ATTORNEY FOR APPELLANT:

NANCY G. ENDSLEY
Landman & Beatty
Indianapolis, Indiana

ATTORNEY FOR APPELLEE:

ANDREW Z. SOSHNICK
AMANDA R. BLYSTONE
Baker & Daniels LLP
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ERVIN MARK BALL,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 29A04-0701-CV-57
	)	
KELLI T. BALL,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable William J. Hughes, Special Judge
Cause No. 29D03-0510-DR-1182

November 8, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Ervin Mark Ball ("Husband") appeals the distribution of marital assets ordered in the dissolution proceeding filed by his former wife, Kelli T. Ball ("Wife"). Husband presents two issues for review, which we consolidate and restate as whether the trial court erred when it construed the parties' prenuptial agreement.

We affirm.

FACTS AND PROCEDURAL HISTORY

On August 25, 1999, Husband and Wife executed a prenuptial agreement ("the Agreement"). The Agreement provides, in relevant part:

> RIGHTS AND OBLIGATIONS AFTER MARRIAGE
>
> Section 2.1. Premarital Property. All property owned separately by a party prior to the marriage shall continue to be owned as separate property ("Separate Property") of such party after the marriage. Separate Property includes those items disclosed by each party on Exhibits "A" and "B", respectively . . . . [A]ny property and assets for which such premarital property is exchanged, transferred or otherwise disposed shall continue to be owned as Separate Property of the party who owned that property before the marriage.
>
> Section 2.2. Postmarital Property. Except as provided otherwise herein, all property individually acquired by either party after the date of their marriage, whether through earnings, income, gifts, inheritance, or otherwise, shall be the Separate Property of the party acquiring the property.
>
> Section 2.3. Joint Property. Except as provided in Section 2.8 or otherwise herein, the parties, prior to and during the marriage, may and most likely will establish joint interests in real or personal property, which property will not be subject to this Agreement.
>
> * * *

Section 2.7. Increases to Property. Any appreciation, accessions to, increments in, or other increases to the Separate Property of a party, and any rents, profits or other proceeds therefrom, shall be such party's Separate Property, even though such rent, profit, appreciation, or increase may be due to the contributions of Separate Property or personal services of the other party. In the event that any of the property listed in Exhibits "A" and "B" shall be sold, transferred, exchanged, commingled, pledged or in some other way disposed of, then to the extent possible, the party owning said property shall be entitled to the proceeds of or the items received in exchange for said property and nothing contained herein shall be deemed to limit the extent to which the proceeds of such sale, exchange or other disposition may be traced.

Section 2.8. Marital Residence. Wife and Husband contemplate that they will acquire real property that shall be used during the marriage as the parties' primary residence ("Marital Residence") and that the Marital Residence shall be titled in both names as tenants by the entireties. Upon the disposition of the Marital Residence during the parties' marriage, the proceeds from the sale of the Marital Residence shall be distributed and paid in the following order: (1) any and all existing mortgage, liens and other encumbrances on the Marital Residence; (2) the costs associated with the sale (e.g., real estate commissions, closing costs, reasonable and necessary expenses to prepare the residence for sale), and other expenses associated with the sale of the Marital Residence; and (3) any and all sums paid from Wife's and/or Husband's Separate Property as a down payment or initial investment in the acquisition of the Marital Residence. Any funds remaining from the sale proceeds after the foregoing obligations have been paid shall be divided equally (50/50) between Husband and Wife.

* * *

Section 2.16. Mutual Services. The parties contemplate that during the course of the marriage each party may render valuable services to the other or with respect to the Separate Property of the other. Each party agrees that such services will be rendered out of love and affection, out of a desire to make the relationship harmonious, and/or as a division of the responsibilities attending the marriage. However, the parties agree that unless there is a written agreement signed by both parties to the contrary, such services shall not be rendered with the expectation of financial compensation, and neither party shall make any claim or maintain any action whatsoever against the other or the other's estate for compensation for such services.

* * *

DISSOLUTION OF MARRIAGE

* * *

> Section 3.2. Waiver of Rights. In the event of a dissolution of marriage, legal separation pursuant to Court authority, or other related petition and/or action, each party waives any rights he or she may have with respect to the Separate Property of the other party, whether owned prior to the marriage or acquired after the parties' marriage as Separate Property . . . .
>
> Section 3.3. Joint Property. Unless otherwise provided herein or otherwise agreed, in the event of the granting of any such dissolution [of] marriage or other related petition, the value of all property jointly held by the parties with each other, whether the property be held by joint tenancy, tenancy by the entireties, tenancy in common, or otherwise, shall be divided equally.
>
> Section 3.4. Marital Residence. Unless otherwise provided herein or otherwise agreed, in the event of the granting of any such dissolution [of] marriage or other related petition, the Marital Residence shall be sold and the proceeds from the sale shall be divided between the parties in the manner set forth in Section 2.8 herein. . . .

Appellee's App. at 4-10.

When the parties executed the Agreement, Wife owned a residence on Crestwood Drive in Carmel ("Crestwood house"). The Crestwood house was listed as Wife's separate property on Exhibit "A" to the Agreement. Husband and Wife married on August 28, 1999, after which they resided at the Crestwood house for a few years until Wife sold it. Wife then purchased a lot in an area that later became known as Bridgewater, and, in 2002, she began constructing a home on the lot. The land and the house, located at 3404 Club Estates Drive in Carmel ("Club Estates house"), were at all times titled solely in Wife's name. Husband and Wife moved into the Club Estates house in August or September of 2003.

On September 19, 2005, Wife filed her petition for dissolution of marriage. On April 5, 2006, Wife filed a motion for summary judgment regarding the disposition of the Club Estates house. Wife included in the designation of evidence in support of that motion her amended request for admissions, which she asserted were deemed admitted pursuant to Indiana Trial Rule 36 for Husband's failure to timely file a response. On July 20, 2006, Husband filed his verified motion to withdraw those admissions. After conducting hearings on both motions, the court granted Husband's motion, allowing him to substitute his responses to Wife's discovery request. The trial court also granted Wife's motion for summary judgment ("Summary Judgment Order"), finding that the Club Estates house was her Separate Property ("Separate Property") as defined in the Agreement.

On November 13, 2006, Husband filed a motion for summary judgment, alleging that Wife had breached the Agreement by titling the Club Estates house in her name only. At the final hearing on November 22, 2006, the trial court denied that motion. The court then issued the Decree of Dissolution ("Decree") on December 22, 2006. The Decree includes the court's findings and conclusions and provides in relevant part:

> 9. The parties are the owners of no Joint Property as defined in Section 3.3 of the Agreement. No Marital Residence exists as referred to in Section 3.4 of the agreement. Each party is the owner of Separate Property as defined in Sections 2.1, 2.2, 2.4, 2.7 and 2.11 of the Agreement.
>
> 10. Wife was the owner of real property located at 3403 Club Estates Drive, Carmel, IN 46032. Pursuant to this Court's Order Granting Summary Judgment in Favor of Wife entered August 11, 2006, said real property is the Separate Property of Wife pursuant to the

Agreement. Wife shall have said real property as her sole and Separate Property.

11. Husband argued at trial that the Wife had breached the Agreement in the acquisition of 3403 Club Estates Drive, Carmel, IN 46032. The Court finds that the Agreement specifically permitted each party to acquire property in his or her own name which was to be treated as the sole and separate property of that party upon dissolution of marriage. (See Agreement paragraphs 2.3, and 2.6[).] Husband argues that this result is inequitable because he contributed substantial services to the completion of the Club Estates property by way of landscaping in a sum in excess of $400,000.00. The parties' rights in this regard are addressed by the Agreement at paragraphs 2.8 and 2.7. Paragraph 2.8 requires the acquisition of property in joint names to qualify as the "Marital Residence" under the agreement and there is no question of fact that the Club Estates property was not acquired in joint names. This was determined by the Court's entry of summary judgment. In addition, Paragraph 2.7 specifically addresses the rights and obligations of the parties where there are increases to property. That provision specifically addresses those instances in which the separate property of one party is increased "due to the contributions of Separate Property or personal services of the other party" and declares that these increases are increases to Separate Property[][1] and not subject to claim by the contributing other spouse. Lastly, the Court is not persuaded that under the facts herein that this determination is inequitable. Wife provided substantial evidence at trial that she made numerous contributions to the landscaping business endeavor of the Husband and that she paid many expenses directly related to the installation of landscaping. These contributions and payments by the Wife met or exceeded the claimed contributions of the Husband individually or through his business entity. Wife did not breach the Agreement by the manner in which she acquired and developed the Club Estates property.

Appellant's App. at 16-17.[2] Husband now appeals.

[1] The brackets here are in place of closing quotation marks, which are omitted because there were no corresponding opening quotation marks in the Decree.

[2] We note that Husband's appendix does not contain a table of contents. We respectfully remind counsel that a table of contents aids our review and is required by Indiana Appellate Rule 50(A)(2).

DISCUSSION AND DECISION

When the trial court has entered findings and conclusions pursuant to Indiana Trial Rule 52, we apply the following two-tiered standard of review: whether the evidence supports the findings and whether the findings support the judgment. Staresnick v. Staresnick, 830 N.E.2d 127, 131 (Ind. Ct. App. 2005). The trial court's findings and conclusions will be set aside only if they are clearly erroneous, that is, if the record contains no facts or inferences supporting them. Id. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. Id. We neither reweigh the evidence nor assess the credibility of witnesses, but consider only the evidence most favorable to the judgment. Id. We review conclusions of law de novo. Id.

Husband contends that the trial court erred when it determined in the Summary Judgment Order that the Club Estates house was Wife's Separate Property under the Agreement and when it found in the Decree that there was no Marital Residence as contemplated in the Agreement. In essence, Husband argues that the trial court erred in its construction of the Agreement. Thus, we address the trial court's construction of the Agreement.

Prenuptial agreements are legal contracts by which parties entering into a marriage attempt to settle their respective interests in the property of the other during the course of the marriage and upon its termination. Magee v. Garry-Magee, 833 N.E.2d 1083, 1087 (Ind. Ct. App. 2005) (citations omitted). Prenuptial agreements are to be construed according to principles applicable to the construction of contracts generally, and they are

to be liberally construed to carry out the parties' intent. Id. The interpretation of a contract is primarily a question of law for the court, even if the instrument contains an ambiguity needing resolution. Id. Thus, on appeal, our standard of review is the same as that employed by the trial court. Id.

To interpret a contract, a court first considers the parties' intent as expressed in the language of the contract. Schmidt v. Schmidt, 812 N.E.2d 1074, 1080 (Ind. Ct. App. 2004). The court must read all of the contractual provisions as a whole to accept an interpretation that harmonizes the contract's words and phrases and gives effect to the parties' intentions as established at the time they entered the contract. Id. If the language of the agreement is unambiguous, the intent of the parties must be determined from the four corners of the document. Id.

Unless the terms of a contract are ambiguous, they will be given their plain and ordinary meaning. Niccum v. Niccum, 734 N.E.2d 637, 639 (Ind. Ct. App. 2000) (citation omitted), trans. denied. If the language of the instrument is unambiguous, the intent of the parties must be determined from its four corners; parol or extrinsic evidence is inadmissible to expand, vary or explain the instrument. Bressler v. Bressler, 601 N.E.2d 392, 395 (Ind. Ct. App. 1992). If there is an ambiguity, parol evidence is allowed in to clarify the ambiguity. See DeBoer v. DeBoer, 669 N.E.2d 415, 422 (Ind. Ct. App. 1996) (citation omitted), trans. denied. The terms of a contract are not ambiguous merely because controversy exists between the parties concerning the proper interpretation of terms. Niccum, 734 N.E.2d at 639 (citation omitted). The terms of a contract are

ambiguous only when reasonably intelligent persons would honestly differ as to the meaning of those terms. Schmidt, 812 N.E.2d at 1083.

Husband claims that the trial court erred when it defined "Marital Residence" as used in the Agreement because the court's construction does not harmonize certain sections and ignores other sections of the Agreement. Husband further contends that the trial court erroneously applied specific over general provisions when it construed that term. We address each contention in turn.

Husband first claims that the trial court's construction of "Marital Residence" does not harmonize all of the sections in the Agreement. In the Summary Judgment Order, the trial court found, in relevant part:

> 8. Section 2.8 of the Agreement states, in part, that:
>
> > Wife and Husband contemplate that they will acquire real property that shall be used during the marriage as the parties' primary residence ("Marital Residence") and that the Marital Residence shall be titled in both names as tenants by the entireties.
>
> This Court reads the word "contemplate" to indicate a plan to do something. Therefore, in order for the Property to be classified as the Marital Residence pursuant to Section 2.8 of the Agreement, the parties' would have had to do each of the following: (1) acquire the real property; (2) use the property as the parties' primary residence; and (3) jointly title the Property.
>
> 9. Under the present circumstances, the [Club Estates] Property does not fall within the definition of "Marital Residence" under Section 2.8 because the Property was not acquire by both parties and was not jointly titled. The Court arrives at this conclusion both by construing the Agreement based on the language of the four corners, and also with the use of admissions to help guide the decision. As guidance, the Court looked to [Husband's] admissions paragraphs one (1) and three (3) in which [Husband] admitted that [Wife]

> purchased the [Club Estates] Property in her individual name and that [Husband] made no financial contributions to the purchase . . . .
>
> 10. Therefore, the [Club Estates] Property is the separate property of [Wife], rather than the "Marital Residence." For this reason, Section 3.4 of the Agreement is not applicable to the present situation, and, therefore, does not require the Property to be sold with the proceeds being divided equally. Rather, the Property falls under the umbrella of Section 2.2 of the Agreement which states that "[e]xcept as provided otherwise herein, all property individually acquired by either party after the date of their marriage, whether through earnings, income, gifts, inheritance, or otherwise, shall be the Separate Property of the party acquiring the property."

Appellant's App. at 9-10.

The trial court applied the plain and ordinary meaning of Section 2.8, which defines "Marital Residence." That section provides that the parties "contemplate that they shall acquire real property that shall be used during the marriage as the parties' primary residence ('Marital Residence') and that the Marital Residence shall be titled in both names as tenants by the entireties." Appellee's App. at 6. We agree with the trial court that "contemplate" as used in the Agreement means to plan or to consider as a future event. See Webster's Third New International Dictionary Unabridged 491 (2002) ("to have in view as a purpose: anticipate doing or performing: plan on: INTEND, PLAN."). Thus, the Agreement does not mandate the purchase of a Marital Residence. Instead, Section 2.8 defines "Marital Residence" as the parties' primary residence during the marriage that is titled in both names as tenants by the entirety.

Further, Section 2.8 provides that "they [Husband and Wife] shall buy real property" that would be the Marital Residence. The word "they" is a plural pronoun, but Wife alone purchased the Club Estates house. Appellee's App. at 6. And although the

Club Estates house was the parties' primary residence during the marriage, it was not titled in both names as tenants by the entirety. Thus, we agree with the trial court that the Club Estates house was not a Marital Residence as defined in Section 2.8.

Further, the trial court's construction harmonizes Section 2.8 with other provisions in the Agreement. Section 2.2 provides for the purchase of Separate Property that is owned by only one of the parties. Under Section 2.7, any increases or appreciation in Separate Property that accrues during the marriage is also Separate Property. And in Section 2.16, the parties agreed that any services rendered by one party with respect to the Separate Property of the other party becomes the Separate Property of the other party, resulting in a waiver of the right to "claim or maintain any action whatsoever against the other or the other's estate for compensation for such services." Appellee's App. at 9. As noted by the trial court, the Agreement provides for the purchase and retention of Separate Property that is not subject to division in dissolution proceedings. As such, Wife's purchase of the lot and building of the Club Estates house as her Separate Property is not inconsistent with the Agreement, nor is the trial court's determination that the parties' residency during the marriage at the Club Estates house did not by itself make that house a Marital Residence as defined in Section 2.8.

Husband also argues that the trial court's construction of the Agreement "is in conflict with the express language of the Prenuptial Agreement which provides for distribution of proceeds from the sale of the marital residence in a manner that recognizes each spouse may have contributed Separate Property 'as a down payment or initial investment in the acquisition of the Marital Residence.'" Brief at 11-12 (quoting the

Agreement). Sections 2.8 and 3.4 of the Agreement provide for the division of proceeds from the sale of the Marital Residence, with credit to be given to each spouse for contributions made by each from his or her Separate Property toward the purchase of the Marital Residence. But the sale of a marital residence, and, thus, Husband's argument, assume the existence of a Marital Residence, which is the very question before us. The cited provisions direct the parties' conduct in the event there is a Marital Residence and that residence is later sold, but those provisions do not help define that term. Thus, Husband's argument in this regard is without merit.

In construing "Marital Residence" as used in the Agreement, the trial court applied the plain and ordinary meaning of the Agreement and considered the contract as a whole. The trial court's interpretation harmonized the various provisions in the Agreement and did not apply general provisions over conflicting specific provisions. We conclude that the trial court did not err in its construction of "Marital Residence" as used in the Agreement. Thus, the trial court did not err when it granted summary judgment to Wife, finding that the Club Estates house was not the Marital Residence but was, instead her Separate Property, and the trial court did not err in finding in the Decree that there was no Marital Residence.[3]

Affirmed.

MATHIAS, J., and BRADFORD, J., concur.

[3] Husband also argues that Section 2.2 of the Agreement, defining Separate Property, is more general than Section 2.8, defining the Marital Residence. We agree with Husband that, when a contract contains general and specific provisions relating to the same subject, the specific provision controls. See Magee, 833 N.E.2d at 1092. But that rule of construction does not apply here, where we have determined that there was no Marital Residence as defined in Section 2.8.