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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1328

Filed: 20 September 2016

Rowan County, No. 08 CVD 2853

BELINDA SHERWOOD SHOWFETY, Plaintiff,

v.

KEVIN JOSEPH SHOWFETY, Defendant.

Appeal by Defendant from judgment entered 4 May 2015 by Judge Lillian B. Jordan in Rowan County District Court. Heard in the Court of Appeals 25 April 2016.

Church Watson Law, PLLC, by Seth A. Glazer and Kary C. Watson, for Plaintiff.

Wyrick Robbins Yates & Ponton LLP, by Michelle D. Connell, for Defendant.

STEPHENS, Judge.

In this appeal from an equitable distribution judgment, we agree with the appellant that the matter must be remanded for certain corrections and additional findings of fact. We otherwise affirm the trial court's judgment.

Factual and Procedural Background

Plaintiff Belinda Sherwood Showfety and Defendant Kevin Joseph Showfety were married on 8 October 1992, became the parents of one child born 11 June 2001, and were separated on 29 February 2008. On 26 August 2008, Belinda filed (1) a

verified complaint for child custody, child support, health insurance, postseparation support, alimony, possession of the contents of the marital home, possession of an automobile, and divorce from bed and board, as well as asserting a claim for equitable distribution; (2) an equitable distribution preliminary inventory affidavit; (3) a verified motion for the same relief sought in her complaint; and (4) a motion for interim allocation of marital assets. On 22 September 2008, the parties entered into a consent order awarding Belinda, *inter alia*, an interim distribution in the amount of $4,000,000.00, but the check Kevin wrote to Belinda for that amount did not clear the bank. As a result, Belinda filed a motion for interim distribution on 15 October 2008. On 29 October 2008, Kevin filed his answer and counterclaim, along with his own preliminary equitable distribution inventory affidavit. Over the next eight years, the parties filed various motions in the cause, none of which are pertinent to this appeal. The trial court entered a judgment of divorce on 14 May 2009, and a child custody and child support order on 4 August 2009. All of the parties' remaining claims and counterclaims were addressed by an equitable distribution judgment entered by the trial court on 4 May 2015. From that judgment, Kevin filed notice of appeal on 21 May 2015.

Discussion

Kevin argues that the trial court erred in (1) finding that the divisible property in Kevin's orthodontic practice was valued at negative $234,002.00 rather than

negative $369,649.00; (2) ordering a distributive award without first distributing the assets in kind or making proper findings of fact; (3) failing to properly value two Individual Retirement Account ("IRAs"); (4) relying upon an expert's report to calculate date of separation value of his orthodontic practice; and (5) declining to accept his valuation expert's evidence regarding passive increases in the value of his orthodontic practice. For the reasons discussed below, we remand for corrections and/or additional findings of fact regarding Kevin's first three arguments. We affirm the trial court's equitable distribution judgment as to Kevin's remaining arguments.

I. Standard of review

Our standard of review in appeals from equitable distribution orders is well settled:

> [W]hen the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable *de novo*.

Romulus v. Romulus, 215 N.C. App. 495, 498, 715 S.E.2d 308, 311 (2011) (citations and internal quotation marks omitted). "Evidentiary issues concerning credibility, contradictions, and discrepancies are for the trial court—as the fact-finder—to resolve . . . ." *Smallwood v. Smallwood*, 227 N.C. App. 319, 322, 742 S.E.2d 814, 817 (2013) (citation omitted). Further, "[t]he distribution of marital property is within

the discretion of the trial court. Accordingly, the trial court's rulings in equitable distribution cases receive great deference and may be upset only if they are so arbitrary that they could not have been the result of a reasoned decision." *Wirth v. Wirth*, 193 N.C. App. 657, 664-65, 668 S.E.2d 603, 609 (2008) (citations and internal quotation marks omitted).

II. Value of marital share of Kevin's orthodontic practice

Kevin first argues that the trial court erred in its findings that the divisible property in Kevin's orthodontic practice was valued at negative $234,002.00 rather than negative $369,649.00. Specifically, Kevin contends, and Belinda concedes, that the trial court failed to subtract the value of Kevin's premarital separate property portion of the practice from the date-of-trial value of the practice, resulting in an erroneous valuation of the divisible portion of the practice. We agree that the trial court made a mathematical error and remand for entry of a corrected finding of fact regarding the value of the divisible property in the practice.

Our General Statutes provide that, "[u]pon application of a party, the court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties . . . ." N.C. Gen. Stat. § 50-20(a) (2015). Divisible property includes "[a]ll appreciation and diminution in value of marital property . . . of the parties occurring after the date of separation and prior to the date of distribution. . . ." N.C. Gen. Stat.

§ 50-20(b)(4)(a). Generally, " '[m]arital property' means all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties," while " '[s]eparate property' means[, *inter alia*,] all real and personal property acquired by a spouse before marriage . . . ." N.C. Gen. Stat. § 50-20(b)(1), (2).

The undisputed evidence at trial was that Kevin started his orthodontic practice in 1986, some six years before the parties' marriage, and, thus, its value at the date of marriage is the separate property of Kevin, while the value of the growth of the practice during the marriage was marital property. Based upon competent evidence, Kevin and Belinda agree that the trial court correctly found as fact that, on the date of separation, "the value of the marital portion of [Kevin's] practice [was] $999,606.00 minus $135,647.00 that is the value at the date of marriage that is the separate property of [Kevin]. The value of [Kevin's] practice on the *date of separation that is marital property is $863,959.00*." (Emphasis added). The court also correctly noted that, due to various economic and personal factors, Kevin's orthodontic practice declined after the date of separation, such that the *total* "value of the . . . practice as of the *date of trial is $629,957.00*." The trial court should next have determined the *date-of-trial value of the marital portion* of the practice in the same manner as it did for the *date-of-separation value of the marital portion*, to wit, by subtracting Kevin's $135,647.00 separate interest in the practice from the $629,957.00 date-of-trial total

value, resulting in a correct date-of-trial marital value of the practice as $494,310.00. Instead, the court skipped this adjustment taking into account the value of Kevin's separate interest and simply subtracted the *marital* date-of-separation value—$863,959.00—from the *total* date of trial value—$629,957.00—and found as fact:

> 22. As stated above the practice declined in value after the date of separation. *The court finds based upon the valuations of* [*Plaintiff's business valuation expert George*] *Hawkins that the divisible property in the orthodonti*[*c*] *practice is a negative* (*$234,002.00*). This divisible property shall be distributed to [Kevin].

(Emphasis added). Because the trial court determined that an equal division of the parties' divisible property was equitable, this mathematical error resulted in a net benefit to Belinda in the amount of $67,823.50 and a net deficit in the same amount to Kevin. Accordingly, we remand to the trial court for the purpose of correcting finding of fact 22.

III. Distributive award

Kevin next argues that the trial court erred in ordering a distributive award to Belinda in the amount of $303,865.50 without making the findings of fact necessary to support a distributive award. Specifically, Kevin argues that the trial court failed to make factual findings (1) that an in-kind award was impractical and (2) that Kevin had the liquid assets to pay a distributive award. We agree.

> [Section] 50-20(e) creates a presumption that an in-kind distribution of marital or divisible property is equitable, but permits a distributive award to facilitate, effectuate, or

> supplement the distribution. In order to rebut the presumption of an in-kind distribution, the equitable distribution judgment must contain a finding, supported by evidence in the record, that an in-kind distribution would be impractical. A trial court's failure to comply with the provisions of the equitable distribution statute constitutes an abuse of discretion.

Wirth, 193 N.C. App. at 669, 668 S.E.2d at 611 (citations, internal quotation marks, and brackets omitted). Where a trial court makes a distributive award, but its order does "not specifically address why it ordered this payment[,]" we must "remand for the trial court to make an additional finding of fact as to how the presumption in favor of an in-kind award was rebutted and a conclusion of law supporting its distributive award." *Clark v. Dyer*, __ N.C. App. __, __, 762 S.E.2d 838, 849-50 (2014), *cert. denied*, 368 N.C. 424, 778 S.E.2d 279 (2015).

In addition, because one of the distributional factors to be considered by the trial court in an equitable distribution matter is "the liquid or nonliquid character of all marital property and divisible property[,]" *see* N.C. Gen. Stat. § 50-20(c)(9), where a trial court orders a party to pay a distributive award, it must "make findings as to whether the [relevant party] has sufficient liquid assets from which he can make the . . . payment." *Urciolo v. Urciolo*, 166 N.C. App. 504, 507, 601 S.E.2d 905, 908 (2004) (citation omitted); *see also Embler v. Embler*, 159 N.C. App. 186, 188, 582 S.E.2d 628, 630 (2003). Where the trial court fails to make such findings, we must remand unless the equitable distribution order clearly reveals liquid assets from which the ordered

distributive award could be paid. *See Clark*, __ N.C. App. at __, 762 S.E.2d at 850 (declining to remand on this issue even though the trial court failed to make findings of fact regarding the plaintiff's liquid assets because the judgment of the trial court had distributed bank accounts to the plaintiff worth more than six times the amount of the distributive award).

Here, the trial court's conclusion of law 6 states: "A distribution in kind is impractical, and the distributive award granted herein to the plaintiff facilitates the distribution and is necessary to achieve equity between the parties." However, as Belinda concedes, the trial court failed to make any findings of fact that would rebut the presumption of an in-kind distribution or whether Kevin has sufficient liquid assets from which he could make the $303,865.50 distributive award to Belinda. Accordingly, we remand for the entry of findings of fact regarding the basis for the court's distributive award or for entry of an in-kind distribution.[1]

IV. Valuation of IRA accounts

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[1] Regarding the lack of factual findings about Kevin's liquid assets, we reject Belinda's attempt to analogize the equitable distribution order here to that held sufficient in *Clark*. Specifically, Belinda contends that because, in 2009, the trial court had distributed to Kevin a money market account then worth almost $5 million "and no evidence was presented that [Kevin] had wasted or exhausted all of those liquid funds[,]" it was clear that Kevin had the liquidity to pay the distributive award ordered six years later. We find that case easily distinguishable. As noted *supra*, in *Clark*, the order was sufficient to support the distributive award because the order also distributed sufficient liquid assets to the party ordered to make the payment. Here, as Belinda notes, *no evidence* was presented about the current existence, much less the value, of the money market account that had been distributed to Kevin in 2009. Unlike the order in *Clark*, the equitable distribution order here did not distribute to Kevin liquid assets valued at several times the amount of the distributive award he was ordered to pay Belinda. Simply put, *nothing* in the equitable distribution order suggests that Kevin has the liquid assets needed to pay the distributive award ordered.

Kevin next argues that the trial court erred in failing to properly value two IRA accounts as of the date of separation and/or the date of distribution. The essence of the dispute between Kevin and Belinda on appeal is whether the parties stipulated to the pertinent valuations at trial. Kevin contends that there were no stipulations regarding the date-of-distribution value of these accounts, while Belinda contends that there were. After careful review, we agree that some of the findings of fact regarding the value of the two IRA accounts as of the date of distribution are incomplete, insufficient, or contain clerical errors. Accordingly, remand to the trial court is necessary.

"For purposes of equitable distribution, marital property shall be valued as of the date of the separation of the parties, and . . . . [d]ivisible property . . . shall be valued as of the date of distribution." N.C. Gen. Stat. § 50-21(b) (2015). However,

> any material fact that has been in controversy between the parties may be established by stipulation.
>
> A stipulation is an agreement between counsel with respect to business before a court. Courts look with favor on stipulations designed to simplify, shorten, or settle litigation and save cost to the parties, and such practice will be encouraged. While a stipulation need not follow any particular form, its terms must be definite and certain in order to afford a basis for judicial decision, and it is essential that they be assented to by the parties or those representing them. Once a stipulation is made, a party is bound by it and he may not thereafter take an inconsistent position. Accordingly, the effect of a stipulation by the parties withdraws a particular fact from the realm of dispute.

Plomaritis v. Plomaritis, 222 N.C. App. 94, 101, 730 S.E.2d 784, 789 (2012) (citations, internal quotation marks, brackets, and ellipses omitted).

A. The Caldwell and Orkin IRA

The equitable distribution order included the following finding of fact:

> 12. [Kevin] had a Caldwell and Orkin IRA account ["the C&O IRA"] when the parties married. From the time the parties married until the date they separated marital funds were deposited into this account. The value of the marital portion of this account is $64,166.04. This amount in the said account shall be divided equally between the parties. If a QDRO is necessary to distribute the plaintiff's share of the funds to her, [Belinda's] attorney, Mr. David Bingham, shall draft such order.

Plainly, this finding of fact includes only one value of the C&O IRA, which is not clearly labeled as either date of separation or date of distribution. However, given that a review of the trial transcript clearly reveals that the value listed is the date of distribution value testified to by Kevin's expert and stipulated to by both Kevin's and Belinda's counsel, we reject Kevin's appellate assertion that the trial court "shirk[ed] its duties required by statute." The following exchange took place during the direct examination of Peter Bell, Kevin's expert witness on valuation:

> [Belinda's counsel]: Judge, again, we've stipulated to all these numbers.
>
> THE COURT: Did you stipulate that the—but you—you haven't stipulated to separate or marital; is that the—

> [Belinda's counsel]: Stipulated, Your Honor. That's all—that's all. We did that.
>
> THE COURT: Oh, okay. I couldn't find it on that. So what you've done is you have stipulated that the marital—that the separate portion of this account [the C&O IRA] is $547,640.86?
>
> [Belinda's counsel]: Yes, Your Honor.
>
> THE COURT: *And you have stipulated that the marital portion of that fund is $62,872.04?*
>
> [Belinda's counsel]: Yes, Your Honor.
>
> THE COURT: So I don't know what we're doing.
>
> [Kevin's counsel]: Yeah. I don't need to cover anything else. *He's stipulating what we want*.

(Emphasis added). This exchange indicates that both Belinda's and Kevin's counsel stipulated to $62,872.04 as the "martial portion" of the C&O IRA. This "marital portion" stipulation, however, was clearly *not* as to the date-of-distribution value of the C&O IRA because, immediately after the above-quoted exchange, counsel for each party, Bell, and the trial court entered into an extended discussion and calculation of the date-of-distribution value of the marital portion of the C&O IRA. During that discussion, Bell, *Kevin's witness*, testified that the date-of-distribution value was $64,166.15, and both Kevin's and Belinda's counsel accepted Bell's undisputed testimony:

THE COURT: I guess the increase—we need to know what this was on the date of separation and then the increase would be divisible property and I'm supposed to value the date of separation and then if there is divisible property, I do that separately. So do we have a date[-]of[-] separation value for each? Because the values on this page are from December 31, 2013.

[Kevin's counsel]: Yes, ma'am. I'll see if he can help us with that.

[Bell]: I get—using this calculator I get a marital component to the account as of yesterday of [$]64,166.15.

[Kevin's counsel]: Would you say that again, please, sir?

[Bell]: I get $64,166.15.

[Kevin's counsel]: All right.

. . . . [Kevin's counsel, apparently assuming that the court would order an equal division of the marital portion of the C&O IRA, asked Bell to calculate half of $64,166.15.]

THE COURT: The whatever the—half doesn't matter. I'll decide that.

[Kevin's counsel]: Yes, ma'am.

THE COURT: (Inaudible)

[Kevin's counsel]: Yes, ma'am.

THE COURT: —not stipulated to 50—I mean to half then being equitable.

[Kevin's counsel]: Is it possible—may I ask him, Your Honor?

> [Kevin's counsel]: Is it possible that you could tell us what your value is as of the date of this report, if I'm reading this report correctly, and that was December 31, 2013, *you've now done it for the date of distribution or date of trial*, can you tell us the date of separation value, which would've been 2/29/08?
>
> [Bell]: I don't have the share value as of 2/29/08, so I can't.
>
> [Kevin's counsel]: Is it possible you can submit a supplemental report on that—
>
> [Bell]: Oh, certainly. No problem.
>
> [Kevin's counsel]: —to do that?
>
> [Kevin's counsel]: Your Honor, if we could have Your Honor's permission just to supplement that for the Court, the Judge.
>
> THE COURT: Are you going—do you have information on that? I mean, do you [have] evidence on that?
>
> [Belinda's counsel]: No, Your Honor. Judge, *we don't have a moment of question that at least so far Mr. Bell's reputation precedes him*.

(Emphasis added). On the final day of trial, the $64,166.15 date-of-distribution value of the C&O IRA and the equitable division thereof as an equal, 50-50 split between the parties were discussed again. In that exchange, Kevin's counsel described the value and division as "undisputed[.]" In sum, the equitable distribution order awarded Kevin *exactly* what he asked for at trial, to wit, for the marital, divisible

portion of the C&O IRA to be valued at $64,166.15[2] and to be divided equally between himself and Belinda. In light of this fact, Kevin's argument is overruled. On remand, we direct the trial court to amend finding of fact 12 to include the date-of-separation value of the C&O IRA and to more clearly label the date-of-distribution value as such.

B. The Fidelity IRA

The equitable distribution order also includes three findings of fact regarding a Fidelity IRA:

> 13. During the marriage and before the date of separation the parties contributed to a Fidelity IRA account in the name of [Belinda]. The value of this account on the date of separation as stipulated to by the parties is $14,586.56. No funds have been deposited into this account since the date of separation. So any increase or decrease since the date of separation is passive and is divisible property and shall also be divided equally between the parties. The present balance in this account shall be divided equally between the parties via a QDRO to be drafted by [Kevin's] attorney, Mr. James Davis.
>
> . . . .
>
> 27. To recap the values of the marital property to be distributed to the parties to determined [sic] if a distributive award is necessary to achieve equity between the parties, the court finds that [Belinda] shall be distributed marital property and divisible property which

[2] The 11-cent discrepancy between the $64,166.04 value stated in finding of fact 12 and the $64,166.15 value Bell testified to and trial counsel stipulated to appears to be a clerical error which can be corrected on remand. *See State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) ("When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth.") (citations and internal quotation marks omitted).

> totals $432,466.00 which is the sum of $545,000.00 for the beach house, $32,083.00 1/2 the [C&O] IRA, $7,586.00[3] 1/2 the Fidelity IRA, $27,797.00 items from Exhibit A, and divisible depreciation of [the] beach house ($180,000.00).
>
> 28. [Kevin] shall be distributed marital property and divisible property which totals $1,040,197.00 which is the sum of $412,000.00 for the marital home, $32,083.00 1/2 the [C&O] IRA, $7,586.00 1/2 the Fidelity IRA, $45,571.00 items from Exhibit A, $863,959.00 his orthodonti[c] practice, and divisible depreciation of marital home ($87,000.00) and his orthodontist practice ($234,002.00).[4]

Plainly, finding of fact 13 does not include a date-of-distribution value for the Fidelity IRA. We must remand for the addition of a finding of fact regarding this value, the necessary amendments to the portions of findings of fact 27 and 28 that refer to the Fidelity IRA, and the amendment or entry of any other findings of fact or conclusions of law that flow therefrom.

V. Value of the orthodontic practice

Kevin also argues that the trial court erred in calculating the date-of-separation value of his orthodontic practice. Specifically, Kevin contends that the valuation expert, whose evidence the court relied upon, included a piece of equipment purchased *after* the date of separation in calculating the date-of-separation value and

[3] This listed one-half value of the Fidelity IRA is a clerical error that the trial court shall correct on remand. *See id.* One-half of the date of separation value of the Fidelity IRA, $14,586.56, would actually be $7,293.28 rather than $7,586.00.

[4] Likewise, as both parties acknowledge, the correct divisible depreciation of the orthodontic practice is $369,649.00. The trial court shall correct this clerical error on remand. *See id.*

that, when this error was drawn to the trial court's attention, the court used a flawed method to adjust the expert's valuation. We disagree.

> In valuing a marital interest in a business, the task of the trial court is to arrive at a date of separation value which "reasonably approximates" the net value of the business interest. [A] court should make specific findings regarding the value of a spouse's professional practice and the existence and value of its goodwill, and should clearly indicate the evidence on which its valuations are based, preferably noting the valuation method or methods on which it relied. On appeal, if it appears that the trial court reasonably approximated the net value of the practice and its goodwill, if any, based on competent evidence and on a sound valuation method or methods, the valuation will not be disturbed.

Offerman v. Offerman, 137 N.C. App. 289, 292-93, 527 S.E.2d 684, 686 (2000) (citation omitted). "In valuing a professional practice, a court should consider the following components of the practice: (a) its fixed assets including cash, furniture, *equipment*, and other supplies; (b) its other assets including accounts receivable and the value of work in progress; (c) its goodwill, if any; and (d) its liabilities." *Poore v. Poore*, 75 N.C. App. 414, 419, 331 S.E.2d 266, 270 (citations omitted; emphasis added), *disc. review denied*, 314 N.C. 543, 335 S.E.2d 316 (1985).

In valuing Kevin's orthodontic practice, the trial court made the following finding of fact:

> 20. Mr. Hawkins chose [a] combined approach for the date [-]of[-]separation value using the Median Goodwill Multiple of Income plus the value of the net tangible assets to determine the value of the practice on February 28, 2008

> which is the date of the separation of the parties. For the date of separation net tangible assets Mr. Hawkins used the cash on hand of $210,141.00[], liabilities of $163,800.00[,] and *an appraised value of the personal property obtained through discovery*. This appraisal simply stated it was a 2008 appraisal of the equipment. *At trial[, Kevin] testified that one piece of the equipment on the list was purchased after the date of separation. This was the Belmont Excalibur* X[]ray *Unit with a value of $2*[,]*720.00. The total used by Mr. Hawkins was $12,033.00 for a total for the net personal property of $58,374.00. The Court has deducted the $2*[,]*720.00 for a value of the equipment of $9*[,]*313.00 and substituted this figure for Mr. Hawkins in his calculation so that the net personal property is $55,652.00.* The value arrived at by Mr. Hawkins for the date[-]of[-]separation value of the practice was $1,002,328.00. With the change made by the court the value of the marital portion of [Kevin's] practice is $999,606.00 minus $135,647.00 that is the value at the date of marriage that is the separate property of Kevin. The value of [Kevin's] practice on the date of separation that is marital property is $863,959.00.

(Emphasis added). Kevin contends that "[i]t is impossible for this reviewing Court to determine if the date[-]of[-]separation value of the practice is correct simply by deleting the fair market value of an [X]ray machine [as the trial court chose to do]." In support of this contention, Kevin observes that *his* expert in business valuations, Andrew Davis, produced a different valuation of the practice in his report because, unlike Hawkins, "Davis adjusted for the low cost of labor, as well as [Kevin's] business decision to not spend money on equipment and technology." Kevin suggests that Davis's testimony and methods raise questions about whether the trial court should have taken an approach like Davis's in adjusting Hawkins' valuation of Kevin's net

personal property. Deducting the value of the machine purchased after the date of separation from the total value of equipment appears to be an entirely reasonable way for the trial court to handle the erroneous inclusion of the X ray machine in Hawkins' valuation. Further, the $2,720.00 value of the X ray machine represents less than three-tenths of one percent (0.003) of the total $1,002,328.00 date-of-separation value of the orthodontic practice. Thus, even if we assume *arguendo* that the trial court should have adjusted Hawkins' valuation in a slightly different way to remove the X ray machine's value, we cannot conclude that the trial court failed to accomplish its crucial task: "to arrive at a date[-]of[-]separation value which 'reasonably approximates' the net value of the business interest." *See Offerman*, 137 N.C. App. at 292, 527 S.E.2d at 686 (citation omitted). Accordingly, we overrule this argument.

VI. Active or passive growth of Kevin's separate property in the orthodontic practice

In his final argument on appeal, Kevin argues that the trial court erred by failing to consider and make findings of fact about the active or passive growth of Kevin's separate property in the orthodontic practice during the parties' marriage. We disagree.

As noted *supra*, under section 50-20(b)(4)(a) of our General Statutes,

> all appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution is to be classified as divisible property. The

> major exception is that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse shall not be treated as divisible property. Thus, under the statute, there is a distinction between active and passive appreciation when classifying divisible property.
>
> Passive appreciation refers to enhancement of the value of property due solely to inflation, changing economic conditions, or market forces, or other such circumstances beyond the control of either spouse. Active appreciation, on the other hand, refers to financial or managerial contributions of one of the spouses.

Brackney v. Brackney, 199 N.C. App. 375, 385-86, 682 S.E.2d 401, 407-08 (2009) (citations, internal quotation marks, and brackets omitted). The party seeking to establish that a postseparation appreciation of the value of marital and divisible property is passive bears the burden of proving this point by a preponderance of the evidence. *See Nicks v. Nicks*, __ N.C. App. __, __, 774 S.E.2d 365, 380-81 (2015).

Here, Kevin characterizes the evidence he offered at trial—exhibits and testimony of his business valuation expert Davis indicating that 35% of the increase in the value of the orthodontic practice between the parties' date of marriage and their date of separation was passive and therefore his separate property—as "uncontested[,]" such that he carried his burden under *Nicks*. Accordingly, he argues that the trial court erred in determining that the entire increase in the value of the practice during the parties' marriage was marital and divisible property. Kevin's argument fails for the simple reason that the evidence regarding appropriate classification of the increase in value of the practice as passive was *not* uncontested.

Hawkins, Belinda's expert, specifically testified that he disagreed with Davis's passive appreciation analysis valuation and instead concluded that the increase in value of the practice during the parties' marriage was "really completely active . . . ." Presented with contradictory evidence regarding the passive versus active nature of the increased value in the orthodontic practice from Davis and Hawkins, the trial court found as fact:

> 16. After hearing from Mr. Davis and Mr. Hawkins and a third expert for [Kevin], Mr. Bell, who did not value the practice but critiqued the other two experts' reports, the court finds Mr. Hawkins' valuations to be more valid. Mr. Davis testified that he believe[d] that Mr. Hawkins['] valuations are 98% correct. . . .

Weighing the credibility of witnesses and resolving discrepancies in the evidence is the role of the trial court. *See Smallwood*, 227 N.C. App. at 322, 742 S.E.2d at 817 (stating that "credibility, contradictions, and discrepancies are for the trial court—as the fact-finder—to resolve"). On appeal, such findings of fact are binding if they are supported by competent evidence. *Romulus*, 215 N.C. App. at 498, 715 S.E.2d at 311. This argument is overruled.

REMANDED IN PART; AFFIRMED IN PART.

Chief Judge McGEE and Judge DAVIS concur.

Report per Rule 30(e).