An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-72-2

Filed: 6 February 2018

Mecklenburg County, No. 10 CVD 8288

PERRIN Q. HENDERSON, Plaintiff

v.

MARY WARD HENDERSON, Defendant

Appeal by defendant from orders entered 5 March 2015 and 28 May 2015 by Judge Jena P. Culler in Mecklenburg County District Court. Heard in the Court of Appeals 24 August 2016. Petition for Rehearing by defendant was filed on 23 January 2017, granted on 6 February 2018, and heard without oral argument. This opinion supersedes the previous opinion filed on 20 December 2016.

Dozier Miller Law Group, by Adam S. Hocutt, for plaintiff-appellee.

Collins Family Law Group, by Rebecca K. Watts, for defendant-appellant.

CALABRIA, Judge.

Where plaintiff made post-separation payments on a marital debt, the trial court did not err in classifying those payments as divisible property. We affirm.

I. Factual and Procedural History

Perrin Henderson ("plaintiff") and Mary Henderson ("defendant") (collectively, "the parties") were married 4 August 1990, separated 1 March 2010, and divorced 9 August 2011. Two children were born during the marriage of the parties. One of the children had reached majority, and the other was sixteen years old at the time that the equitable distribution orders appealed from were entered.

Plaintiff filed a complaint for equitable distribution and child custody on 12 April 2010. The trial court entered an "Equitable Distribution Judgment" order on 5 March 2015.

The trial court found that, after the parties separated, defendant maintained exclusive possession of the marital residence. Plaintiff paid interest-only mortgage payments on the first mortgage of the marital residence which totaled $292,934.00 during the separation period. The balance on this mortgage was $907,997.00 both at the date of separation and when the equitable distribution order was entered. The court found that "[t]he amount of $292,934.00 is divisible property. The Bank of America first mortgage in the amount of $907,997.00 and the divisible property related to the payments made by [plaintiff] towards the first mortgage totaling $292,934.00 are distributed to [plaintiff]."

The parties also had a second mortgage on the marital residence at the time of separation. Plaintiff made all of the payments after separation on this mortgage as well. The date of separation debt on this mortgage was $166,731.00 and $157,744.00

when the equitable distribution order was entered. The court found that "[t]he Bank of America second mortgage is distributed to [plaintiff] at a balance of $166,731.00."

The fair market value of the marital residence was $900,000.00 at the date of separation and $1,150,000.00 when the equitable distribution order was entered. The court found that "[t]he increase in value of the former marital residence of $250,000.00 since the date of separation is passive and, therefore divisible property. The Court distributes said real property and residence as well as the increase in value of the real property and residence to [plaintiff]."

The court's order provided that it had considered all factors set out in N.C. Gen. Stat. § 50-20(c). However, the order neither listed nor included any findings on distributional factor 11a, including acts of a spouse to preserve marital property after the date of separation. For factor 12, which encompasses any other factor the court finds to be just and proper, the court found no further factors existed. After consideration of the factors, the court concluded that "[t]he parties are entitled to an equitable distribution of their marital property, as hereinafter ordered, and the division ordered herein, although unequal in favor of [defendant], is an equitable distribution of marital property, after due consideration of all factors as set forth in N.C.G.S. §50-20(c)."

On 23 March 2015, defendant filed a motion for relief pursuant to Rules 52 (amendment of findings) and 59 (new trial) of the North Carolina Rules of Civil

Procedure. Defendant's request was based upon the court ordering her to vacate the marital residence prior to the entry of the equitable distribution order itself. Additionally, defendant requested that any order to vacate the residence occur after a re-evaluation of alimony. The court entered an order in response to defendant's motion on 28 May 2015 granting the Rule 52 motion to amend and denying the Rule 59 motion for a new trial. On 28 May 2015, the court entered an "Amended Equitable Distribution Judgment" order in which defendant was given additional time to vacate the marital residence.

From the 5 March 2015 equitable distribution order, the 28 May 2015 amended order, and the 28 May 2015 denial of defendant's Rule 59 motion, defendant appeals.

II. Equitable Distribution

In her sole argument on appeal, defendant contends that the trial court erred in classifying plaintiff's mortgage payments as divisible property. We disagree.

A. Standard of Review

> Equitable distribution is vested in the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion. Only a finding that the judgment was unsupported by reason and could not have been a result of competent inquiry, or a finding that the trial judge failed to comply with the statute, will establish an abuse of discretion.

Wiencek-Adams v. Adams, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (citations omitted).

B. Analysis

In an equitable distribution proceeding, the trial court must determine what property is marital, divisible, and separate, and distribute it accordingly. N.C. Gen. Stat. § 50-20(a) (2015). Marital property is defined as:

> all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property or divisible property in accordance with subdivision (2) or (4) of this subsection. Marital property includes all vested and nonvested pension, retirement, and other deferred compensation rights, and vested and nonvested military pensions eligible under the federal Uniformed Services Former Spouses' Protection Act. It is presumed that all property acquired after the date of marriage and before the date of separation is marital property except property which is separate property under subdivision (2) of this subsection. It is presumed that all real property creating a tenancy by the entirety acquired after the date of marriage and before the date of separation is marital property. Either presumption may be rebutted by the greater weight of the evidence.

N.C. Gen. Stat. § 50-20(b)(1). By contrast, divisible property is defined as:

> a. All appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution, except that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse shall not be treated as divisible property.
>
> b. All property, property rights, or any portion thereof received after the date of separation but before the date of distribution that was acquired as a result of the efforts of

> either spouse during the marriage and before the date of separation, including, but not limited to, commissions, bonuses, and contractual rights.
>
> c. Passive income from marital property received after the date of separation, including, but not limited to, interest and dividends.
>
> d. Passive increases and passive decreases in marital debt and financing charges and interest related to marital debt.

N.C. Gen. Stat. § 50-20(b)(4).

Defendant contends that the mortgage payments, which the trial court determined to be divisible property, were in fact marital property, as they constituted an active change, as opposed to a passive change, in the mortgage. Defendant cites *Brackney v. Brackney*, 199 N.C. App. 375, 682 S.E.2d 401 (2009), for the principle that passive changes in the value of marital property, such as inflation or other changes over time, are classified as divisible, while active changes are marital.

The property at issue is the payments made by plaintiff on the first mortgage. The trial court found, and the parties do not challenge, that plaintiff made payments solely on the interest on the mortgage, and that the mortgage was marital property. Defendant challenges the trial court's determination that the payments were divisible property, and that they could be awarded to plaintiff.

Despite defendant's assertions, however, our case law dictates another result. This Court has consistently held that post-separation payments on marital debt are

divisible property that can be distributed to the party making those payments. Specifically, this Court has held that:

> "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. Likewise, a spouse is entitled to some consideration for any post-separation use of marital property by the other spouse."

Bodie v. Bodie, 221 N.C. App. 29, 34, 727 S.E.2d 11, 15 (2012) (quoting *Walter v. Walter,* 149 N.C. App. 723, 731, 561 S.E.2d 571, 576-77 (2002)); s*ee also Wirth v. Wirth*, 193 N.C. App. 657, 665, 668 S.E.2d 603, 609 (2008) (holding that post-separation payments of marital debt entitled defendant to credit); *Warren v. Warren*, 175 N.C. App. 509, 517, 623 S.E.2d 800, 805 (2006) (holding that a husband's payments of the interest on a line of credit constituted divisible property).

Defendant argues, however, that changes made to the relevant statutes in 2013 render this prior precedent inapplicable. Defendant notes that the language of N.C. Gen. Stat. § 50-20(b)(4)(d), regarding "[p]assive increases and passive decreases in marital debt and financing charges and interest related to marital debt[,]" is the result of these changes. However, even if this argument is true, it does not change our analysis.

The plain text of the statute is clear. Pursuant to that statute, "[p]assive increases and passive decreases in marital debt and financing charges and interest related to marital debt" constitute divisible property. Defendant contends that the

use of the word "passive" stands in contrast to the word "active" – that is, if "passive increases and passive decreases in marital debt" are divisible property, "active" increases or decreases, such as payments made by plaintiff, would not be divisible property. However, we construe the statute strictly by its language, and find that it contains three clauses: (1) "passive increases . . . in marital debt[;]" (2) "passive decreases in marital debt[;]" and (3) "financing charges and interest related to marital debt." In reading the third clause independently of the first two, we hold that financing charges and interest related to marital debt constitute divisible property, irrespective of their "passive" or "active" nature. Plaintiff's payments on the mortgage were payments on "financing charges and interest related to marital debt," and as such, a strict reading of the statute's plain language reveals them to be divisible payments.

Defendant cites an unpublished case in which this Court held that a husband's payments for taxes, insurance, and homeowners' association dues were not divisible property. We note, however, that (1) unlike those payments, the payments at issue in the instant case were made for "financing charges and interest," and thus satisfied the language of the statute, and (2) that case, being unpublished, is not binding upon this Court. We therefore decline to rely upon or extend its reasoning to this case.

Ample precedent supports a position that the payments at issue were divisible property. Even if portions of those cases are no longer applicable based upon

amendments to the statute, the plain language of the statute itself continues to support the position that financing charges and interest related to marital debt are divisible property. We therefore hold that the trial court did not abuse its discretion in classifying plaintiff's post-separation payments of marital debt to be divisible property, to be distributed to plaintiff.

This argument is without merit. The trial court's order is affirmed.

AFFIRMED.

Judges DAVIS and TYSON concur.

Report per Rule 30(e).