

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA01-565

NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2002

VIRGIL DUNCAN,

Plaintiff,

v.

Iredell County
No. 99 CVD 00014

FRANCES DUNCAN,

Defendant.

Appeal by plaintiff from order entered 25 October 2000 by Judge James M. Honeycutt in District Court, Iredell County. Heard in the Court of Appeals 20 February 2002.

Harrell Powell, Jr., for the plaintiff-appellant.

David P. Parker, for the defendant-appellee.

WYNN, Judge.

Following divorce of the marital parties to this action, Judge James M. Honeycutt ordered an unequal distribution in Frances Duncan's favor under N.C. Gen. Stat. § 50-20 (1999); Virgil Duncan appeals. We affirm.

In the pre-trial order, the parties agreed upon the value of certain items of marital property, but disagreed on the manner of distribution. Included in this list were two pieces of real estate in Statesville--one located at 215 Lookout Dam Road and the other on Ross Catfish Drive. Frances Duncan asserted in the pre-trial

order that she was entitled to an unequal distribution in her favor under N.C. Gen. Stat. § 50-20(c), enumerating various factors under G.S. § 50-20(c) for the trial court to consider, including:

9. Any other factor which the Court finds to be just and proper, including, without limitation, Virgil Duncan's placing title to property, both tangible and intangible in the name of his children during the marriage [while] Frances Duncan was using her money to purchase marital assets and pay bills.

The trial court made the following relevant findings of fact in its order:

5. That the Court finds that on or about the date of separation, the Plaintiff moved out of the marital residence located at 215 Lookout Dam Road, Statesville, North Carolina and that the Defendant has resided in the marital residence since that date. That the residence had originally been owned by the Plaintiff and was his separate property at the time of the marriage. During the marriage the parties executed a Deed necessary to convert ownership of the property to tenancy by the entirety. The parties also converted ownership of a tract of land belonging to the Defendant as her separate property, that being the real estate located at Ross Catfish Drive, Statesville, North Carolina, to tenancy by the entirety. Each of these transactions constituted a gift to the marital estate. That the marital residence was rebuilt by the parties after being destroyed by fire in 1989. Insurance proceeds were used to rebuild the Lookout Dam Road residence.

6. Both parcels of land lie near or adjoin land belonging to the Defendant's family. The Lookout Dam Road residence is more on the periphery and the Ross Catfish tract is more surrounded by the Defendant's relatives. Both parties testified that they wanted the Lookout Dam Road property. The Defendant testified that she is willing to borrow funds or arrange a distribution of her pension to pay any difference in value to the Plaintiff. Plaintiff wants the marital residence because

it is the property he once owned before the marriage. Plaintiff has been residing with friends since the date of separation. Defendant has had control of both parcels of land. With the other valuations and distributions being made by the Court, the distribution to each party would be substantially uneven (based on an equal distribution) regardless of how the two parcels of land are distributed. The Court finds that the Lookout Dam Road residence should be distributed to the Defendant and that the Ross Catfish Drive property should be distributed to the Plaintiff.

. . .

16. That the Court considered the Defendant/Wife's contentions for an unequal distribution listed on the attached Pre-Trial Order and finds as follows:

#9. As to Defendant/Wife's contention in number 9, the Court finds that the Plaintiff/Husband did pursue a pattern of putting property and money in the hands of his family during the marriage. During and after one of the parties' prior separations, the Plaintiff/Husband told the Defendant/Wife that he had been advised by his attorney (not the one currently representing him) to put property in the name of another so that the Defendant/Wife could not get it. The Plaintiff/Husband used and insured some vehicles after they were reportedly transferred to his children. The Plaintiff/Husband had the camper moved to a friend's house. He put the 1992 Harley Davidson M/C in his son's name. He moved the Honda 4-wheeler to a daughter's house at the date of separation and claimed it belonged to a grand-daughter. Most notably, the Plaintiff/Husband took part of the proceeds from the sale of a parcel of marital property (lake property), approximately \$28,000.00, and put it in a custodian account at FUNB with himself as the custodian. He retained, as custodian, the control of said funds. The weight assigned to this contention is great.

. . .

18. That the Court finds that the total marital estate is \$481,199.00. That the Court has considered the contentions for an unequal distribution and finds that the Defendant is entitled to an unequal distribution. That the Plaintiff should receive 43.4% of the marital property and the Defendant should receive 56.6% of the marital property to achieve an equitable distribution.

The trial court therefore concluded that the distributional factors weighed in Frances Duncan's favor, such that an unequal distribution in her favor was equitable. Accordingly, the trial court distributed 56.6% of the marital estate to her. Furthermore, the trial court ordered that the Ross Catfish Drive property be distributed to Virgil Duncan, and the Lookout Dam Road property be distributed to Frances Duncan.

Virgil Duncan contends that the trial court erred by: (1) Finding that the Lookout Dam Road residence should be distributed to Frances Duncan; (2) Finding that the distribution to each party would be substantially uneven regardless of how the two parcels of real estate were distributed; (3) Finding that he had pursued a pattern of placing property and money in the hands of his family during the marriage, and in assigning great weight to this finding; (4) Finding that Frances Duncan was entitled to an unequal distribution of the marital estate; (5) Concluding that the distributional factors under G.S. § 50-20(c) weighed in Frances Duncan's favor such that an unequal distribution in her favor would be equitable; (6) Ordering an unequal distribution in Frances Duncan's favor; and (7) Ordering that Frances Duncan be the sole

owner of the Lookout Dam Road property, and ordering that he be the sole owner of the Ross Catfish Drive property. With each of these contentions, we disagree.

Under G.S. § 50-20(c), the trial court must equally divide marital property unless it determines that an equal division would not be equitable, in which case it must divide the marital property equitably, considering various enumerated factors. See, e.g., *Smith v. Smith*, 314 N.C. 80, 331 S.E.2d 682 (1985). The party seeking an unequal division of marital assets bears the burden of proving by a preponderance of the evidence that an equal division is not equitable. See *Hall v. Hall*, 88 N.C. App. 297, 363 S.E.2d 189 (1987). G.S. § 50-20(c) vests the trial court with discretion in distributing marital property, and our review is therefore limited to determining whether there was a clear abuse of discretion. See *White v. White*, 312 N.C. 770, 324 S.E.2d 829 (1985). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *Id.* at 777, 324 S.E.2d at 833.

A finding by the trial court that a single factor is sufficient to support an unequal distribution, if supported by the evidence, is within the trial court's discretion and will be upheld on appeal. See *Shoffner v. Shoffner*, 91 N.C. App. 399, 371 S.E.2d 749 (1988). Misconduct by one of the parties during the marriage which dissipates or reduces the value of the marital estate for non-marital purposes (such as conveying marital assets in contemplation of divorce) may properly be considered under G.S. §

50-20(c), as it is consonant with the essential philosophy of equitable distribution. See *Smith*. Furthermore, this Court has held that a spouse's exclusive use of the marital residence subsequent to the date of separation is a relevant distributional factor under this section. See *Burnett v. Burnett*, 122 N.C. App. 712, 471 S.E.2d 649 (1996).

In the instant case, the trial court properly considered the distributional factors under G.S. § 50-20(c), finding that Virgil Duncan had committed misconduct during the marriage which affected the value of the marital estate, thereby justifying an unequal distribution in Frances Duncan's favor. Additionally, the trial court found that Frances Duncan had resided in the marital residence at 215 Lookout Dam Road since the parties' separation, justifying the distribution of the marital residence to her. The trial court's challenged findings are supported by competent evidence in the record, and are therefore binding on appeal. See *Hall*, 88 N.C. App. at 305, 363 S.E.2d at 194. Furthermore, those findings support the trial court's conclusions of law. Virgil Duncan has failed to show any abuse of discretion by the trial court. The trial court's 25 October 2000 order is therefore,

Affirmed.

Judges TIMMONS-GOODSON and TYSON concur.

Report per Rule 30(e).