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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-399

Filed: 15 January 2019

Forsyth County, No. 14 CVD 6521

AMY (DROHAN) HUGHES, Plaintiff,

v.

BRENDAN DROHAN, Defendant.

Appeal by defendant from order entered 23 October 2017 by Judge Laurie Hutchins in District Court, Forsyth County. Heard in the Court of Appeals 3 October 2018.

David B. Hough, for plaintiff-appellee.

Harvey W. Barbee, Jr., for defendant-appellant.

STROUD, Judge.

Father appeals from an order modifying his child support obligation. We affirm the trial court's order regarding modification of his child support and its inclusion of withdrawals from Father's 401(k) account as income. But because there was no evidence before the trial court to support some findings of expenses used in

the child support calculations, we reverse and remand for the trial court to enter a new child support order.

I. Background

Mother and Father married in 2001 and separated in 2013. They have two children who have primarily lived with Mother. On 27 October 2014 Mother and Father entered into a consent order which set child support at $1,031.80 per month for Father. In November 2015, Father filed a motion to modify child support, alleging as changes of circumstances that one child was no longer in day care, Mother had remarried, the incomes of both parties had increased, and "[o]ther reasons to be presented at trial." Before the motion to modify was heard, in July 2016, Father sent Mother a copy of a letter dated 16 June 2016 from a doctor at the Department of Veterans Affairs in support of his service-related disabilities. The letter stated that Father had a disability rating of 50% based upon several mental health issues and physical ailments. Also in June 2016, Father resigned from his job at Costco and withdrew $33,000.00 from his retirement account ("401(k)").

After receiving the disability letter from Father, Mother filed a motion for emergency ex parte modification of custody, alleging the children were endangered by Father's mental health conditions and alcohol abuse. The trial court held a hearing on the emergency custody motion on 26 July 2016 and on 8 August 2016 entered a temporary order requiring Father's visitation to be supervised by his

fiancé.[1] On 10 August 2016, the trial court entered a temporary child support order addressing Father's motion for modification reducing his child support obligation from $1,031.80 to $500.00. The order notes Father's recent disability and that Mother had requested continuance of the full hearing on child support modification because she needed more time to get information on Father's medical condition. The trial court found that since it appeared Father was on disability, his child support should be temporarily reduced effective 1 August 2016. The order continued the hearing on the child support modification to the week of 19 September 2016.

The case was then continued five times, and, on 28 April 2017, the trial court held a hearing on the pending motions for modification of child support and custody. The trial court entered two separate orders as a result of that hearing. First, the trial court entered an order addressing Mother's motion for modification of custody on 2 June 2017, finding no substantial change of circumstances justifying a modification of custody. Although Father had been diagnosed with post-traumatic stress disorder and was unable to work due to his disability, the trial court found he posed no threat to the children. Then on 23 October 2017, the trial court entered an order addressing Father's motion for modification of child support and set a new child support obligation of $507.99 based on the North Carolina Child Support Guidelines. Father timely appealed.

[1] Custody is not at issue in this appeal.

II. Change of Circumstances

Father argues that the trial court erred by modifying child support without first concluding there had been a substantial change of circumstances since the prior order dated 10 August 2016. This argument is perplexing, since the case was before the court on Father's motion for modification of the 2014 Consent Order and his motion alleged several substantial changes in circumstances justifying modification of child support. In addition, it is not clear if Mother disputes that the trial court erred by finding a substantial change of circumstances, but we will address Father's argument nonetheless.[2]

Modification of child support is governed by N.C. Gen. Stat. 50-13.7:

> Except as otherwise provided in G.S. 50-13.7A, an order of a court of this State for support of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested subject to the limitations of G.S. 50-13.10.

N.C. Gen. Stat. § 50-13.7(a) (2017).

We review the trial court's determination of child support for abuse of discretion:

> Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is

[2] Mother notes that if we were to accept Father's argument as correct and reversed the order on appeal, the result would be that his child support would remain at the original $1,031.80 amount per month—about twice the amount under the order on appeal. Or if we were to treat the temporary child support order of 10 August 2016 as a permanent order and reversed the order on appeal, his child support obligation would be only $7.99 lower than the order on appeal.

> limited to a determination of whether there was a clear abuse of 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 judge failed to comply with the statute will establish an abuse of discretion. However, the trial court must make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law.

Sarno v. Sarno, ___ N.C. App. ___, ___, 804 S.E.2d 819, 824 (2017) (citations, quotation marks, brackets, and ellipses omitted).

Father correctly notes that modification of child support is a two-step process. *See McGee v. McGee*, 118 N.C. App. 19, 26-27, 453 S.E.2d 531, 536 (1995) ("[M]odification of a child support order involves a two-step process. The court must first determine a substantial change of circumstances has taken place; only then does it proceed to apply the Guidelines to calculate the applicable amount of support."). First, the court must find there has been a change in circumstances since entry of the prior order. Second, the court must calculate the new child support obligation based upon the new circumstances. Beyond this, Father's argument is based upon several incorrect assumptions.

First, he argues that there was no pending motion to modify child support since no motion requesting determination of child support was "filed after entry of the initial order in October, 2015." However, no order was entered in October 2015. The *initial* Consent Order for both child support and custody was entered in October 2014,

and *Father* filed a motion for modification of child support in November 2015. The trial court addressed his motion in the order on appeal.

Father also argues that the order states it was "entered upon Plaintiff's motion seeking child support" and Plaintiff had not filed any motion regarding child support, but it is obvious from the entire record and transcript of the hearing that the reference to "Plaintiff" instead of "Defendant" here is a clerical error. In any event, there was no dispute over the issues to be addressed. At the beginning of the hearing, counsel for both parties agreed with the trial court's statement of the issues to be heard:

> THE COURT: Does Counsel agree with -- those are the two limited issues today?
> …
> THE COURT: Whether [Father's] visitation has to be supervised and number two, trying to determine an amount of child support.

Father's argument also seems to incorrectly assume that the 10 August 2016 order was a permanent order so a change of circumstances would be required to modify it.[3] But the August 2016 Order was explicitly a temporary order, and it continued the hearing on Father's motion for modification of child support based upon Mother's request for additional time to get information about Father's medical condition. *See Gray v. Peele*, 235 N.C. App. 554, 557-58, 761 S.E.2d 739, 742 (2014)

[3] At the hearing, Father's counsel correctly identified the initial order subject to modification. After the trial court inquired about which order was to be modified, regarding "the most recent one," he stated, "We're not modifying that one. That's a temporary. Probably want the original one from the mediation two years ago."

("An order is temporary if either (1) it is entered without prejudice to either party; (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues. If the order does not meet any of these criteria, it is permanent. With respect to child support orders, our case law is less developed, but not totally devoid of guiding precedent. In these cases, we have looked to the intent behind the trial court's order to determine if a support order is temporary. In doing so, we have considered whether the order explicitly identifies itself as a temporary order and whether the language of the order contemplates that another permanent order will be entered at a future point in time." (citations, quotation marks, and brackets omitted)). The only prior permanent child support order was the October 2014 Consent Order and this is the order Father sought to modify. Accordingly, the relevant time period for showing a change of circumstances supporting modification of child support was from October 2014 to the date of the hearing.

Mother also argues that Father did not file an additional motion for modification after his disability began, but he was not required to file a new motion. She was well aware of the issue—in August 2016 the hearing was continued so she could get additional medical information—and Mother did not object to the trial court's consideration of the issue. Although Father was still employed when he filed the motion, by the time of the hearing, he was not working and was on disability. The

trial court properly considered the circumstances existing as of the date of the hearing. And certainly Father does not dispute that he had a significant decrease in income since he had to stop working; his change in income is a change of circumstances justifying modification. *See McGee,* 118 N.C. App. at 27, 453 S.E.2d at 536 ("[I]t now appears settled that a significant involuntary decrease in a child support obligor's income satisfies the necessary showing even in the absence of any change affecting the child's needs."). We also note that although the custody order was not appealed, custody and child support were heard at the same time and the custodial schedule is one of the factors used to determine child support. *See Gray*, 235 N.C. App. at 558, 761 S.E.2d at 742 ("A claim for either child support or custody can be brought and heard by the trial court independently, so in one sense, a final determination of one claim would be entirely separate of the other. But in many cases, and this is one of them, the amount of child support depends in large part upon the custodial schedule and the custodial schedule is in dispute. In fact, N.C. Gen. Stat. § 50-13.4 establishes child support guidelines which are based upon the applicable custodial schedule and a presumption that child support shall be set in accordance with the guidelines unless the parties' incomes place their case outside of the guidelines or there is a request for deviation from the guidelines and the trial court makes findings that a deviation is justified in the particular case.").

Contrary to Father's argument, a substantial change in circumstances is a finding of fact, not a conclusion of law, and although the trial court's order does not use the exact words "substantial change of circumstances," the order includes detailed findings of the change in circumstances since the prior order:

> 7. [Father] had previously been gainfully employed at Costco Warehouse, but resigned from his job in June of 2016.
>
> a. Dr. Randy D. Readling, M.D., Psychiatrist for the Department of Veterans Affairs, has determined that [Father] suffers from Postraumatic [sic] Stress Disorder.
>
> b. [Father], according to Dr. Readling, has been given the following diagnoses:
>
> [List of ten diagnoses and medical conditions]
>
> c. Dr. Readling further stated that [Father] remains disabled with "significant issues with depression, anxiety, irritability and episodes of anger as well as nightmares and flashbacks of the traumatic events he experienced in Iraq;"
>
> d. Dr. Readling also cites that as a result of his mental condition, [Father] has experienced "two past incidences in 2013 where [Father] considered shooting himself but was interrupted from doing so;"
>
> e. Dr. Readling declared that medically [Father] was therefore unemployable; and the Court finds same as fact; and
>
> f. Dr. Readling concluded that "It is the opinion of this Psychiatrist that [Father's] condition will not improve in the near future to make employment possible:" and the Court finds same as fact.

> 8. Based upon Dr. Readling's professional assessment, [Father] was awarded at 50% disability rating by the Veteran's Administration (hereinafter called "VA") and has been awarded $1,068.00 per month as a disability benefit.

These findings set out the changes in Father's earnings and ability to work in detail and are more than adequate to show the requisite change in circumstances justifying modification of child support.

Mother argues that the trial court erred by relying on hearsay evidence because Father submitted an affidavit from his physician, but Mother did not object to the affidavit at trial or cross-appeal. She also contends that she never got sufficient information regarding his medical condition, but again, she did not cross-appeal and our record does not include any orders regarding discovery. This argument is overruled.

III. Income

Father next argues that the trial court should not have included the money he withdrew from his 401(k) account in his income and prorated over 4 years for purposes of calculating his child support. Father argues that under *McKyer v. McKyer*, 179 N.C. App. 132, 632 S.E.2d 828, (2006), the "conversion of an asset into cash is not considered income for purposes of child support, when the asset is awarded to one party as part of an equitable distribution proceeding." Since the 401(k) plan was awarded to him as a marital asset as part of the division of the parties' property, Father contends that it should not be treated as income.

In *McKyer*, the trial court did not include proceeds from the sale of the marital home in the mother's income for purposes of calculating child support, and the father appealed, arguing that the proceeds must be included as non-recurring income. *Id.* at 143, 632 S.E.2d at 834. This Court held that the trial court was within its discretion to exclude from the mother's income the proceeds from the sale of the marital home awarded to her in equitable distribution:

> In the equitable distribution proceedings, the McKyers' marital residence was principally distributed to Ms. McKyer with an order that it be sold. Although our courts have never addressed whether, in the child support context, the conversion of an asset to cash renders the cash income, courts in other jurisdictions have routinely held that it does not. Likewise, proceeds from the sale of an asset under both Federal and State income tax laws are not considered taxable income except to the extent the seller profits from the sale.
>
> In short, the mere fact that a non-recurring payment has occurred, in the absence of evidence that the payment was "income" at all, is alone insufficient to establish that the payment was necessarily non-recurring income.

Id. at 143-44, 632 S.E.2d at 834-35 (footnote and citations omitted).

McKyer neither requires or prohibits the trial court from treating Father's 401(k) withdrawal as income under the circumstances of this case. First, that an asset was distributed to a parent in an equitable distribution proceeding does not affect whether it may be considered as income for purposes of child support; the child support guidelines address "income from *any* source" and equitable distribution does not insulate an asset from inclusion in the calculation of income for purposes of child

support. N.C. Child Support Guidelines, AOC-A-162, at 3 (2019) (emphasis added). Second, the trial court's determination of whether to treat the 401(k) proceeds as income is within its discretion and is based upon the facts of the particular case. *See Id.* at 143-44, 632 S.E.2d at 834-35. In *McKyer*, the funds were from the sale of a residence, which the court noted "are not considered taxable income except to the extent the seller profits from the sale." *Id.* at 143, 632 S.E.2d at 835.

The Guidelines specifically include "retirement or pension" and severance pay as some of the potential types of income which may be prorated:

> "Income" means a parent's actual gross income from any source, including but not limited to income from employment or self-employment (salaries, wages, commissions, bonuses, dividends, severance pay, etc.), ownership or operation of a business, partnership, or corporation, rental of property, retirement or pensions, interest, trusts, annuities, capital gains, Social Security benefits, workers compensation benefits, unemployment insurance benefits, disability pay and insurance benefits, gifts, prizes and alimony or maintenance received from persons other than the parties to the instant action. When income is received on an irregular, non-recurring, or one-time basis, the court may average or prorate the income over a specified period of time or require an obligor to pay as child support a percentage of his or her non-recurring income that is equivalent to the percentage of his or her recurring income paid for child support.

N.C. Child Support Guidelines at 3.

Father did not present any evidence about the tax consequences from his 401(k) withdrawal. He testified that he used the 401(k) proceeds of "roughly $35,000"

at least in part to pay for his and his new wife's wedding, to support his new wife and two stepchildren, to pay for a trip to Hawaii which cost over $5,000, and to buy things for his children. Father argues that the trial court failed to make any finding of fact about how much, if any, of the 401(k) proceeds he still had at the time of the hearing, but a parent cannot reduce or avoid his child support obligation merely by spending down his income before a child support hearing. Father was aware of his child support obligation and his own pending motion for modification of child support when he received the 401(k) distribution. Under these circumstances, the trial court's inclusion of the 401(k) distribution in Father's income is not "unsupported by reason." *Sarno* ___ N.C. App. at ___, 804 S.E.2d at 824. The trial court did not abuse its discretion treating the 401(k) proceeds as "non-recurring" income and prorating it over a specific period of time. Father's argument is overruled.

IV. Child Care and Health Insurance Expenses

Father argues that the trial court's finding of fact regarding Mother's expenses for their children's health insurance and work-related child care is not supported by the evidence. Father challenges the following finding:

> 13. [Mother] also expends the following monthly sums for the said minor children: daycare costs of $210.00 and medical insurance of $217.51.

We review the challenged finding of fact to determine whether it is supported by substantial evidence. *Scott v. Scott*, 157 N.C. App. 382, 385, 579 S.E.2d 431, 433 (2003).

Mother argues that "the figures were presented to the court during the hearing" with no objection from Father. Mother is correct that counsel for the parties discussed various numbers with the trial court, but she does not note any evidence of the amounts. After presentation of the evidence and arguments, the trial court discussed the potential child support calculations with counsel. At that point, the trial court had not determined whether it would include the 401(k) withdrawal as income or how long the proration period would be, but the amounts of work-related child care and health insurance expenses do not appear to have been in dispute.

> THE COURT: All right. Thank you, Mr. Clerk for finding [the previous child support order] and so now I just still -- I've been talking to you all and not really allowing you to do the math but I'm -- is any -- either side got their child support worksheet yet based on the two-year and the three-year split?[4]
>
> MR. HOUGH: I don't have a worksheet but I worked it out, yeah. North Carolina location ---
>
> THE COURT: All right. Tell me what you came up with.
>
> MR. HOUGH: The final figure was $669.94.
>
> THE COURT: $669 and...
>
> MR. HOUGH: Ninety-four cents.
>
> THE COURT: Ninety-four cents. So depending on the math, that's what you think that it would come down to if I accept your suggestion of the two-year split?

[4] The "two-year" and "three-year" split is a reference to potential periods for prorating the 401(k) withdrawal funds.

> MR. HOUGH: That's correct.
>
> THE COURT: All right. Mr. Barbee, have you done the three-year calculation?
>
> MR. BARBEE: Yes, I got 483, Your Honor, 483.16.
>
> . . . .
>
> THE COURT: All right. Mr. Hough, do you want to be heard? Anything new?
>
> MR. HOUGH: Yes. I'm not sure that the figure that Mr. Barbee gave us -- I don't know for sure, includes the insurance that my client pays of 217 a month plus childcare of 210 a month. And I think that the figure, if it was not included, would go up closer to the figure we propose of 699.94.
>
> THE COURT: Can he provide insurance through the VA?
>
> [FATHER]: No, ma'am. I cannot.
>
> THE COURT: Thank you. All right. I'm going to take that under advisement.

It is well-established that "[s]tatements by an attorney are not considered evidence." *In re D.L.*, 166 N.C. App. 574, 582, 603 S.E.2d 376, 382 (2004). The parties did not stipulate to these numbers. We are unable to find any evidence in the record about health insurance or child care expenses—all of the exhibits are about Father's income and spending. Thus, finding of fact 13 was not supported by the evidence. We reverse the child support order's calculation of child support to the extent it was based upon this finding and remand for entry of a new order setting Father's child support obligation.

V. Conclusion

We affirm the trial court's finding of a substantial change of circumstances supporting a modification of the child support order and including Father's 401(k) proceeds as income, but we reverse and remand for recalculation of Father's child support obligation based upon competent evidence regarding any work-related child care or health insurance expenses for the minor children. On remand, the trial court shall hold a hearing to receive additional evidence limited to the issue on remand and should correct the clerical error in the order referring to "Plaintiff's Motion" instead of "Defendant's Motion" for modification of child support.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Judges DILLON and BERGER concur.

Report per Rule 30(e).