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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-86

Filed: 3 October 2017

Mecklenburg County, No. 14-CVD-3610

SARAH GYEDU-SAFFO, Plaintiff,

v.

CRAIG E. DUNCAN, Defendant.

Appeal by Defendant from order entered 13 July 2016 by Judge Alicia D. Brooks in Mecklenburg County District Court. Heard in the Court of Appeals 24 August 2017.

Tom Bush Law Group, by Nicholas L. Cushing, for Plaintiff-Appellee.

Church Watson Law, PLLC, by Kary C. Watson and Carmela E. Mastrianni, for Defendant-Appellant.

DILLON, Judge.

Craig E. Duncan (“Father”) appeals from an order granting Sarah Gyedu-Saffo (“Mother”) permanent custody of their minor child, J.D., permanent child support, and attorney’s fees, and denying Father’s claim for alimony. After careful review, we affirm.

I. Background

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In November 2011, Father and Mother married. Eighteen months later, in May 2013, their only child, J.D., was born. They divorced in July 2015.

In February 2014, within a year of J.D.'s birth, the parties separated and Mother filed a complaint requesting custody of J.D. and child support from Father. Eight months later, in October 2014, the trial court issued a Memorandum of Judgment (the "October MOJ"), granting temporary custody of J.D. to Mother, pending further evaluation of each parent.

In July 2016, after considering new evidence, the trial court entered an Order (the "July 2016 Order") granting Mother permanent custody of J.D., permanent child support and attorney's fees, and denying Father's claim for alimony. Father timely appealed.

II. Analysis

On appeal, Father challenges several portions of the trial court's July 2016 Order. We review each argument in turn.

A. Calculation of Father's Income

Defendant's core argument challenges the trial court's calculation of his gross monthly income in awarding child support. Specifically, Defendant contends that the trial court improperly imputed income to him and otherwise inappropriately evaluated the expense payments listed on his financial affidavits. We disagree.

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This Court reviews a trial court's child support order only for an abuse of discretion. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). In so doing, we review findings of fact only insofar as they are based on competent evidence; conclusions of law are reviewed *de novo* to determine if they are rightfully founded on sufficient findings of fact. *See Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). "Whether a statement is [a finding of] fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law." *Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 658 (1982). "Because the determination of gross income requires the application of fixed rules of law, it is properly denominated a conclusion of law rather than a finding of fact." *Lawrence v. Tise*, 107 N.C. App. 140, 145 n.1, 419 S.E.2d 176, 180 n.1 (1992). Therefore, we review the total amount of gross income *de novo*, while giving deference to the individual findings of fact by the trial court.

Here, Father's occupation throughout the parties' marriage and separation was researching and writing a book. After the parties separated in February 2014, Father began living with his mother as her caretaker. Father had no other job and made no attempts to seek employment. Father also served as his mother's power of attorney, had access to his mother's checking account, and was in charge of managing the household bills. In exchange for his care, Father's mother allowed him to stay with her free of charge and paid many of his expenses.

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In relation to Father's employment and living conditions, the trial court made the following Findings of Fact:

58. Father has unfettered access to his mother's accounts.

...

74. Father's actual income, based on the deposits into his account, based upon his unfettered access to his mother's money[,] and based upon the expenses his mother pays on his behalf is \$3,120 per month.

Father challenges the findings of "unfettered access" to his mother's accounts. Father concedes that he has some access to his mother's accounts, but contends that this access is limited solely to paying the household bills, his mother's expenses, and other payments that she requests. Father also alleges that the trial court "double-dipped" by considering the deposits into his bank account and the expenses paid by his mother, which were one and the same.

We conclude that the trial court's findings are supported by competent evidence in the record. Specifically, on cross examination, Mother's counsel asked Father if he had "total un-fettered control and access over [his mother's] money," to which Father responded, "Yeah." Mother's counsel then walked through each deposit into Father's account starting in 2015, and Father confirmed that each and every deposit came from his mother. We conclude that Father's testimony constitutes substantial evidence to support the trial court's finding of "unfettered access."

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Father contends that, as a matter of law, the trial court erred in calculating his gross monthly income. Father claims that the court improperly imputed income to him, and further determined his income based upon insufficient sources. Ordinarily, a parent's gross income is determined based upon his or her income at the time the order is entered. *Holland v. Holland*, 169 N.C. App. 564, 568, 610 S.E.2d 231, 234 (2005). However, there are instances when income not officially gained will be considered by the court. For example, income may be imputed to a parent who intentionally disregards parental obligations by suppressing his or her income in bad faith. *See Roberts v. McAllister*, 174 N.C. App. 369, 378, 621 S.E.2d 191, 198 (2005). Also, contributions by third-parties towards a party's living expenses may be considered a form of income. *Guilford County ex rel. Easter v. Easter*, 344 N.C. 166, 171, 473 S.E.2d 6, 9 (1996); *Spicer v. Spicer*, 168 N.C. App. 283, 287-89, 607 S.E.2d 678, 682-83 (2005) (holding that payment of living expenses, including cost-free housing, constituted financial support and maintenance that the trial court may consider as income, in accordance with Child Support Guidelines).

Here, Father's unemployment prevented the trial court from considering a form of official, bright-line income. Apart from researching and making progress towards writing his book, Father's daily routine consisted of playing video games and taking care of his mother. In exchange for the care he provided, Father's mother paid a majority of his living expenses. Father's mother provided him with rent-free

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housing, as well as electricity, natural gas, cable television, internet, home and food supplies, gasoline, cellular phone service, religious contributions, clothing, grooming, laundry, and other forms of entertainment and recreation, as noted in Father's Financial Affidavit. The trial court considered these contributions towards Father's well-being as monthly credits toward his overall income, as they covered expenses he would normally have to somehow pay. Father's mother's assistance is a form of financial support that alleviates Father's financial obligations, and may thereby be considered in determining the proper amount of child support that he should pay. *Id.* We therefore conclude that the trial court did not err by incorporating the value of his expenses paid by Father's mother in calculating Father's gross income.

Father challenges Findings of Fact 69, 70, and 71 in which the trial court found that Father acted in bad faith in not being gainfully employed. However, the trial court also indicated that it was not imputing any income to Father based on its finding of bad faith. Rather, the trial court incorporated the value of Father's mother's contributions, which we have concluded was appropriate, in determining Father's income. Therefore, assuming *arguendo* that the trial court erred in its findings concerning Father's bad faith, such error was harmless as the findings were not necessary to sustain the trial court's award.

Father challenges Findings of Fact 65, 66, 67, 79, 80, 81, and 82, in which the trial court essentially found that Father did not qualify to receive alimony from

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Mother and calculated the amount of child support Father was required to pay. We conclude, however, that the financial information before the trial court supports the finding that Father does not need alimony, and that Father must pay child support to Mother.

We note Father's objections to Findings of Fact 72 and 73, in which the trial court expressed its belief that "everyone has a duty to support their child even if one party has the ability to do it on their own" and "Father cannot expect to have a relationship with J.D. . . . but not participate financially in supporting her." These findings are reflective of Father's testimony that he should only be required to pay child support if Mother could not support J.D. herself. These findings are not necessarily resolutions of facts in dispute, and we do not place substantial weight on them in our review.

B. Improper Child Support Guidelines

Defendant's second argument challenges the trial court's use of the 2015 Child Support Guidelines in calculating his required payments. Defendant contends that the court erred by applying the 2015 Guidelines to an award beginning in 2014, and by not considering his financial information from 2014. We disagree.

We conclude that the trial court rightfully applied the 2015 Guidelines to Father's case. Specifically, the Applicability and Deviation section of the 2015 North Carolina Child Support Guidelines explains that "[the guidelines] are effective

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January 1, 2015, and apply to child support actions *heard* on or after that date.” N.C. Child Support Guidelines, AOC-A-162, Rev 8/15 (emphasis added). Though this present action was originally filed in 2014, the actual hearing on the matter was held in April 2016.

We conclude that the trial court was under no obligation to consider any financial information from 2014. “Prospective child support includes the portion of the child support award representing that period from the time a complaint seeking child support is filed to the date of trial.” *Ex rel. Miller v. Hinton*, 147 N.C. App. 700, 706, 556 S.E.2d 634, 639 (2001); *see Hill v. Hill*, 335 N.C. 140, 143-44, 435 S.E.2d 766, 768 (1993). The court considers the party’s actual income at the time the order is made or modified when determining child support obligations. *Sharpe v. Nobles*, 127 N.C. App. 705, 708, 493 S.E.2d 288, 290 (1997).

Here, the child support obligation was prospectively assigned. It is true that the court assigned Father an obligation to repay owed support from 2014. However, the complaint in this action was filed in 2014, and the July 2016 Order assigned child support obligations stemming from the date of filing forward. Therefore, the trial court needed only to consider Father’s current income in assigning his obligations for the period of time in 2014. We conclude that the trial court did not err by not using Father’s 2014 financial information.

C. Temporary Versus Permanent Child Custody Order

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Father next argues that the trial court erred in granting Mother permanent custody without first making a finding of a substantial change in circumstances. Father contends that the October MOJ from 2014 was a permanent order, rather than a temporary order, and thereby required a finding of substantially changed circumstances before it could be modified.

“The issue of whether an order is temporary or final in nature is a question of law that is reviewed *de novo* on appeal.” *Hatcher v. Matthews*, ___ N.C. App. ___, ___, 789 S.E.2d 499, 502 (2016).

We conclude that Father’s argument is not properly before us on appeal. An appellate court may not consider issues that were not raised at trial; thereby, a failure to argue a point or object at trial is a fatal defect. *Tohato, Inc. v. Pinewild Mgmt., Inc.*, 128 N.C. App. 386, 390, 496 S.E.2d 800, 803 (1998). Likewise, our Supreme Court has long held that “where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount” on appeal. *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996).

During the trial, Father made no objection to the court’s characterization of the proceedings as setting out a plan for permanent custody and child support:

Q: I show that this matter is on for the issue of permanent custody, permanent child support[,] and attorney fees, is that correct?

[Father’s Counsel]: And alimony.

Q: And alimony, all right.

Additionally, Father himself later referred to the October MOJ as a “temporary agreement” on direct examination. Father was given an opportunity to respond to this characterization, and ultimately agreed with and affirmed an intent to craft a permanent order. Further, Father was in full support of modifying the child custody assignments set out in the October MOJ to better suit his interests. Not only did he *not* object to the creation of a permanent order, he adopted a position in favor of it. Father spoke at length during his direct examination about adjusting the custody arrangement and visitation schedule set out in the October MOJ. Father’s position at trial was in favor of a permanent order, and, thus, he shall not be allowed to “switch horses on appeal” before this Court in order to argue that the trial court should not have “modified” the October MOJ.

D. Attorney’s Fees

Father next contends that the trial court erred by awarding Mother attorney’s fees in regard to their claims for child support and child custody. Specifically, Father alleges that the information introduced at trial establishing Mother’s financial status was statutorily insufficient to award attorney’s fees as a matter of law. Whether a party meets the statutory requirements to receive attorney’s fees is a question of law, to be reviewed *de novo* on appeal. *See Taylor v. Taylor*, 343 N.C. 50, 53-54, 468 S.E.2d 33, 35 (1996).

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In an action for child support and child custody, or child custody alone, an award of attorney's fees requires proof of the following facts: (1) the party requesting the award is an interested party acting in good faith; and (2) he or she has insufficient means to defray the cost of suit. *Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 723 (1980).

Father challenges Findings of Fact 91, 93, 94, and 102 which describe the parties' financial burdens as related to attorney's fees. In his brief on appeal, Father presents a categorical list of each expense testified to by Mother at trial. After totaling up Mother's expenses and subtracting them from her monthly income, Father concludes that "[Mother] has funds left over at the end of the month" and thereby Mother "has sufficient means to pay her own attorney's fees." We disagree.

Mother is an interested party in this case, and we find no evidence that she has acted in bad faith. While the differences in Father's and Mother's relative estates may be considered, the focus of our review is on the income and debts of the party requesting attorney's fees. *See Van Every v. McGuire*, 348 N.C. 58, 62, 497 S.E.2d 689, 691 (1998). Mother submitted multiple affidavits detailing her financial information, all of which were added to the court file to be reviewed by the judge. Mother also testified at trial regarding her financial income, debts, and other commitments. Mother's net monthly income amounts to approximately \$5,600, before deducting over \$7,500 worth of monthly debts and expenses. Mother, acting

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as sole provider for J.D.'s living expenses, has incurred debt to help support herself, J.D., and her mother, in addition to paying her attorney on credit. We find Mother's need to use a credit card to account for a nearly \$2,100 deficit in her monthly requirements to be supported by the evidence before the court. The evidence shows that Mother has insufficient means to defray the costs of the suit, and we thereby conclude that Findings of Fact 91, 93, 94, and 102 are supported by competent evidence.

In the alternative, Father argues that the child support award must fail because its finding as to the amount of attorney's fees paid by Mother was not supported by competent evidence *admitted at trial*, notwithstanding that an Affidavit for Attorney's Fees was filed with the trial court and was considered by the trial court. Specifically, the trial court stated in its July 2016 Order that it considered all items in the court file, which included the affidavit. We conclude that the trial court properly reviewed the entire court file before making its findings, and we thereby affirm.

E. Mother's Request to Relocate

Lastly, Father assigns error to Finding of Fact 100 and Decretal Paragraph 14 of the July 16 Order. Father challenges the trial court's finding that it would "consider [Mother's] request to relocate" upon her filing of an appropriate motion to modify. Father alleges that the inclusion of the challenged language in the July 2016

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Order amounts to an agreement between the parties and the court to waive Mother's need to show a "substantial change in circumstances," as required by section 50-13.7 of the North Carolina General Statutes. N.C. Gen. Stat. § 50-13.7 (2015) ("[B]efore a child custody order may be modified, the evidence must demonstrate a connection between the substantial change in circumstances and the welfare of the child[.]"). We disagree.

The language of each part of the July 2016 Order incorporating the challenged language is prefaced by the trial court's actual ruling. Namely, Decretal Paragraph 14 states, "Mother's request to relocate with the child is denied at this time." Father contends that the challenged language amounts to a conclusion of law; rather, the legal conclusion reached by the court was simply that Mother's request to relocate was denied. The challenged language is merely explanatory, stating at which time it may entertain a properly filed motion to modify in accordance with the procedural and substantive rules as proscribed by N.C. Gen. Stat. § 50-13.7. At the time of the July 2016 Order, Mother had made no plans to formally relocate to Charlotte and had yet to find a job in that area. In the event that Mother did so, the trial court would be fully in its power to consider whether such plans amounted to a substantial change of circumstances at that time.

AFFIRMED.

Judges HUNTER, JR., and ARROWOOD concur.

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Report per Rule 30(e).