

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-891

Filed: 20 September 2016

Alexander County, No. 10 CVD 289

CAROLE UHLIG (formerly CIVITARESE), Plaintiff,

v.

JOSEPH CIVITARESE, JR., Defendant.

Appeal by Plaintiff from Equitable Distribution Order entered 6 March 2015 by Judge Christine Underwood in Alexander County District Court. Heard in the Court of Appeals 14 January 2016.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, for Plaintiff-Appellant.

Gottholm, Ralston & Benton, PLLC, by Matthew L. Benton, for Defendant-Appellee.

INMAN, Judge.

Although assets acquired by either spouse during a marriage are generally classified as marital property, no asset can be presumed to be marital property without a prima facie showing of the circumstances of its acquisition. A trial court must make the necessary findings of fact regarding disputed property before classifying property as either marital or separate.

Carole Uhlig (“Wife”) appeals from the 6 March 2016 final Equitable Distribution Order granting an unequal distribution award in favor of Joseph Civitarese, Jr. (“Husband”). Wife contends that the trial court erred by (1) improperly imposing the rebuttable presumption that several bank accounts held in her name were marital property, without first making factual findings necessary to classify the accounts as marital property; (2) classifying as separate property an account Husband created from marital funds for the purpose of repaying a loan; and (3) calculating an unequal distribution and requiring her to pay a distributive award.

After careful consideration, we reverse and remand.

I. Factual and Procedural History

Wife and Husband (“the parties”) were married on 26 July 1991. During this marriage the parties had two children, one born 20 January 1993 and the other born 17 February 1996. The parties separated on 19 May 2010 and later divorced on 13 July 2011.

Wife, as plaintiff, brought this action against Husband, as defendant, asserting claims for divorce, child custody and support, spousal support, and equitable distribution. Husband filed counterclaims for child custody and support and equitable distribution. The parties proceeded to trial on 5 and 6 March 2015 to resolve their competing equitable distribution claims.

UHLIG V. CIVITARESE

Opinion of the Court

Evidence and argument during the trial focused on disputes regarding, among other things, the classification, valuation, and distribution of eight bank accounts and certificates of deposit (“CDs”) which were identified on Schedule D of the amended pre-trial order. Wife contended that seven of the eight accounts were her separate property and that the eighth account was marital property; Husband contended that the seven accounts were marital property and that the eighth account was his separate property.

At trial, rather than Wife presenting evidence on all issues in dispute first, followed by Husband presenting evidence on all issues in dispute, both parties presented evidence with respect to each disputed item, so that Wife and Husband each presented portions of their cases on a rotating basis.

For example, evidence and testimony for the account identified as Item 1 on Schedule D was presented as follows: Wife testified that the account was valued at \$90,000, was in her name, and was created “[f]rom the sale of [her] mother’s house . . . [in] Oakland, New Jersey.” Wife further testified as follows:

Q. All right. And did you inherit the -- the house from your mother?

A. Yes.

On cross examination, Husband’s attorney entered, as exhibits, a statement from the account showing an initial deposit of \$90,000 on 28 April 2010 and a statement from the parties’ joint checking account showing two checks written for the

amounts of \$90,000 on 28 and 30 October 2009. On redirect, Wife reaffirmed the source of funds for the account as being from the sale of her mother's house, and introduced, as exhibits, the documentation from the sale of her mother's house and a statement from a five year CD in which Wife initially deposited those funds. The statement reflected that the original CD was opened on 1 July 2002.

From this evidence, the trial court made the following findings of fact with regard to Item 1 on Schedule D:

46. As described in paragraph 36 above, [Wife] wrote two checks for \$90,000.00 from [the joint checking account] after the parties deposited the net proceeds from the sale of the [Pennsylvania] house [the parties' former residence]. It was obvious from the testimony of both parties, as well as the other evidence presented, that these two checks were used to create two of the following accounts: Item 1 on Schedule D []; Item 4 on Schedule D []; or Item 5 on Schedule D []. It was not clear from the testimony and evidence presented which of these two accounts was created from the [joint checking account].

47. [Wife] failed to meet her burden to show that the following items were her separate property: Item 1 on Schedule D []; Item 4 on Schedule D []; or Item 5 on Schedule D [].

48. The Court values Item 1 [] at \$90,000.00, and classifies it as marital property. The Court distributes this Item to Wife at that value.

The trial court's findings do not establish that the account identified as Item 1 was created or obtained during the marriage by one or both of the spouses and existed at the date of separation.

UHLIG V. CIVITARESE

Opinion of the Court

A similar evidentiary process and findings were made for Items 2-7. The trial court's findings reflect that funds Wife had received from inheritances had been commingled with the parties' jointly owned assets. Absent from the trial court's evidentiary findings, however, were ultimate findings of a prima facie showing that any of the accounts in dispute were marital property.

With respect to Item 8, the account that Wife contended was marital property and Husband contended was his separate property, the trial court found as follows:

55. From [the parties' joint checking account], [Husband] withdrew \$158,691.73, which was the amount the parties agreed they owed to his mother and aunt. This money was transferred to [the account listed as Item 8] on October 28, 2009. This account was created and held by [Husband]. [Husband] used this money to accomplish the purchase of a home in Alexander County, North Carolina by his mother, which he resided in rent-free from the [date of separation] until just recently. [Husband] has paid property taxes on this residence. [Husband] has reported taxable interest income from this account on his income tax returns. The remaining balance on this account as of the [date of separation] was \$63,084.31. [Husband]'s mother is deceased. [Husband] has not inherited this account, though it is still held in his name.

56. The Court concludes that the [Husband] has met his burden to show that [this account], which is Item 8 on Schedule D, is his separate property.

On 6 March 2015, following the close of arguments, the trial court entered its final order for Equitable Distribution. Included in this order, the trial court classified Items 1-7 on Schedule D of the pre-trial order as marital property and Item 8 as

Husband's separate property. The trial court ordered an in-kind distribution of marital assets and ordered Wife to pay a distributive award in the amount of \$39,311.58, which is the difference between the two total asset distributions.

Wife filed a timely Notice of Appeal on 27 March 2015.

II. Analysis

A. Standard of Review

The standard of review in equitable distribution cases involving a trial court's classification of property 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." *Romulus v. Romulus*, 215 N.C. App. 495, 498, 715 S.E.2d 308, 311 (2011) (quoting *Lee v. Lee*, 167 N.C. App. 250, 253, 605 S.E.2d 222, 224 (2004)). "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*, 215 N.C. App. at 498, 715 S.E.2d at 311 (internal citation omitted).

Generally, "[t]he division of marital property is a matter within the sound discretion of the trial court." *Gagnon v. Gagnon*, 149 N.C. App. 194, 197, 560 S.E.2d 229, 231 (2002) (internal citation omitted). "As to the actual distribution ordered by the trial court, '[w]hen reviewing an equitable distribution order, the standard of review is limited to a determination of whether there was a clear abuse of discretion.

A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason.’ ” *Stovall v. Stovall*, 205 N.C. App. 405, 407-08, 698 S.E.2d 680, 683 (2010) (alteration in original) (quoting *Petty v. Petty*, 199 N.C. App. 192, 197, 680 S.E.2d 894, 898 (2009)).

However, “[b]ecause the classification of property in an equitable distribution proceeding requires the application of legal principles, this determination is most appropriately considered a conclusion of law.” *Romulus*, 215 N.C. App. at 500, 715 S.E.2d at 312 (citing *Hunt v. Hunt*, 112 N.C. App. 722, 729, 436 S.E.2d 856, 861 (1993)). When reviewing issues of classification of property, misapplications of the burdens of proof are reviewed for harmless error. *Finney v. Finney*, 225 N.C. App. 13, 19-20, 736 S.E.2d 639, 644 (2013) (“Because the record contains conflicting evidence regarding the classification of the property as marital versus separate, we cannot conclude that the trial court’s misapplication of the burdens of proof was harmless.”).

B. Classification of Property in Equitable Distribution

In deciding equitable distribution issues, a trial court is required to follow a three step process in which it identifies, classifies, and then distributes all property belonging to the marital estate. N.C. Gen. Stat. §§ 50-20 *et seq.* (2015); *see also Minter v. Minter*, 111 N.C. App. 321, 325, 432 S.E.2d 720, 723 (1993). The classification and identification of property as marital, divisible, or separate “ ‘depend[s] upon the proof

UHLIG V. CIVITARESE

Opinion of the Court

presented to the trial court of the nature' of the assets." *Langston v. Richardson*, 206 N.C. App. 216, 220, 696 S.E.2d 867, 871 (2010) (quoting *Atkins v. Atkins*, 102 N.C. App. 199, 206, 401 S.E.2d 784, 787 (1991) (citation omitted)).

A party asserting that property be classified as marital has the "burden by showing by the preponderance of the evidence that the property: (1) was 'acquired by either spouse or both spouses;' and (2) was acquired 'during the course of the marriage;' and (3) was acquired 'before the date of the separation of the parties;' and (4) is 'presently owned.'" *Langston*, 206 N.C. App. at 220, 696 S.E.2d at 871 (quoting *Atkins*, 102 N.C. App. at 206, 401 S.E.2d at 787). "If this burden is met and a party claims the property to be separate, that party has the burden of showing the property is separate." *Atkins*, 102 N.C. App. at 206, 401 S.E.2d at 787-88. A party may satisfy this "burden by showing by the preponderance of the evidence that the property was either: (1) 'acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage' (third-party gift provision); or (2) 'acquired by gift from the other spouse during the course of marriage' and the intent that it be separate property is 'stated in the conveyance' (inter-spousal gift provision); or (3) was 'acquired in exchange for separate property' and no contrary intention that it be marital property is 'stated in the conveyance' (exchange provision)." *Id.* at 206, 401 S.E.2d at 788 (quoting N.C. Gen. Stat. § 50-20(b)(2)). "If both parties meet their burdens, . . . the

UHLIG V. CIVITARESE

Opinion of the Court

property is excepted from the definition of marital property and is, therefore, separate property.” *Id.* at 206, 401 S.E.2d at 788.

“The conclusion that property is either marital, separate or non-marital, must be supported by written findings of fact.” *Hunt*, 112 N.C. App. at 729, 436 S.E.2d at 861 (internal quotation marks and citations omitted). “Appropriate findings of fact include, but are not limited to, (1) the date the property was acquired, (2) who acquired the property, (3) the date of the marriage, (4) the date of separation, and (5) how the property was acquired (i.e., by gift, bequest, or purchase).” *Id.* (citing N.C. Gen. Stat. § 50-20(b)(1), (2)).¹ The purpose of these findings is to “enable an appellate court to review the decision and test the correctness of the judgment. The fact that there is evidence in the record from which sufficient findings *could* be made does not excuse the error.” *Stone v. Stone*, 181 N.C. App. 688, 693, 640 S.E.2d 826, 829 (2007) (citing *Wade v. Wade*, 72 N.C. App. 372, 376, 325 S.E.2d 260, 266 (1985)). “When the findings and conclusions are inadequate, appellate review is effectively precluded.” *Id.* at 694, 640 S.E.2d at 829 (citing *Armstrong v. Armstrong*, 322 N.C. 396, 405, 368 S.E.2d 595, 600 (1988)).

In *Hunt*, an equitable distribution order was reversed and remanded, in part, because of the trial court’s failure to make adequate findings of fact in support of its

¹ 2011 N.C. Sess. Laws. 284, § 51 eliminated bequests from the definition of separate property effective 14 June 2011, but because Wife inherited property from her parents before the effective date of the statute, it does not affect our decision in this case.

classification of disputed properties. *Hunt*, 112 N.C. App. at 729, 436 S.E.2d at 861-62. The parties disputed whether certain properties should have been classified as marital or separate. *Id.* The trial court made specific findings for the dates the parties were married and separated, however, failed to make “findings as to when the property was acquired, how it was acquired, or by whom it was acquired.” *Id.* This Court concluded that this lack of adequate findings of fact resulted in an inability to sustain the classifications. *Id.*

In an unpublished decision by this Court on a record most closely on point to this case, we likewise held that a trial court erred when it failed to make the necessary findings of fact to settle disputed classifications of marital property in an equitable distribution case. *Duruanyim v. Duruanyim*, 204 N.C. App. 210, __ S.E.2d __, 2010 WL 1961159, at *2, 2010 N.C. App. LEXIS 811, at *4-6 (2010) (unpublished). In *Duruanyim*, the trial court made none of the requisite findings delineated in *Hunt* regarding the disputed property listed on the pre-trial order. *Id.* (“The trial court made no findings to settle these disputes in the final order; rather, the court merely classified the majority of the property as marital, assigned a value, and distributed it to one party or the other.”). In response to the lack of findings, this Court remanded the case and “ ‘emphasize[d] that our holding does not require voluminous findings from the trial court, but instead simply findings sufficiently adequate to reflect that it has performed the task imposed upon it by our case law [and statutes].’ ” *Id.* (

alteration in original) (quoting *Robertson v. Robertson*, 174 N.C. App. 784, 790, 625 S.E.2d 117, 121 (2005)).

Here, the parties dispute the classification of Items 1-8 on Schedule D of the amended pre-trial order. Conflicting evidence as to the nature and origin of these accounts was presented by both parties. The trial court made several findings of fact related to these items, including the date of marriage, the date of separation, and the value of each account individually.

However, the trial court failed to make any findings necessary to settle the disputes over these classifications. Specifically, the trial court did not make any findings for Items 1-7 as to who created the accounts, when the accounts were created, or whether the accounts existed at the date of separation. Nor did the trial court find that Husband met his initial burden of showing that the properties were marital.

As for Item 8, the trial court's findings establish that the account was opened by Husband during the marriage and before the date of separation, and that the account was presently owned by Husband on the date of separation. The trial court further found that Husband had not inherited the property, despite the property being titled in his name. These findings support a classification of the property as marital and shift the burden of proof to Husband to show the property was "acquired by a spouse before marriage or acquired by a spouse by devise, descent, or gift during the course of the marriage." N.C. Gen. Stat. § 50-20(b)(2). The trial court made no

UHLIG V. CIVITARESE

Opinion of the Court

additional findings that Husband demonstrated the account was acquired through “devise, descent, or gift” and merely concluded “that the [Husband] ha[d] met his burden to show that [the account], which is Item 8 on Schedule D, is his separate property.”

Ultimately, the trial court made conclusions of law before making the necessary findings to settle the disputes at issue. The trial court found that Wife “failed to meet her burden to show that [Items 1-7 were] her separate property,” without first finding facts essential to classify the properties as marital. Because of conflicting evidence and the trial court’s lack of specific findings, we cannot conclude that the trial court’s misapplication of the burdens of proof was harmless.

Because the trial court did not make the necessary findings with regards to the items listed as 1-8 on Schedule D, we must reverse the trial court’s judgment and remand this case to the trial court to make the proper findings of fact and conclusions of law.

Wife also contends, and Husband concedes, that the trial court erred in awarding an unequal distribution in favor of Husband by ordering Wife to pay a distributive award of \$39,311.58. We agree with the parties that the trial court erred in its calculation of the distributive award, which should have sought to achieve an equal distribution. This error can be corrected on remand.

Finally, Wife contends that the trial court erred by not making the necessary findings of fact or conclusions of law to justify its grant of the distributive award in favor of Husband. Because we reverse the judgment and remand for further findings, which will be fundamental to the trial court's calculation of the distributive award, we do not address this argument.

III. Conclusion

For the reasons described above we reverse the trial court's order classifying Items 1-7 on Schedule D as marital property and Item 8 on Schedule D as Husband's separate property. We remand for further proceedings consistent with this opinion. It is unclear from the record whether there is sufficient evidence to support additional necessary findings and conclusions. We leave it to the discretion of the trial court to decide whether additional evidence should be presented on remand.

REVERSED AND REMANDED.

Judges STEPHENS and HUNTER, JR. concur.

Report per Rule 30(e).