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CLERK OF COURT
BERKELEY COUNTY, SC

STATE OF SOUTH CAROLINA COUNTY OF BERKELEY	IN THE FAMILY COURT OF THE NINTH JUDICIAL CIRCUIT CASE NUMBER: 2018-DR-08-2100
MICHAEL BAUER, *Plaintiff,* vs. LORI G. BAUER, *Defendants.*	**NOTICE OF MOTION AND MOTION FOR STAY OF JUDGMENT AND MOTION TO ALTER OR AMEND**

TO: THE HONORABLE COURT; AND ABOVE-NAMED PLAINTIFF, BY AND THROUGH HIS COUNSEL OF RECORD:

PLEASE TAKE NOTICE that Defendant (hereinafter "Wife"), by and through her undersigned counsel, hereby moves before the Honorable Jack A. Landis, pursuant to Rule 62(b), SCRCP, to stay the execution of the judgment of the Final Order (hereinafter "the Order") entered on May 4, 2022, pending resolution of Defendant's motion to alter or amend that Order, which is herein.

PLEASE TAKE NOTICE that Defendant (hereinafter "Wife"), by and through her undersigned counsel, hereby moves before the Honorable Jack A. Landis, pursuant to Rule 59(e), SCRCP, to alter or amend the Final Order (hereinafter "the Order") entered on May 4, 2022. This Motion is based upon the following:

I. This Motion is timely served.

Rule 59(e), SCRCP, provides a motion to alter or amend a judgment shall be served no later than 10 days after receipt of written notice of entry of the order.

The Order was entered on May 4, 2022 and notice of its entry was received by Defendant via email on May 5, 2022.

Denied without hearing

II. The Court erred in presiding over the trial in this matter without ensuring Wife consented to remittal of the Court's disqualification as provided by Rule 501, SCACR, Section 3F.

Rule 501, SCACR, Section 3E(1) provides that a judge shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned. "A judge who stays in a case after personally verbalizing that the facts in question may provide a basis for disqualification raised doubts as to impartiality and fairness..." John P. Freeman, *Appearance of Impropriety, Recusal, and the Segars-Andrews Case*, 62 S. C. L. Rev. 485 (2011).

In this case, the Court disclosed, "[M]y wife's father is one of Mr. Toporek's law partners. She has used their office on occasion to hold depositions or have meetings. She is not part of that firm. I can tell you that the fact that her father and Mr. Toporek are law partners doesn't affect my impartiality."[1] Tr. of R. p. 11:4-8.

Thereafter, the Court appears to have attempted to follow the Remittal of Disqualification procedure detailed by Rule 501, SCACR, Section 3F. However, the Court did not explicitly "ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification" as provided by Rule 501, SCACR, Section 3F. Instead, before exiting the courtroom, the Court stated: "I am going to step out of the courtroom for just a couple of minutes; give y'all an opportunity to discuss with your clients this situation, and I'll be back in in just a minute." Tr. of R. p. 11:17-20.

Further, the Commentary to Rule 501, SCACR, Section 3F, provides: "A party may act through counsel *if* counsel represents on the records that the party has been consulted

[1] It is noteworthy that this Court previously issued an Order to Amend Plaintiff's Complaint on January 23, 2020, and an Order of Extension on August 4, 2020, and it is unclear whether the relationship described herein was disclosed before either of those Orders was entered. Likewise, prior to disclosing the relationship to the parties, the Court ruled upon two pre-trial motions.

and consents (emphasis added). Here, upon returning to the courtroom, the Court inquired of Wife's trial counsel, "Mr. Haskins, any issues?" and Mr. Haskins responded, "No, Your Honor." Tr. of R. p. 12:1-6. Counsel did not specify that he had consulted with Wife about the Court's disclosure and possible disqualification or that Wife had specifically consented to remittal of the disqualification.

Based upon the foregoing, Wife contends the remittal of disqualification procedure was not properly followed, such that the Court should have remained disqualified from hearing this matter such that the Order should be vacated and a new trial be granted.

III. The Court erred when it failed to defer to the terms of the parties' Agreement that had been approved by the Family Court and incorporated into its January 11, 2017 Order in case number 2016-DR-10-2205.

Agreements settling issues in marital litigation must be approved by the Family Court before they can be incorporated into an order of the Family Court. See Moseley v. Mosier, 279 S.C. 348 (1983). Pursuant to S.C. Code Ann. Section 63-3-530(A)(25), the Family Court has exclusive jurisdiction to modify or vacate any order issued by the Court; however, S.C. Code Ann. Section 20-3-620(C) prohibits the Family Court's authority to modify an order affecting distribution of marital property except by appeal or remand following appeal.

Public policy does not preclude enforcement of the property settlement agreement provisions that were executed at the time of reconciliation. See Crawford v. Crawford, 301 S.C. 476 (Ct. App. 1990), cited by Bourne v. Bourne, 336 S.C. 642 (Ct. App. 1999).

In this case, the parties were married on December 20, 2014, and separated for the first time on or about March 24, 2016.

On June 14, 2016, Wife initiated case number 2016-DR-10-2205, and that case was resolved by an agreement signed by the parties on October 17, 2016, which was approved by the Honorable Michèle Patrão Forsythe on January 11, 2017. Defendant's Exhibit 2 (hereinafter referred to as the "parties' Agreement" or "the 2017 Order").

Thereafter, in 2017 – with the specific date being contested – the parties reconciled, but ultimately ceased cohabiting in February 2019.

Because this Court could not have properly modified the equitable apportionment provisions of the January 11, 2017 Order, the parties' rights as of that date are the starting point for analysis of their subsequent entitlement to relief. However, the Order in this case is silent regarding the existence of the January 11, 2017 Order incorporating the parties' Agreement and the effect of its terms on the parties' respective rights. This was error.

A. The Court erred in considering the parties' conduct prior to January 11, 2017, when determining whether Wife's non-marital property at 506 Live Oak Drive had been transmuted to marital property following the parties' reconciliation.

Wife does not dispute that she added Husband to the deed for this property shortly after the parties were married with the intention of the associated mortgage being refinanced into their joint names. Tr. of R. p. 71:8-25. However, as detailed hereinabove, as of January 11, 2017, Wife had the sole ownership interest in the property as a result of the parties' Agreement.

A party claiming an equitable interest in property upon divorce bears the burden of proving the property is marital. Wilburn v. Wilburn, 403 S.C. 372 (2013). Thereafter, "if the party presents evidence to show the property is marital, the burden shifts to the other spouse to present evidence to establish the property's nonmarital character." Id.

Here, as a result of the January 11, 2017 Order approving the parties' Agreement, Wife had the sole, non-marital interest in the property located at 506 Live Oak Drive. Defendant's Exhibit 2. Husband has not presented a preponderance of the evidence to establish the property's nonmarital character. In this regard, the Court reached a conclusion supported by a preponderance of the evidence.

"Transmutation is a matter of intent to be gleaned from the facts of each case." Jenkins v. Jenkins, 345 S.C. 88, 98 (Ct. App. 2001). The spouse claiming transmutation must produce objective evidence showing that, during the marriage, the parties themselves regarding the property as the common property of the marriage. Johnson v. Johnson, 296 S.C. 289 (Ct. App. 1988). Nonmarital property is transmuted into marital property (1) if it becomes so commingled with marital property as to be untraceable; (2) if it is titled jointly; or (3) if it is utilized by the parties in support of the marriage or in some other manner so as to evidence an intent by the parties to make it marital property. Id.

Evidence of transmutation can include placing the property in joint names, transferring the property to the other spouse as a gift, using the property exclusively for marital purposes, commingling the property with marital property, using marital funds to build equity in the property, or exchanging the property for marital property. Id.

"Though one spouse acquires legal title to property prior to marriage, the discharge of indebtedness by both the husband and wife may transmute the property into marital property." Canady v. Canady, 296 S.C. 521 (Ct. App. 1988) and Wyatt v. Wyatt, 293 S.C. 495 (Ct. App. 1987), citing Trimnal v. Trimnal, 287 S.C. 495 (1986).

In Canady, the parties used the property in support of their marriage and jointly discharged indebtedness incurred, and the husband's testimony supported the

conclusion that he perceived the property to have been transmuted. 296 S.C. at 524. Similarly, in Wyatt, the wife acquired legal title to a mobile home prior to the marriage and paid off one-half of the mortgage, with the remainder of the indebtedness discharged through the joint efforts of the husband and wife; further, the husband made substantial improvements to the property, such that the Court of Appeals found the property had been transmuted. 293 S.C. at 497. Likewise, in Trimnal, the husband made only a few monthly payments toward the mortgage before the parties were married, and the majority of the debt was paid off jointly during the marriage, such that the property was transmuted. 287 S.C. at 498.

The facts herein are distinguishable from all of the above cases. In this case, after the parties reconciled in 2017, the 506 Live Oak Drive property did not become commingled with marital property. The parties' execution of a quit claim deed in accordance with the terms of the 2017 Order support a finding that they intended for Wife to maintain the sole interest in the property, and the parties did not use the property in support of the marriage, as they resided elsewhere.

The only evidence Husband provided in support of his claim the property was transmuted was his payment of the mortgage on the property between August 2017 and January 2019. However, Wife contends that such payments were not substantial enough to transmute the character of the property.

Husband testified that when the parties were married in 2014, the mortgage balance was approximately $320,000, Tr. of R. 135:10-12. Husband testified that when the parties separated "the last time," the mortgage balance had been paid down to approximately $240,000. Tr. of R. 135:13-18. Therefore, the sum of his testimony is that

over the course of 50 months, his marital contributions resulted in an $80,000 reduction of the mortgage balance.

However, Husband did not specify the mortgage balance when the parties separated in 2016; when their Agreement was approved on January 11, 2017; or when he filed the action in November 2018. As such, it is not possible to determine how much of Husband's contributions to acquisition of equity in the property before entry of the January 11, 2017 Order were intended to be received by Wife in consideration of other terms of that Agreement.

Some of the payments made in 2017 – totaling $5,800 – were contemplated by the parties' Agreement that had been approved by the Court. Tr. of R. p. 137:3-7. Following the parties' reconciliation, starting in August 9, 2017, Husband claims to have paid the mortgage plus additional principal payments of $7,893. Tr. of R. 137:8-18. Husband claims to have paid $39,538 toward the mortgage of which $11,000 went toward the principal in 2018. Tr. of R. 167:22-25. Wife acknowledged bank records reflecting Husband's payment of $31,021.97 toward the mortgage in 2018. Tr. of R. 49:7-53:4; Plaintiff's Exhibit 4.

However, it is also not possible to determine how much the mortgage balance was affected by Husband's payments made between August 2017 and January 2019, specifically. Therefore, Wife contends that Husband has not quantified the equity in the property that was acquired by his efforts following the parties' reconciliation in 2017, such that he cannot demonstrate by a preponderance of the evidence that the property was transmuted.

B. The Court erred in crediting the value of Wife's premarital Jeep, which was awarded to her in the 2017 Agreement, to her as marital property.

The Order acknowledges Wife owned the vehicle, subject to a note, when the parties were married in 2014. Order, para. 14. Wife admitted that Husband had contributed funds to pay off the note associated with that vehicle during the parties' marriage. Tr. of R. pp. 38:9-41:7.

The Order does not contain findings related to the value of the vehicle when the parties' Agreement was approved in January 2017. The 2017 Order gave Wife ownership of that vehicle. Tr. of R. 92:3-8.

As with the 506 Live Oak Drive property, after the parties reconciled in 2017, the Jeep did not become commingled with marital property. Likewise, it remained titled in Wife's sole name, and it was not used in support of the parties' marriage in any way.

Further, Husband did not offer any evidence to support a claim that he contributed to acquisition of equity in the vehicle after the parties' reconciliation in 2017.

In its Order, the Court gave the Jeep a value of $12,000. Order, para. 14. Wife does not dispute this value; however, she believes the value was improperly credited to her as a marital asset.

C. The Court erred by failing to enforce the language of the 2017 Order regarding the Daniel Island condominium being undisclosed property and awarding Wife one-half the value of that asset; or, in the alternative, the Court erred in finding the property was not transmuted and should have instead granted Husband a special equity in the equitable apportionment.

A family court order can be modified only when jurisdiction was specifically reserved in the decree or if allowed by statute. See Hayes v. Hayes, 312 S.C. 141 (Ct. App. 1993) and Jordan v. Jordan, 307 S.C. 407 (Ct. App. 1992).

As detailed hereinabove, the 2017 Order determined the rights and obligations of the parties as of January 11, 2017. When the parties appeared before the Court and sought approval of their Agreement in January 2017, Husband owned the property, but it was not referenced in the Agreement. Tr. of R. 92:21-93:11. Husband admitted that the condominium was not referenced as either marital or non-marital property in the parties' Agreement signed in October 2016 then approved by the Court in January 2017. Tr. of R. 181:3-16. Further, the language of the parties' Agreement specifically disclaimed any ownership interest in property not listed within. Tr. of R. p. 182:23-183:7.

The parties' 2017 Agreement also specified that any undisclosed property would "be accounted for by a 50-50 in-kind division; or if such asset cannot be divided by payment to the discovering party by the non-discovering party of 50 percent of the value of said asset." Tr. of R. 184:8:19.

Wife contends that this Court is bound to the terms of the 2017 Order and must find that the condominium was an undisclosed property such that she is entitled to fifty percent (50%) of the value of the condominium. It is noteworthy that the provision of the parties' 2017 Agreement does not entitle the non-discovering party to a percentage of the *equity* in the asset, but in the asset's entire value. Based upon the appraisal of the condominium admitted as Plaintiff's Exhibit, Wife is entitled to $270,000 from Husband for his failure to disclose the asset before entering the parties' 2017 Agreement or seeking its approval by the Court.

In the alternative, S.C. Code Ann. Section 20-3-630(A) defines "marital property" as all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation

regardless of how title is held. Property that is purchased by one spouse after the commencement of marital litigation is not marital property, but the other spouse may be entitled to a special equity interest if marital funds were used for the down payment. Greene v. Greene, 351 S.C. 329 (Ct. App. 2002).

In this case, Husband contends that because he purchased the Daniel Island condominium after the date of the commencement of the parties' litigation, it is non-marital property.

The down payment for the purchase came from funds in account owned by Bauer Medical, which was dissolved in 2016. Tr. of R. 168:1-15. Though the business was established in 2001, Husband deposited funds he earned during the marriage into the account. Tr. of R. 178:2-179:14. Once he closed the account for Bauer Medical, Husband moved the funds into his personal checking account, and he wrote a check from his personal checking account for the down payment to purchase the condominium. Tr. of R. 180:1-16.

In its Order, and in accordance with Greene, the Court properly found that the $200,000 down payment used for the purchase of the condominium came from marital funds, such that Wife would be entitled to a special equity interest. As to the remaining equity in the property, Husband testified that the mortgage associated with the property was paid off in April 2017 after he received inherited funds following his mother's death. Tr. of R. 144:9-11. Prior to Husband's receipt of those funds, he made payments on the mortgage in February 2017. Tr. of R. 145:11-13.

In certain instances, the nonmarital character of inherited property is lost such that the property may be equitably divided, such as when the property becomes so

commingled as to be untraceable; is utilized by the parties in support of the marriage; or is titled jointly or otherwise utilized in such a manner as to evidence an intent by the parties to make it marital property. See Hussey v. Hussey, 280 S.C. 418 (Ct. App. 1984).

When an inheritance is transmuted into marital property, the inheritor is entitled to special consideration upon divorce when determining the percentage of the marital estate to which the inheriting party is equitably entitled upon distribution. See Dawkins v. Dawkins, 386 S.C. 169 (2010), citing Toler v. Toler, 292 S.C. 374 (Ct. App. 1987).

In this case, Husband did not offer evidence of the purchase price of the condominium, which would indicate to the Court how much equity existed – by virtue of the down payment made with marital funds – at the time of the purchase. Likewise, Husband did not offer evidence of the fair market or appraised value of the property in January 2017 when the parties' Agreement was approved.

Husband testified that the mortgage on the condominium was paid off on August 29, 2017. Tr. of R. 144:9-11. However, he did not detail what the balance of the mortgage or the fair market value of the property were at that time, which would determine the equity accrued from using his inheritance to pay off the mortgage. Further, the record is silent on any equity that may have accrued based only upon market fluctuations since the purchase in 2016.

Therefore, Wife contends that the equity in the condominium accrued based upon use of marital funds for the down payment is so commingled with the equity accrued by use of inherited funds and market fluctuations that it is untraceable.

Likewise, Wife began living at the condominium in April or May 2017, and she continued to live there through February 2019. Tr. of R. 234:1-13. As a result of

Husband's purchase of the condominium and his identification of it as his primary residence, Wife was required to pay a higher tax rate on the Live Oak Drive property for 2018 and subsequent years. Tr. of R. 246:24-247:25. Further, the record is replete with references to Wife's efforts to make the condominium a shared home for the parties; though the Court found the facts uncompelling as to Wife's direct contributions to the market value of the property, there is a preponderance of the evidence that Husband allowed Wife to make use of the property in support of their marriage.

Therefore, if the Court does not believe Wife is entitled to one-half the value of the asset in accordance with the 2017 Order, then it erred in finding that the was not transmuted and subject to equitable apportionment and granting Husband a special equity.

CONCLUSION

Based upon the foregoing, Wife respectfully requests the Court alter or amend the Order as follows:

(1) Vacating the Order and setting the matter for a new trial; or, in the alternative,

(2) Determining the parties' rights to equitable apportionment from entry of the January 11, 2017 Order forward;

(3) Finding that Wife's non-marital property located at 506 Live Oak Drive was not transmuted and is, therefore, not subject to apportionment;

(4) Determining that the parties' conduct subsequent to the January 11, 2017 Order did not change Wife's non-marital entitlement to ownership of the

2010 Jeep, such that its value should not be credited to her as if it were a marital asset; and

(5) Finding that the Daniel Island condominium was undisclosed property under the 2017 Order, such that Wife is entitled to $270,000 from Husband; or, in the alternative, finding that the property was transmuted and subject to equitable apportionment with Husband receiving a special equity for use of his inheritance to accrue equity in the property.

Respectfully submitted,

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May 16, 2022

SCRCP RULE 11 CERTIFICATION

Pursuant to Rule 11, SCRCP, I affirm that prior to the filing of the within Motion that I have communicated orally or in writing with the opposing party and/or counsel and have attempted in good faith to resolve the matter contained in the Motion, or I certify that consultation would serve no useful purpose or could not be timely held, or I certify that Rule 11, SCRCP, is inapplicable to the within Motion.

Megan Hunt Dell, Bar No. 79028