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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-786

Filed 18 April 2023

Currituck County, No. 19 CVD 237

RONALD A. FOSTER, JR., Plaintiff,

v.

ASHLEY FOSTER, Defendant.

Appeal by defendant from judgment entered 14 April 2022 by Judge Robert Trivette in Currituck County District Court. Heard in the Court of Appeals 22 March 2023.

*Pritchett & Burch, PLLC, by Lloyd C. Smith, III, for plaintiff-appellee.*

*O'Neal Law, P.C., by Edward A. O'Neal, for defendant-appellant.*

ARROWOOD, Judge.

Ashley Foster (“defendant”) appeals from judgment ordering the equitable distribution of the marital estate that she shares with Ronald A. Foster, Jr. (“plaintiff”). For the reasons stated herein, we affirm the trial court’s order.

I. Background

Plaintiff and defendant (collectively, “the parties”) were married on

FOSTER V. FOSTER

*Opinion of the Court*

12 October 2014 and separated on 31 December 2019. One child was born of the marriage.

Plaintiff filed a complaint for child custody and equitable distribution on 14 June 2019. Defendant answered, counterclaimed, and filed a notice of *lis pendens* on 4 November 2020. Plaintiff filed his preliminary equitable distribution inventory affidavit on 24 February 2021 and defendant filed her preliminary equitable distribution affidavit on 30 August 2021. An equitable distribution pretrial order was entered by the parties on 9 February 2022. The matter came on for hearing on 24 February 2022 and 3 March 2022.

On 14 April 2022, the trial court entered a judgment of equitable distribution finding “a slight unequal division of the marital and divisible property” in favor of defendant as equitable. Defendant timely appealed on 12 May 2022.

II. Discussion

On appeal, defendant challenges the trial’s court classification of the settlement plaintiff received pursuant to the Longshore and Harbor Workers’ Compensation Act (“LHWCA”). Defendant asserts the trial court improperly classified the entirety of the settlement as plaintiff’s separate property, thus, defendant argues, the items subsequently purchased with the settlement proceeds were also incorrectly classified as plaintiff’s separate property. Defendant also challenges the trial court’s findings with respect to the former marital residence, which the parties conceded plaintiff purchased prior to the marriage, but defendant

argues is a “mixed marital asset[,]” as it increased in value during their marriage. Lastly, defendant argues the trial court erred by finding no divisible component to the Union Bank of Switzerland (“UBS”) account. We address each argument in turn.

A. Equitable Distribution Judgment

“Equitable distribution is vested in the discretion of the trial court and will not be disturbed absent a clear abuse of that discretion. Only a finding that the judgment was unsupported by reason and could not have been a result of competent inquiry,” or a finding that the trial court failed to comply with our general statutes, “will establish an abuse of discretion.” *Wineck-Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (citations omitted).

Pursuant to N.C. Gen. Stat. § 50-20 (2022), in equitable distribution proceedings the trial court is required to: “(1) classify property as being marital, divisible, or separate property; (2) calculate the net value of the marital and divisible property; and (3) distribute equitably the marital and divisible property.” *Brackney v. Brackney*, 199 N.C. App. 375, 381, 682 S.E.2d 401, 405 (2009) (citation omitted), *withdrawn*, 363 N.C. 853, 694 S.E.2d 200 (Mem) (2010). The trial court’s classification of property “must be specific and detailed enough to enable a reviewing court to determine what was done and its correctness.” *Robinson v. Robinson*, 210 N.C. App. 319, 323, 707 S.E.2d 785, 789 (2011) (citation and internal quotation marks omitted). “A trial court’s determination that specific property is to be characterized as marital, divisible, or separate property will not be disturbed on appeal ‘if there is

competent evidence to support the determination.’” *Brackney*, 199 N.C. App. at 381, 682 S.E.2d at 405 (citation omitted).

1. Classification of the LHWCA Settlement

Defendant contends the trial court erroneously classified the LHWCA settlement and the items subsequently purchased with the settlement as plaintiff’s separate property. We disagree.

“The classification of property in an equitable distribution proceeding requires the application of legal principles, and we therefore review *de novo* the classification of property as marital, divisible, or separate.” *Green v. Green*, 255 N.C. App. 719, 724, 806 S.E.2d 45, 50 (2017) (citation and internal quotation marks omitted), *disc. review denied and review dismissed*, 371 N.C. 485, 818 S.E.2d 273 (2018). Marital property is defined as “all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of separation of the parties, and presently owned, except property determined to be separate or divisible property[.]” N.C. Gen. Stat. § 50-20(b)(1) (2022). Separate property is defined as

all real and personal property acquired by a spouse before marriage or acquired by a spouse by devise, descent, or gift during the course of the marriage. . . . Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance. The increase in value of separate property and the income derived from separate property

shall be considered separate property.

*Id.* § 50-20(b)(2). The party seeking to classify property as separate bears the burden of proving, by a preponderance of the evidence, that the asset is separate property. *Atkins v. Atkins*, 102 N.C. App. 199, 206, 401 S.E.2d 784, 787-88 (1991).

Plaintiff was employed by Academi N.K.A. Constellis Group as a “security specialist” and working in Afghanistan when he received injuries in 2015. Pursuant to the LHWCA, plaintiff reached a settlement with his employer and received \$35,000.00 for past, present, and future medical benefits and \$550,000.00 for past, present, and future indemnity benefits, penalties, and interest for a total lump sum of \$585,000.00.

In North Carolina, workers’ compensation awards are classified as either marital property or separate property by utilizing “the analytical approach[.]” *Freeman v. Freeman*, 107 N.C. App. 644, 652-53, 421 S.E.2d 623, 627 (1992). Accordingly,

[t]o the extent that an award replaces medical expenses, lost wages, or loss of earning capacity sustained during the marriage, it is marital property subject to equitable distribution. To the extent that the award replaces such economic loss occurring after separation, it is the separate property of the injured spouse.

*Id.* at 654, 421 S.E.2d at 628. If “the award was acquired by the injured spouse during the marriage and before separation, then the entire award will be marital property unless” the injured spouse “proves by a preponderance of the evidence that the award,

or some portion of it, was intended to compensate him for economic loss occurring after the date of separation[.]” *Id.*

Defendant argues that the trial court erred by “f[inding] that all of the settlement benefits paid to [plaintiff]” were plaintiff’s separate property. We disagree. As an initial matter, we note that the trial court’s order did not classify the entirety of the settlement as plaintiff’s separate property, but merely a portion. With respect to the settlement, the trial court found:

(3) In the summer of 2016,<sup>1</sup> [plaintiff], who worked as a security contractor, was injured on the job. Plaintiff’s Exhibit 2 contains the Settlement Agreement and Order for [plaintiff’s] employment injury which set forth the award terms of \$35,000.00 for past, present, future medical benefits, and \$550,000.00 for past, present, future compensation for a total of \$585,000.00. The settlement was not pursuant to NCGS Chapter 97 North Carolina’s Worker’s Compensation Act. It is pursuant to the Longshore and Harbors Workers Compensation Act 33 U.S.C. § 901 et seq. as extended by the Defense Base Act, 42 U.S.C. § 651 et seq. and said settlement was pursuant to those acts and implemented with the regulations at 20 C.F.R. § 702.242 and Compensation for Disability 33 U.S.C. §§ 906, 908. When [plaintiff] received the lump sum portion of the settlement in March of 2017, the money went into a Navy Federal Credit Union account solely in his name, and then a month later he transferred the money into a Union Bank of Switzerland (UBS) account solely in his name.

(4) During the pendency of the claim, until settlement, [plaintiff] received maximum weekly compensation at a rate of \$1,377.02. The settlement was based upon

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<sup>1</sup> Plaintiff received injuries in 2015, not 2016.

FOSTER V. FOSTER

*Opinion of the Court*

consideration for future medical expenses and future compensation at the maximum weekly compensation rate considering the average working life of a man's age. There were 112 weeks of marriage following the settlement until the date of separation. At a weekly rate of \$1,377.02 he was awarded \$154,226.24 of compensation during the marriage. As of the date of settlement, [plaintiff] had no outstanding medical bills as those had been satisfied by the employer. [Plaintiff] did not receive medical treatment prior to the date of separation and incurred no further medical bills during the marriage. The award for medical benefits was and is for future medical benefits.

- (5) Despite their lack of or under employment from 2017 until the date of separation, the parties maintained and increased their standard of living during the marriage. They did this in part by living for almost 20 months on the funds from the UBS account. Any marital portion of the settlement funds were expended during the marriage. A review of the bank statements confirm the same. From April of 2017 until the parties separated in December of 2019, [plaintiff] regularly transferred funds from the UBS into accounts used to pay for marital expenses. Although [plaintiff] chose to use these separate funds to pay for marital expenses, he always maintained the remaining funds separately and never jointly titled the account.
- (6) [Plaintiff] has met his burden by the preponderance of the evidence that the injury settlement proceeds were separate property.

After careful review of the record, it is clear that the trial court's classification of a portion of the LHWCA settlement as plaintiff's separate property was based on competent evidence. Defendant's assertion that plaintiff "made no effort to trace or segregate the settlement funds" is not supported by the evidence as the settlement

FOSTER V. FOSTER

*Opinion of the Court*

was deposited into the UBS account and maintained separately. The trial court considered plaintiff's maximum weekly compensation rate of \$1,377.02 to calculate the marital portion of the settlement, which it found to be \$154,226.24. The trial court then determined that this "marital portion of the settlement" was "expended during the marriage."

Thus, plaintiff met his burden by the preponderance of evidence that a portion of the lump sum settlement was indeed his separate property. Therefore, the trial court's classification of UBS account #4482, and the subsequent purchases of Foster Capital LLC,<sup>2</sup> the golf simulation equipment, and the Vizio Smart TV, as separate property was not error as these purchases were made with the settlement proceeds. **[R 72-74]** Contrary to defendant's argument, plaintiff did not have an additional burden to trace or segregate the settlement as it was never unjustly commingled with marital property:

[c]ommingling of separate property with marital property, occurring during the marriage and before the date of separation, does not necessarily transmute separate property into marital property. Transmutation would occur, however, if the party claiming the property to be his separate property is unable to trace the initial deposit into its form at the date of separation.

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<sup>2</sup> In a related argument, defendant contends real property purchased by Foster Capital LLC belongs to the marital estate. This argument is overruled as the trial court found "Foster Capital was funded from the UBS account which held [plaintiff]'s separate funds from the settlement, and therefore any Foster Capital interest in real property . . . would be [plaintiff]'s separate property."



*Fountain v. Fountain*, 148 N.C. App. 329, 333, 559 S.E.2d 25, 29 (2002) (citations omitted). Accordingly, defendant's argument is overruled.

2. Former Marital Residence

Defendant also challenges the trial court's findings pertaining to the former marital residence. Specifically, defendant contends the trial court erred in its classification of the passive and active increases in the property and by finding no divisible component to the property. We disagree.

As set forth above, "[t]he increase in value of separate property and the income derived from separate property shall be considered separate property." N.C. Gen. Stat. § 50-20(b)(2). Accordingly, "increases in value to . . . separate property" remain separate property, but "only to the extent that the increases were passive[.]" *Ciobanu v. Ciobanu*, 104 N.C. App. 461, 464-65, 409 S.E.2d 749, 751 (1991) (citation and internal quotation marks omitted). Our case law establishes

a distinction between active and passive appreciation of separate property. Active appreciation refers to financial or managerial contributions of one of the spouses to the separate property during the marriage; whereas, passive appreciation refers to enhancement of the value of separate property due solely to inflation, changing economic conditions or other such circumstances beyond the control of either spouse.

*O'Brien v. O'Brien*, 131 N.C. App. 411, 420, 508 S.E.2d 300, 306 (1998) (citation omitted), *disc. review denied*, 350 N.C. 98, 528 S.E.2d 365 (Mem) (1999). Thus, "[i]ncreases in value to separate property attributable to the financial, managerial,

and other contributions of the marital estate are ‘acquired’ by the marital estate.” *Ciobanu*, 104 N.C. App. at 465, 409 S.E.2d at 751 (citation omitted). The marital estate only “shares in the increase in value of separate property ‘it has proportionately acquired in its own right[.]’” *Id.* at 465, 409 S.E.2d at 752 (citation omitted).

With respect to the marital residence, the trial court found:

- (1) The parties stipulated that [plaintiff] owned the property prior to the marriage of the parties and the property’s chain of title. [Plaintiff] purchased the property in 2009 with his brother, in February of 2014 [plaintiff]’s brother gave his one-half (1/2) interest in the property to [plaintiff] at which time, [plaintiff] became the sole owner. [Plaintiff] refinanced the property prior to the marriage on March 12, 2014. At no time from 2009 forward did [plaintiff] relinquish/gift/devise any of his legal title of the property to [defendant].
- (2) The property located at 126 Trevor Way, Moyock, NC is [plaintiff]’s separate property. During the marriage there has been both active and passive increases in value of the [plaintiff]’s separate property. The parties stipulated to the value of the property on the date of marriage as \$295,000.00 and the value on the date of separation was \$364,000.00. The total equity in the property as of the date of separation was \$109,630.02.
- (3) Only the active increase in value to the [plaintiff]’s separate property is subject to distribution. The only active contribution during the marriage were the mortgage payments. The balance of the mortgage on the date of marriage was \$254,369.98 therefore the total active contribution of the marriage to the property is \$24,200.00 in mortgage and subject to distribution and distributes to [plaintiff]. The remaining equity of

FOSTER V. FOSTER

*Opinion of the Court*

\$85,430.02 is a result of passive appreciation and is the [plaintiff]'s separate property and should be moved to Schedule G.

Defendant's contention that the equity balance of \$109,630.02 is entirely marital is misplaced. As our precedent establishes, and the trial court found, only active increases in separate property are "acquired by the marital estate[.]" *Ciobanu*, 104 N.C. App. at 465, 409 S.E.2d at 751-52 (citation and internal quotation marks omitted). Thus, the trial court properly classified the mortgage payments paid during the marriage as the only active increase attributable to the marital estate. Defendant offers no evidence on appeal to rebut this finding.

Likewise, the trial court's finding with respect to the divisible component of the marital residence is also proper as the residence is plaintiff's separate property.

Divisible property includes:

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, except 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.

N.C. Gen. Stat. § 50-20(b)(4)(a). With respect to the increase in value following the date of separation, the trial court found:

(2) 126 Trevor Way: Since the date of separation the property market value has increased from \$365,000 to \$450,000.00 for a total market value increase of \$85,000.00. Since the date of separation, [plaintiff] has made mortgage payments in the amount of \$13,617.46

FOSTER V. FOSTER

*Opinion of the Court*

which qualify as an active increase in the value and not considered divisible property. The remaining increase in equity of \$71,282.54 is a direct result of passive market forces. The Trevor Way property is [plaintiff]’s separate property therefore the passive increase in value of the property is the [plaintiff]’s separate property and not subject to distribution and is moved to Schedule G.

Here, defendant’s arguments only generally challenge the trial court’s findings of fact and conclusions of law and fail to indicate specific evidence the trial court did not consider or erred in considering. *See Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 398, 617 S.E.2d 306, 314 (2005) (“It is not the role of this Court to fabricate and construct arguments not presented by the parties before it.”) (citation omitted), *abrogated by Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 853 S.E.2d 698 (2021). Accordingly, the trial court’s findings are conclusive on appeal and defendant’s argument is overruled.

3. UBS Account #4882

Lastly, defendant contends the trial court’s classification of the UBS account as separate property was error and therefore the findings related to the divisible component of the property were also error. We disagree.

As set forth above, a portion of plaintiff’s LHWCA settlement was classified as marital property and the remaining portion was deemed separate property. With respect to the UBS account, the trial court found:

- f. *Item 10: UBS Account #4882*. The parties stipulated all funds in this account were a result of the

employment injury settlement, that the date of separation balance was \$26,111.43 and the same should be distributed to [plaintiff]. For the reasons set forth earlier in this order, [plaintiff] has met his burden by the preponderance of the evidence, his testimony, the settlement documents and controlling federal law over his settlement support the balance in this UBS account as of the date of separation is [plaintiff]'s separate property. This item is [plaintiff]'s separate property.

As the UBS account is plaintiff's separate property, increases in value to the UBS account remain plaintiff's separate property unless defendant can establish the marital estate actively contributed to this increase. *Ciobanu*, 104 N.C. App. at 464-65, 409 S.E.2d at 751-52. Here, the trial court found any increase in the UBS account was passive and therefore remained plaintiff's separate property. The trial court's order stated: "There was a passive increase to the value of the UBS account in the amount of \$9,274.71. The UBS account is [plaintiff]'s separate property therefore the passive increase is [plaintiff]'s separate property and not subject to distribution." Accordingly, defendant's argument is overruled.

### III. Conclusion

For the reasons stated herein, we conclude that the trial court did not abuse its discretion as the court's order included thorough findings supported by substantial competent evidence. The trial court's equitable distribution judgment is affirmed.

AFFIRMED.

Judges DILLON and COLLINS concur.

Report per Rule 30(e).