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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-186

Filed: 2 January 2018

Rowan County, No. 10 CVD 2646

MATTIE ARLENE HANKINS, Plaintiff,

v.

DONALD REID HANKINS, Defendant.

Appeal by Defendant from judgment entered 15 August 2016 by Judge Marshall Bickett in District Court, Rowan County. Heard in the Court of Appeals 21 August 2017.

Lisa S. Costner, P.A., by Lisa S. Costner, for Plaintiff-Appellee.

Bailey & Ryan, PLLC, by Nora Ryan, for Defendant-Appellant.

McGEE, Chief Judge.

Donald Reid Hankins ("Defendant") appeals from an equitable distribution judgment that, *inter alia*, classified certain properties as marital property subject to equitable distribution with his former wife, Mattie Arlene Hankins ("Plaintiff"). We affirm in part, reverse in part, and remand in part.

I. Background

Plaintiff and Defendant were married on 16 September 1981. They separated on 20 March 2010, and were divorced on 27 September 2011. At trial, Defendant testified that, shortly before their marriage, he and Plaintiff signed a prenuptial agreement ("the prenuptial agreement") that, *inter alia*, dictated the following in regard to the residence they shared as husband and wife:

> 6. [Defendant] . . . will execute a deed within a reasonable time, not exceeding ninety (90) days, subsequent to solemnization of the intended marriage of the parties, conveying a one-half undivided interest in the real property and structures located thereon at 109 Stonewall Road, Salisbury, North Carolina, to [Plaintiff], . . . and that [Plaintiff] will assume, in an appropriate manner immediately upon execution of said conveyance by [Defendant], [f]ifty (50) percent of the outstanding debt arising out of the acquisition of said property by [Defendant].

The deed was never executed and 109 Stonewall Road remained titled in Defendant's name only. Defendant testified he thought "the attorney" had "taken care" of preparing the deed and "it was never questioned after that."

The prenuptial agreement further stated that each party would retain "all the properties of any name or nature, real, personal, or mixed" that belonged to each party before the marriage, and that said property would "remain forever his [or her] personal estate, and that this shall include all interest, profits and rents which may in time accrue, or result in any manner from increase in value, or be collected for use of the same in any way."

Plaintiff filed a complaint for divorce and equitable distribution on 28 June 2010. The trial court entered a Final Equitable Distribution Pretrial Order (the

"pretrial order") on 26 November 2014. The pretrial order listed the parties' agreements and disagreements regarding their property. The Burley Drive property and the marital residence located at 109 Stonewall were included in "Schedule B" of the pretrial order, indicating "Plaintiff and Defendant have an agreement that said property is marital and agree to its distribution but not its value." A Vanguard Money Market account with a balance of $27,421.00 was included on "Schedule E" of the pretrial order, indicating "Plaintiff and Defendant have a disagreement as to whether said property is marital."

In addition to the marital home located at 109 Stonewall Road, Defendant owned several properties prior to the marriage, and continued to own those properties during the marriage. The following properties are relevant to this appeal: 8527 Burley Drive and 8532 Burley Drive (collectively, the "Burley Drive property"), and Unit 306 at Wiltshire Village. Defendant purchased the Burley Drive property in 1972 with two business partners, whose interest he eventually purchased. There was a house located on the 8532 Burley Drive property when it was purchased and the 8527 Burley Drive property was vacant. Defendant testified there was $34,000.00 remaining on the mortgage for the Burley Drive property when he married Plaintiff in 1981.

Defendant rented out the house located at 8532 Burley Drive, both before and during the marriage, for an average of $1,200.00 a month. The rent proceeds were paid to Defendant, which he used to pay, among other things, household bills and

college tuition for the parties' children. Defendant also made improvements at 8532 Burley Drive, before and during the marriage, including rebuilding a pier that had been destroyed in a hurricane. Defendant used funds inherited from his grandmother and from his real estate investment company, Hankins House, to make the improvements. During the marriage, Defendant and Plaintiff purchased a trailer that they placed at 8527 Burley Drive and rented to tenants.

Prior to marriage, Defendant set up a bank account (the "Hankins House account") into which rental payments were deposited and from which mortgage payments were paid. The mortgage on 8532 Burley Road was paid in full in 1992 with funds from the Hankins House account. Defendant testified that "money that came in to Hankins House was rechanelled [sic] and used where it was needed, whether it was to make another investment, or to make repairs or what have you." Defendant testified that "[t]he Hankins House account was always separate, although [Plaintiff] wrote checks out of it to pay bills . . . with [Defendant's] authority[.]" Defendant further testified that he and Plaintiff each wrote checks from the "Hankins Marketing accounts," and that he and Plaintiff each had a personal checking account, as well as joint certificates of deposit, and stock that they jointly owned.

Defendant presented evidence of three Vanguard accounts: (1) a REIT Index Fund Investor Shares account, (2) an Intermediate-Term Bond Index Fund Investor Shares account, and (3) a Prime Money Market Fund account. The Prime Money

Market Fund account had a value of $100,330.00 and included a deposit of $55,000.00 on 30 March 2004 from the sale of 511 Iredell. Defendant also testified that he "wrote a check out of [his] Vanguard [money market] fund" to pay for a 2007 Chrysler vehicle.

The trial court entered an Equitable Distribution Judgment ("the judgment") on 15 August 2016. In the judgment, the trial court found as fact that: (1) the Burley Drive property "w[as] purchased by [] Defendant prior to the marriage with [] Defendant's separate funds[;]" (2) because "Defendant failed to adequately trace the source of any separate funds to pay for" improvements to the Burley Drive property, Defendant had a $182,580.00 separate interest in the Burley Drive property, while the remaining $443,420.00 value of the property was marital and subject to equitable division; (3) the marital residence at 109 Stonewall Road was marital property; and (4) $16,750.00 of the value of Unit 306 Wiltshire Village was separate property of Defendant, while the remaining $49,250.00 in value was marital property. The trial court also found that "an unequal division of <u>marital and divisible</u> assets <u>and debts</u> would be equitable[.]" The trial court concluded as a matter of law that "an unequal division of the property as provided below [was] equitable and fair considering all of the evidence and the statutory factors." The trial court then listed the property it was distributing to each party. Defendant appeals.

II. <u>Analysis</u>

Defendant argues the trial court erred by: (1) failing to determine which property was controlled by the prenuptial agreement and in classifying the Burley Drive property as "70.834 percent" marital property although it was owned by Defendant prior to the marriage; (2) classifying the property at 109 Stonewall Road as marital; (3) finding the property at Unit 306 Wiltshire Village to be partly marital; (4) finding Defendant's Vanguard Money Market Account to be marital, and in finding the 2007 Chrysler vehicle paid for from that account to be marital; (5) failing to make any findings of fact regarding the classification or valuation of the 550 shares of Merrill Lynch; and (6) failing to enter specific findings of fact with regard to the distributional factors listed in N.C. Gen. Stat. § 50-20(c).

A. *Prenuptial Agreement — Burley Drive Property*

Defendant argues the prenuptial agreement was valid and binding, and that the trial court erred in not correctly enforcing the agreement. Defendant further argues that, if the prenuptial agreement is enforced correctly, the Burley Drive property is his separate property and not subject to equitable distribution. "The standard of review on appeal from a judgment entered after a non-jury trial is 'whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.'" *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (quoting *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (2001)), *disc. review denied*, 356 N.C. 434, 572 S.E.2d 428 (2002).

"The principles of construction applicable to contracts also apply to premarital agreements[.]" *Cooke v. Cooke*, 185 N.C. App. 101, 106, 647 S.E.2d 662, 665 (2007) (citation omitted). "Like other contracts, if [a premarital] agreement is not ambiguous, it should be construed in accordance with its wording to effectuate the intention of the parties as it existed at the time of the execution of the agreement." *Stewart v. Stewart*, 222 N.C. 387, 391, 23 S.E.2d 306, 309 (1942). "In interpreting contract language, the presumption is that the parties intended what the language used clearly expresses, and the contract must be construed to mean what on its face it purports to mean." *Stewart v. Stewart*, 141 N.C. App. 236, 240, 541 S.E.2d 209, 212 (2000) (citation omitted).

In the present case, the relevant portion of the prenuptial agreement states:

> [A]ll the properties of any name or nature, real, personal, or mixed, wherever they may be found, belonging to [Defendant] before marriage shall be and remain forever his personal estate, and that this shall include all interest, profits and rents which may in time accrue, or result in any manner from increase in value, or be collected for use of the same in any way.

Defendant argues that, because the Burley Drive property was owned by him prior to the marriage (as set forth in the prenuptial agreement), the Burley Drive property was his separate property and not subject to equitable distribution. We agree. It is undisputed that the Burley Drive property was purchased by Defendant prior to the marriage. The relevant portion of the prenuptial agreement states that "all . . . properties of any name or nature" that belonged to Defendant before his marriage to Plaintiff "shall be and remain forever his personal estate[.]" The

prenuptial agreement further provided that "all interest, profits and rents [from said property] which may in time accrue, or result in *any manner* from increase in value" shall likewise be considered separate property. (emphasis added). In order to give effect to the plain language of the prenuptial agreement, we hold the Burley Drive property is the separate property of Defendant.

Although Plaintiff contends this case is like *McIntyre v. McIntyre*, 188 N.C. App. 26, 654 S.E.2d 798 (2008), we find *McIntyre* to be distinguishable. In *McIntyre*, the parties signed a prenuptial agreement in which the husband

> release[d], renounce[d] and forever quitclaim[ed] to [the wife] all right, title, interest, claim and demand whatsoever including all marital rights in the real estate and personal property of [the wife] and agrees that [the wife] may at all times hereafter purchase, acquire, own[,] hold, possess, encumber, dispose of and convey any and all kinds and classes of property, both real and personal, as though still unmarried and without the consent, joinder or interference of [the husband].

Id. at 28, 654 S.E.2d at 799. The prenuptial agreement contained an identical clause in which the wife released all claims to the husband's property. *Id.* at 28, 654 S.E.2d at 799-800. This Court held that the agreement was ambiguous as to whether the parties intended to waive equitable distribution rights:

> It is true that the Agreement does state that the parties waive "all marital rights" in each other['s] property. However, unlike other agreements that have been found to waive equitable distribution rights, the Agreement in the present case does not specifically reference property *that might be acquired during marriage*, nor does it contain an express waiver of equitable distribution rights.

Id. at 35, 654 S.E.2d at 804 (emphasis added).

In the present case, the property at issue – the Burley Drive property – was acquired *before* the marriage, rather than *during* the marriage. While the prenuptial agreement does not state the parties waived all marital rights, it does state they each agreed that "all the properties of any name or nature, real, personal, or mixed, wherever they may be found, belonging to [each party] before marriage shall be and remain forever [his or her] personal estate[.]" That precisely describes the Burley Drive property.

We hold this language clearly and unambiguously means just what it says: that any properties owned by either party prior to the marriage are "forever [each party's] personal estate," notwithstanding later contributions of marital property that increased the value of the Burley Drive property. Any other interpretation would render meaningless the contractual language of the prenuptial agreement. Therefore, the Burley Drive property was Defendant's separate property under the terms of the prenuptial agreement, and the trial court erred in classifying that property as "70.834 percent" marital and subject to equitable distribution.

B. *Marital Residence at 109 Stonewall Road*

Defendant argues the property at 109 Stonewall Road should be treated as separate property because, according to the prenuptial agreement, Plaintiff "acquired an undivided one-half interest, i.e., a separate property interest, in the property. Under the terms of the agreement [Plaintiff] also assumed one-half of the mortgage debt on the property." Defendant further argues the trial court erred in

classifying 109 Stonewall Road as marital because the prenuptial agreement expressly provided that "each party was to have an undivided one-half interest in the [109 Stonewall Road] property[.]" The relevant portion of the prenuptial agreement provides:

> [Defendant] . . . will execute a deed within a reasonable time, not exceeding ninety (90) days, subsequent to solemnization of the intended marriage of the parties, conveying a one-half undivided interest in the real property and structures located thereon at 109 Stonewall Road, Salisbury, North Carolina, to [Plaintiff], . . . and . . . [Plaintiff] will assume, in an appropriate manner immediately upon execution of said conveyance by [Defendant], [f]ifty (50) percent of the outstanding debt arising out of the acquisition of said property by [Defendant].

Said deed to the property located at 109 Stonewall Road was never executed, as required in the prenuptial agreement. Defendant contends that "[u]nder the terms of the agreement . . . each party had separate property consisting of a one-half undivided interest in 109 Stonewall Road and separate debt consisting of one[-]half of the remaining mortgage debt for 109 Stonewall Road" and "[t]he trial court's failure to account for this provision of the agreement is error."

The marital residence at 109 Stonewall Road was included in "Schedule B" of the "final equitable distribution pretrial order," which read: "Plaintiff and Defendant have an agreement that said property *is marital* and agree to its distribution but not its value." (emphasis added). "This Court has recognized that in equitable distribution cases, a pre-trial order containing a stipulation that all

property to be classified, evaluated, and distributed . . . [is] binding upon the parties as to all assets classified as marital property." *Plomaritis v. Plomaritis*, 222 N.C. App. 94, 103, 730 S.E.2d 784, 790 (2012) (internal quotation marks and citation omitted). As in *Plomaritis*,

> [t]he terms of the stipulations in the pre-trial order were "definite and certain[,]" as they expressed the extent of the parties' agreements regarding many items of marital and divisible property, removing those matters agreed upon from dispute. Therefore, these stipulations were binding on all parties and the trial judge, and this pre-trial order "when entered control[ed] [sic] [alteration in original] the subsequent course of the action[.]"

Id. at 105, 730 S.E.2d at 791 (citations omitted). Accordingly, the parties' pretrial stipulation is "binding upon the parties," and the trial court did not err in treating 109 Stonewall Road as marital property.

C. *Unit 306 Wiltshire Village*

Defendant argues the trial court erred by finding the Wiltshire Village property to be partly marital, and in the alternative, made a mathematical error in determining the marital interest. "The trial court's unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *Peltzer v. Peltzer*, 222 N.C. App. 784, 787, 732 S.E.2d 357, 360 (2012). In the trial court's judgment, finding of fact thirteen, which is unchallenged by either party, provides:

> That [] Defendant purchased property located at Unit 306 Wiltshire Village. That this property was purchased on August 12, 2002[,] *which was during the marriage* and

> [wa]s valued at $56,000[.00]. That [] Defendant contends that this property was paid for with separate funds. That the [trial] court finds that this property is subject to the marital presumption. That [] Defendant was able to show that he sold a 1957 Thunderbird automobile for $16,750[.00][,] which he acquired in 1976 which was paid towards the purchase of this property. [] Defendant failed to meet his burden of proof to show that the remaining $49,250[.00] interest in this property was acquired through the sale or use of his separate property. That this asset is a mixed asset with $16,750[.00] being [] Defendant's separate property and the remaining $49,250[.00] is therefore classified as marital property.

(emphasis added). While Defendant states in his brief that "[t]he trial court erred in finding [Unit 306 Wiltshire Village] to be partly marital," he offers no argument to that effect. We therefore deem any such argument abandoned. N.C.R. App. P. 28(b)(6) ("Issues not presented in a party's brief, *or in support of which no reason or argument is stated*, will be taken as abandoned." (citation omitted) (emphasis added)).

Defendant also argues the trial court committed a mathematical error in its judgment with regard to the Unit 306 Wiltshire Village property. The trial court found the property to be worth $56,000.00, with $16,750.00 of that amount classified as being Defendant's separate property. Defendant further argues that the remaining interest should be $39,250.00, not $49,250.00 as the trial court calculated. Plaintiff concedes this mathematical error and we remand to the trial court to correct the error.

D. *Vanguard Prime Money Market Fund Account and 2007 Chrysler Vehicle*

Defendant argues the Vanguard Prime Money Market Fund account is his separate property and that the 2007 Chrysler vehicle ("the Chrysler") purchased with money from that account is also his separate property. Defendant presented evidence of three different Vanguard accounts: (1) a REIT Index Fund, (2) an Intermediate-Term Bond Index Fund Investor Shares account, and (3) a Prime Money Market Fund account. Defendant deposited $55,000.00 into the Vanguard Prime Money Market Fund account, which he acquired from the sale of separate property at 511 Iredell Avenue. Defendant's exhibit 35 shows the Vanguard Prime Money Market Fund account with an account value of $100,330.00. In its finding of fact fourteen, the trial court found:

> [T]he house at 511 Iredell Avenue . . . [was] sold during the marriage for $70,000[.00] . . . . The Court finds that this was [] Defendant's separate property on the date of marriage . . . . That $55,000[.00] of this money was placed into [] Defendant's Vanguard account. That this money is [] Defendant's separate property.

While the trial court found this $55,000.00 to be Defendant's separate property, Defendant deposited the $55,000.00 into the Vanguard Prime Money Market Fund account, which also contained non-separate property, and thus, Defendant was unable to prove that the Chrysler was paid for with only his separate money. Defendant testified he paid for the Chrysler by writing a check for $16,000.00 out of the Vanguard Prime Money Market Fund account. As there was clearly additional money in the Vanguard Prime Money Market Fund account totaling more than the $55,000.00 Defendant received from the sale of the 511

Iredell Avenue property and, because the trial court found that "Defendant failed to adequately rebut the marital presumption" in regard to this additional money, we hold the trial court did not err in finding that Defendant "failed to meet his burden of proof that the Vanguard Account was his separate property."

E. *550 Shares of Merrill Lynch*

Defendant argues that in finding of fact 21, there is a clerical error in the trial court's identification of the 550 shares of Merrill Lynch as a mixed asset — that the asset the trial court meant to address was Plaintiff's Wells Fargo Simplified Employee Pension IRA account. Plaintiff concedes this error as a misidentification of her Wells Fargo separate IRA account. Plaintiff further concedes there are no separate findings of fact regarding the Merrill Lynch shares.

> In reviewing a trial [court]'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) (internal quotation marks and citation omitted). There was no competent evidence to support finding of fact 21 because of the misidentification of the asset. Therefore, the trial court erred in finding the Merrill Lynch shares to be a mixed asset. We reverse that portion of the trial court's judgment and remand for findings of fact concerning Merrill Lynch shares.

F. *Findings of Fact Pursuant to N.C. Gen. Stat. § 50-20(c)*

Defendant argues the trial court failed to make specific findings of fact demonstrating how each relevant distributional factor, pursuant to N.C. Gen. Stat. § 50-20(c), was considered while setting forth its findings of fact. Defendant further argues the trial court failed to make a finding for each factor for which evidence was offered and "[a]s such, the trial court provided no discernible basis for [its] determination that an unequal division [wa]s equitable."

Pursuant to N.C. Gen. Stat. § 50-20(c):

> There shall be an equal division by using net value of marital property and net value of divisible property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably. The court shall consider all of the following factors under this subsection[.]

N.C. Gen. Stat. § 50-20(c) (2015). The statute then lists fourteen factors for the court to consider. "When dividing marital property, the trial court is required to consider the distributional factors and to make findings of fact supporting the division of property." *Minter v. Minter*, 111 N.C. App. 321, 329, 432 S.E.2d 720, 725 (1993) (citation omitted). "The trial court has broad discretion in evaluating and applying the N.C. Gen. Stat. § 50-20 factors. Thus, [o]nly when the evidence fails to show *any* rational basis for the distribution ordered by the court will its determination be upset on appeal." *Brackney v. Brackney*, 199 N.C. App. 375, 388-89, 682 S.E.2d 401, 409 (2009) (internal quotation marks and citations omitted) (emphasis in original). "It is not required that the trial court make findings

revealing the exact weight assigned to any given factor." *Finkel v. Finkel*, 162 N.C. App. 344, 349, 590 S.E.2d 472, 476 (2004) (internal quotation marks and citations omitted).

The trial court supported many of its findings with the N.C.G.S. § 50-20(c) factors: the income, property and liabilities of each party at the time the division became effective — N.C.G.S. § 50-20(c)(1); the length and duration of the marriage, and the parties' physical and mental health — N.C.G.S. § 50-20(c)(3); the liquid or non-liquid character of all marital and divisible property — N.C.G.S. § 50-20(c)(9); the tax consequences to each party — N.C.G.S. § 50-20(c)(11); and acts of the parties to maintain, preserve, develop or expand, or to waste, neglect, devalue, or convert, marital or divisible property, or both, during the period after separation and before distribution — N.C.G.S. § 50-20(c)(11a).

A trial court has broad discretion in evaluating and applying the factors in N.C.G.S. § 50-20(c) and, in the present case, the trial court supported its findings with testimony and evidence presented at trial. Thus, we hold the trial court did not err in applying the N.C.G.S. § 50-20(c) distributional factors.

III. Conclusion

In review, we affirm the trial court's classification of the property at 109 Stonewall Road as marital property; the classification of Unit 306 Wiltshire Village as partly marital property; and the classification of the Vanguard Prime Money Market Fund account as marital. We hold the trial court erred in finding the

Burley Drive property to be subject to equitable distribution, as the property is the separate property of Defendant and that portion of the trial court's order is reversed. We also remand to the trial court for findings of fact concerning the Merrill Lynch shares, and for the trial court to correct the mathematical error regarding Unit 306 Wiltshire Village.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED IN PART.

Judges DIETZ and BERGER concur.

Report per Rule 30(e).