NO. COA01-493

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

WILLIAM RANDY PERKINS,
EXECUTOR OF THE ESTATE OF
WILLIAM JAMES PERKINS, Deceased,
Plaintiff-Appellee,

v. Alamance County
No. 00 CVD 1448

MARGARET S. PERKINS,
Defendant-Appellant.

Appeal by defendant from judgment dated 1 September 2000 by Judge Ernest J. Harviel in District Court, Alamance County. Heard in the Court of Appeals 12 March 2002.

Wishart, Norris, Henninger & Pittman, P.A., by Pamela S. Duffy and Hillary D. Whitaker, for plaintiff-appellee.

Neill A. Jennings, Jr. for defendant-appellant.

McGEE, Judge.

William James Perkins (plaintiff) and Margaret S. Perkins (defendant) were married on 31 May 1986. Plaintiff filed a verified complaint dated 29 June 2000 seeking an absolute divorce from defendant and preserving the issue of equitable distribution then pending in a previously filed action. In his divorce complaint, plaintiff alleged in part that

> 1. The plaintiff is a citizen and resident of Guilford County, North Carolina, and has been a resident of the State of North Carolina for at least six consecutive months

> next preceding the filing of this Complaint.
>
> 2. The defendant is a citizen and resident of Randolph County, North Carolina.
>
> 3. The plaintiff and defendant were lawfully married on May 31, 1986.
>
> 4. The plaintiff and defendant separated from each other on June 19, 1999 with the intention of remaining separate and apart from each other, and have at no time resumed the marital relationship since said date.

Defendant filed an answer on 10 August 2000 admitting the allegations in paragraphs one through three but denying the allegations in paragraph four. In her answer, defendant stated that the "allegations [in paragraph 4] are false and untrue and are denied. Plaintiff went into the hospital on 21 June 1999. Defendant was forced to leave the marital home on 18 October 1999, the day before Plaintiff returned home."

A divorce hearing was held on 1 September 2000. Plaintiff's son, William Randy Perkins (Randy Perkins) testified that plaintiff was admitted to Alamance Regional Medical Center on 21 June 1999. On that date, Randy Perkins heard a discussion between plaintiff and defendant at the hospital during which defendant told plaintiff that "[y]ou needn't be thinking about coming home for me to take care of you, unless you sign the farm over to me." Randy Perkins testified that plaintiff responded "[t]hat's not going to happen."

Randy Perkins testified that on 8 July 1999 plaintiff executed a general power of attorney and a living will and health care power of attorney, granting Randy Perkins his power of attorney. On that same day plaintiff executed a revocation of the power of attorney

he had previously issued in favor of defendant.

Plaintiff was discharged from the hospital on 22 July 1999 and began residing at Alamance Health Care Center. Randy Perkins testified that he made the arrangements for plaintiff's move and defendant had no role in plaintiff's admission to Alamance Health Care Center. He stated he visited plaintiff daily and never saw defendant visit plaintiff. Randy Perkins also testified that while plaintiff was at Alamance Health Care Center, he and his brother and sister provided plaintiff with toiletries and other necessities, and that his sister did plaintiff's laundry.

Carol Allen, an employee of Alamance Health Care Center, testified that she saw defendant visit plaintiff "[n]o more than twice" while plaintiff stayed there.

Stephanie Blackburn (Ms. Blackburn) testified that in the first week of July 2000 defendant came to Ms. Blackburn's home and they had a discussion in which defendant told Ms. Blackburn that plaintiff was in a nursing home and that defendant was seeing another man. Ms. Blackburn testified that defendant told her she wished that she had met the other man years ago. She also told Ms. Blackburn that she had been to see an attorney to find out about her rights in divorcing plaintiff.

Defendant testified that she moved from the family residence in October 1999, when plaintiff was released from Alamance Health Care Center. She denied that she ever had a conversation with plaintiff at the hospital when Randy Perkins was present. She testified she visited plaintiff at the hospital two or three times

a week and later regularly visited him at Alamance Health Care Center. She also talked with him by telephone daily. Defendant testified to several violent incidents when plaintiff attacked and threatened her during their marriage. When asked if plaintiff ever deeded the farm to her, defendant responded, "He didn't even put my name on things he promised me[.]"

Kathleen Brothers testified that she went with defendant to visit plaintiff in the hospital and at Alamance Health Care Center and that some weeks they went as often as three times a week.

The trial court entered a judgment of divorce dated 1 September 2000 and made the following pertinent findings of fact:

> 6. The plaintiff was admitted to Alamance Regional Medical Center hospital on June 21, 1999.
>
> 7. On June 21, 1999 at the hospital, the defendant told the plaintiff that he could not return to the marital residence unless he deeded certain property of his to the defendant. The plaintiff never deeded the property to the defendant nor did he take any action to deed the property to the plaintiff.
>
> 8. On July 8, 1999 the plaintiff gave his Health Care Power of Attorney and a general Power of Attorney to his son, Randy Perkins. On that same day the plaintiff executed a revocation of the Power of Attorney he had previously issued in favor of the defendant.
>
> 9. On July 22, 1999 the plaintiff was discharged from the hospital and went to Alamance Health Care Center.
>
> 10. The defendant told Stephanie Blackburn in the first week of July 2000 when the defendant came to Ms. Blackburn's residence that she had a Mexican boyfriend. The defendant further stated that she wished that she had met him years ago. On that

> occasion defendant told Ms. Blackburn that she had been to see an attorney to find out about her rights in divorcing plaintiff.
>
> 11. While the plaintiff was at Alamance Health Care Center, the defendant did not do the plaintiff's laundry. The plaintiff's children provided the plaintiff with what toiletries or other necessities plaintiff needed and they did the plaintiff's laundry.
>
> 12. The plaintiff and defendant separated from each other on June 21, 1999 and have at no time resumed the marital relationship since said date.
>
> 13. The defendant had the intention of remaining separate and apart on June 21, 1999.
>
> 14. The court does not find the defendant's testimony about her intentions or the date of separation credible.

The trial court concluded that plaintiff was entitled to an absolute divorce, and granted plaintiff an absolute divorce and ordered that the parties' claims for a declaratory judgment, equitable distribution, alimony and postseparation support in a previously filed action survive the entry of judgment. From this order, defendant appeals.

Plaintiff died following the divorce hearing and his son, Randy Perkins, executor of the Estate of William James Perkins, was substituted as plaintiff by consent of the parties.

Defendant raised thirteen assignments of error but in her brief to our Court, she addressed only nine assignments of error; therefore, the remaining arguments are deemed abandoned. N.C. R. App. P. 28(a) ("Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief are deemed abandoned.").

N.C. Gen. Stat. § 50-6 (1999) provides that parties to a marriage may obtain an absolute divorce "on the application of either party, if and when the husband and wife have lived separate and apart for one year, and the plaintiff or defendant in the suit . . . has resided in the State for a period of six months." "The words 'separate and apart,' as used in G.S. 50-6, mean that there must be both a physical separation and an intention on the part of at least one of the parties to cease the matrimonial cohabitation." *Myers v. Myers*, 62 N.C. App. 291, 294, 302 S.E.2d 476, 479 (1983) (citing *Mallard v. Mallard*, 234 N.C. 654, 68 S.E.2d 247 (1951) and *Earles v. Earles*, 29 N.C. App. 348, 224 S.E.2d 284 (1976)). The issues in the case before us deal with the parties' date of separation.

I.

Defendant contends by her first assignment of error that the trial court erred in admitting Randy Perkins' testimony as to a conversation between plaintiff and defendant on 21 June 1999, because the testimony is inadmissible hearsay.

Randy Perkins testified, over defendant's objection, that on 21 June 1999 he overheard a conversation between plaintiff and defendant at Alamance Regional Medical Center in which defendant said to plaintiff that "[y]ou needn't be thinking about coming home for me to take care of you, unless you sign the farm over to me." Randy Perkins testified that plaintiff responded, "[t]hat's not going to happen."

Although defendant concedes in her brief to our Court that

"[d]efendant's alleged statement, her part of the conversation, was admissible under Rule 801 as an admission of a party opponent," defendant argues that plaintiff's statement was inadmissible hearsay. However, defendant has failed to cite any authority to support her argument in violation of N.C.R. App. P. 28(b)(5), which requires that the argument contain citations of the authorities upon which the appellant relies. Since defendant has failed to cite authority in support of her argument, we deem this assignment of error to be abandoned. *See Byrne v. Bordeaux*, 85 N.C. App. 262, 354 S.E.2d 277 (1987); *Wilson v. Wilson*, 134 N.C. App. 642, 518 S.E.2d 255 (1999).

II.

Defendant contends by her second, third and fourth assignments of error that the trial court erred in admitting into evidence plaintiff's 8 July 1999 power of attorney, plaintiff's revocation of power of attorney, and plaintiff's living will and health care power of attorney because these documents are not relevant proof of the parties' intent to separate.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (1999). Generally, "[a]ll relevant evidence is admissible[.]" N.C. Gen. Stat. § 8C-1, Rule 402 (1999). To be relevant evidence,

> "it is not required that the evidence bear directly on the question in issue, and it is competent and relevant if it is one of the circumstances surrounding the parties, and

> necessary to be known to properly understand their conduct or motives, or to weigh the reasonableness of their contentions."

Speizman Co. v. Williamson, 12 N.C. App. 297, 305, 183 S.E.2d 248, 253, *cert. denied*, 279 N.C. 619, 184 S.E.2d 113 (1971) (quoting *Bank v. Stack*, 179 N.C. 514, 103 S.E. 6 (1920)).

Although rulings by the trial court "on relevancy technically are not discretionary and therefore are not reviewed under [an] abuse of discretion standard . . . , such rulings are given great deference on appeal." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991), *disc. review denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992); *see State v. Lotharp*, 148 N.C. App. 435, 444, 559 S.E.2d 807, 812 (2002).

Defendant argues that the evidence at issue "had no tendency to make the existence of any fact in issue more likely than it would be without the evidence." Defendant also argues that the trial court erred in admitting this evidence to prove the existence of a condition at another time.

The fact of consequence in this appeal is the date of separation of the parties. Plaintiff's transfer of control of his personal affairs from defendant to Randy Perkins shortly after telling defendant that he would not sign the farm over to her on 21 June 1999 is a manifestation of his intent to remain separate and apart from defendant, and is relevant in determining plaintiff's intent to separate his personal affairs from defendant and to the date of the parties' separation. The trial court was permitted to

consider all relevant evidence when determining the date of separation, and from that evidence draw its own inferences. *See Lin v. Lin*, 108 N.C. App. 772, 775, 425 S.E.2d 9, 10-11 (1993). The trial court did not err in admitting these documents into evidence. Defendant's second, third and fourth assignments of error are overruled.

Defendant also argues by her tenth assignment of error that the trial court erred in finding of fact number eight that "[o]n July 8, 1999 the plaintiff gave his Health Care Power of Attorney and a general Power of Attorney to his son, Randy Perkins. On that same day the plaintiff executed a revocation of the Power of Attorney he had previously issued in favor of the defendant." Defendant contends this finding is based on insufficient and irrelevant evidence because this evidence does not clearly show an intent to separate on 19 June 1999. As we have previously determined, this circumstantial evidence is relevant to show plaintiff's intent to separate his personal affairs from defendant. This assignment of error is overruled.

III.

Defendant contends in her seventh assignment of error that the trial court's finding of fact number twelve and conclusion of law number two are not based on sufficient evidence. The trial court determined in finding of fact number twelve that "plaintiff and defendant separated from each other on June 21, 1999 and have at no time resumed the marital relationship since said date." The trial court then concluded that "plaintiff is entitled to an absolute

divorce."

"Upon appellate review of a case heard without a jury, the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary." *Lemons v. Lemons*, 112 N.C. App. 110, 114, 434 S.E.2d 638, 641 (1993), *disc. review denied*, 335 N.C. 556, 441 S.E.2d 117 (1994) (citing *Chandler v. Chandler*, 108 N.C. App. 66, 422 S.E.2d 587 (1992)). "If the evidence allows different inferences to be drawn therefrom, the trial judge determines which inferences shall be allowed, and this determination is binding on the appellate courts." *Lin*, 108 N.C. App. at 775, 425 S.E.2d at 10-11. Therefore, although conflicting evidence was presented at trial as to the date of separation, finding of fact twelve is supported by competent evidence in the record and is conclusive on appeal.

Defendant further argues the trial court erred in its findings of fact and conclusion because no direct evidence was introduced as to the date of the separation. However, "[a] person's intent is seldom provable by direct evidence, and must usually be shown through circumstantial evidence." *State v. Compton*, 90 N.C. App. 101, 104, 367 S.E.2d 353, 355 (1988). Intent can be shown by "'proving facts from which the fact sought to be proven may be inferred.'" *Bowes v. Bowes*, 287 N.C. 163, 173-74, 214 S.E.2d 40, 46 (1975) (citations omitted). The trial court did not err in inferring the date of separation based upon plaintiff's evidence concerning the date of separation. Further, although defendant

claims she offered direct evidence that the date of separation was 19 October 1999, "'[a] person's testimony regarding [her intent] . . . is competent evidence, but it is not conclusive[.]" *Burke v. Harrington*, 35 N.C. App. 558, 560, 241 S.E.2d 715, 717 (1978) (citations omitted). Rather, the trial court must consider all surrounding circumstances as well as the conduct of the parties. *Id.* In this case, although conflicting evidence, direct and circumstantial, was presented as to the date of separation, the trial court found plaintiff's evidence more credible and explained in finding of fact fourteen that it "does not find the defendant's testimony about her intentions or the date of separation credible." Defendant's seventh assignment of error is overruled.

IV.

Defendant argues by her eighth assignment of error that the trial court erred in denying defendant's motion to stay execution of judgment pending appeal.

N.C. Gen. Stat. § 1A-1, Rule 62(d) (1999) states in part that "[w]hen an appeal is taken, the appellant *may* obtain a stay of execution . . . by proceeding in accordance with and subject to the conditions of G.S. 1-289, G.S. 1-290, G.S. 1-291, G.S. 1-292, G.S. 1-293, G.S. 1-294, and G.S. 1-295." (emphasis added). Because the General Assembly used the word "may," the statute indicates that whether to allow a stay of execution is within the discretion of the trial court. *Campbell v. Church*, 298 N.C. 476, 483, 259 S.E.2d 558, 563 (1979). "[T]he use of 'may' generally connotes permissive or discretionary action and does not mandate or compel a particular

act." *Id.* (citing *Felton v. Felton*, 213 N.C. 194, 195 S.E. 533 12 (1938)). As plaintiff states in his brief, defendant did not "present any grounds to the Trial Court which would have justified a stay, nor has the defendant offered any such grounds in her brief[.]" The trial court did not abuse its discretion in denying defendant's request for a stay. Defendant's eighth assignment of error is without merit.

V.

By her ninth assignment of error, defendant contends the trial court erred in finding that

> [o]n June 21, 1999 at the hospital, the defendant told the plaintiff that he could not return to the marital residence unless he deeded certain property of his to the defendant. The plaintiff never deeded the property to the defendant nor did he take any action to deed the property to the plaintiff.

Defendant again fails to cite any authority in support of her argument and this argument is therefore abandoned. Defendant further has not properly preserved this issue for our review because what defendant is now arguing was not assigned as error on appeal as required by N.C.R. App. P. 10(a) ("[T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal[.]"). This assignment of error is overruled.

VI.

Defendant argues by her twelfth assignment of error that the trial court erred in entering judgment because plaintiff did not present any evidence as to marriage and residence in this State and

therefore has failed to meet the statutory requirements for an absolute divorce pursuant to N.C. Gen. Stat. §§ 50-6 and 50-8.

We disagree. "'An admission in a pleading or a stipulation admitting a material fact becomes a judicial admission in a case and eliminates the necessity of submitting an issue in regard thereto to the jury.'" *Despathy v. Despathy*, ___ N.C. App. ___, ___, 562 S.E.2d 289, 291 (2002) (quoting *Crowder v. Jenkins*, 11 N.C. App. 57, 62, 180 S.E.2d 482, 485 (1971)). "Judicial admissions 'are binding on the pleader as well as the court.'" *Id.* (quoting *Universal Leaf Tobacco Co. v. Oldham*, 113 N.C. App. 490, 493, 439 S.E.2d 179, 181, *disc. review denied*, 336 N.C. 615, 447 S.E.2d 412 (1994)).

In this case, plaintiff alleged in his verified complaint that he had been a resident of North Carolina for at least six consecutive months preceding the filing of the complaint and that plaintiff and defendant were lawfully married on 31 May 1986. Defendant admitted these allegations in her answer and did not contest these issues at trial. Defendant's admissions are binding upon her. Defendant's final assignment of error is without merit.

We affirm the trial court's judgment of divorce.

Affirmed.

Judges GREENE and CAMPBELL concur.

Report per Rule 30(e).