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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-811

Filed: 20 March 2018

Mecklenburg County, No. 15 CVD 12244

ROBERT FINN, Plaintiff,

v.

JENNIFER R. FINN, Defendant.

Appeal by defendant from order entered 7 December 2016 by Judge Christy T. Mann in Mecklenburg County District Court. Heard in the Court of Appeals 10 January 2018.

Plumides, Romano, Johnson and Cacheris, PC, by Richard B. Johnson, for plaintiff-appellee.

The Law Office of Stephen M. Corby, PLLC, by Stephen M. Corby, for defendant-appellant.

ZACHARY, Judge.

This appeal arises from domestic litigation between plaintiff Robert Finn and defendant Jennifer R. Finn. Defendant appeals from an order denying her claims for alimony and attorney's fees. We conclude that the court's order fails to set forth sufficiently detailed findings of fact to enable this Court to conduct a meaningful

review. Accordingly, we vacate the trial court's order and remand for entry of additional findings.

Background

The parties were married in 1995 and separated in March 2015. They are the parents of three daughters, born in 1999, 2002, and 2007 ("the children"). On 26 June 2015, plaintiff filed a complaint seeking joint custody of the children. On 17 July 2015, defendant signed[1] her answer, denying the relevant allegations of plaintiff's complaint and asserting counterclaims for legal and physical custody of the children, child support, equitable distribution, postseparation support, alimony, and an interim distribution of the marital estate.

The trial court conducted a hearing on defendant's claims for postseparation support, temporary child support, and attorney's fees on 19 November 2015. On 12 April 2016, the court entered an order directing plaintiff to pay defendant $1,200 per month in postseparation support, and $2,248 per month in temporary child support. The court held open the issue of defendant's claim for attorney's fees.

On 21 July 2016, the trial court conducted a hearing on the issues of permanent custody of the children, and on defendant's claims for child support, alimony, and attorney's fees. Plaintiff testified that he was employed by Wells Fargo Bank, and

[1] We do not know when defendant's answer was filed, as the file stamp on this document is illegible. See N.C. R. App. P. 9(b)(3) (2017) ("Every pleading, motion, affidavit, or other paper included in the record on appeal shall show the date on which it was filed[.]").

received an annual bonus in March of each year. He used his 2016 bonus of approximately $48,400 to pay child support arrears and taxes, and paid the remainder to defendant. Plaintiff had filed a revised financial affidavit reflecting an increase in his salary, together with monthly expenses including, *inter alia*, $264 for the children's health insurance, $675 for food and supplies, $600 for gasoline, and $280 for auto insurance. After the parties separated, plaintiff continued to make mortgage payments on the former marital residence. Plaintiff also testified that defendant was capable of earning a higher salary than she received in her current employment and that defendant had not complied with the visitation provisions in the temporary child custody order.

On cross-examination, plaintiff admitted that he had used defendant's share of his annual bonus to pay certain marital expenses, and that he included a monthly contribution of $1,500 to a 401(k) account as an expense in his financial affidavit although he was not making contributions to that account, resulting in a net monthly income that was $1,500 more than he represented in his financial affidavit. Plaintiff listed several credit card debts in his affidavit; however, because one of these was used for daily living expenses, certain living expenses were counted twice, both as a monthly expense and also as a credit card payment.

Defendant testified that she lived with the children in the former marital residence. She had a bachelor's degree in early childhood education and an associate's

degree in nursing. During the marriage, she worked as a teacher's assistant and as a nurse, and was also a homemaker. It was difficult to implement the parties' visitation schedule because the children did not want to visit with plaintiff. Defendant had to use a credit card to pay her attorney's fees and the daily living expenses for herself and the children.

On 7 December 2016, the trial court entered an order denying defendant's claims for alimony and attorney's fees. This order did not address the issues of child custody or child support. Defendant has appealed to this Court from the order denying her claims for alimony and attorney's fees.

Standard of Review

The trial court's determination as to defendant's entitlement to alimony is a question of law, reviewable *de novo*. *Romulus v. Romulus*, 215 N.C. App. 495, 520, 715 S.E.2d 308, 324 (2011). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *In re Greens of Pine Glen Ltd.,* 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003) (citation omitted). "The amount of alimony is determined by the trial judge in the exercise of his sound discretion and is not reviewable on appeal in the absence of an abuse of discretion." *Green v. Green*, ___ N.C. App. ___, ___, 806 S.E.2d 45, 54 (2017), (quoting *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982)). "The trial court's decision constitutes an abuse of discretion where it 'is manifestly unsupported by reason, or

so arbitrary that it could not have been the result of a reasoned decision[.]' " *Collins v. Collins*, 243 N.C. App. 696, 700, 778 S.E.2d 854, 856 (2015) (quoting *Frost v. Mazda Motors of Am., Inc.,* 353 N.C. 188, 199, 540 S.E.2d 324, 331 (2000)). "When 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." *Miller v. Miller*, ___ N.C. App. __, __, 799 S.E.2d 890, 901 (2017) (citation and internal quotation marks omitted).

Trial Court's Denial of Alimony

On appeal, defendant argues that the trial court erred by denying her claim for alimony. Defendant contends that the trial court's order failed to contain findings of fact adequate to demonstrate its consideration of the factors set out in N.C. Gen. Stat. § 50-16.3A(b) for which evidence was presented. We agree.

Pursuant to N.C. Gen. Stat. § 50-16.3A(a), "[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, including those set out in subsection (b) of this section." N.C. Gen. Stat. § 50-16.3A(a) (2016). N.C. Gen. Stat. § 50-16.1A(2) defines a "dependent spouse" 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) (2016). Our Supreme Court has held that "the phrase 'actually substantially dependent' . . . obviously implies that the spouse seeking alimony must have actual dependence on the other in order to maintain the standard of living in the manner to which that spouse became accustomed during the last several years prior to separation." *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E.2d 849, 854 (1980) (emphasis omitted). The phrase "accustomed standard of living of the parties" "contemplates the economic standard established by the marital partnership for the family unit during the years the marital contract was intact" and "anticipates that alimony, to the extent it can possibly do so, shall sustain that standard of living for the dependent spouse to which the parties together became accustomed." *Williams*, 299 N.C. at 181, 261 S.E.2d at 855. However, "just because one spouse is a dependent spouse does not automatically mean the other spouse is a supporting spouse. . . . A surplus of income over expenses is sufficient . . . to warrant a supporting spouse classification." *Bodie v. Bodie,* 221 N.C. App. 29, 46, 727 S.E.2d 11, 22 (2012) (quotation marks and citations omitted).

In the present case, the trial court was required to consider the factors set out in N.C. Gen. Stat. § 50-16.3A(b) and to make findings on the factors for which evidence was produced in its determination of the amount and duration of alimony. *See* N.C. Gen. Stat. § 50-16.3A(c) (2016) ("[T]he 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.") These statutory factors are the following:

> (1) The marital misconduct of either of the spouses. . . ;
> (2) The relative earnings and earning capacities of the spouses;
> (3) The ages and the physical, mental, and emotional conditions of the spouses;
> (4) The amount and sources of earned and unearned income of both spouses, including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others;
> (5) The duration of the marriage;
> (6) The contribution by one spouse to the education, training, or increased earning power of the other spouse;
> (7) The extent to which the earning power, expenses, or financial obligations of a spouse will be affected by reason of serving as the custodian of a minor child;
> (8) The standard of living of the spouses established during the marriage;
> (9) The relative education of the spouses and the time necessary to acquire sufficient education or training to enable the spouse seeking alimony to find employment to meet his or her reasonable economic needs;
> (10) The relative assets and liabilities of the spouses and the relative debt service requirements of the spouses, including legal obligations of support;
> (11) The property brought to the marriage by either spouse;
> (12) The contribution of a spouse as homemaker;
> (13) The relative needs of the spouses;
> (14) The federal, State, and local tax ramifications of the alimony award;
> (15) Any other factor relating to the economic circumstances of the parties that the court finds to be just and proper[;]
> (16) The fact that income received by either party was previously considered by the court in determining the value

> of a marital or divisible asset in an equitable distribution of the parties' marital or divisible property.

N.C. Gen. Stat. § 50-16.3A(b) (2016).

"An award of alimony will be upheld where the trial court makes sufficient findings as to the reasons for the amount, duration, and manner of payment of alimony." *Juhnn v. Juhnn*, 242 N.C. App. 58, 59, 775 S.E.2d 310, 312 (2015). In *Friend-Novorska v. Novorska*, 143 N.C. App. 387, 545 S.E.2d 788, *aff'd per curiam*, 354 N.C. 564, 556 S.E.2d 294 (2001), this Court held that the findings of fact "required to support the amount, duration, and manner of payment of an alimony award are sufficient if findings of fact have been made on the ultimate facts at issue in the case[.]" *Friend-Navorska*, 143 N.C. App. at 395, 545 S.E.2d at 789. "The ultimate facts at issue in the case are facts relating to the factors set forth in section 50-16.3A(b) for which evidence is presented at trial." *Id.*, fn 3.

In the present case, the order denying defendant's claim for alimony contained the following findings of fact:

> 1. The parties are citizens and residents of Union County, North Carolina.
>
> 2. The parties were married on June 9, 1995, and separated on March 18, 2015.
>
> 3. Three children were born to the marriage of the parties, . . . in [1999, 2002, and 2007] ("the children").
>
> 4. Plaintiff is employed by *Wells Fargo* at a gross monthly income of $12,822.00. Plaintiff has total deductions from his pay check which equal $5,097.00 per month. The Court

> is not including his $1,500.00 per month 401(k) deduction, leaving him a net income of $7,725.00 per month.
>
> 5. Plaintiff's Shared Family Expenses total $3,634.00 per month, the same as [he] listed on his Affidavit, but with $14.00 added for health insurance.
>
> 6. Plaintiff's Individual Expenses are reduced to $1,362.00, as the Court removed $150.00 for Laundry, $50.00 for Charitable Contributions and $450.00 for Household Furnishings.
>
> 7. Plaintiff's Debt Service is reduced to $777.00 per month.
>
> 8. Plaintiff's total expenses each month equal $5,773.00, to which is added [h]is child support obligation of $2,258.00 per month for a total of $8,031.00 per month.
>
> 9. Plaintiff's expenses and child support obligation result in him having a deficit of $306.00 per month.
>
> 10. Defendant is a dependent spouse, but Plaintiff does not have the present ability to pay alimony, therefore, Defendant's claim for alimony is denied.
>
> 11. Based on the above, even though Plaintiff is a supporting spouse and Defendant is a dependent spouse, Plaintiff does not have the present ability to pay Alimony and the Court is denying Defendant's claims for Alimony and Attorney's Fees.

Based upon its findings of fact, the trial court concluded that "Plaintiff is a supporting spouse and Defendant is a dependent spouse[.] Plaintiff does not have the present ability to pay Alimony and the Court is denying Defendant's claims for Alimony and Attorney's Fees." We conclude that the findings in the trial court's order are inadequate to allow us to conduct a meaningful appellate review.

First, the order does not identify the source of the dollar amounts in the trial court's findings. The parties submitted initial and revised affidavits setting out their respective incomes and claimed expenses. Additionally, the trial court entered an order for temporary child support and postseparation support, in which the court made detailed findings as to the parties' income and expenses at that time. Finally, the parties' testimony included references to certain expenses. These submissions varied as to the claimed amounts of certain expenses, and with regard to plaintiff's income. Because we do not know the source of the figures upon which the trial court relied in its calculations, we cannot determine whether the amounts are supported by the evidence.

In addition, the trial court's order failed to make findings as to many of the factors set out in N.C. Gen. Stat. § 50-16.3A(b) for which evidence was offered. An objective determination of the parties' "accustomed standard of living" is central to the trial court's determination of whether to award alimony and postseparation support. *Crocker v. Crocker*, 190 N.C. App. 165, 660 S.E.2d 212 (2008). In the case before us, the trial court's order contains no findings concerning the parties' accustomed standard of living. Therefore, we have no basis upon which to determine whether the expenses claimed by the parties are reasonable and are consistent with the marital standard of living, and no way to assess whether the trial court abused its discretion in its consideration of the parties' income and reasonable expenses.

Moreover, the order contains no findings pertaining to other factors listed in N.C. Gen. Stat. § 50-16.3A(b) for which evidence was offered, including the following:

> 2. The relative earnings and earning capacities of the spouses;
>
> 4. The amount and sources of earned and unearned income of both spouses, including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others;
>
> 5. The duration of the marriage;
>
> 7. The extent to which the earning power, expenses, or financial obligations of a spouse will be affected by reason of serving as the custodian of a minor child;
>
> 12. The contribution of a spouse as homemaker;
>
> 13. The relative needs of the spouses;
>
> 14. The federal, State, and local tax ramifications of the alimony award.

N.C. Gen. Stat. § 50-16.3A(b) (2016).

The absence of findings on these issues prevents us from reviewing the trial court's determination that plaintiff cannot afford to pay alimony. For example, in its order for postseparation support, which was entered in April of 2016, the trial court found that plaintiff's monthly net income was $8,280. Between October 2015 and July 2016, plaintiff's monthly salary rose by approximately $340 per month. However, in the revised financial affidavit that plaintiff filed in July of 2016, plaintiff's stated net income (excluding $1,500 that plaintiff intended to contribute to

a 401(k)) was $7,725, a reduction of over $500 per month. This decrease in plaintiff's income resulted in part from the fact that plaintiff had increased by $500 the amount withheld from his pay each month for federal taxes. On cross-examination, defendant's attorney questioned this decision, suggesting that it was an attempt by plaintiff to reduce his income. Given that the trial court's calculations resulted in a finding that plaintiff had a "deficit" of $306 per month, the reasonableness of plaintiff's decision to reduce his income by more than $500 per month would appear to be relevant to the trial court's determination of plaintiff's ability to pay alimony. However, the trial court did not make any findings regarding the reasonableness of plaintiff's decision to increase his monthly deduction for federal taxes by $500.

Defendant also argues that the trial court erred by failing to include plaintiff's annual bonus in its computation of plaintiff's income. In determining the amount and duration of alimony, the court must consider the "amount and sources of earned and unearned income . . . including, but not limited to, earnings, dividends, and benefits[.]" N.C. Gen. Stat. § 50-16.3A(b)(4) (2016). Where a supporting spouse receives bonuses on a consistent basis, this amount may be included in the calculation of the spouse's income. *Burger v. Burger,* ___ N.C. App. ___, ___, 790 S.E.2d. 683, 688 (2016). On remand, the trial court should consider whether to include plaintiff's annual bonus in its calculation of plaintiff's income.

For the reasons discussed above, we conclude that the order did not contain sufficient facts to enable us to determine the validity of the court's determinations on the issue of alimony or whether the court abused its discretion. We vacate the court's order and remand for entry of additional findings that address the relevant statutory factors.

Denial of Defendant's Motion for Attorney's Fees

Defendant asserts that the trial court erred by denying her motion for attorney's fees. N.C. Gen. Stat. § 50-16.4 provides that "[a]t any time that a dependent spouse would be entitled to alimony pursuant to G.S. 50-16.3A . . . the court may, upon application of such spouse, enter an order for reasonable counsel fees, to be paid and secured by the supporting spouse in the same manner as alimony." N.C. Gen. Stat. § 50-16.4 (2016). "Because we vacate that portion of the trial court's order denying alimony and remand for additional findings as to whether plaintiff was entitled to alimony, we also vacate that portion of the order denying plaintiff's claim for [attorney's] fees." *Carpenter v. Carpenter*, ___ N.C. App. ___, ___, 781 S.E.2d 828, 834 (2016). Accordingly, we remand and instruct the trial court to reexamine the issue of attorney's fees.

Conclusion

For the reasons discussed above, we vacate the court's order and remand for entry of findings on the factors set out in N.C. Gen. Stat. § 50-16.3A(b) for which

evidence was introduced. We also vacate the portion of the order denying defendant's claim for attorney's fees, and remand for further consideration of this issue.

VACATED AND REMANDED.

Judges CALABRIA and ARROWOOD concur.

Report per Rule 30(e).