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NO. COA11-427
NORTH CAROLINA COURT OF APPEALS

Filed: 18 October 2011

ALICE A. BRYAN (formerly MATTICK),
Plaintiff-Appellee,

v.

Mecklenburg County
No. 02 CVD 11074

MICHAEL J. MATTICK,
Defendant-Appellant.

Appeal by Defendant from order dated 17 December 2010 by
Judge Jena P. Culler in District Court, Mecklenburg County.
Heard in the Court of Appeals 27 September 2011.

*Giordano Gordon and Burns, PLLC, by William F. Burns, Jr.,
for Plaintiff-Appellee.*

Joseph L. Ledford for Defendant-Appellant.

McGEE, Judge.

Alice A. Bryan (Plaintiff) and Michael J. Mattick (Defendant) were married on 4 May 1974. Plaintiff and Defendant separated on 12 October 1993, and entered into a separation agreement (the Agreement) on 5 May 1995. Pursuant to the Agreement, Defendant agreed to continue to pay Plaintiff's medical insurance premiums, and reimburse Plaintiff for "any

[medical] expenses not covered by major medical . . . insurance." The Agreement also provided that any term of the Agreement could be enforced through application to the trial court for specific performance. The Agreement was not incorporated into the parties' divorce decree, and was not made an order of the trial court by the consent of Plaintiff and Defendant.

At the time the Agreement was entered, Plaintiff was suffering from progressive multiple sclerosis. Both Plaintiff and Defendant knew that Plaintiff's disease was chronic and that, over time, a worsening of Plaintiff's condition was a strong possibility. Plaintiff filed suit sometime before November 2002 for reimbursement of unpaid medical expenses. This matter was resolved by consent judgment (the consent judgment) entered 12 November 2002. The consent judgment ordered Defendant to reimburse Plaintiff for certain medical expenses, and further ordered Defendant to abide by the provisions of the Agreement. Plaintiff filed a motion to show cause on 20 October 2009 praying that the trial court enter an order requiring Defendant to show cause why he should not be held in contempt for violating the consent judgment by again failing to reimburse Plaintiff for uninsured medical expenses.

The trial court entered an order on 20 October 2009 for Defendant to show cause (the show cause order).

Plaintiff's motion contended that, upon the direction of her physician, she had entered the Willow Lake assisted living facility (Willow Lake or assisted living facility) in late March of 2009; that Plaintiff had submitted bills from Willow Lake to Defendant for reimbursement pursuant to the terms of the Agreement; and that Defendant had refused to reimburse Plaintiff for any costs associated with her move to Willow Lake. Defendant filed a "Response and Counterclaim for a Declaration of Rights and Responsibilities" on 3 November 2010, wherein Defendant requested that the trial court dismiss the show cause order, deny the relief sought by Plaintiff, and enter a declaratory judgment establishing the rights and responsibilities of the parties under the Agreement. The trial court heard the matter on 28 September 2010 and 9 November 2010. "[T]he matter was heard on Defendant's counterclaim seeking a declaration of the parties['] rights and responsibilities and Plaintiff's motion for enforcement of the [consent judgment.] Plaintiff did not pursue her contempt motion." The trial court entered its order on 17 December 2010, in which it determined that, under the Agreement, Defendant was responsible for reimbursing Plaintiff for certain expenses associated with

Plaintiff's move to Willow Lake. The trial court ordered Defendant to reimburse Plaintiff for expenses accrued up to the time of the entry of the 17 December 2010 order and those expenses in the future. Defendant appeals.

I.

As an initial matter, Defendant questions whether the trial court had subject matter jurisdiction to enter its 20 December 2010 order in which it declared the rights of Plaintiff and Defendant under the Agreement. Defendant moved the trial court for a declaratory judgment in his 3 March 2010 Response and Counterclaim for a Declaration of Rights and Responsibilities. Defendant now claims the trial court had no jurisdiction to grant the relief Defendant sought because, according to Defendant, the Agreement had become an order of the trial court.

Once approved by the court as a judgment of the court a separation agreement loses its contractual nature. *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E. 2d 338, 342 (1983); *Henderson v. Henderson*, 307 N.C. 401, 407, 298 S.E. 2d 345, 350 (1983). See *Doub v. Doub*, 313 N.C. 169, 326 S.E. 2d 259 (1985).

Cavanaugh v. Cavanaugh, 317 N.C. 652, 659, 347 S.E.2d 19, 24 (1986); see also *Holden v. Holden*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, 2011 N.C. App. LEXIS 1637, 17-19 (2011); *Fucito v. Francis*, 175 N.C. App. 144, 622 S.E.2d 660 (2005)

(declaratory judgment not available when consent agreement has become an order of the court in divorce action).

However, the Agreement never became an order of the trial court, either by consent of the parties or by incorporation in a valid decree of divorce. The consent judgment was an order for specific performance. A separation agreement is only enforceable by specific performance when it remains a contract between the parties. It is not enforceable by specific performance if it has become an order of the court. *Holden*, ___ N.C. App. at __, __ S.E.2d at __, 2011 N.C. App. LEXIS 1637, 17-19.

The separation agreement here is a contract between the parties not subject to modification by the court. The . . . judgment ordering specific performance was an exercise of the court's equitable powers and did not modify the separation agreement. In the exercise of its equitable powers, the court could order specific performance of all or only part of the contract and could modify its orders from time to time as equity required.

Harris v. Harris, 307 N.C. 684, 688, 300 S.E.2d 369, 372-73 (1983). It is clear that any "incorporation" of the Agreement into the consent judgment was for the purpose of clarification as to what provisions of the Agreement the trial court was specifically enforcing by the consent judgment. The Agreement itself did not become an order of the court, and has not lost

its nature as a contract between Plaintiff and Defendant. The trial court had jurisdiction to act upon Defendant's motion for a declaratory judgment.

II.

Defendant argues on appeal that certain of the trial court's findings of fact were not supported by competent evidence. Defendant contends that the trial court erred in concluding that "[u]ninsured medical costs and expenses include medical necessities, but not the expenses that are the ordinary necessities of life." Defendant further contends that the trial court erred in ordering him to pay Plaintiff \$2,690.00 in monthly medical expenses and in ordering him to pay \$41,475.56 in prior unpaid medical expenses.

"It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable *de novo*.

Lee v. Lee, 167 N.C. App. 250, 253, 605 S.E.2d 222, 224 (2004)
(citations omitted).

Questions relating to the construction and effect of separation agreements between a husband and wife are ordinarily determined by the same rules which govern the

interpretation of contracts generally. Whenever a court is called upon to interpret a contract its primary purpose is to ascertain the intention of the parties at the moment of its execution.

Where a contract is unambiguous, its construction is a matter of law for the court to determine. As stated in *Lane*,

"Intention or meaning in a contract may be manifested or conveyed either expressly or impliedly, and it is fundamental that that which is plainly or necessarily implied in the language of a contract is as much a part of it as that which is expressed. If it can be plainly seen from all the provisions of the instrument taken together that the obligation in question was within the contemplation of the parties when making their contract or is necessary to carry their intention into effect, the law will imply the obligation and enforce it. The policy of the law is to supply in contracts what is presumed to have been inadvertently omitted or to have been deemed perfectly obvious by the parties, the parties being supposed to have made those stipulations which as honest, fair, and just men they ought to have made." However, "no meaning, terms, or conditions can be implied which are inconsistent with the expressed provisions."

Gilmore v. Garner, 157 N.C. App. 664, 666-67, 580 S.E.2d 15, 17-18 (2003) (citations omitted). Contract interpretation is a matter of law, and we review matters of law *de novo*.

III.

Defendant argues that the trial court erred in its second conclusion of law, which states: "Uninsured medical costs and

expenses include medical necessities, but not the expenses that are the ordinary necessities of life." We disagree with Defendant's argument.

The relevant provision of the Agreement reads as follows:

11. Medical Insurance and Payments.

The Husband shall continue to provide and pay for major medical and hospitalization insurance for the benefit of the Wife and the parties['] children. The Husband's obligation to provide and pay for said insurance shall continue for the Wife indefinitely[.] The Husband shall provide the coverage presently existing for the benefit of the Wife[.] In the event the Wife remarries, the Husband obligation to provide this coverage shall cease.

The Husband agrees to reimburse the Wife . . . for any expenses not covered by major medical and/or hospitalization and dental insurance. In this regard, the Husband agrees to maintain a five hundred dollar (\$500.00) balance in a special checking account to be opened by the Wife for this purpose.

According to the consent judgment, Defendant stipulated to the following:

5. That the Plaintiff is disabled and has significant medical expenses including for medications. She has incurred over the last seven (7) years or so uninsured medical expenses totaling through March of this year \$11,483.77. These expenses are according [to the Agreement] the responsibility of the husband.

. . . .

7. That the Plaintiff's complaint herein

seeks damages in a specified amount for unreimbursed medical expenses for medications, doctor visits and other health care related expenses incurred by the Plaintiff for which Defendant is responsible; and, the Defendant, as evidenced by his signature acknowledges responsibility for same.

Also included in the consent judgment is the following: "[The trial court] retains jurisdiction of this matter for further Orders as may be necessary to enforce the provisions of this Order and any such additional Orders as may be necessary relating to the enforcement of the [Agreement.]"

Our review of the Agreement supports the trial court's second conclusion of law, as it reflects the intentions of the parties as shown by the plain language of the Agreement, and is consistent with the parties' understanding of the meaning of medical expenses as evidenced in the consent judgment. Defendant does not make any argument against this interpretation of the uninsured medical costs terms in the Agreement and, in fact, this interpretation is completely in line with Defendant's own declared interpretation of this language in the Agreement. Defendant's true argument seems to be that the trial court incorrectly applied this interpretation to the facts. Defendant's argument that the trial court's second conclusion of law was made in error is without merit.

Defendant's next argument on appeal is that the trial court erred in determining that certain costs associated with Plaintiff's expenses at Willow Lake constituted medical expenses. Defendant expressly contends that the trial court erred in its 20 December 2010 order by ordering the following:

3. The [trial court] declares and orders that, based on the evidence presented in this case, the current monthly Willow Lake room and board charge for the Plaintiff of \$3,795.00 plus the \$350.00 medication assistance charge, less the room upgrade of \$400.00 and less the average monthly cost of Plaintiff for ordinary necessities of life in the amount of \$1,055.00 represents the medical expense component of the monthly Willow Lake bill for which Defendant is liable.

4. The unpaid uninsured medical expenses owed by Defendant for amounts accrued from April 2009 through August 2010, is \$41,475.56. Defendant shall reimburse said amount in full within twelve (12) months from the date of this Order.

5. That Defendant's continuing obligation shall be in accordance with this Order.

The trial court made the following relevant findings of fact concerning Plaintiff's uninsured medical expenses:

7. That the Plaintiff is 57 years old and has progressive multiple sclerosis. She is severely disabled physically and cognitively. She has a gait ataxia with falls and limited ability to walk more than 200 feet with a cane. She has significant impairment of memory to the point where she is not able to care for her own needs or to supervise attendant care. She has a high

risk for falls and injury. She is not able to function without continued supervision.

8. Prior to March of last year, Plaintiff's attending physician recommended that she be moved to an assisted living facility where her needs could be met since attempts at staying in her home with the help of a home health aide were unsuccessful. In April 2009 she moved into the Willow Lake Retirement Residence in Willow Grove, Pennsylvania where she has been in their assisted living program and where her current needs are being met.

9. That the parties' son, Michael R. Mattick, is Plaintiff's attorney in fact. In that capacity, he handles her financial matters and, more specifically, keeps track of her funds and pays her bills including the cost of the assisted living program and her uninsured medical expenses.

10. That Michael R. Mattick prepares and sends to the Defendant on a monthly basis for payment documentation which includes a copy of the monthly billing statement for Willow Lake, the assisted living facility, copies of all medical and dental related bills not covered in full by Medicare or Plaintiff's insurance carrier, Horizon Blue Cross and Blue Shield, and copies of receipts for co-payments paid in behalf of the Plaintiff.

11. That since April 2009 when the Plaintiff entered the Willow Lake Retirement Residence, Plaintiff has demanded that the Defendant pay the monthly cost of Plaintiff's room and board at the facility, plus an additional charge Willow Lake of \$350.00 per month for administering Plaintiff's medications.

12. That the monthly billing statement of Willow Lake includes items for which the

Defendant is not expected to reimburse the Plaintiff such as a room upgrade charge of \$400.00 and other charges such as a spending allowance, cable TV, telephone and personal care items.

13. That the Defendant has paid all Plaintiff's uninsured dental and prescription expenses and has reimbursed the Plaintiff for her co-pays, but he has refused to pay any portion of the monthly Willow Lake billing for the Plaintiff's room and board or the additional Willow Lake monthly medication assistance charge of \$350.00.

14. That included in the monthly Willow Lake room and board charge are the following:

- a) 24 hour access to staff
- b) dining program
- c) linen service
- d) housekeeping service
- e) emergency response system
- f) scheduled transportation
- g) medical appointment scheduling
- h) supervision of daily activities

15. Plaintiff lived in her own home prior to entering Willow Lake. She presented credible evidence at the hearings showing that for the one year period of time prior to her moving to Willow Lake, she had average monthly expenses for the ordinary necessities of life of approximately \$1,055.00. Plaintiff's computation was exclusive of any direct or indirect medical, dental, eye care, medical insurance or pharmaceutical costs, but included items such as food, utilities, a place to live, and property taxes.

16. That the Court finds that uninsured medical costs and expenses include medical necessities, but not the expenses that are the ordinary necessities of life. The court

specifically finds that the current monthly Willow Lake room and board charge for the Plaintiff of \$3,795.00 plus the \$350.00 medication assistance charge, less the room upgrade of \$400.00 and less the average monthly cost of Plaintiff's ordinary necessities of life in the amount of \$1,055.00 represents the medical expense component of the monthly Willow Lake bill for which the Defendant is liable.

17. That through the end of August 2010, the Plaintiff incurred and billed the Defendant for the Willow Lake room and board charges and medication assistance charges the cumulative sum of \$59,410.56.

18. That the Defendant is entitled to credit against the monthly Willow Lake room and board charge of \$1,055.00 for each of the seventeen months Plaintiff resided at Willow Lake up to and including August 2010.

19. That as of August 31, 2010, the Defendant was indebted to the Plaintiff in the sum of \$41,475.56 which represents the medical component of the Willow Lake charges.

Defendant argues that:

Findings of Fact Nos. 15 and 16, from which Findings of Fact 17, 18 and 19 are derived are clearly erroneous and not supported by the totality of the evidence presented, or competent evidence. As discussed above, the only competent evidence [of] the intent of the parties was that [Defendant] would not be responsible for residential or custodial care, and that he pay only uninsured medical expenses.

Initially, we point out that the standard of review for the trial court's findings of fact does not include consideration of

the "totality of the evidence presented," only whether competent evidence was presented to the trial court to support its findings. *Lee*, 167 N.C. App. at 253, 605 S.E.2d at 224. Further, Defendant makes no argument that the actual findings above are not supported by competent evidence, and he has therefore abandoned any such argument. "Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C.R. App. P. 28(b)(6). Any conclusions made by a trial court concerning the intent of the parties are not findings of fact but, rather, conclusions of law, and we treat them as such. *Dunevant v. Dunevant*, 142 N.C. App. 169, 173, 542 S.E.2d 242, 245 (2001).

The trial court's findings show that Plaintiff suffers from progressive multiple sclerosis, a condition with which she was afflicted at the time the Agreement was entered. "She is severely disabled physically and cognitively." Plaintiff has limited mobility and suffers falls. "She has significant impairment of memory to the point where she is not able to care for her own needs or to supervise attendant care. She has high risk for falls and injury. She is not able to function without continued supervision." Plaintiff's physician recommended Plaintiff be moved to an assisted living facility "where her needs could be met since attempts at staying in her home with

the help of a home health aide were unsuccessful." Plaintiff's current needs are being met at Willow Lake.

We hold that Plaintiff's removal from her private residence and admission into an assisted living facility was a medical necessity and, on these facts, reasonable assisted living expenses are covered under the plain language meaning of "expenses not covered by major medical . . . insurance." *Garner*, 157 N.C. App. at 666-67, 580 S.E.2d at 17-18.

Having held that reasonable assisted living expenses are covered by the Agreement, we turn to the specific expenses awarded to Plaintiff. The trial court concluded, and Defendant makes no credible contrary argument, that Defendant was responsible for reimbursing Plaintiff's medical necessities, but not for expenses constituting the "ordinary necessities of life." The trial court's unchallenged findings show that Plaintiff's monthly room and board charges for Willow Lake are \$3,795.00. This amount does not include cable or telephone charges, which the trial court concluded were not medical necessities. The \$3,795.00 amount did include \$400.00 which constituted a room upgrade fee. The trial court determined that this upgrade did not constitute a medical necessity. The trial court further found that Plaintiff was charged a \$350.00 monthly medication assistance charge, which charge the trial court

concluded was a medical necessity. The trial court found that Plaintiff's ordinary living expenses prior to moving into Willow Lake amounted to \$1,055.00. The trial court therefore determined that, pursuant to the Agreement, Plaintiff was entitled to reimbursement for the \$350.00 monthly medication assistance charge, and the monthly "room and board" assisted living charge of \$3,795.00 - minus the \$400.00 room upgrade fee and minus \$1,055.00, which constituted Plaintiff's ordinary living expenses before she entered the assisted living facility upon her doctor's recommendation.

We hold that the trial court's findings support its conclusion and award with respect to the amount of monthly uninsured medical expenses it determined constituted reimbursable medical expenses under the Agreement. Plaintiff's move to an assisted living facility was a medical necessity due to her physical and mental deterioration. These additional services constitute medical necessities under the Agreement.

We find no error with the trial court's methodology in determining Defendant's monthly obligation under the Agreement. The trial court discounted charges for cable and telephone services, subtracted the \$400.00 monthly charge for the room upgrade, and also subtracted the amount Plaintiff was previously paying for her monthly ordinary living expenses prior to her

move into the assisted living facility. What remains constitutes the additional amount Plaintiff is now required to pay due to her medically needed move from her private residence to Willow Lake. We affirm the order of the trial court with one exception.

In the trial court's finding of fact number eighteen, it states: "That the Defendant is entitled to credit against the monthly Willow Lake room and board charge of \$1,055.00 for each of the seventeen months Plaintiff resided at Willow Lake up to and including August 2010." We note, first, that this is not a true finding of fact. Second, this "finding" seems to limit the credit afforded Defendant to the \$1,055.00 found to constitute Plaintiff's prior ordinary living expenses. In light of the trial court's determination, in its sixteenth finding, that Defendant was not responsible for reimbursing Plaintiff for the \$400.00 room upgrade charge, we remand to the trial court to either amend its order to reflect a credit for that \$400.00 monthly room upgrade charge or, alternatively, include additional findings and conclusions as needed to clarify the reasoning behind the omission of this charge from the credit given Defendant.

Affirmed in part, remanded in part.

Judges ELMORE and HUNTER, JR. concur.

Report per Rule 30(e).