trust IRA.

After hearing arguments of counsel, hearing testimony of the parties, and reviewing the court file and exhibits presented, the trial court ordered, in pertinent part, that defendant owed plaintiff a distributive award of \$137,762.65 and \$20,000 in attorney's fees related to plaintiff's claim for child custody.

## II. Analysis

### Issues #11, #13, #14, and #15

We first address in unison defendant's issues #11, #13, #14, and a portion of #15 on appeal. For the following reasons, we dismiss these issues.

Pursuant to North Carolina Appellate Procedure Rule 28(a)(6), "[i]ssues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C. App. R. 28(b)(6). Accordingly, "it is the duty of appellate counsel to provide sufficient legal authority to this Court, and failure to do so will result in dismissal." *Moss Creek Homeowners Ass'n, Inc. v. Bissette*, 202 N.C. App. 222, 233, 689 S.E.2d 180, 187 (2010). This Court shall also dismiss issues, with few exceptions not applicable to the case at bar, if an appellant fails to preserve an issue for appellate review:

[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the

ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. App. R. 10(a)(1). Moreover, we generally dismiss "moot" issues. See *Kendrick v. Cain*, 272 N.C. 719, 722, 159 S.E.2d 33, 35 (1968). An issue is moot "[w]henver, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue[.]" *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978).

In the body of defendant's argument relating to issue #11 on appeal, he states, "[t]o add insult to injury, the trial court allowed [p]laintiff's trial attorney to essentially interject his belief of how debt should be classified in equitable distribution cases and how the trial court's evidentiary standards should be determined according to misplaced case law[.]" Defendant does not argue that the trial court committed legal error, he does not provide any legal authority in support of his contention, and his purported argument merely articulates his distaste towards the conduct of plaintiff's trial attorney.

In issue #13, defendant argues that the delayed entry of the equitable distribution order prejudiced him. However, defendant

points to absolutely no legal authority in support of his contention. He entirely fails to set forth the relevant standard of review and legal authority for determining whether a trial delay constitutes error. Defendant's argument merely contains his personal opinion about the delayed entry of the equitable distribution order and is devoid of any legal reasoning. Moreover, he fails to make any argument to show how the delay affected the outcomes of the findings or conclusions in the trial court's equitable distribution order. See *Wall v. Wall*, 140 N.C. App. 303, 314, 536 S.E.2d 647, 654 (2000).

In issue #14, defendant argues that the trial court erred by denying his presentation of evidence during the injunction and final equitable distribution trial hearing on 7 February 2014. However, defendant failed to preserve this issue for appellate review.

Defendant points us to the following colloquy in support of his position that the trial court erred by denying his presentation of evidence:

DEFENDANT: Well, Your Honor, as I also have delineated in the email, there is a substantial equity in the marital, former marital home.

THE COURT: Okay. And as I said in my response, saying about all (unintelligible), I can't do that because I'm bound by the evidence.

DEFENDANT: Are you not accepting evidence today, Your Honor?

THE COURT: No, we're finished with the evidence.

DEFENDANT: Okay.

THE COURT: We're just determining the wording of my judgment at this point[.]

It is clear from the colloquy above that defendant never objected to the trial court's ruling that he could not present any further evidence. Moreover, after reviewing the remaining portion of the 7 February 2014 hearing, defendant failed to make any objection related to the presentation of evidence.

The second portion of defendant's issue #15 relates to the trial court's alleged error by "grossing up" the award to plaintiff of \$137,762.65 to \$185,979.58 due to the early withdrawal penalty and taxation on the IRA proceeds. Although the equitable distribution order provided for a "grossing up" of the distributive award, the trial court entered an Amended Domestic Relations Order on 12 August 2014, which ordered a transfer of \$157,762.65 from defendant's IRA to plaintiff. This amount represents the \$137,762.65 distributive award and \$20,000 in attorney fees. Thus, the "grossing up" amount was never included in the actual transfer of funds. As such, even if the trial court erred by "grossing up"

the distributive award in the equitable distribution order, the issue is moot at this point in light of the superseding Amended Domestic Relations Order.

For the foregoing reasons, we dismiss issues #11, #13, #14, and a portion of #15 on appeal.

**Issue #1: The Equitable Distribution Judgment**

First, defendant argues that the trial court's equitable distribution judgment is fatally defective because many of the findings contain "evidentiary" facts rather than "ultimate" facts. We disagree.

In equitable distribution actions, the trial court must conduct a three-pronged analysis: "(1) identify the property as either marital, divisible, or separate property after conducting appropriate findings of fact; (2) determine the net value of the marital property as of the date of the separation; and (3) equitably distribute the marital and divisible property." *Mugno v. Mugno*, 205 N.C. App. 273, 277, 695 S.E.2d 495, 498 (2010).

Moreover, a trial court must "make written findings of fact that support the determination that the marital property and divisible property has been equitably divided." N.C. Gen. Stat. § 50-20(j) (2013). Findings of fact can be "ultimate" or "evidentiary" in nature. *Smith v. Smith*, 336 N.C. 575, 579, 444

S.E.2d 420, 422-23 (1994) (citation and quotation marks omitted).

"Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove ultimate facts." *Id.* (citation and quotation marks omitted). A trial court's order

does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts[.] [I]t does require *specific findings* of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.

*Williamson v. Williamson*, 140 N.C. App. 362, 364, 536 S.E.2d 337, 338-39 (2000) (citation and quotation marks omitted).

Here, the "ultimate" facts are facts that address the requirements of the three-pronged analysis: identification of the property as marital, divisible, or separate, a determination of the date of separation value of the property, and a determination of the distribution of the property. The "evidentiary" facts are facts upon which the "ultimate" facts regarding classification, value, and distribution are based.

The equitable distribution order in this case appropriately contains both "ultimate" and "evidentiary" findings necessary for

us to review whether the property was equitably divided. Accordingly, defendant's argument fails because the equitable distribution judgment is not "fatally defective." See *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982) ("[P]roper finding of facts requires a specific statement of the facts on which the rights of the parties are to be determined, and those findings must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment.").

**Issue #2: 2009 Ford Expedition**

Defendant argues that the trial court's finding of fact #12 that the 2009 Ford Expedition had a net value of \$11,890 was not supported by competent evidence. While we agree with defendant, he has failed to establish any prejudicial error.

"In reviewing a trial judge's findings of fact, we are 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.'" *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)); see also *Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010)

("`[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.'" (quoting *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008))).

Stipulations are judicial admissions and are binding upon the parties absent well-established exceptions not relevant to the present case. *Quesinberry v. Quesinberry*, 210 N.C. App. 578, 582, 709 S.E.2d 367, 371 (2011). "A stipulated fact is not for the consideration of the jury, and the jury may not decide such fact contrary to the parties' stipulation." *Smith v. Beasley*, 298 N.C. 798, 801, 259 S.E.2d 907, 909 (1979). In a non-jury trial, a trial court "acts as both judge and jury, thus resolving any conflicts in the evidence." *Matter of Oghenekevebe*, 123 N.C. App. 434, 439, 473 S.E.2d 393, 397 (1996).

During the marriage, the parties acquired a 2009 Ford Expedition. The trial court classified the vehicle as marital property. In the Final pretrial Order, the parties stipulated that the vehicle should be distributed to defendant. The trial court was also bound by the parties' stipulation that the loan balance on the vehicle was \$21,235.05. Instead, the trial court's loan balance value in its order is \$19,560. The trial court calculated the vehicle's net value of \$11,890 to be distributed to

defendant by taking the date of separation value of \$31,450 (Kelley Blue Book value presented by plaintiff) less the unstipulated loan amount of \$19,560. Had the stipulated loan amount been used in the calculation, the net value to be distributed to defendant for the vehicle would have been \$10,214.95, resulting in a difference of \$1,675.05.

The trial court found the total marital estate to be \$286,229.30 (\$280,877.30 distributed to defendant + \$5,352 to plaintiff). A reduction in defendant's distribution by \$1,675.05 would have changed the marital estate's value to \$284,554.25 (\$279,202.25 distributed to defendant + \$5,352 to plaintiff). The \$1,675.05 value is 0.6% of the adjusted value of the marital estate, which constitutes a *de minimis* error. As such, the trial court's erroneous calculation does not warrant reversal. However, because we reverse and remand this matter on issue #6, the trial court should also correct and apply this finding on remand. See *Dechkovskaia v. Dechkovskaia*, \_\_ N.C. App. \_\_, \_\_, 754 S.E.2d 831, 835 (2014), *review denied*, \_\_ N.C. App. \_\_, \_\_, 758 S.E.2d 870 (2014) (holding that for a marital estate worth \$591,702, a \$5,000 calculation error in the value of the marital residence was *de minimis*).

Defendant also argues that the trial court assigned an erroneous fair market value to the vehicle of \$31,450 because it based this figure on plaintiff's testimony of the "Kelley Blue Book valuation with the incorrect model year, accessories, condition, and mileage inputs. [Defendant] provided a valuation of \$28,170[.]" We disagree.

In making findings of fact, "[t]he fact that the trial judge believed one party's testimony over that of the other and made findings in accordance with that testimony does not provide a basis for reversal in this Court." *Woncik v. Woncik*, 82 N.C. App. 244, 248, 346 S.E.2d 277, 279 (1986).

Defendant essentially asks this Court to re-weigh the evidence on appeal, which we are unable to do. Competent evidence presented by plaintiff showed that the Kelley Blue Book value of the vehicle at the date of separation was \$31,450. *See State v. Dallas*, 205 N.C. App. 216, 220, 695 S.E.2d 474, 477 (2010) (holding that "the use of the Kelley Blue Book for determining the value of [vehicles]" is admissible). Nothing in the record indicates that plaintiff relied on a value based on the incorrect vehicle and inputs. Accordingly, the trial court's valuation of the vehicle will remain undisturbed.

**Issue #3: USAA Investments Brokerage Account**

Next, defendant argues that the trial court erred by finding that the USAA Brokerage Account ending in 3120 and valued at \$85,670 was marital property. We disagree.

"[T]he distribution of marital property is within the sound discretion of the trial court and will not be overturned absent an abuse of discretion." *O'Brien v. O'Brien*, 131 N.C. App. 411, 416, 508 S.E.2d 300, 304 (1998). The equitable distribution process requires that the trial court initially classify all of the distributable property as either marital, separate, or divisible. N.C. Gen. Stat. § 50-20(a) (2013). Marital property includes "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of separation of the parties." *Simon v. Simon*, \_\_ N.C. App. \_\_, \_\_, 753 S.E.2d 475, 478 (2013) (citation and quotation marks omitted).

Separate property includes:

all real and personal property acquired by a spouse before marriage or acquired by a spouse by devise, descent, or gift during the course of the marriage. However, property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance.

N.C. Gen. Stat. § 50-20(b)(2) (2013). The party seeking to classify the property as marital must show by a preponderance of the evidence "that the property: (1) was acquired by either spouse

or both spouses; and (2) was acquired during the course of the marriage; and (3) was acquired before the date of the separation of the parties; and (4) is presently owned." *Langston v. Richardson*, 206 N.C. App. 216, 220, 696 S.E.2d 867, 871 (2010) (citation and quotation marks omitted). If the party meets this burden, the opposing party seeking to show that the property is separate must then prove by a preponderance of the evidence

that the property was: (1) acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage (third-party gift provision); or (2) acquired by gift from the other spouse during the course of marriage and the intent that it be separate property is stated in the conveyance (inter-spousal gift provision); or (3) was acquired in exchange for separate property and no contrary intention that it be marital property is stated in the conveyance (exchange provision).

*Id.* at 220-21, 696 S.E.2d at 871 (citation and quotation marks omitted). Here, there is no dispute that the account was acquired by defendant in 2007, during the marriage, and that it was in existence at the time of separation. Thus, the dispositive question is whether the trial court erred by ruling that defendant did not meet his burden of showing that the account was separate property.

Upon a review of the record, defendant presented evidence tending to show that the brokerage account had some separate

property attributes. He testified that the funds in that account were inherited from his mother. He also recalled establishing the account with the inherited funds and always kept the inherited funds in a separately held account in his own name (the account at issue here was in defendant's name only).

However, as defendant concedes in his brief, he was unable to trace the funds in this account back to the 2007 inherited funds because he "had forgotten to deposit the funds since the time [he] inherited the funds[.]" Evidence at trial established that defendant cashed two checks for the inherited funds within three days prior to 3 July 2007 and 18 January 2008 for \$113,409.48 and \$3,402.47, respectively. The funds in the account appear to stem from deposits made during the course of 2008, with the first deposit being made 29 January 2008 for \$52,000.

Accordingly, competent evidence in the record supports the trial court's finding that the USAA Brokerage Account ending in 3120 and valued at \$85,670 was marital property. See *Minter v. Minter*, 111 N.C. App. 321, 329, 432 S.E.2d 720, 725 (1993) ("[A]n equitable distribution order will not be disturbed unless the appellate court, upon consideration of the cold record, can determine that the division ordered . . . has resulted in a[n] obvious miscarriage of justice.").

**Issue #4: The Wedding Ring**

Defendant challenges the trial court's distribution of the wedding ring, arguing that 1.) no credible evidence was offered to support the finding that defendant had possession of the ring and 2.) the finding was incongruent with the trial court's oral statement during trial that no sufficient evidence supported a finding that defendant took the ring. We disagree. We initially note that defendant does not dispute that plaintiff's wedding ring is marital property valued at \$5,000.

After reviewing the record, competent evidence supported the trial court's finding that defendant kept the ring after separation and had possession of the wedding ring at the time of trial. Plaintiff testified that on 1 September 2010, she placed the ring in a jewelry box under the sink in her bathroom. While she was out of the house that day, defendant entered her residence and removed items from the house. When plaintiff returned to the residence, she checked the jewelry box and found that the ring was missing. As of the trial date, plaintiff had not located the ring. Thus, defendant's argument fails.

With regard to the conflict between the trial court's oral statement during trial that no sufficient evidence supported a finding that defendant took the ring and the trial court's order

finding that defendant "kept the ring and said ring was in [defendant]'s possession at the time of trial", the written finding of fact in the trial court's order controls. The trial court initially made its oral statement on the first day of trial, before all of the evidence was presented and issues were ruled upon. Later at trial, evidence was presented that brought into question defendant's credibility. After weighing the credibility of the witnesses and the evidence in totality, the trial court entered a final order reflecting its findings. Defendant essentially attempts to appeal from the trial court's oral ruling, which is impermissible under the circumstances of this case. *See In re Hawkins*, 120 N.C. App. 585, 587, 463 S.E.2d 268, 270 (1995) (holding that the trial court had not entered a final order from which an appeal could be taken when it made an oral ruling during trial because it had not ruled on all issues); *see also* N.C. R. Civ. P. § 1A-1, Rule 58 (2013) ("[J]udgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court."). Accordingly, we overrule defendant's argument on appeal.

**Issue #5: "Testimony" of Plaintiff's Attorney**

Next, defendant argues that the trial court erroneously overruled his objection to plaintiff's attorney's recitation of

past orders to establish evidence that defendant had possession of the wedding ring in violation of North Carolina Civil Procedure Rule 46. We disagree.

Even accepting defendant's argument as true, such error was not prejudicial because we have already established above that plaintiff's testimony provided competent evidence in support of the trial court's finding that defendant had possession of the ring at the time of trial, notwithstanding the alleged conduct of plaintiff's trial attorney. Accordingly, defendant's argument fails.

**Issue #6: USAA Whole Life Insurance Policy**

Defendant also argues the trial court erred in finding that the parties stipulated that the USAA Whole Life Insurance policy was marital property and by concluding that the policy value should be distributed to defendant. We agree.

After reviewing the record, the parties did not stipulate that the policy was marital. The parties offered conflicting testimony on this issue and defendant contended that the policy was separate. Because the purported stipulation was the only finding in support of the trial court's distribution of the policy to defendant as marital property in the amount of \$32,428, the distribution was also made in error. Accordingly, we reverse these

portions of the order (finding of fact #33 and conclusion of law #9a) and remand to the trial court to: 1.) consider the evidence presented with regard to the policy, 2.) classify the policy as marital, separate, or divisible, and 3.) distribute the policy value accordingly.

**Issue #7: Home Equity Line of Credit (HELOC)**

Next, defendant argues that the trial court erred in its finding that the HELOC was defendant's separate debt. We disagree.

Marital debt is "one incurred during the marriage and before the date of separation by either spouse or both spouses for the joint benefit of the parties." *Becker v. Becker*, 127 N.C. App. 409, 414, 489 S.E.2d 909, 913 (1997) (citation and quotation marks omitted). The party claiming that debt is marital carries the burden of proof to show "the value of the debt on the date of separation and that it was incurred during the marriage for the joint benefit of the husband and wife." *Id.* at 415, 489 S.E.2d at 913. (citation and quotation marks omitted)

Here, defendant alleged the HELOC was marital debt. There is no dispute that the HELOC existed on the date of separation in the amount of \$38,938. Thus, the dispositive issue is whether defendant met his burden of showing that the debt was for the joint

benefit of the parties. Defendant testified that plaintiff was aware of the HELOC and

[w]e basically used them to live and build stuff around the house. I mean, we spent a lot of money at Lowe's, I fixed things the way she wanted them, working around the house, in the yard. . . . [I]t was spent around the house. . . . [We] built a tree house for the boys in the back yard[.]

However, plaintiff testified that she was never aware that defendant acquired the HELOC, never signed the paperwork on the HELOC, and she only learned about the debt after they separated. She further testified that she did not know for what purpose defendant used the HELOC money.

After weighing the credibility of the parties' testimony, the trial court, in its discretion, ultimately concluded that defendant failed to meet his burden and ruled that the debt was separate. The trial court's finding on this issue was supported by competent evidence. Thus, the trial court did not err by finding that the debt was separate.

**Issue #8: Alleged Post-Separation Debt Payments Associated with Blossom Hill Drive Property**

Next, defendant argues that the trial court erred by failing to credit defendant with post-separation debt payments made in the amount of \$5,334. His argument hinges on the premise that the post-separation debt payments were used to keep the property at

9630 Blossom Hill Drive out of foreclosure due to plaintiff's alleged limited or non-payment of HOA dues from July 2010 until March 2012 while she lived in the home. Accordingly, defendant challenges the trial court's finding that when plaintiff lived in the home, she "paid the . . . HOA dues . . . for the home" as being unsupported by competent evidence.

However, plaintiff testified that in August 2009 the couple purchased the Blossom Hill Drive property. On the date of separation (10 June 2010) they both lived at that address, but after separation plaintiff lived there until 15 March 2012. From 10 June 2010 until 15 March 2012 plaintiff stated that she paid the monthly mortgage amount of \$980 and the monthly HOA fees of \$110 and that the mortgage and HOA fees were fully paid when she moved out of the house. Thus, defendant's argument fails.

Defendant also argues that the trial court made inadequate findings regarding his post-separation debt payment of \$5,334 to repurchase the property from HOA lien foreclosure. He contends that the trial court was required to give defendant a dollar for dollar credit in the division of the property, order that plaintiff reimburse defendant, or treat his payments as distributional factors. We disagree.

"The trial court is required to consider all debts of the parties in determining an equitable distribution." *Edwards v. Edwards*, 110 N.C. App. 1, 12-13, 428 S.E.2d 834, 839 (1993). "If the debt is marital, the court has discretion to apportion or distribute the debt in an equitable manner." *Id.* at 13, 428 S.E. 2d. at 839.

Although the trial court found that "in or about February 2013 [defendant] made a payment of \$5,334 to repurchase said property from the homeowner's association[,] " there is no finding to indicate how or whether it considered those payments in equitable distribution. The trial court found that:

the home should be distributed to [defendant].  
. . . [T]he Court values said home at \$0 due to the pending foreclosure proceedings. . . .  
[T]he Court is also valuing the debt associated with the home at \$0 because it appears as though said debt will be discharged in the foreclosure and neither party will actually pay said debt.

However, the trial court was not required to make findings related to its consideration of the \$5,334 payment in its equitable distribution order. It is undisputed that the outstanding HOA fees owed to the HOA were for the time period on and after March 2012, which was after the date of the parties' separation. Defendant makes no argument that the HOA payments were made towards a divisible or marital debt. Because defendant failed to carry

his burden, the trial court was not required to consider the \$5,334 payment as a distributional factor in its equitable distribution order.

Moreover, defendant has failed to show that he can receive credit or reimbursement for his payment under these circumstances. See *id.* at 11, 428 S.E.2d at 839. ("Defendant does not argue that these [expenses] were marital debts, so she is not entitled to credit on that ground."). Thus, defendant's argument fails.

**Issues #9, #10: Credit Card Debt**

Defendant's next arguments are interrelated and will thus be discussed in unison. Defendant argues that the trial court erred in finding that a portion of the debt in USAA MasterCard credit card debt account ending in 5755 and a USAA Rewards American Express credit card debt account ending in 4791 were defendant's separate debt. We disagree.

During the marriage, defendant acquired debt with the MasterCard (which was in his individual name). Although defendant challenges the methodology by which the trial court classified the MasterCard debt as marital or separate, he does not challenge the total balance of the debt at the date of separation being \$13,101 or the charged amounts found on Plaintiff's Exhibit 33, which is a spreadsheet that was offered during trial to show credit card

charges by defendant purportedly used for "women[,] " including websites, dating, hotels, strip clubs (\$11,652.78); "alcohol" (\$1,377.49), "cigars," and "gambling."

After reviewing the specific nature of the charges, the trial court found that defendant failed to meet his burden of proving that the charges related to "women" and "alcohol" were incurred for the joint benefit of the parties. Thus, it found that \$13,030.27 was defendant's separate debt on the MasterCard.

Similarly, with regard to the American Express credit card debt, the card was in defendant's individual name. The uncontested date of separation balance on the card was \$14,536. Plaintiff's Exhibit 34 was a spreadsheet that listed the same categories of charges incurred by defendant in Exhibit 33. The trial court found, without dispute, that the amounts allocated to "women" were \$1,749.56 and \$2,787 to "gambling[," respectively. The trial court once again determined that defendant failed to meet his burden to establish that these two categories were for the joint benefit of the parties and accordingly classified them as defendant's separate debt totaling \$4,536.56.

As previously discussed, because defendant sought to classify the credit card debt as marital, he carried the burden of proof at trial on this issue. The trial court as the finder of fact had

the authority to believe none, some, or all of the parties' testimony. After considering the evidence presented by plaintiff and defendant, the trial court, within its discretion, concluded that defendant failed to meet his burden of proof to establish that the portions of the MasterCard and American Express credit card debt were marital. Defendant has also failed to provide any legal authority to demonstrate that the trial court abused its discretion in making such determinations. Thus, his arguments fail.

**Issue #12: Other Alleged Post-Separation Debt Payments**

Next, defendant argues that the trial court erred by failing to make adequate findings of fact and conclusions of law regarding \$76,981 in post-separation debt payments made by defendant. Defendant contends that he made post-separation payments of \$59,790 for Trophin Court mortgage payments, payments on a HELOC secured on that property (\$3,000), HOA fees associated with that property (\$1,170), and two credit card accounts (\$13,021). He further claims that he paid these post-separation debts from the USAA Investment Brokerage Account ending in 3120. As such, he avers that the trial court was required to give defendant a dollar for dollar credit in the division of the property, order that

plaintiff reimburse defendant, or treat his payments as distributional factors. We disagree.

"A spouse is entitled to some consideration, in an equitable distribution proceeding, for any post-separation payments made by that spouse (*from non-marital or separate funds*) for the benefit of the marital estate." *Shope v. Pennington*, \_\_ N.C. App. \_\_, \_\_, 753 S.E.2d 688, 690 (2014) (citation and quotation marks omitted). A defendant is not entitled to credit "for those payments toward marital debt if those payments were made using marital funds." *Id.*

Fatal to defendant's argument is that he claims he made post-separation payments from the USAA Investment Brokerage Account. The trial court found, and we agreed, in issue #3 above, that this account was marital property. Thus, assuming *arguendo* that defendant in fact made the alleged post-separation payments, he has nevertheless failed to establish that the source of these payments was from his separate funds. Accordingly, the trial court was not required to give defendant credit for his alleged post-separation payments in the equitable distribution proceeding. Thus, defendant's argument fails.

**Issue #15: U.S. Trust IRA**

Defendant argues that the trial court erred by ordering that more than 50% of the U.S. Trust IRA's value be awarded to plaintiff in violation of N.C. Gen. Stat. § 50-20.1 (2013). We disagree.

In relevant part, the trial court found:

32. [Defendant] is the owner of a U.S. Trust IRA which consists of funds that [he] inherited from his parents. The date of separation value of said IRA was \$234,987. The parties have stipulated, and the Court so finds, that said IRA is [defendant's] separate property.

According to the provisions of N.C. Gen. Stat. § 50-20, "the court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties in accordance with the provisions of this section." N.C. Gen. Stat. § 50-20 (2013). Thus, the trial court must distribute the marital and divisible property. *Id.* Accordingly, N.C. Gen. Stat. § 50-20.1 contemplates the equitable distribution of those marital portions of pension and retirement benefits. The statute restricts a trial court from awarding a party more than 50% of the marital portion of the earning party's benefits with some limited exceptions. N.C. Gen. Stat. § 50-20.1.

Here, the U.S. Trust IRA was not a marital asset as the parties stipulated that it was defendant's separate property. As

such, it was not subject to division through equitable distribution, and the restrictions in N.C. Gen. Stat. § 50-20.1 do not apply. However, defendant's U.S. Trust IRA, a separate liquid asset, was available as a resource from which the trial court could order a distributive award. See *Sauls v. Sauls*, \_\_ N.C. App. \_\_, \_\_, 763 S.E.2d 328, 331-32 (2014). Thus, defendant's argument fails.

**Issue #16: Attorney's Fees**

Defendant argues that the trial court erred by awarding attorney's fees to plaintiff because plaintiff failed to offer any competent evidence to suggest that defendant refused to provide support that was adequate under the circumstances. We disagree.

In relevant part, pursuant to N.C. Gen. Stat. § 50-13.6 (2013), the trial court in a proceeding for custody or support "may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit." However,

[b]efore ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; provided however, should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable

attorney's fees to an interested party as deemed appropriate under the circumstances.

*Id.* Here, the trial court ordered defendant to pay a portion of plaintiff's attorney's fees related to her successful child custody claim. The trial court found that "[plaintiff] is an interested party acting in good faith who does not have sufficient means to defray the expense of this action and is entitled to an award of attorney's fees to be paid by [defendant]" for "fees related to her claim for child custody[.]" Because the attorney's fees were not awarded as a result of a child support action, the trial court was not required to make a finding that defendant refused to provide adequate support under the circumstances. Thus, defendant's argument fails.

**Issues #17, #18: Injunction/Order Freezing Defendant's IRA Account and Domestic Relations Order**

Finally, defendant's issues #17 and #18 relate to alleged errors arising from the trial court's order entitled "injunction/order freezing defendant's IRA account" and the domestic relations order. However, defendant's appeal from the injunction order and domestic relations order are interlocutory. Although N.C. Gen. Stat. § 50-19.1 (2013) allows for a party to appeal from an order "adjudicating a claim for absolute divorce, divorce from bed and board, child custody, child support, alimony,

or equitable distribution" despite the pendency of other claims in the same action, an injunction order and domestic relations order are not included on the list of immediately appealable interlocutory orders. See N.C. Gen. Stat. § 50-19.1.

There is no indication from the record that all of the claims brought by the parties have been resolved, thus making the orders in question interlocutory. Defendant does not articulate any argument that the domestic relations order or the injunction order affects a substantial right. Thus, we dismiss these issues on appeal.

Assuming *arguendo* that defendant's appeal from the injunction order and the domestic relations order is properly before this Court, his argument nevertheless fails. Defendant argues that because the equitable distribution order is fatally defective, the trial court's subsequent injunction order and domestic relations order constitute reversible error. However, we previously ruled in issue #1 that the equitable distribution order is not fatally defective. Thus, defendant cannot prevail on this issue.

### **III. Conclusion**

In sum, we dismiss defendant's issues #11, #13, #14, and a portion of #15. We also dismiss defendant's appeal as it pertains

to issues #17 and #18 because they arise from the injunction order and domestic relations order, which are both interlocutory.

We reverse the equitable distribution order as it relates to the USAA Whole Life insurance policy (issue #6) and remand for classification and appropriate distribution. We also remand to correct the loan balance value of the 2009 Ford Expedition (issue #2) on the order. Finally, we affirm all other portions of the equitable distribution order to the extent that they remain unaffected by our rulings with regard to issues #2 and #6.

Dismissed, in part; affirmed, in part; reversed, in part.

Judges DAVIS and TYSON concur.