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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-485

Filed: 7 November 2017

Guilford County, No. 14 CVD 9219

ANITA S. ALDAY, Plaintiff,

v.

STEPHEN R. ALDAY, Defendant.

Appeal by defendant from judgment entered 29 December 2016 by Judge Jan H. Samet in Guilford County District Court. Heard in the Court of Appeals 3 October 2017.

Hill Evans Jordan & Beatty, PLLC, by William W. Jordan, for plaintiff-appellee.

Rebecca Perry, P.A., by Rebecca Perry, for defendant-appellant.

ARROWOOD, Judge.

Stephen R. Alday (“defendant”) appeals from an alimony judgment entered in favor of Anita S. Alday (“plaintiff”). For the following reasons, we reverse and remand to the trial court.

I. Background

ALDAY V. ALDAY

Opinion of the Court

Plaintiff and defendant were married on 16 May 1987. They had three children during their marriage, born on 6 March 1992, 26 July 1997, and 19 March 2002. After approximately 26 years of marriage, defendant moved out of the marital residence on 1 April 2013.

On 18 September 2014, plaintiff initiated this action for child custody, child support, post-separation support and alimony, equitable distribution, interim distribution, an injunction to prevent waste or conversion of property, and attorney's fees. Defendant answered and filed counter claims for absolute divorce, equitable distribution, and child custody on 15 October 2014. A judgment granting the parties an absolute divorce was filed on 2 February 2015. Furthermore, the matters of child custody, child support, and equitable distribution were settled by the parties, leaving only the issues of alimony and attorney's fees.

A hearing on alimony was held on 19 and 20 January 2016 before the Honorable Jan H. Samet in Guilford County District Court. The trial court entered an Alimony Judgment on 29 December 2016. In the judgment, the trial court ordered that defendant, who was found to be a supporting spouse, shall pay plaintiff, who was found to be a dependent spouse, \$2,860.00 in alimony per month. The trial court further ordered that defendant shall pay \$15,108.75 in partial satisfaction of plaintiff's attorney's fees. Defendant filed notice of appeal on 23 January 2017.

II. Discussion

On appeal, defendant challenges both the trial court's award of alimony and the trial court's award of attorney's fees. Upon review, we reverse both awards and remand to the trial court for further proceedings.

A. Alimony

The award of alimony is governed by N.C. Gen. Stat. § 50-16.3A. This Court has explained that the statute breaks down the alimony determination into two separate inquiries: first, whether a spouse is *entitled* to alimony; and second, the *amount* of alimony to be awarded. *Barrett v. Barrett*, 140 N.C. App. 369, 371, 536 S.E.2d 642, 644 (2000). “We review the first inquiry de novo, *Rickert v. Rickert*, 282 N.C. 373, 379, 193 S.E.2d 79, 82 (1972), and the second under an abuse of discretion standard, *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982).” *Id.*

Concerning entitlement, the statute provides that “[t]he court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors” N.C. Gen. Stat. § 50-16.3A(a) (2015). Those relevant factors include the factors listed in subsection (b) of the statute concerning the amount and duration of alimony to be awarded.

[I]n “determining the amount, duration, and manner of payment of alimony, the court shall consider all relevant factors” including, *inter alia*, the following: marital misconduct of either spouse; the relative earnings and earning capacities of the spouses; the ages of the spouses; the amount and sources of earned and unearned income of

both spouses; the duration of the marriage; the extent to which the earning power, expenses, or financial obligations of a spouse are affected by the spouse's serving as custodian of a minor child; the standard of living of the spouses during the marriage; the assets, liabilities, and debt service requirements of the spouses, including legal obligations of support; and the relative needs of the spouses.

Hartsell v. Hartsell, 189 N.C. App. 65, 69, 657 S.E.2d 724, 727 (2008) (quoting N.C. Gen. Stat. § 50-16.3A (2007)). “The court shall set forth the reasons for its award or denial of alimony and, if making an award, the reasons for its amount, duration, and manner of payment. . . . [Furthermore,] the court shall make a specific finding of fact on each of the factors in subsection (b) of this section if evidence is offered on that factor.” N.C. Gen. Stat. § 50-16.3A(c).

In the present case, defendant contends the trial court erred both in determining plaintiff was entitled to alimony and in determining the amount, duration, and manner of payment of alimony.

Specifically, defendant first argues the trial court erred in concluding that plaintiff is a dependent spouse because there is no finding that plaintiff is either actually substantially dependent or substantially in need of maintenance and support. Thus, defendant contends “the judgment lacks sufficient findings as to the basic ultimate facts required to support the court's conclusion that [plaintiff] is a dependent spouse within the meaning of N.C. Gen. Stat. § 50-16.1A(2).”

This Court has stated that “[i]n all non-jury trials, the trial court must specifically find those material and ultimate facts from which it can be determined

whether the findings are supported by the evidence and whether they support the conclusions of law reached.” *Carpenter v. Carpenter*, __ N.C. App. __, __, 781 S.E.2d 828, 832 (2016) (quotation marks and citations omitted); *see also* N.C. Gen. Stat. § 1A-1, Rule 52(a). “The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment – and the legal conclusions which underlie it – represent a correct application of the law.” *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980).

“Dependent spouse” is defined in N.C. Gen. Stat. § 50-16.1A(2) as “a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse.” N.C. Gen. Stat. § 50-16.1A(2) (2015). This Court has explained that

[a] party is “actually substantially dependent” upon her spouse if she is currently unable to meet her own maintenance and support. *Barrett*, 140 N.C. App. at 370, 536 S.E.2d at 644 (citing *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E.2d 849, 854 (1980)). A party is “substantially in need of maintenance and support” if she will be unable to meet her needs in the future, even if she is currently meeting those needs. *Barrett*, 140 N.C. App. at 371, 536 S.E.2d at 644.

Carpenter, __ N.C. App. at __, 781 S.E.2d at 832-33. “The burden of proving dependency is upon the spouse asserting the claim for alimony.” *Bodie v. Bodie*, 221 N.C. App. 29, 45, 727 S.E.2d 11, 22 (2012) (quotation marks and citations omitted).

This Court has also stated that “[i]f the trial court determines that a party’s reasonable monthly expenses exceed her monthly income, and that she has no other means with which to meet those expenses, it may properly conclude the party is dependent.” *Carpenter*, __ N.C. App. at __, 781 S.E.2d at 833 (citing *Beaman v. Beaman*, 77 N.C. App. 717, 723, 336 S.E.2d 129, 132 (1985)).

In this case, plaintiff introduced an affidavit of income and expenses. Based on the financial information in the affidavit, the trial court issued findings detailing plaintiff’s monthly income, reasonable monthly shared family expenses, and reasonable individual expenses. Comparing those findings, the trial court found as follows:

8. Plaintiff’s total monthly needs and expenses for both her shared family expenses and her individual needs are \$5,866.52 per month. She has net earnings of \$3,006.77 per month, so her net need from the defendant is \$2,860.00 per month.

Under *Carpenter*, the trial court was not required to make specific findings that plaintiff was actually substantially dependent or substantially in need of maintenance and support, as defendant asserts. The trial court’s finding that plaintiff’s reasonable expenses exceeded her income supported a determination that plaintiff was actually substantially dependent. However, the trial court never found that plaintiff “has no other means with which to meet those expenses” and evidence in the record indicates that plaintiff could earn more money as a nurse in a private setting, as opposed to her current job as a school nurse. Without further findings

concerning plaintiff's inability to meet her expenses, we hold the trial court's findings are insufficient to support the conclusion that plaintiff is a dependent spouse. Therefore, the trial court erred in determining plaintiff is entitled to alimony.

Although reversal of the trial court's order is proper based solely on the holding that the trial court erred in determining plaintiff is entitled to alimony, because the trial court may issue additional findings to support its entitlement determination upon remand, we briefly address additional issues with the trial court's order so that the errors do not recur below.

In the event plaintiff is entitled to alimony, defendant argues, and plaintiff concedes, the trial court erred in calculating the amount of alimony awarded. Both parties are in agreement that the trial court must make additional findings. We agree.

First, the trial court failed to account for defendant's child support obligation when calculating plaintiff's shared family expenses. The evidence was that the parties' minor child primarily resided with plaintiff. The trial court, however, failed to make a deduction from plaintiff's shared family expenses for the portion of those expenses attributed to the parties' minor child. Defendant argues that by including expenses attributable to the minor child in plaintiff's shared family expenses, the trial court is effectively requiring defendant to pay an additional portion of the child's expenses beyond his guideline child support obligation through the guise of alimony.

This Court addressed a similar issue in *Robinson v. Robinson*, 210 N.C. App. 319, 707 S.E.2d 785 (2011), in which this Court vacated an alimony award that included a child's actual expenses in the determination of the dependent spouse's expenses after the supporting spouse's child support obligation was determined pursuant to the child support guidelines.

In the present case, plaintiff pro-rated the shared family expenses in her affidavit of income and expenses, allocating 50% of those expenses to herself and 50% to the parties' child. Nevertheless, the trial court did not account for the expenses attributable to the parties' child. Upon remand, the trial court should issue findings regarding what portion of plaintiff's shared family expense is attributable to the parties' minor child and should make the proper deduction in plaintiff's family shared expenses so that defendant is not paying more for the child than the amount determined under the child support guidelines.

Not only does this error in determining plaintiff's expenses affect the amount of alimony awarded, it appears that the inclusion of the minor child's expenses in plaintiff's shared family expenses may also affect the trial court's determination that plaintiff is a dependent spouse.

Second, the trial court failed to consider all liabilities and debt service requirements of the parties, as required by N.C. Gen. Stat. § 50-16.3A(b)(10). Evidence of the parties' debts was introduced into evidence in the parties' affidavits

on income and expenses. Thus, the trial court was required to make specific findings of fact concerning the debts of the parties. *See* N.C. Gen. Stat. § 50-16.3A(c). There are no such findings in the trial court's alimony judgment.

Third, it is clear on the face of the alimony judgment that the trial court erred in its calculations supporting the award of alimony. For example, the trial court incorrectly totaled defendant's shared family expenses found in finding of fact number 9 (\$2,024.66) and defendant's individual expenses found in finding of fact number 10 (\$2,385.00). The trial found in finding of fact number 11 that defendant's total monthly expenses from findings of fact numbers 9 and 10 totaled \$4,009.00. However, as defendant points out, the correct total of the expenses in findings of fact numbers 9 and 10 is \$4,409.66. Furthermore, in findings of fact numbers 11 and 13, the trial court listed two different amounts when stating the amount of child support defendant is required to pay each month. The trial court then used the incorrect total for defendant's expenses and the incorrect child support amount in finding of fact number 13 in determining defendant's surplus after making support payments.

Upon remand, if the trial court finds that plaintiff is entitled to alimony, the trial court must issue further findings to address all factors in N.C. Gen. Stat. § 50-16.3A(b) and accurately calculate the amount of any alimony to be awarded.

Lastly, we note that the trial court must make more specific findings to direct the payment of the alimony ordered. Below, the trial court ordered the payment of alimony as follows:

1. The plaintiff is hereby awarded alimony from the defendant in the amount of Two Thousand Eight Hundred Sixty and no/100 DOLLARS (\$2,860.00) per month effective September 18, 2014, subject to credits for the retroactive portion of this award for payments made to plaintiff by defendant other than child support payments during the period September 18, 2014, to the entry of this judgment, the same to continue until the death of either party, the plaintiff's remarriage or cohabitation within the purview of N.C. Gen. Stat. § 50-16.9(b).

This decretal portion of the order, however, fails to identify those payments previously made to plaintiff by defendant or provide a schedule for the payment of the arrearages.

Because the trial court committed numerous errors in ordering defendant to pay plaintiff alimony, we reverse the alimony award in favor of plaintiff and remand to the trial court for further proceedings.

B. Attorney's Fees

Defendant also challenges the trial court's award of attorney's fees to plaintiff. That award provided that "[t]he defendant shall pay the sum of \$15,108.75 in partial satisfaction of the plaintiff's counsel fees in this action."

“As with our analysis for alimony, an analysis for attorney’s fees requires a two-part determination: entitlement and amount.” *Barrett*, 140 N.C. App. at 374, 536 S.E.2d at 646.

A spouse is entitled to attorney’s fees if that spouse is (1) the dependent spouse, (2) entitled to the underlying relief demanded (e.g., alimony and/or child support), and (3) without sufficient means to defray the costs of litigation. Entitlement, i.e., the satisfaction of these three requirements, is a question of law, fully reviewable on appeal.

Id. (citing *Clark v. Clark*, 301 N.C. 123, 135-36, 271 S.E.2d 58, 67 (1980)). “Once a spouse is entitled to attorney’s fees, our focus then shifts to the amount of fees awarded. The amount awarded will not be overturned on appeal absent an abuse of discretion.” *Id.* at 375, 536 S.E.2d at 647.

Defendant challenges both the entitlement to and the amount of attorney’s fees in this case. We agree the trial court erred in both determinations. Because we held there were insufficient findings of fact to support the trial court’s conclusion that plaintiff is a dependent spouse and, therefore, plaintiff was not entitled to alimony, we necessarily must find that the trial court erred in awarding plaintiff attorney’s fees. However, even if the trial court were to make additional findings upon remand to support its determination that plaintiff is entitled to alimony, the parties are in agreement that the trial court failed to make sufficient findings to support the amount of attorney’s fees awarded to plaintiff in this case. The trial court’s award of attorney’s fees was based on finding of fact number 16, which specified the time

various attorney's and paralegals spent working on plaintiff's alimony claim. Yet, it appears from the attachment to the attorney's affidavit submitted in support of plaintiff's motion for attorney's fees that portions of time for which plaintiff was awarded attorney's fees for the alimony claim were spent on matters other than alimony; namely child support, child custody, or equitable distribution. Moreover, plaintiff concedes the trial court should make additional findings as to the nature of the attorney's services, his experience, and the appropriate hourly rate.

Should the trial court make an award of alimony upon remand, the trial court should revisit the issue of attorney's fees and make further findings to support any award of attorney's fees it orders.

III. Conclusion

For the reasons discussed, we reverse both the trial court's award of alimony to plaintiff and the trial court's award of attorney's fees to plaintiff. The matter is remanded to the trial court for further proceedings. We leave it to the discretion of the trial court to determine whether to take additional evidence or conduct additional hearings in this matter.

REVERSE AND REMAND.

Judges BRYANT and MURPHY concur.

Report per Rule 30(e).