

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

NO. COA11-468
NORTH CAROLINA COURT OF APPEALS

Filed: 1 November 2011

CLARA FINNEY FOX,
Plaintiff,

v.

Person County
No. 07 CVD 185

EARL THOMAS FOX,
Defendant.

Appeal by plaintiff from judgment and order entered 7 September 2010 by Judge Mark E. Galloway in District Court, Person County. Heard in the Court of Appeals 28 September 2011.

Wayne E. Crumwell for plaintiff appellant.

James E. Ramsey for defendant appellee.

McCULLOUGH, Judge.

Clara Finney Fox ("plaintiff") appeals from an Equitable Distribution Judgment and Order entered 7 September 2010. For reasons discussed herein, we affirm.

I. Background

Plaintiff married Earl Thomas Fox ("defendant") on 20 April 1994. Plaintiff and defendant never had children and

subsequently separated on 7 November 2006. They were granted a judgment of absolute divorce in a separate action.

Prior to the divorce decree, plaintiff commenced this action by filing a complaint on 27 February 2007 seeking divorce from bed and board, alimony, spousal support, and equitable distribution of marital and divisible property. Defendant filed his answer on 17 April 2007. Each party requested an unequal distribution of the property, in their respective favor.

On 6 September 2007, the trial court entered an order dismissing plaintiff's claims for alimony and spousal support and retained the issue of equitable distribution for future consideration. In finding plaintiff to not be a dependent spouse, the trial court noted plaintiff was disabled as a result of injuries suffered in her employment. Plaintiff received a workers' compensation lump sum payment in the amount of \$120,000.00, with a remaining balance of \$55,000.00 deposited in a certificate of deposit, drawing 6.25% interest. Plaintiff also has funds under the Workers' Compensation Medical Act set aside in the amount of \$8,300.00, as well as a Social Security disability of \$690.00 per month. On the other hand, defendant is a disabled police officer receiving monthly disability benefits from the State of North Carolina and Social Security

disability totaling \$2,442.00, while having monthly expenses of \$2,443.80.

Before getting married, each party owned a separate residence; and upon deciding to get married, they agreed to sell their respective residences, applying the proceeds to the acquisition of a joint residence. Plaintiff sold her residence for \$75,000.00 and contributed \$59,378.00 to the purchase of the marital residence, while defendant sold his residence for \$39,066.00 and contributed the entire amount to the improvement of the residence.

Upon separation, plaintiff continued to live in the marital residence, making payments on the deed of trust in the amount of \$688.77 per month for an approximate total of \$19,829.33 from the date of separation to the time of trial. At trial, the court determined the property had a fair rental value of approximately \$20,000.00 over the same period. Defendant did not make any payments toward the mortgage during this time and plaintiff's payments reduced the principal on the mortgage by almost \$9,000.00.

In its 7 September 2007 order, the trial court considered the parties' arguments as to distributional factors under N.C. Gen. Stat. § 50-20(c) and found that an equitable distribution of the marital and divisible estate would be proper. In doing

so, the trial court divided the marital and divisible property. Plaintiff received marital property valued at \$25,662.63 and defendant received marital property totaling \$45,321.63, but defendant also retained marital debt in the amount of \$37,708.15. The trial court also ordered a distributive award to be paid by either plaintiff or defendant depending on whether the marital residence was purchased by plaintiff, defendant, or had to be sold, with plaintiff being given first right of refusal to purchase. Plaintiff gave notice of appeal on 6 October 2010.

II. Analysis

Plaintiff raises thirteen issues on appeal; however, most of the issues are incorporated by reference into plaintiff's main argument or are merely withdrawn. Other issues are waived due to plaintiff's failure to cite to any relevant authority in support of its argument. *See* N.C.R. App. P. 28(b)(6) (2009). Therefore, plaintiff raises one main argument in that the trial court erred in ordering an equal division of the marital property. She argues the trial court should have awarded her an unequal division of the marital property due to her separate contributions to the purchase of the marital residence, her post-separation payments towards the mortgage, and the increased

equity and reduction in debt coinciding with the mortgage payments. We disagree.

The party desiring an unequal division of marital property bears "the burden of proving by a preponderance of the evidence that an equal division would not be equitable." *White v. White*, 312 N.C. 770, 776, 324 S.E.2d 829, 832 (1985). When the moving party does provide evidence that tends to show an unequal division may be proper, the trial court must use its discretion and weigh the factors provided in N.C. Gen. Stat. § 50-20(c) (2009), which favor equal division. *White*, 312 N.C. at 777, 324 S.E.2d at 833. "[T]he statute is a legislative enactment of public policy so strongly favoring the equal division of marital property that an equal division is made *mandatory* 'unless the court determines that an equal division is not equitable.'" *Id.* at 776, 324 S.E.2d at 832 (quoting N.C.G.S. § 50-20(c)). We review a trial court's equitable distribution award for clear abuse of discretion and a trial court may be reversed "only upon a showing that its actions are manifestly unsupported by reason." *Id.* at 777, 324 S.E.2d at 833.

In reviewing the trial court's findings and conclusions, we cannot hold that the trial court abused its discretion in awarding an equal division of the marital property. Plaintiff first argues she should have received a dollar-for-dollar credit

for her separate contribution to the purchase of the marital residence. Generally, a single asset may be purchased with both separate and marital contributions and our Court will apply the "source of funds" approach to "distinguish between marital and separate contributions[.]" *McLean v. McLean*, 323 N.C. 543, 545, 374 S.E.2d 376, 378 (1988). This approach would mean each estate receives interest in the property in a ratio equivalent to each parties' initial investment. *Id.* at 546, 374 S.E.2d at 378. "However, our Court . . . has declined to apply this rule when a spouse uses separate funds to furnish consideration for property conveyed to the marital estate, as demonstrated by titling the property as a tenancy by the entirety. In such cases a presumption of a gift of separate property to the marital estate arises, which is rebuttable by clear, cogent, and convincing evidence." *Id.* "Unless that presumption is rebutted by clear, cogent and convincing evidence, [N.C.G.S. § 50-20(b)(2) (1987)] dictates that the gift 'shall be considered separate property only if such an intention is stated in the conveyance.'" *Id.* at 552, 374 S.E.2d at 382 (quoting N.C. Gen. Stat. § 50-20(b)(2) (1987)).

Here, plaintiff and defendant held the marital residence as a tenancy by the entirety. The evidence tends to show that upon marriage, plaintiff and defendant agreed to sell their

respective residences and contribute the proceeds to the purchase of a marital residence. The trial court made the finding of fact that "Defendant contributed all of the proceeds from the sale of his separate property, while the Plaintiff contributed only 4/5 of hers" in determining the separate contributions were gifts to the marital estate. Plaintiff did not express any intention in the conveyance for her gift to be considered separate property. Based on the marital gift presumption, it appears the parties' intentions were to have their separate contributions considered as gifts to the marital estate; and plaintiff does not present sufficient clear, cogent, and convincing evidence to suggest otherwise. *See id.; McLeod v. McLeod*, 74 N.C. App. 144, 154, 327 S.E.2d 910, 916-17 (1985), *overruled on other grounds by Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986).

Plaintiff also claims the trial court erred in determining defendant contributed the entire proceeds from the sale of his separate residence towards the purchase of the marital residence, because the only evidence presented was defendant's testimony and a handwritten letter purportedly prepared by defendant's mother. Unfortunately, plaintiff does not cite to any authority for this argument regarding the competency of the evidence, and thus, as stated above, this argument is waived.

See N.C.R. App. P. 28(b)(6). Based on the foregoing reasons, the trial court did not abuse its discretion in classifying the separate contributions as gifts toward the purchase of the marital residence.

Plaintiff next argues her post-separation contributions towards the mortgage were sufficient to warrant an unequal division. Plaintiff cites to N.C.G.S. § 50-20(b)(4)(d), which states "[i]ncreases and decreases in marital debt and financing charges and interest related to marital debt" are divisible property, for the contention that her post-separation contributions to the mortgage are divisible property. Nonetheless, it appears the trial court thoroughly reviewed the issue in finding the payments should not be considered a distributional factor. The trial court reasoned that plaintiff paid approximately \$19,829.33 towards the mortgage following the separation, but at the same time the property had a monthly rental value of between \$700.00 and \$750.00. Therefore, the rental value of the property over the same period would have been approximately \$20,000.00. Consequently, the trial court found the separate distributional factors of the mortgage payments made by plaintiff and the rental value owed to defendant offset each other. Plaintiff attempts to argue the trial court abused its discretion in considering rental value as

a distributional factor, but this argument is without merit. See *Becker v. Becker*, 88 N.C. App. 606, 607-08, 364 S.E.2d 175, 176-77 (1988).

The other facts considered by the trial court clearly support the court's conclusions. While plaintiff did receive a lower value of marital property, defendant retained an offsetting amount of marital debt. The trial court further considered the parties' separate property, mainly in the form of plaintiff's workers' compensation award and the fact that she had approximately \$60,000.00 in savings, while defendant had none. Plaintiff argues the trial court erred in not considering the parties' health and incomes in making the divisions, but in actuality, two days before entering the equitable distribution judgment and order, the trial court considered these issues in denying alimony and spousal support because plaintiff failed to prove that defendant was the supporting spouse. Also, the trial court determined defendant owed plaintiff \$3,300.00 as compensation for payments made towards the note and mortgage on defendant's separate property, in the form of a mobile home. Based on the extensive findings of fact in the equitable distribution judgment and order and the previous order denying alimony and spousal support, the trial court fully considered the factors as expressed in N.C.G.S. § 50-20(c) and as a result

did not abuse its discretion in finding an equal division to be an equitable distribution.

III. Conclusion

We cannot find the trial court's actions to be "manifestly unsupported by reason." See *White*, 312 N.C. at 777, 324 S.E.2d at 833. Accordingly, the trial court did not abuse its discretion in ordering an equal division and finding it to be equitable.

Affirmed.

Judges HUNTER (Robert C.) and STEELMAN concur.

Report per Rule 30(e).