

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-1126

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2007

CANDY WILKINSON,
Plaintiff,

v.

Catawba County
No. 03 CVD 3430

LARRY WILKINSON,
Defendant.

Appeal by plaintiff from judgment entered 11 April 2006 by Judge Amy R. Sigmon in Catawba County District Court. Heard in the Court of Appeals 16 April 2007.

David Shawn Clark, P.A., by D. Shawn Clark, for plaintiff appellant.

Crowe & Davis, P.A., by H. Kent Crowe, for defendant appellee.

McCULLOUGH, Judge.

Plaintiff-wife and defendant-husband were married on 14 February 1997 and one child was born of the marriage. On 12 November 2003, wife filed a complaint for a domestic violence protective order. On 17 November 2003, husband filed an answer and a counterclaim requesting custody and child support; divorce from bed and board; and equitable distribution. On 7 April 2005, the parties were divorced. On 21 September 2005, a pretrial order for equitable distribution was filed. In this pretrial order, the parties made certain stipulations as to the equitable distribution

and narrowed the issues requiring determination by the trial court. The issues identified in the pretrial order were tried before Judge Sigmon. On 11 April 2006, the trial court entered a corrected order for equitable distribution. Wife now appeals this order.

In her sole assignment of error on appeal, wife asserts that the trial court erroneously determined that certain real property located at 5515 E NC 150, Maiden, North Carolina, was marital property rather than wife's separate property. She contends that the evidence before the trial court showed that the property was given to her by her parents to be held in trust for the parties' son.

Despite wife's contention, our review of the record reveals that the classification of the subject real property was not an issue before the trial court. The pretrial order signed by both parties provided that

by their signatures affixed hereto, each party stipulates that he or she agrees with the facts and issues classified as agreed upon and stipulates the facts and issues classified as being in dispute are accurately reflected and that there are no other issues to be determined by the Court[.]

The property at 5515 E NC 150 was included in Schedule D designated as a list of "marital property upon which there is a disagreement as to distribution and disagreement as to value." (Emphasis added). Further, paragraph 25(c) of the pretrial order provides that the trial court will determine " . . . the value of and which party shall be the owner of the items in Schedule D." By this stipulation, the parties removed the classification of the subject

property from the matters to be resolved by the trial court. *Despathy v. Despathy*, 149 N.C. App. 660, 662, 562 S.E.2d 289, 291 (2002) (holding that stipulation by the parties to a particular fact withdraws it from the realm of dispute).

It is within the discretion of the trial court to set aside a stipulation of the parties. *Lowery v. Locklear Constr.*, 132 N.C. App. 510, 514, 512 S.E.2d 477, 479 (1999). However, "[a] party to a stipulation who desires to have it set aside should seek to do so by some direct proceeding, and, ordinarily, such relief may or should be sought by a motion to set aside the stipulation in the court in which the action is pending, on notice to the opposite party.'" *Moore v. Richard West Farms, Inc.*, 113 N.C. App. 137, 141, 437 S.E.2d 529, 531 (1993) (citation omitted).

Here, wife took no action to set aside her stipulation as to the disputed property and raises the issue for the first time in this appeal. Consequently, we hold that wife is bound by her stipulations, and this assignment of error is overruled.

No error.

Judges STEELMAN and LEVINSON concur.

Report per Rule 30(e).