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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-760

Filed: 4 December 2018

Mecklenburg County, No. 15-CVD-14421

GRACE PATRICIA RATHKAMP (Formerly Grace Rathkamp Danello), Plaintiff,

v.

TIMOTHY F. DANELLO, Defendant.

Appeals by plaintiff and defendant from order entered 4 January 2017 by Judge Matthew J. Osman in Mecklenburg County District Court. Heard in the Court of Appeals 7 March 2018.

Hamilton Stephens Steele & Martin, PLLC, by Amy E. Simpson, for plaintiff.

Tharrington Smith, LLP, by Jill Schnabel Jackson, for defendant.

BERGER, Judge.

Grace Patricia Rathkamp ("Plaintiff") appeals and Timothy F. Danello ("Defendant") cross-appeals from an equitable distribution order entered on January 4, 2017 (the "Judgment"). Plaintiff argues that the trial court erred in its classification, valuation, and distribution of certain property and failed to properly weigh distributional factors in her favor. Defendant asserts that the trial court erred

in its classification, valuation, and distribution of certain property and abused its discretion in awarding an unequal distribution in Plaintiff's favor and in valuing the net marital estate. We affirm in part, dismiss in part, reverse in part, vacate in part, and reverse in part and remand.

Factual and Procedural Background

Plaintiff and Defendant were married on May 2, 1987. Two children were born of the marriage. On March 29, 2015, the parties separated and executed a separation agreement two days prior. From the date of separation, the parties lived separate and apart. On July 31, 2015, Plaintiff filed a complaint seeking equitable distribution of the marital estate, injunctive relief, and an unequal distribution in her favor. On October 26, 2015, Defendant filed an answer and counterclaims. The parties were granted an absolute divorce on July 15, 2016.

On June 30, 2016, a Final Equitable Distribution Pretrial Order (the "Pretrial Order") was entered with consent from both parties. The Pretrial Order set forth a schedule of assets that reflected each party's contentions as to classification, valuation, and distribution. The trial court conducted the equitable distribution hearing on June 30 and July 1, 2016.

On August 19, 2016, the trial court announced its decision concerning equitable distribution in open court; however, the order was not filed until January 4, 2017. The Pretrial Order stipulations agreed to by both parties were incorporated

into the order, which distributed a net value of 51.39% of the marital and divisible estate to Plaintiff and 48.61% to Defendant. Both Plaintiff and Defendant timely appeal.

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). It is not this Court's role to "reweigh the evidence and credibility of the witnesses." *Romulus v. Romulus*, 215 N.C. App. 495, 502, 715 S.E.2d 308, 314 (2011).

> Accordingly, the [trial court's] findings of fact are conclusive if they are supported by any competent evidence from the record. However, even applying this generous standard of review, there are still requirements with which trial courts must comply. Under [North Carolina's Equitable Distribution Act (the "Equitable Distribution Act")], equitable distribution is a three-step process; the trial court must (1) determine what is marital property; (2) find the net value of the property; and (3) make an equitable distribution of that property.

Robinson v. Robinson, 210 N.C. App. 319, 322, 707 S.E.2d 785, 789 (2011) (citations and quotation marks omitted). However, the trial court is only required to engage in this three-step process "when evidence is presented to the trial court which supports the claimed classification, valuation and distribution." *Young v. Gum*, 185 N.C. App.

642, 648, 649 S.E.2d 469, 474 (2007) (citation omitted).

The Equitable Distribution Act further requires trial courts to "make written findings of fact that support the determination that the marital property and divisible property has been equitably divided" in any order distributing marital assets. N.C. Gen. Stat. § 50-20(j) (2017). "[I]n doing all of these things the court must be specific and detailed enough to enable a reviewing court to determine what was done and its correctness." *Robinson*, 210 N.C. App. at 323, 707 S.E.2d at 789 (citation and quotation marks omitted). "The purpose for the requirement of specific findings of fact that support the court's conclusions of law is to permit the appellate court on review to determine from the record whether the judgment—and the legal conclusions that underlie it—represent the correct application of the law." *Patton v. Patton*, 318 N.C. 404, 406, 348 S.E.2d 593, 595 (1986) (citations and quotation marks omitted).

Analysis

I. Classification and Valuation

On appeal, Plaintiff contests the trial court's classification and valuation of a 2008 Toyota 4Runner; Defendant's accrued annual and sick leave; First Citizens Bank Checking Account #9572 (the "First Citizens Account"); a Wells Fargo Elective Deferral Plan (the "Wells Fargo Deferral Plan"); and a SunTrust Deferred Compensation Plan (the "SunTrust Compensation Plan"). On cross-appeal,

Defendant challenges the trial court's classification and valuation of two education savings accounts (the "Education Savings Accounts"); Defendant's post-separation payments of a marital home equity line of credit loan (the "HELOC Loan"); Bank of America Account #1956 (the "Bank of America Account"); and Plaintiff's Great Plains Trust Company Profit Sharing Plan (the "Profit Sharing Plan").

"Upon application of a party, 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 . . . ." N.C. Gen. Stat. § 50-20(a) (2017). "When making an equitable distribution of a marital estate, a trial court must first classify all property owned by the parties as martial, separate or divisible." *Carpenter v. Carpenter*, 245 N.C. App. 1, 11, 781 S.E.2d 828, 837 (2016) (citing N.C. Gen. Stat. § 50-20(a)). "Following classification, property classified as marital is distributed by the trial court, while separate property remains unaffected." *McLean v. McLean*, 323 N.C. 543, 545, 374 S.E.2d 376, 378 (1988) (citation omitted).

> 'Marital property' means 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. . . . 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.

N.C. Gen. Stat. § 50-20(b)(1). " 'Presently owned' under G.S. § 50-20(b)(1) refers to the date of separation." *Wornom v. Wornom*, 126 N.C. App. 461, 465, 485 S.E.2d 856,

858 (1997).

> 'Separate property' means 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. . . . Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance.

N.C. Gen. Stat. § 50-20(b)(2). With regard to separate and marital property, "[t]his Court has interpreted the term 'acquired' as having a dynamic meaning, thus adopting the source of funds theory which recognizes that because property is acquired over time, it may have a dual nature and must therefore be designated according to whether the funds used for acquisition were marital or separate." *Tiryakian v. Tiryakian*, 91 N.C. App. 128, 135, 370 S.E.2d 852, 856 (1988) (citations and quotations marks omitted).

> 'Divisible property' means all real and personal property as set forth below:
>
> 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).

"In equitable distribution proceedings, the party claiming a certain classification has the burden of showing, by a preponderance of the evidence, that the property is within the claimed classification." *Brackney v. Brackney*, 199 N.C. App. 375, 383, 682 S.E.2d 401, 406 (2009) (citation omitted). "If the party meets this burden, then the burden shifts to the party claiming the property to be [the alternative classification] to show by a preponderance of the evidence that the property meets the definition of [such alternative classification]." *Fountain v. Fountain*, 148 N.C. App. 329, 332-33, 559 S.E.2d 25, 29 (2002) (citation and quotation marks omitted). "If both parties meet their burdens, the property is considered separate property." *Id.* at 333, 559 S.E.2d at 29 (citation omitted).

Therefore, in the first step of equitable distribution, the burden of proof initially rests "upon the party claiming that property is marital property to show by a preponderance of the evidence that the property: (1) was acquired by either spouse or both spouses; (2) during the marriage; (3) before the date of the separation of the parties; and (4) is presently owned." *Caudill v. Caudill*, 131 N.C. App. 854, 857, 509 S.E.2d 246, 248 (1998) (citations omitted).

> The claim that property is marital can be challenged by the other party, who claims the property is separate, by showing, by a preponderance of the evidence, that the property was: (1) acquired by that spouse by bequest, devise, descent, or gift from a third party during the course of the marriage; or (2) acquired by gift from the other spouse during the course of the marriage and the intent that it be separate property is stated in the conveyance; or (3) was acquired in exchange for separate property and no contrary intention that it be marital property is stated in the conveyance.

Id. at 857, 509 S.E.2d at 248-49 (citations omitted).

"The party claiming that property is marital property must also provide evidence by which that property is to be valued by the trial court." *Young*, 185 N.C. App. at 647-48, 649 S.E.2d at 474 (citation omitted). "The division of marital property upon divorce is to be accomplished by using the net value of the property, *i.e.*, its market value, if any, less the amount of any encumbrance serving to offset or reduce the market value." *Poore v. Poore*, 75 N.C. App. 414, 416-17, 331 S.E.2d 266, 269 (1985).

> For purposes of equitable distribution, marital property shall be valued as of the date of the separation of the parties, and evidence of preseparation and postseparation occurrences or values is competent as corroborative evidence of the value of marital property as of the date of the separation of the parties. Divisible property and divisible debt shall be valued as of the date of distribution.

N.C. Gen. Stat. § 50-21(b) (2017).

A. Classification of 2008 Toyota 4Runner

In her first assignment of error, Plaintiff argues the trial court erred in

classifying the 2008 Toyota 4Runner as marital property because the finding of fact on this property's classification is not supported by competent evidence. We agree as the trial court's finding is based on a purported stipulation that is not found in the record or supported by other competent evidence.

> A stipulation is an agreement between counsel with respect to business before a court . . . [and] [w]hile a stipulation need not follow any particular form, its terms must be definite and certain in order to afford a basis for judicial decision, and *it is essential that they be assented to by the parties* or those representing them.

Plomaritis v. Plomaritis, 222 N.C. App. 94, 101, 730 S.E.2d 784, 789 (2012) (*purgandum*[1]) (emphasis added).

In the Judgment, the trial court found:

> 12. As of the Separation Date Plaintiff/Wife was the titled owner of a 2008 Toyota 4Runner. *The parties stipulated this was martial property.* The Court finds the net fair market value of the automobile as of the Separation Date was $15,622.50 and further finds the automobile should be distributed to Plaintiff/Wife.

(Emphasis added.) Although the trial court stated that "[t]he parties stipulated [the 2008 Toyota 4Runner] was marital property," the record tends to show that Plaintiff and Defendant did not agree to classify the 2008 Toyota 4Runner as marital property.

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[1] Our shortening of the Latin phrase "*Lex purgandum est.*" This phrase, which roughly translates "that which is superfluous must be removed from the law," was used by Dr. Martin Luther during the Heidelberg Disputation on April 26, 1518 in which Dr. Luther elaborated on his theology of sovereign grace. Here, we use *purgandum* to simply mean that there has been the removal of superfluous items, such as quotation marks, ellipses, brackets, citations, and the like, for ease of reading.

In the Pretrial Order, both Plaintiff and Defendant contested the classification of the 2008 Toyota 4Runner. Plaintiff had contended it was a "Gift to daughter," while Defendant had contended it was marital property because Plaintiff had stated that the vehicle was not gifted to their daughter until after the date of separation.

Because the classification of the 2008 Toyota 4Runner was contested in the Pretrial Order and no other evidence in the record demonstrates that Plaintiff and Defendant agreed to classify this property as marital, there was no "definite and certain" stipulation available as "a basis for judicial decision" to properly classify the 2008 Toyota 4Runner as marital property. *Plomaritis*, 222 N.C. App. at 101, 730 S.E.2d at 789. We find no competent evidence to support the trial court's classification of the 2008 Toyota 4Runner as marital property. Accordingly, we reverse and remand this issue to the trial court for appropriate classification of the 2008 Toyota 4Runner.

B. Classification and Valuation of Defendant's Accrued Leave

Plaintiff next contends that the trial court erred by refusing to classify, value, and distribute Defendant's annual and sick leave, which he had accrued during the marriage and prior to the date of their separation, as marital property. We disagree.

> The requirements that the trial court (1) classify and value all property of the parties, both separate and marital, (2) consider the separate property in making a distribution of the marital property, and (3) distribute the marital property, *necessarily exist only when evidence is presented to the trial court which supports the claimed classification,*

> *valuation and distribution.*

Young, 185 N.C. App. at 648, 649 S.E.2d at 474 (citation omitted) (emphasis added).

Concerning Defendant's annual and sick leave, the trial court found:

> 43. The Court finds there was insufficient competent evidence presented at the Trial to enable the Court to classify, value, or distribute sick leave or annual leave accumulated by Defendant/Husband through his employment.

The evidence in the record includes a "Statement of Earnings and Leave" from Defendant's employer, documenting Defendant's accrued leave as of April 4, 2015, or six days after the date of separation. In her amended equitable distribution affidavit, Plaintiff asserted that Defendant's accrued annual and sick leave should have been valued at $56,218.00, which she argues is its fair-market value as of the date of separation. The evidence in record showed only that as of April 4, 2015, Defendant had accrued a balance of 83 hours of annual leave and 440.50 hours of sick leave. However, there is no evidence in the record that supports the classification or valuation asserted by Plaintiff. Accordingly, we affirm the trial court's finding that there was insufficient evidence by which it could classify, value, and distribute Defendant's accrued annual and sick leave.

C. Classification and Valuation of the First Citizens Account

Plaintiff next argues that the trial court erred in classifying the First Citizens Account as marital property rather than separate property because Plaintiff exclusively owned the account. Plaintiff also contests the trial court's valuation of

the First Citizens Account at $5,948.50, as she contends that the account only contained $1,848.50 as of the date of separation. We disagree.

"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." N.C. Gen. Stat. § 50-20(b)(1).

> [T]he statute makes it clear that for the purpose of *classification* of property (as either marital or separate) the marital estate is frozen as of the date of separation. While its components clearly may increase in value after separation and before distribution . . . no new property may be added to the marital estate after the date of separation.

Becker v. Becker, 88 N.C. App. 606, 607, 364 S.E.2d 175, 176 (1988) (citation omitted). Therefore, the general rule is that "the marital estate is limited to property that is owned by the parties on the date of separation and may not be augmented by property acquired after that date." *Smith v. Smith*, 111 N.C. App. 460, 482, 433 S.E.2d 196, 210 (1993), *reversed in part on other grounds*, 336 N.C. 575, 444 S.E.2d 420 (1994).

> Certain exceptions to this general rule, however, have been recognized. For example, this Court has recognized that when there has been an exchange or conversion of marital assets after the date of separation, the new property acquired as a result of the exchange or conversion may properly be classified as marital property.

Id. at 482-83, 433 S.E.2d at 210. "[W]hen property is converted after the date of separation, . . . the source of funds rule continues to apply, and the dispositive question in determining if an asset is a marital asset remains whether the source of funds therefor were marital funds." *Mauser v. Mauser*, 75 N.C. App. 115, 118, 330

S.E.2d 63, 65 (1985) (citation omitted).

Therefore, to classify an asset received by one spouse after the date of separation,

> the trial court [is] required to determine the nature of the assets. Was it a gift? An inheritance? Earnings of a spouse? Proceeds from the sale of marital property? . . . Only after determining the nature of the asset received by one spouse *after separation*, yet claimed by the other spouse to be "marital property," may a classification be made of that asset as between "marital" or "separate" property.

Johnson v. Johnson, 317 N.C. 437, 452, 346 S.E.2d 430, 438-39 (1986).

Here, the trial court found:

> 18. During the marriage and as of the Separation Date Plaintiff/Wife maintained a First Citizens Checking Account ending in #9572, having a balance of $5,848.50. The Court finds that these funds are marital property to be distributed to Plaintiff/Wife.

The evidence in the record tends to show that Plaintiff opened the First Citizens Account in her name with an initial deposit of $1,030.00 on December 22, 2014, approximately three months before the date of separation. Plaintiff made two separate $500.00 deposits into the First Citizens Account, one on January 2, 2015 and the other on February 10, 2015. After a withdrawal of $181.50 on March 11, 2015, the final balance of the First Citizens Account as of the date of separation was $1,848.50. On April 3, 2015, five days after the date of separation, Plaintiff deposited $4,000.00 into the First Citizens Account.

Based upon the evidence presented by the parties, the trial court valued the First Citizens Account at $5,848.50, and classified this entire amount as marital property. On the date of separation, $1,858.50 was present in the account, and there is competent evidence in the record to support the trial court's classification of this amount as marital property. The trial court heard evidence that this $1,848.50 was acquired during the course of their marriage, before the date of separation, and was presently owned as of the date of separation. "Once this showing had been made, the burden of proof necessary to show that the assets were marital had been met. The burden therefore shifted to [Plaintiff] to show that the source of the contested property was separate property, as defined by N.C.G.S. § 50-20(b)(2)." *Minter v. Minter*, 111 N.C. App. 321, 327, 432 S.E.2d 720, 724 (1993). However, the record shows that Plaintiff failed to satisfy this burden.

Plaintiff testified that she opened the First Citizens Account because her parents had given her money for Christmas and Thanksgiving, and she "wanted to separate the money they gave [her]." However, Plaintiff was unable to account for the source of each deposit made into the First Citizens Account. Plaintiff testified that the First Citizens Account consisted of "a thousand dollar gift from my parents for Christmas. There was a $500 gift from my parents for Thanksgiving. There was a $30 refund from OrthoCarolina. And there was one other check."

From the record before us, at least $348.50 of the disputed $1,848.50 was

properly classified as marital property. It is unclear from what class of property the "$30 refund from Ortho Carolina" derived, and Plaintiff could not account for an additional $318.50 in the account.

With regard to the remaining $1,500.00 present in the account as of the date of separation, Plaintiff claimed that this amount had been gifted to her by her parents. "A gift is a voluntary transfer of property by one another without any consideration therefor. . . . In order to constitute a valid gift, there must be present two essential elements: 1) donative intent; and 2) actual or constructive delivery." *Milner v. Littlejohn*, 126 N.C. App. 184, 187-88, 484 S.E.2d 453, 456 (1997) (*purgandum*).

> A party who claims a certain classification of property has the burden of showing, by the preponderance of the evidence, that the property is within the claimed classification. If the property was acquired during the marriage by a spouse from [her] parent, though, then a rebuttable presumption arises that the transfer is a gift to that spouse only. The burden then shifts to the spouse resisting the separate property classification to show that the parent lacked donative intent.

Joyce v. Joyce, 180 N.C. App. 647, 650, 637 S.E.2d 908, 911 (2006) (*purgandum).* In order to be entitled to this rebuttable presumption, however, the spouse asserting that the property was a gift must introduce evidence that the subject asset was in fact gifted to the spouse by her parents.

Here, Plaintiff's only evidence as to the origin of this $1,500.00 was her own testimony. No additional evidence was offered that could trace the source of the funds

to support her claim that the deposits had been gifted to her by her parents, such as check images or testimony from her parents. Despite Plaintiff's testimony, the trial court found as fact that this $1,500.00 was marital property. "The trial judge in an equitable distribution action is the sole arbiter of credibility and may reject the testimony of any witness in whole or in part." *Id.* (*purgandum).*

It is not this Court's role to "reweigh the evidence and credibility of the witnesses." *Romulus*, 215 N.C. App. at 502, 715 S.E.2d at 314. The First Citizens Account was opened, maintained, and used during the marriage, and $1,848.50 was presently owned at the date of separation. Plaintiff failed to meet her burden of proof that the $1,500.00 in the account prior to the date of separation had been her separate property. Accordingly, we affirm the trial court's classification that $1,848.50 held in the First Citizens Account was marital property.

The $4,000.00 deposited in the First Citizens Account after the date of separation would generally not be included in the marital estate because "the marital estate is limited to property that is owned by the parties on the date of separation and may not be augmented by property acquired after that date." *Smith*, 111 N.C. App. at 482, 433 S.E.2d at 210. However, "when property is converted after the date of separation, . . . the source of funds rule continues to apply, and the dispositive question in determining if an asset is a marital asset remains whether the source of funds therefor were marital funds." *Mauser*, 75 N.C. App. at 118, 330 S.E.2d at 65

(citation omitted).

Here, the evidence tends to establish that Plaintiff attempted to convert the disputed $4,000.00 from marital property into her separate property. Three months before the date of separation, Plaintiff opened the First Citizens Account in her own name and without Defendant's knowledge. Plaintiff testified that she could not identify the source of the $4,000.00:

> [Plaintiff's Counsel:] So go to the next statement dated April 17th of 2015. There is a $4,000 deposit, which is the amount that [Husband] is contending is marital. Do you see that statement?
>
> [Plaintiff:] I do see that.
>
> [Plaintiff's Counsel:] And when was that deposit made?
>
> [Plaintiff:] April 3rd.
>
> [Plaintiff's Counsel:] Do you have a recollection today as to where that money came from?
>
> [Plaintiff:] I don't have . . . a recollection.
>
> [Plaintiff's Counsel:] All right. Have you seen—been able to determine where any withdrawal—corresponding withdrawal has been made right around that time from another account?
>
> [Plaintiff:] I haven't, but I honestly haven't looked for it.
>
> [Plaintiff's Counsel:] Okay. But that was four days after the separation; correct?
>
> [Plaintiff:] Yes.

> On cross-examination, Plaintiff further testified to the following:
> [Defendant's Counsel:] So approximately four days after—four or five days after your separation, you deposited $4,000 into this First Citizens account; correct?
>
> [Plaintiff:] Yes, I did.
>
> [Defendant's Counsel:] It didn't come out of your Wells Fargo checking account, did it?
>
> [Plaintiff:] I don't know where it came from.
>
> [Defendant's Counsel:] Well, you've got those records and those records don't reflect it coming out of that account, do they?
>
> [Plaintiff:] I haven't looked at the records honestly. I don't know if there's a $4,000 corresponding withdrawal. I don't know.
>
> [Defendant's Counsel:] Right. And it would not [have come from] your salary, would it?
>
> [Plaintiff:] I don't know what it is.
>
> [Defendant's Counsel:] It didn't come out of any of the Great Plains accounts, did it?
>
> [Plaintiff:] Like I said, I don't know the source of the $4,000.

Plaintiff further testified that a few months prior to separating, she withdrew $10,578.67 from an account that she maintained during the marriage, and admitted that she had not disclosed the existence of the First Citizens Account to Defendant during their marriage. Plaintiff testified that she could not remember if the withdrawal of the $10,578.67 was in cash, or what she had done with the money after

it was withdrawn.

Because Plaintiff could not identify the source of the $4,000.00 and the evidence in the record suggests that it had come from marital property, the trial court did not err by classifying the $4,000.00 as marital funds. Accordingly, we affirm both the trial court's classification of the funds in First Citizens Account as marital property and its valuation of $5,848.50.

D. Classification and Valuation of SunTrust Compensation Plan

Plaintiff next argues that the trial court erred in its classification of the SunTrust Compensation Plan as entirely marital property. Plaintiff contends that only 84.6% of her SunTrust Compensation Plan is marital property because the remaining portion was earned prior to the parties' marriage. Plaintiff also contests the court's valuation of the SunTrust Compensation Plan by asserting that the trial court also erred by not accounting for tax consequences associated with the Plan. We disagree.

In North Carolina, retirement benefit awards "shall be determined using the proportion of time the marriage existed (up to the date of separation of the parties), simultaneously with the employment which earned the vested and nonvested pension, retirement, or deferred compensation benefit, to the total amount of time of employment." N.C. Gen. Stat. § 50-20.1(d) (2017).

The trial court found:

> 28. As of the Separation Date Plaintiff/Wife maintained a SunTrust Bank, Inc. Officers' Deferred Compensation Plan. The Court finds that the value of this asset as of the Separation Date was $197,429.03, that it is a marital asset in its entirety, and that it should be distributed to Plaintiff/Wife at that value.

The parties were married on May 2, 1987. Plaintiff elected to defer a portion of the income she earned in 1987 until the following tax year. This caused a rebuttable presumption to arise that the deferred income was marital property as "[i]t is presumed that all property acquired after the date of marriage . . . is marital property." N.C. Gen. Stat. § 50-20(b)(1). "The burden therefore shifted to [Plaintiff] to show that the source of the contested property was separate property, as defined by N.C.G.S. § 50-20(b)(2)." *Minter*, 111 N.C. App. at 327, 432 S.E.2d at 724.

To rebut the presumption that the SunTrust Compensation Plan was entirely marital, Plaintiff gave the following testimony:

> [Defendant's Counsel:] Do you recognize this document? These are documents that we subpoenaed and got from SunTrust Corporation. . . .
>
> [Plaintiff:] Yep. That's my account statement.
>
> [Defendant's Counsel:] Right. And it's showing—and your—the $7,000 deferral was deferral from income that was paid to you in . . . 1988.
>
> [Plaintiff:] It was awarded to me in '88 based on my production of 1987.
>
> [Defendant's Counsel:] And, Ms. Danello, the payment was taxable income to you in 1988; correct?

> [Plaintiff:] I guess. I don't remember. That was a long time ago.
>
> [Defendant's Counsel:] And you have not provided a single document on this plan that says anything about this award being based upon production from a prior year; is that correct?
>
> [Plaintiff:] I don't have any document. I've given you the documents I have. I have these annual statements. Frankly, this doesn't feel like marital money to me. I earned this when I was barely married.

No other evidence was introduced by Plaintiff to demonstrate that the 1988 deferred income was a result of her pre-marital efforts. However, Defendant produced an exhibit demonstrating that Plaintiff on December 10, 1987, more than six months after the parties were married, had signed an election form to defer a portion of the income she earned in 1987. Given this conflicting evidence and the trial court's role as the sole judge of credibility, we affirm the trial court's classification of the entire SunTrust Compensation Plan as marital property.

Plaintiff further argues that the trial court erred by not valuing the SunTrust Compensation Plan with due regard for the potential tax consequences of future disbursements of this property. We disagree.

In equitable distribution matters, trial judges shall consider

> [t]he tax consequences to each party, including those federal and State tax consequences that would have been incurred if the marital and divisible property had been sold or liquidated on the date of valuation. The trial court may, however, in its discretion, consider whether or when such

> tax consequences are reasonably likely to occur in determining the equitable value deemed appropriate for this factor.

N.C. Gen. Stat. § 50-20(c)(11).

When interpreting Section 50-20(c)(11), this Court has held:

> it was improper to value the plaintiff's retirement benefits on an after tax basis. We reasoned that calculating the value of the assets based on "hypothetical tax consequences arising from speculative early withdrawals" violated the provision of G.S. § 50-20(b)(1) that vested retirement or pension funds are to be valued as of the date of separation. . . . [Therefore,] it is improper to consider possible tax consequences as a distributive factor under G.S. § 50-20(c)(11) in the absence of evidence that some taxable event has already occurred or that the distribution ordered by the court will itself create some immediate tax consequence to either of the parties.

Harvey v. Harvey, 112 N.C. App. 788, 792-93, 437 S.E.2d 397, 400 (1993) (citations omitted).

Here, Plaintiff testified that assets from the SunTrust Compensation Plan will be taxed according to the state and federal tax values that will be applicable when Plaintiff begins to receive distributions. The Judgment awarded the SunTrust Compensation Plan to Plaintiff. As this award would not upset any of the present terms of the SunTrust Compensation Plan and the trial court did not order for any of its assets to be prematurely distributed, resulting in additional tax penalties, the Judgment did not "itself create some immediate tax consequence to either of the parties." *Id.* at 793, 437 S.E.2d at 400. Moreover, although the disbursements

Plaintiff will eventually receive from the SunTrust Compensation Plan will be taxed, future taxation is not imminent. As state and federal tax values vary from year to year, any consideration of the amount of taxes that will be deducted from future disbursements would be purely speculative and may not serve as "competent evidence for the purpose of valuing a marital asset." *Id.* at 792, 437 S.E.2d at 400. Accordingly, we affirm the trial court's classification and valuation of the SunTrust Compensation Plan.

E. Valuation of the Wells Fargo Deferral Plan

Plaintiff also argues that the trial court erred in its consideration of the tax consequences when it valued the Wells Fargo Deferral Plan at $21,450.95. We disagree.

Again, it is generally "improper to value the plaintiff's retirement benefits on an after tax basis . . . [if] the value of the assets [are] based on hypothetical tax consequences." *Harvey*, 112 N.C. App. at 792, 437 S.E.2d at 400 (1993) (citation and quotation marks omitted). "The trial court is not required to consider possible taxes when determining the *value* of property in the absence of proof that a taxable event has occurred during the marriage or *will* occur with the division of the marital property." *Weaver v. Weaver,* 72 N.C. App. 409, 416, 324 S.E.2d 915, 920 (1985) (citations omitted), *disapproved on other grounds by Armstrong v. Armstrong,* 322 N.C. 396, 403-04, 368 S.E.2d 595, 599 (1988).

Here, the tax consequences of withdrawing the assets from the Wells Fargo Deferral Plan are definite. Defendant withdrew funds from the Wells Fargo Deferral Plan in two disbursements within a year of trial. In the valuation of this asset and the tax consequences of withdrawals therefrom, Defendant gave the following testimony:

> [Plaintiff's Counsel:] There's a Wells Fargo plan that you have. . . .You likewise, are getting a deferred comp payout from Wells Fargo?
>
> [Defendant:] Correct.
>
> [Plaintiff's Counsel:] And the balance on that payout was [$]30,725 on the separation date; right?
>
> [Defendant:] That's what we put down, yes.
>
> [Plaintiff's Counsel:] Right. And you get paid approximately [$]15,000 gross per year until it pays out over the next two years?
>
> [Defendant:] Roughly I think that's correct.
>
> [Plaintiff's Counsel:] And you contend in your final pretrial order that it should be tax effective so that the actual number should be [$]21,450.
>
> [Defendant:] Yes. That's what we presented.

The evidence in the record corroborates Defendant's testimony that the Wells Fargo Deferral Plan's gross, pre-tax balance of $30,725.04 was paid out in two disbursements: $15,368.40 in February 2016 and $15,356.64 in February 2017. With regard to first disbursement, $4,667.10 of state and federal taxes were withheld, so

Defendant actually received $10,701.30. With regard to the second disbursement, Defendant expected that $4,606.99 of state and federal taxes would be withheld, resulting in an after-tax payment of $10,749.65. The total pay out to Defendant after considering the tax consequences was $21,450.95.

The trial court's consideration of the tax consequences of these Wells Fargo Deferral Plan disbursements was supported by competent evidence in the record. Accordingly, we affirm the trial court's valuation of the Wells Fargo Deferral Plan in the amount of $21,450.95.

F. Classification of the Education Savings Accounts

In his cross-appeal, Defendant contends that the trial court erred in classifying the Education Savings Accounts as marital property rather than gifts to the parties' children. We affirm the trial court's classification of the Education Savings Accounts as martial property, but vacate its order for Plaintiff to deliver the value of the accounts to the parties' children.

As previously discussed, the Equitable Distribution Act dictates that "the trial court is only permitted to distribute marital and divisible property." *Mugno v. Mugno*, 205 N.C. App. 273, 277, 695 S.E.2d 495, 498 (2010) (citation omitted). Therefore,

> [p]roperty that was acquired but then given away to some third party during the marriage—including a gift to the married couple's minor children—is not subject to equitable distribution. . . . In order to constitute a valid gift, [however,] there must be present two essential

> elements: 1) donative intent; and 2) actual or constructive delivery. These two elements act in concert, as the present intention to make a gift must be accompanied by the delivery, which delivery must divest the donor of all right, title, and control over the property given.

Berens v. Berens, ___ N.C. App. ___, ___, 818 S.E.2d 155, 157-58 (2018) (citations and quotation marks omitted). "Applying this settled property law principle" governing gift ownership, this Court recently held in *Berens v. Berens*, that "the parties' contributions to their 529 Savings Plans were not gifts" to the plans' named beneficiaries—the parties children. *Id.* at ___, 818 S.E.2d at 158.

Here, the trial court found:

> 25. On the Separation Date the parties' son owned an Educational Savings Account with Great Plains Trust Company, account #0047, which was titled in his name. The account balance on the Separation Date was $26,585.79. Plaintiff/Wife was the Trustee for the account. This Educational Savings Account was a "Coverdell" account which must be used for the educational purposes of the beneficiary (parties' son) or ultimately distributed to the beneficiary. In March 2016, Plaintiff/Wife closed this account and transferred all of the funds initially into an Educational Savings Account for the parties' daughter. Plaintiff/Wife subsequently withdrew these funds in the form of a cashier's check and maintained the cashier's check in her possession as of the Trial. Since the account #0047 was closed and the parties' son is now over the age of 18, a new Educational Savings Account cannot be created for the benefit of the son. The Court finds the ESA account #0047 to be a marital asset which should be distributed to Defendant/Husband at a value of $26,585.79. The Court further finds that Plaintiff/Wife should deliver directly to the parties' son within five (5) days of the entry of this Equitable Distribution Judgment a cashier's check in the amount of $26,585.79 payable to the order of the

> parties' son and Plaintiff/Wife's counsel shall provide written notice to Defendant/Husband's counsel of this delivery within five (5) days of the entry of this Equitable Distribution Judgment.
>
> 26. As of the Separation Date the parties' daughter owned an Educational Savings Account with Great Plains Trust Company, account #0048, which was titled in her name. The account balance on the Separation Date was $26,609.16. Plaintiff/Wife was the Trustee for the account. This Educational Savings Account was a "Coverdell" account which must be used for the educational purposes of the beneficiary (parties' daughter) or ultimately distributed to the beneficiary. Account #0048 is still in existence and the parties' daughter presently attends graduate school. The Court finds this account to be a marital asset which should be distributed to Defendant/Husband at a value of $26,609.16. The Court further finds that Plaintiff/Wife should deliver directly to the parties' daughter within five (5) days of the entry of this Equitable Distribution Judgment a cashier's check in the amount of $26,609.16 payable to the order of the parties' daughter and Plaintiff/Wife's counsel shall provide written notice to Defendant/Husband's counsel of this delivery within five (5) days of the entry of this Equitable Distribution Judgment. Plaintiff/Wife shall indemnify and hold harmless the Defendant/Husband and the parties' daughter from any and all costs, taxes or penalties related to this action.

Pursuant to Section 530 of the Internal Revenue Code, a "Coverdell education savings account" may be created "for the purpose of paying the qualified education expenses of an individual who is the designated beneficiary." 26 U.S.C. § 530(b)(1) (2018). Although there are minor differences between the Coverdell and 529 savings plans, a Coverdell education savings account is substantively similar to the 529 savings plan discussed in *Berens*. *See Berens*, ___ N.C. App. at ___, 818 S.E.2d at 157-

58. Most notably, both plans permit the account owner to change the named beneficiary. *Compare* 26 U.S.C. § 530(d)(6) *with* 26 U.S.C. § 529(c)(3)(C).

Therefore, just as the 529 savings plans were not identified as gifts to the named beneficiaries in *Berens*, Coverdell education savings accounts are also not considered gifts to the named beneficiaries. To be considered a gift, the purported gift must be delivered to the recipient in a manner that "divest[s] the donor of all right, title, and control over the property given." *Berens*, ___ N.C. App. at ___, 818 S.E.2d at 158 (citation and quotation marks omitted). Because the account owner to either education plan will not divest all control and title of the savings account to the named beneficiary, the delivery element will not be satisfied. Therefore, a parent does not gift either education savings plan simply by naming his or her child as the account's beneficiary. Accordingly, just as the 529 savings plans were properly classified as marital property rather than gifts to the plan beneficiaries in *Berens*, Coverdell education savings accounts may also be classified as marital property.

Here, the record and the trial court's Finding #25 further demonstrate why the disputed Education Savings Plans are not gifts to the parties' children. Finding #25 states that Plaintiff closed the Education Savings Plan benefitting her son in March 2016 and "transferred all of the funds initially into an Educational Savings Account for the parties' daughter. Plaintiff/Wife subsequently withdrew these funds in the form of a cashier's check and maintained the cashier's check in her possession as of

the Trial." The record provides competent evidence to support this finding. Plaintiff's ability to unilaterally withdraw the entirety of the her son's Education Savings Plan and transfer that money to her daughter demonstrates that the parties maintained the right to control the Education Savings Accounts. Since the accounts were not gifts to the parties' children, were acquired during the marriage, and were presently owned as of the date of separation, we affirm the trial court's classification of the Education Savings Accounts as marital property.

However, we must vacate the trial court's order requiring Plaintiff to deliver the amount of the Education Savings Plans to the parties' children. The Equitable Distribution Act states that the trial court "shall provide for an equitable distribution of the martial property and divisible property *between the parties*." N.C. Gen. Stat. § 50-20(a) (emphasis added). Because the Equitable Distribution Act only permits the trial court to distribute property between the parties of an equitable distribution action, the trial court did not have the authority to award property to the parties' children. That being said, the trial court's attempt to protect the educational aspirations of the parties' children is laudable, and we recognize that this may be viewed as an unfortunate outcome.

G. Classification of Post-Separation Payments of the HELOC Loan

Defendant contends that the trial court erred by not classifying his post-separation payments toward the marital HELOC Loan as divisible debt. We

disagree.

Divisible property includes "[p]assive increases and passive decreases in marital debt and financing charges and interested related to marital debt." N.C. Gen. Stat. § 50-20(b)(4)(d). Section 50-20(b)(4)(d) "excludes from the definition of divisible property *non-passive* increases and decreases in marital debt and *non-passive* increases and decreases in financing charges and interest related to marital debt which occurred on or after 1 October 2013." *Lund v. Lund*, 244 N.C. App. 279, 290-91, 779 S.E.2d 175, 183 (2015), *aff'd*, ___ N.C. App. ___, 798 S.E.2d 424 (2017). "Passive appreciation refers to enhancement of the value of property due solely to inflation, changing economic conditions, or market forces, or other such circumstances beyond the control of either spouse. Active appreciation, on the other hand, refers to financial or managerial contributions of one of the spouses." *Brackney*, 199 N.C. App. at 385-86, 682 S.E.2d at 408 (*purgandum*).

Here, the trial court found:

> 44. Between the Separation Date and the Trial, Defendant/Husband made payments concerning the Wells Fargo Bank HELOC (re Stedwick Place residence) in the amount of $7,500. The Court finds this is not divisible property.

The record tends to show that Defendant's post-separation payments of the HELOC Loan do not constitute divisible property as they were active decreases in marital debt. Accordingly, we affirm the trial court's decision not to classify Defendant's payments of the HELOC Loan as divisible property.

H. Classification and Valuation of the Bank of America Account

Defendant argues that the trial court erred by not accounting for two deposits, which derived from Defendant's separate property, when it classified the Bank of America Account as entirely marital property. Defendant also asserts that the trial court erred by valuing the Bank of America Account as of March 19, 2015, ten days prior to the date of separation. We disagree regarding the trial court's classification, but agree with Defendant regarding the trial court's valuation of the Bank of America Account.

More specifically, Defendant's classification challenge derives from the trial court's classification of a 2004 Acura TL as Defendant's separate property and a $20,000.00 loan that Defendant received from his brother as Defendant's separate debt. The record evidences that Defendant sold his 2004 Acura TL for $5,200.00, which he deposited into the Bank of America Account on January 20, 2015. The record also shows that $20,000.00 was transferred into the Bank of America Account on November 13, 2014. Defendant argues that even though he deposited these assets into the parties' joint bank account months before the date of separation, $25,200.00 in the Bank of America Account should have been classified as his separate property.

> Commingling of separate property with marital property, occurring during the marriage and before the date of separation, does not necessarily transmute separate property into marital property. Transmutation would occur, however, if the party claiming the property to be his separate property is unable to trace the initial

deposit into its form at the date of separation.

Fountain, 148 N.C. App. at 333, 559 S.E.2d at 29 (citations omitted). Therefore, "[t]he deposit of funds into a joint account, standing alone, is not sufficient evidence to show a gift or an intent to convert the funds from separate property to marital property." *Manes v. Harrison-Manes*, 79 N.C. App. 170, 172, 338 S.E.2d 815, 817 (1986) (citation omitted). However, the deposit of separate funds by one spouse into an account jointly owned by both spouses will transmute the separate funds into marital property if the depositing spouse is unable to satisfy his or her burden of tracing the initial deposit through the date of separation. *Fountain*, 148 N.C. App. at 333, 559 S.E.2d at 29 (citations omitted).

Here, it is undisputed that the Bank of America Account was established by both parties during the marriage and the funds in the account were still owned by both as of the date of separation. "Once this showing had been made, the burden of proof necessary to show that the assets were marital had been met. The burden therefore shifted to [Defendant] to show that the source of the contested property was separate property, as defined by N.C.G.S. § 50-20(b)(2)." *Minter*, 111 N.C. App. at 327, 432 S.E.2d at 724.

As previously stated, Defendant deposited $20,000.00, which was a loan from his brother, into the Bank of America Account on November 13, 2014—more than four months before the date of separation. Also, Defendant deposited $5,200.00, which was from the sale of his 2004 Acura TL, into the same account on January 20,

2015—more than two months before the date of separation. However, evidence in the record shows that the fund balance in the Bank of America Account fluctuated in the four months prior to the parties' separation. On November 14, 2014, the Bank of America Account had a balance of $211,213.00. On March 19, 2015, the account balance was $88,340.78. Given this fluctuation, record evidence supports the trial court's finding that Defendant did not meet his burden of showing that the disputed $25,200.00 remained in the Bank of America Account as of the date of separation. Accordingly, we affirm the trial court's classification of the Bank of America Account as marital property.

Defendant further asserts that the trial court erred by valuing the Bank of America Account as of March 19, 2015, rather than the date of separation, March 29, 2015. We agree. "[M]arital property shall be valued as of the date of the separation of the parties." N.C. Gen. Stat. § 50-21(b).

Here, the trial court found:

> 15. As of the Separation Date Defendant/Husband maintained a Bank of America Checking Account ending in #1956, having a balance of $88,340.78 as of March 19, 2015, ten days prior to the Separation Date. On March 30, 2015, one day after the Separation Date, Defendant/Husband received a net payment [of] $5,128.42 from the FDIC as his net salary for the period March 16 through March 30, 2015. The Court finds this net pay to have been earned during the marriage and prior to the Separation Date, with the result that the marital balance in this account as of the Separation Date was $93,469. This balance is to be distributed to Defendant/Husband. The entire balance is

found to be marital.

As the trial court noted in Finding #15, the Bank of America Account had balance of $88,340.78 on March 19, 2015, ten days before the date of separation. Between March 19 and the date of separation, $657.70 was deposited into the account and withdrawals of $200.00, $474.24, $200.00, $2,971.70, and $173.53 were made from the account, leaving a balance of $84,979.01 as of the date of separation. Moreover, although $5,128.42 was deposited the day after the date of separation, Defendant does not contest the fact that this $5,128.42 was properly classified as marital funds because it was Husband's salary which had been earned during the course of the marriage.

Accordingly, we affirm the trial court's classification of the Bank of America Account as marital property. However, we reverse and remand for the trial court to either revalue the Bank of America Account as of the date of separation or provide findings of fact explaining its deviation from the general rule that assets are to be valued as of the date of separation.

I. Valuation of the Profit Sharing Plan

Defendant next contends that the trial court erred in valuing the Profit Sharing Plan as of December 31, 2014, rather than the date of separation, March 29, 2015. As the parties were only able to produce annual statements for this plan, a statement showing the value on the date of separation was not available. Therefore, the trial court valued the Profit Sharing Plan based on two annual statements, which

showed that the Profit Sharing Plan had a balance of $158,563.31 as of December 21, 2014 and a balance of $188,293.06 as of December 31, 2015. Since the parties were separated in March 2015, Defendant asserts—for the first time on appeal—that the trial court was required to apply the coverture fraction method to ascertain the balance accrued from January 2015 until the date of separation. Defendant contends that, had this method been applied, the trial court's valuation would have included an additional $7,164.87 that would have been classified as marital property attributable to Plaintiff. However, Defendant failed to properly preserve this issue for appeal.

Rule 10 of the North Carolina Rules of Appellate Procedure states:

> [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.R. App. P. 10(a)(1). "[T]he law does not permit parties to swap horses between courts in order to get a better mount [on appeal], meaning, of course, that a contention not raised and argued in the trial court may not be raised and argued for the first time in the appellate court." *Wood v. Weldon*, 160 N.C. App. 697, 699, 586 S.E.2d 801, 803 (2003) (citations and quotation marks omitted).

Here, the trial court found:

> 39. As of the Separation Date Plaintiff/Wife maintained a

> Great Plains Trust Company Profit Sharing Plan which the parties stipulated was marital property. The Court finds the Profit Sharing Plan had a net value on the Separation Date of $158,563.31 and finds this Plan should be distributed to Plaintiff/Wife. The Court does not find a divisible property component for the Plan.

In the Pretrial Order, Defendant asserted that the Profit Sharing Plan should be valued at $158,563.31, which would reflect the sum of the vested and non-vested portions of the Profit Sharing Plan as of December 31, 2014. Plaintiff asserted that it should be valued at $112,659.00, which would reflect only the vested portion of the Profit Sharing Plan as of December 31, 2014. In his closing argument, Defendant's counsel stated:

> And then 43, the Great Plains Trust Company profit sharing plan, this is—one of the issues here is the value of this martial property. And if you look at Exhibit 43—43A there are only annual statements of this, Your Honor. *And where we disagree on this, Your Honor, is their position is the value of this is only the vested portion.* And our position is marital property as defined by statute includes vested and nonvested portion[s].

(Emphasis added.) Defendant did not ask the trial court to apply the coverture fraction method or argue that the Profit Sharing Plan's valuation should also reflect an additional proportion of the balance accrued from January 2015 until the date of separation. Therefore, this issue was not preserved for appellate review and is waived.

II. <u>Distribution</u>

In addition to challenging the classification and valuation of the SunTrust

Compensation Plan, Plaintiff also asserts that the trial court erred by not considering the tax consequences of future disbursements from the SunTrust Compensation Plan as a distributional factor weighing in her favor. Plaintiff further contends that the trial court erred when it did not consider Defendant's alleged dissipation of marital assets in anticipation of separation and Plaintiff's payments for the benefit of the marital residence after the date of separation as factors weighing in Plaintiff's favor. In his cross-appeal, Defendant asserts that the trial abused its discretion by awarding an unequal distribution in Plaintiff's favor and miscalculating the net value of the marital estate.

Section 50-20(c) addresses distribution of the marital estate, which is the third step in the equitable distribution process. Before listing the factors to be considered, Section 50-20(c) states that

> [t]here 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.

N.C. Gen. Stat. § 50-20(c). Section 50-20(c) then gives twelve factors that the trial court is to consider when dividing the property. *See generally* N.C. Gen. Stat. § 50-20(c). Decisions concerning this distribution of property are

> 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, 331 N.C. at 691, 417 S.E.2d at 451 (citations omitted).

A. Tax Consequences of the SunTrust Compensation Plan

As previously discussed, the trial court did not err when it did not include the potential tax consequences of future disbursements in its valuation of the SunTrust Compensation Plan. Concerning this same asset, Plaintiff also contends that the trial court erred by not considering the tax consequences of future disbursements from the SunTrust Compensation Plan as a distributional factor weighing in her favor. We disagree.

> In determining whether an equal distribution of marital property is equitable to the parties, the trial court must consider all of the factors listed in N.C. Gen. Stat. § 50-20(c). . . . These factors include the tax consequences to each party. N.C. Gen. Stat. § 50-20(c)(11). Our courts have construed this provision as requiring the court to consider tax consequences that will result from the distribution of property that the court actually orders. It is error for a trial court to consider hypothetical tax consequences as a distributive factor.

Dolan v. Dolan, 148 N.C. App. 256, 258, 558 S.E.2d 218, 220 (*purgandum*), *aff'd per curiam*, 355 N.C. 484, 562 S.E.2d 422 (2002).

For example, in *Wilkins v. Wilkins*, this Court held that the trial court erred in considering "hypothetical tax consequences as a distributive factor" because

> funds could be withdrawn from plaintiff's retirement plans only upon the occurrence of certain events, none of which had occurred on or before the date of separation or the date

> of the hearing, and many of which could not occur until at least several years after the date on which the judgment was entered. We conclude that to predict variables (including *inter alia* the government's tax structure, plaintiff's financial condition, the date of plaintiff's early withdrawals, if any, and the date of plaintiff's eventual retirement) that far in the future requires the trial court to engage in impermissible speculation.

Wilkins v. Wilkins, 111 N.C. App. 541, 552-53, 432 S.E.2d 891, 897 (1993).

When assessing the tax consequences to each party as a distributional factor, the trial court in the current matter found that "[t]his factor does not weigh in either party's favor." This finding is supported by competent evidence in the record. Although there may be tax consequences if and when Plaintiff withdraws funds from the SunTrust Compensation Plan, these tax consequences are not only merely hypothetical, but as in *Wilkins*, also require the trial court to engage in impermissible speculation. Accordingly, we affirm the trial court's decision not to use the hypothetical tax consequences of possible disbursements from the SunTrust Compensation Plan as a distributional factor.

B. Dissipation of Marital Assets

Plaintiff next argues that Defendant allegedly dissipated marital assets in anticipation of separation when Defendant (1) withdrew funds from the parties' HELOC loan; and (2) used marital property to pay for his own costs associated with the divorce. We disagree.

First, Plaintiff contends that Defendant dissipated marital assets when he

made the "unilateral decision" to withdraw $190,000.00 from the HELOC loan five months prior to the date of separation. Plaintiff asserts that the trial court erred by not considering the newly incurred financing charges on the home equity line as a distributional factor weighing in Plaintiff's favor.

"[B]ecause it is consonant with the essential philosophy of equitable distribution, misconduct during the marriage which dissipates or reduces the value of marital assets for nonmarital purposes may properly be considered under N.C.G.S. 50-20(c)(12)." *Smith v. Smith*, 314 N.C. 80, 81, 87-88, 331 S.E.2d 682, 687 (1985).

> In accord with the economic contribution theory of equitable distribution, it is clear that only items affecting the marital economy are considered under the first eleven factors of N.C.G.S. 50-20(c). Thus, under 50-20(c)(12), the only other considerations which are "just and proper" within the theory of equitable distribution as expressed by 50-20(c)(1)-(11) are those which are relevant to the marital economy. Therefore, [our Supreme Court has held] that marital fault or misconduct of the parties which is not related to the economic condition of the marriage is not germane to a division of marital property under 50-20(c) and should not be considered.

Id. Applicable here, the "creation of a spousal joint account should as a matter of law imply consent by each spouse to use by the other of funds from the account for purposes of sustaining the family or enhancing its standard of living." *McClure v. McClure*, 64 N.C. App. 318, 323, 307 S.E.2d 212, 215 (1983). However, the presumption that each spouse consents to the other spouse's withdrawal of funds from a joint account can be rebutted by "clear and convincing evidence" showing the

use of marital assets for a non-martial purpose. *Id.*

Here, when assessing "[a]ny other factor which the court deems just and proper" pursuant to Section 50-20(c)(12), the trial court found that "[t]his factor does not weigh in either party's favor." This finding is supported by competent evidence in the record.

After the withdrawal from the parties' HELOC loan, approximately $190,000.00 was deposited into their joint Bank of America Account. The parties stipulated that both the HELOC loan and the majority of the Bank of America Account were martial property.

Plaintiff does not contend that she did not have equal access to the funds. In fact, Plaintiff testified that she withdrew a large portion of the $190,000.00 for herself and her children:

> I took a check for 160,000 . . . and it was split into three accounts—133- into an account in my name, and then I put 13,500 into each [account for the parties' children]—well, they were in my name but they were in an account for [the children].

Accordingly, the evidence in the record does not demonstrate that Defendant's withdrawal of the $190,000.00 from the HELOC loan constituted a dissipation of marital assets prior to separation. Therefore, the trial court did not abuse its discretion in finding that the financing charges incurred when Defendant withdrew $190,000.00 from the HELOC loan was not a distributional factor weighing in Plaintiff's favor.

Plaintiff also contends that the trial court erred when it did not use the attorney and private investigator fees that Defendant had paid before the date of separation with marital funds as a distributional factor weighing in Plaintiff's favor.

Again, however, the parties stipulated that the HELOC loan debt and funds therefrom which were deposited into the Bank of America Account were both to be classified as marital assets. The record plainly demonstrates that the trial court considered the Section 50-20(c) distributional factors in light of the evidence presented at trial. Plaintiff has failed to demonstrate the trial court abused its discretion, and we affirm.

C. Post-Separation Payments on the Marital Residence

After the date of separation, Plaintiff paid over $6,200.00 for repairs and $5,000.00 in mortgage payments with separate funds for the benefit of the martial residence. Plaintiff contends that the trial court erred when it did not give her credit in its distribution of assets for these post-separation payments. 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. Likewise, a spouse is entitled to some consideration for any post-separation use of marital property by the other spouse. To accommodate post-separation payments, the trial court may treat the payments as distributional factors under section 50-20(c)(11a), N.C.G.S. § 50-20(c)(11a), or provide direct credits for the benefit of the spouse making the payments[.] With regard to post-separation use of marital property, the trial court may treat the use as a

> distributional factor under N.C. Gen. Stat. § 50-20(c)(12), . . . or place some value on the use and provide a direct credit for the benefit of the spouse who did not use the property. If the property is distributed to the spouse who did not have the post-separation use of it or who did not make post-separation payments relating to the property's maintenance (i.e. taxes, insurance, repairs), the use and/or payments must be considered as either a credit or distributional factor. If, on the other hand, the property is distributed to the spouse who had the post-separation use of it or who made post-separation payments relating to its maintenance, there is, as a general proposition, no entitlement to a credit or distributional factor. Nonetheless, the trial court may, in its discretion, weigh the equities in a particular case and find that a credit or distributional factor would be appropriate under the circumstances.

Walter v. Walter, 149 N.C. App. 723, 731-32, 561 S.E.2d 571, 576-77 (2002) (citations omitted).

Here, the trial court found:

> 52. From the Separation Date through the Trial, Plaintiff/Wife had the exclusive use, possession, and benefit, of the Stedwick Place residence. As a result, the Court finds it would not be equitable to give Plaintiff/Wife any credit in the equitable distribution for any post-Separation Date expenditures which she made related to the residence. The Court finds that Plaintiff/Wife should not be credited for post Separation Date expenditures she made related to the marital residence since she had the sole possession, use, and benefit of the marital residence from the Separation Date through the trial.

Competent evidence in the record supports the finding that Plaintiff maintained the exclusive use, benefit, and possession of the marital residence for more than a year between the date of separation and trial. Defendant testified that

the fair rental value of the marital residence during this period was $4,000.00 per month. Although Plaintiff asserts that the trial court erred by not crediting her $11,200.00 (*i.e.,* $6,200.00 in repairs plus $5,000.00 for mortgage payments) that she had spent on the marital residence, the value of her exclusive possession of the marital residence was of much greater benefit to her than the cost she expended. Accordingly, the trial court did not err by not crediting Plaintiff for the post-separation payments made for the benefit of the marital residence.

D. Unequal Distribution in Plaintiff's Favor

In his cross-appeal, Defendant asserts that the trial court abused its discretion by (1) awarding an unequal distribution of the parties' net marital estate to Plaintiff and (2) miscalculating the net value of the marital estate. We affirm in part and reverse in part.

> [P]ublic policy so strongly favor[s] the equal division of marital property that an equal division is made *mandatory* unless the court determines that an equal division is not equitable. The clear intent of the legislature was that a party desiring an unequal division of marital property bear the burden of producing evidence concerning one or more of the twelve factors in the statute and the burden of proving by a preponderance of the evidence that an equal division would not be equitable. Therefore, if no evidence is admitted tending to show that an equal division would be inequitable, the trial court *must* divide the marital property equally.
>
> When evidence tending to show that an equal division of marital property would not be equitable is admitted, however, the trial court must exercise its discretion in assigning the weight each factor should

> receive in any given case. It must then make an equitable division of the marital property by balancing the evidence presented by the parties in light of the legislative policy which favors equal division.

White v. White, 312 N.C. 770, 776-77, 324 S.E.2d 829, 832-33 (1985) (citations and quotation marks omitted).

"A ruling on whether an unequal division of marital property is appropriate will be upset only if it is manifestly unsupported by reason." *Upchurch v. Upchurch*, 128 N.C. App. 461, 468, 495 S.E.2d 738, 743 (1998) (citation omitted). "This Court has held that a finding, with evidentiary support, that a single factor is sufficient to support an unequal distribution, is within the court's discretion and is properly upheld on appeal." *Shoffner v. Shoffner*, 91 N.C. App. 399, 402, 371 S.E.2d 749, 751 (1988).

In relevant part, the trial court in the current matter made the following findings of fact and conclusions of law regarding its decision to distribute the marital estate unequally:

> 57. The net marital and divisible estate is $3,588,854.67. Based upon the foregoing, after totaling the martial and divisible assets to be distributed to each party, and the marital and divisible debt to be allocated to each, Plaintiff/Wife is distributed in kind marital and divisible assets and debts having a net value of $1,844,228.71, and Defendant/Husband is distributed in kind marital and divisible assets and debts having a net value of $1,744,625.96.
>
> 58. This Court has considered the evidence presented by both parties regarding the statutory distributional factors

and makes Findings of Fact as to those factors as set forth below:

(a) Income, property and liabilities of the parties. Both parties have significant incomes and both have similar property ownership and liabilities. This factor does not weigh in either party's favor.

(b) Duration of the marriage; age and physical and mental health of the parties. The parties were married for 29 years as of the Trial and there were no prior marriages. They are approximately the same age. This factor does not weigh in either party's favor.

(c) Need to occupy the marital home due to custody of children. The parties' two children are emancipated. This factor does not weigh in either party's favor.

(d) Expectation of pension, retirement, or other deferred compensation rights that are not marital property. Both parties have defined benefit pension plans, but as set forth above, no competent evidence was presented at the Trial as to the net value of either party's pension plan as of the Separation Date. The Court finds that the anticipated monthly pension benefit for Defendant/Husband at whatever date he retires in the future will be greater than the monthly benefit to be received by Plaintiff/Wife from her denied benefit pension plan from her former employer, SunTrust Bank. The Court finds this factor weighs significantly in Plaintiff/Wife's favor.

(e) Any equitable claim to, interest in, or direct or indirect contribution to the acquisition of marital property. Each party supported the other's career advancement and each party made contributions and offered services as a spouse, parent, wage earner and homemaker. This factor does not weigh in either party's favor.

(f) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse. Each party made direct and indirect contributions to help educate or develop the career potential of the other party and to advance the other party's career. This factor does not weigh in either party's favor.

> (g) Any direct contribution to any increase in value of separate property during the marriage. This factor does not weigh in either party's favor.
>
> (h) The liquid or nonliquid character of all marital and divisible property. The parties have substantial liquid assets compared to most of the cases before the court. This factor does not weigh in either party's favor.
>
> (i) The difficulty of evaluating any component asset. No evidence was presented to the Court as to this factor.
>
> (j) The tax consequences to each party. This factor does not weigh in either party's favor.
>
> (k) Acts of either party to maintain or preserve or waste assets during the period after the separation. This factor does not weigh in either party's favor.
>
> (l) Any other factor which the court deems just and proper. This factor does not weigh in either party's favor.
>
> 59. As set forth in Finding of Fact #57, above, Plaintiff/Wife is distributed in kind marital and divisible assets and debts having a net value of $1,844,228.71, while Defendant/Husband is distributed in kind marital and divisible assets and debts having a net value of $1,744,625.96. Plaintiff/Wife's share is 51.39% of the total net marital and divisible estate compared to Defendant/Husband's 48.61% share. The Court finds this unequal distribution to be equitable in light of the distributional factors as set forth above, specifically the factor described in Finding of Fact 58(d), above.

As evidenced by Finding #58, the trial court properly considered all applicable factors as required under Section 50-20(c) and made detailed findings that support an unequal distribution. There is no evidence in the record that the trial court's unequal division of the marital estate was "manifestly unsupported by reason." *Upchurch*, 128 N.C. App. at 468, 495 S.E.2d at 743. Accordingly, we affirm the trial court's distribution of the marital estate.

Defendant also argues that based on the errors asserted in his cross-appeal, the trial court miscalculated the net value of the martial estate. We agree.

On remand, the trial court must revalue the Bank of America Account as of the date of separation. This should be taken into account when revaluing the net marital estate. Additionally, the trial court may take into account the value of the 2008 Toyota 4Runner, depending on the classification the trial court assigns to this asset.

Conclusion

For the reasons stated above, we affirm in part, dismiss in part, vacate in part, reverse in part and remand.

AFFIRM IN PART; DISMISS IN PART; REVERSE AND REMAND IN PART; VACATE IN PART.

Judges ELMORE and INMAN concur.

Report per Rule 30(e).