IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-12-2

Filed: 1 October 2019

Davidson County, No. 12 CVD 257

ASKALEMARIAM YIGZAW, Plaintiff,

v.

ALEHEGN ASRES, Defendant.

Appeal by Plaintiff from an order entered 31 July 2018 by Judge Wayne L. Michael in Davidson County District Court. Originally Heard in the Court of Appeals 7 May 2019. By orders dated 13 May 2019, this Court allowed Defendant's motion to dismiss the appeal and denied Plaintiff's petition for writ of *certiorari*. Upon *certiorari* and by order dated 14 August 2019, the Supreme Court of North Carolina reversed the order dismissing Plaintiff's appeal and remanded the case to the Court of Appeals for further proceedings.

Mary McCullers Reece for Plaintiff-Appellant.

Barnes, Grimes, Bunce & Fraley, PLLC, by Shawn L. Fraley, for Defendant-Appellee.

INMAN, Judge.

This appeal arises from a trial court order modifying child support obligations without requiring competent evidence or making findings as to the parties' estates, net incomes, and expenses. After careful review, we vacate and remand the trial court's order for further proceedings not inconsistent with this opinion.

I. FACTUAL AND PROCEDURAL HISTORY

Askalemariam Yigzaw ("Plaintiff") and Alehegn Asres ("Defendant") were married in 2003. The couple had two children by the marriage. In 2012, Plaintiff filed an action for divorce, child custody and support, post-separation support, permanent alimony, equitable distribution, and attorneys' fees. The parties settled Plaintiff's claims for child support, post-separation support, alimony, and attorneys' fees through an entered consent judgment in July of 2013. Under the terms of that consent judgment, Defendant agreed to pay Plaintiff $3,000 per month for 36 months in alimony and $2,000 per month in child support, with the latter subject to reevaluation after 36 months. Custody was later resolved through a consent order dated 23 February 2015.

Defendant filed a motion to modify child support on 22 July 2016. Defendant's motion alleged that, in the three years since the consent judgment was entered, Plaintiff had: (1) obtained a nursing degree; (2) attained employment with High Point Regional Hospital as a registered nurse; and (3) begun receiving rental income from a rental property she owned.

The trial court heard and received evidence from the parties on Defendant's motion on 14 March 2017. The hearing opened with the parties agreeing that their combined monthly income was in excess of $25,000, which placed any eventual child support award outside the scope of the North Carolina Child Support Guidelines (the "Guidelines") applicable at the time of the hearing. *See* N.C. Child Support Guidelines, 2016 Ann. R. N.C. at 50 (providing that a parent's presumptive child support obligation cannot be determined by reference to the Guidelines' schedule when the parents' combined income is in excess of $25,000 per month). Plaintiff then called an enforcement worker with Davidson County Child Support as a witness to testify what the presumptive child support obligations of the parties would be if the Child Support Guidelines applied to the parties' combined monthly income.[1] As part of her testimony, the enforcement worker identified several expenses Plaintiff and Defendant regularly incurred in connection with their income-generating activities, such as homeowners association dues and insurance on a rental property, car and truck costs, and meals and entertainment, but no evidence demonstrating other ordinary expenses of the parties was introduced.

Plaintiff was the next witness to take the stand. Her testimony on both direct and cross examination focused heavily on costs incurred for the children, including

[1] A trial court may turn to the Guidelines for assistance in resolving high-income child support cases, though its ultimate decision must be based on the particular facts of the case. *Smith v. Smith*, 247 N.C. App. 135, 145, 786 S.E.2d 12, 21 (2016).

food, clothing, medicine, piano lessons, educational programs and trips, and various athletic activities. As part of her cross examination, Defendant's counsel introduced into evidence an affidavit filed by Plaintiff in January of 2012 cataloging her personal and child-based expenses at that time. As to her estate, Plaintiff testified on re-direct and re-cross concerning her purchase of a rental property for roughly $95,000 with money loaned to her by a friend. Plaintiff testified that she continued to repay the loan in monthly installments of $850.

Defendant was the third and final witness tendered at trial. Defendant testified that he paid many of the child-based expenses and fees testified to by Plaintiff, including paying for the children's school fees, clothes, and medical care. Defendant also introduced documentary evidence evincing his payment of those expenses. The hearing proceeded to closing arguments following Defendant's testimony and, at the conclusion of the hearing, the trial court took the matter under advisement.

On 31 July 2018, more than 16 months after the hearing, the trial court entered an order modifying Defendant's monthly child support obligation by reducing it from $2,000 to $750. In its order, the trial court made findings concerning the parties' respective gross incomes and employment, including a finding that Plaintiff received a monthly rental income, but the trial court made no findings concerning the estates of the parties or their reasonable expenses. And, while the trial court did

make findings as to the reasonable expenses of the children, it did so solely in reliance on Plaintiff's affidavit filed in 2012, five years prior to the hearing:

> 13. The plaintiff is unable to provide detailed or reliable testimony or corroborative documents concerning the current reasonable needs of the children for health, education, and maintenance. The plaintiff did testify that the children are involved in activities in addition to school . . . . The Court finds that the children do in fact participate in all of these activities but the plaintiff was unable to show that she was the one who actually paid for any of these activities, or the actual cost of any of the activities. The Court is unable to determine the reasonable needs of the children [from] evidence presented by plaintiff at this hearing.
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> 14. The only comprehensive reliable evidence presented by the parties as to the current reasonable expenses of the children is plaintiff's affidavit filed January 26, 2012 . . . which placed the children's expenses as $1,172.00 per month, but did not include any "shared" expenses for the operation of the household. Allowing a portion of the electricity, heat, cable and internet, to be apportioned to the children, would place the total reasonable needs at about $1,500.00 per month (the assertion that the water bill is $200.00 per month is either not credible or not reasonable).

The trial court also found "[e]ither party alone is capable of providing for the reasonable needs of the children without contribution from the other parent." Plaintiff filed notice of appeal on 24 August 2018.

Defendant filed a motion to dismiss the appeal pursuant to Rules 34 and 37 of the North Carolina Rules of Appellate Procedure, and argued that Plaintiff's notice of appeal failed to comply with Rule 3(d)'s requirement that it "be signed by counsel

of record for the party or parties taking the appeal, or by any such party not represented by counsel of record." N.C. R. App. P. 3(d) (2019).[2]

Plaintiff promptly filed a response to the motion to dismiss and filed a petition for writ of *certiorari*. On 13 May 2019, this Court allowed Defendant's motion to dismiss and denied Plaintiff's petition for writ of *certiorari*. Plaintiff thereafter filed a petition for writ of *certiorari* with the Supreme Court. On 14 August 2019, the Supreme Court allowed Plaintiff's petition "for the limited purpose of reversing the Court of Appeals' 13 May 2019 order dismissing plaintiff's appeal . . . and remanding this case to the Court of Appeals for further proceedings not inconsistent with this order."

II. ANALYSIS

A. Appellate Jurisdiction

As noted *supra*, this Court originally allowed Defendant's motion to dismiss Plaintiff's appeal pursuant to Rules 34 and 37 of the North Carolina Rules of Appellate Procedure. The Supreme Court reversed that order; as a result, we possess

[2] Defendant's motion included two exhibits: (1) a notice of limited appearance in the trial court signed by Plaintiff's appellate counsel dated 24 August 2018; and (2) Plaintiff's notice of appeal, signed by Plaintiff rather than her counsel, filed 29 August 2018. Defendant argued that these documents demonstrated Plaintiff was represented by counsel at the time the notice of appeal was filed and Plaintiff's counsel was, therefore, required to sign the record on appeal consistent with Rule 3(d). Plaintiff argued that the notices were filed simultaneously, and that any default in doing so was merely technical rather than jurisdictional.

jurisdiction over Plaintiff's appeal. *See* N.C. Gen. Stat. § 50-19.1 (2019) (allowing an immediate right of appeal from child support orders).

B. Standard of Review

We review a trial court's decision rendered following a bench trial by determining "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." *Oakley v. Oakley*, 165 N.C. App. 859, 861, 599 S.E.2d 925, 927 (2004) (quotation marks and citations omitted). "[F]indings of fact by the trial court supported by competent evidence are binding on the appellate courts even if the evidence would support a contrary finding. Conclusions of law are, however, entirely reviewable on appeal." *Scott v. Scott*, 336 N.C. 284, 291, 442 S.E.2d 493, 497 (1994) (citation omitted).

C. Child Support Orders in High-Income Cases

High-income child support cases may not be resolved solely upon reliance on the Guidelines; instead, "the trial court must consider the needs of the child, specifically based upon the 'accustomed standard of living' of that child, and must make findings of fact to address these needs[.]" *Crews v. Paysour*, ___ N.C. App. ___, ___, 821 S.E.2d 469, 474 (2018) (citation omitted). Any order entered in such a case " 'must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to meet the reasonable needs of the child and (2) the

relative ability of the parties to provide that amount.' " *Id.* (quoting *Smith*, 247 N.C. App. at 145-46, 786 S.E.2d at 21). Further:

> These conclusions must themselves be based upon factual findings specific enough to indicate to the appellate court that the judge below took due regard of the particular estates, earnings, conditions, [and] accustomed standard of living of both the child and the parents. It is a question of fairness and justice to all concerned. In the absence of such findings, this Court has no means of determining whether the order is adequately supported by competent evidence.

Coble v. Coble, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) (citation and quotation marks omitted; alteration in original).

To satisfy the above standard, "the trial court must hear evidence and make findings of specific fact on the child's actual past expenditures and present reasonable expenses to determine the reasonable needs of the child." *Newman v. Newman*, 64 N.C. App. 125, 128, 306 S.E.2d 540, 542 (1983) (citations and quotation marks omitted). The trial court is also " '*required* to make findings of fact with respect to the factors listed in [N.C. Gen. Stat. § 50-13.4(c)],' including findings on 'the parents' incomes, estates, and present reasonable expenses in order to determine their relative ability to pay.' " *Smith*, 247 N.C. App. at 154, 786 S.E.2d at 26 (quoting *Sloan v. Sloan*, 87 N.C. App. 392, 394, 360 S.E.2d 816, 819 (1987)) (emphasis and second alteration in original). In other words, the trial court " '*must hear evidence and make findings of fact* on the parents' income[s], estates (e.g., savings; real estate holdings, including fair market value and equity; stocks; and bonds) and present reasonable

expenses.' " *Taylor v. Taylor*, 118 N.C. App. 356, 362-63, 455 S.E.2d 442, 447 (1995) (quoting *Little v. Little*, 74 N.C. App. 12, 20, 327 S.E.2d 283, 290 (1985)) (emphasis added, alteration in original), *rev'd on other grounds*, 343 N.C. 50, 468 S.E.2d 33 (1996). And, " '[a]t the very least, a trial court *must* determine what major assets comprise the parties' estates and their approximate value.' " *Smith*, 247 N.C. App. at 153-54, 786 S.E.2d at 26 (quoting *Sloan*, 87 N.C. App. at 395, 360 S.E.2d at 819) (emphasis added).

D. The Trial Court's Order Lacks Necessary Findings

The trial court's order in this case does not include any findings concerning the parties' respective estates and reasonable expenses. Absent such findings, Plaintiff argues, *vacatur* and remand is necessary. Defendant does not address this argument on appeal.

We agree with Plaintiff that the trial court's order lacks necessary findings. Although the order contains findings as to the parties' gross incomes, it includes no findings of their reasonable expenses or net incomes, nor findings of their respective estates. Such findings are clearly required by precedents. *Smith*, 247 N.C. App. at 153-54, 786 S.E.2d at 26. We note that, in examining the record, the parties presented evidence to support necessary findings as to the existence of their estates; for example, Plaintiff testified and introduced uncontroverted evidence indicating that she owns a rental property subject to debt that she purchased for $95,000, and

uncontroverted documentary evidence indicates Defendant owns a truck. The trial court erred, therefore, in failing to make findings of the estates of the parties. *See Newman v. Newman*, 64 N.C. App. 125, 128, 306 S.E.2d 540, 542 (1983) (vacating and remanding an order modifying child support for further findings when the record disclosed the father owned a house but no findings were made concerning its value to his estate); *Norton v. Norton*, 76 N.C. App. 213, 218, 332 S.E.2d 724, 728 (1985) (holding a trial court erred in entering an order modifying child support, partly because it made no findings as to the father's estate where "[i]t is apparent from the record that the father, at least, has an estate").

E. Findings as to Reasonable Expenses of the Children Are Unsupported

Plaintiff also challenges Finding of Fact 14 that the reasonable expenses of the children totaled $1,500 per month. That finding is expressly based on an affidavit filed by Plaintiff in 2012. In that affidavit, Plaintiff itemized the children's individual expenses—which totaled $1,172 per month—but failed to apportion any of her household expenses towards her children. In making Finding of Fact 14, the trial court allocated $328 of monthly household expenses to the children in arriving at their total reasonable expenses of $1,500.

Presuming, *arguendo*, that the children's individual expenses as calculated in the 2012 affidavit had remained the same at the time of the hearing in 2018,[3] no

[3] In actuality, the trial court found that the children had *increased* expenses but it lacked credible evidence to determine the amount of that increase.

evidence in the record indicates Plaintiff's household expenses had remained constant since that time. To the contrary, the only evidence pertinent to Plaintiff's household at the time of the hearing suggests that she had moved at least once since January of 2012. Without competent evidence to find the Plaintiff's current household expenses, the trial court had no evidentiary basis for apportioning $328 in such expenses to the children. *See, e.g., Atwell v. Atwell*, 74 N.C. App. 231, 236, 328 S.E.2d 47, 50 (1985) (holding a trial court cannot estimate and attribute a portion of a party's fixed household expenses to a child "based on speculation"). As a result, we hold that the trial court's finding as to the reasonable expenses of the children is not supported by sufficient evidence, and the trial court's order is unsupported by adequate findings. *Newman*, 64 N.C. App. at 128, 306 S.E.2d at 542.

F. Disposition

Given the trial court's failure to make adequate and necessary findings sufficient to support a modification of Defendant's child support obligation, *vacatur* and remand is appropriate. *See, e.g., id.* (vacating and remanding an order modifying child support for failure to make sufficient findings as to the reasonable needs of the child, the estates of the parties, and the parties' reasonable expenses). Ordinarily, this Court does not restrict the trial court's discretion to receive additional evidence on remand, as "the trial court is aware of the circumstances at the time of remand, and we are not[.]" *Crews*, ___ N.C. App. at ___, 821 S.E.2d at 472. However, this

Court has restricted that discretion; for example, we may require the trial court to hear additional evidence if requested by the parties. *Lasecki v. Lasecki*, 246 N.C. App. 518, 543, 786 S.E.2d 286, 304 (2016). "And further, because of the specific issues addressed by the opinion, sometimes we do expressly require additional evidence on remand." *Crews*, ___ N.C. App. at ___, 821 S.E.2d at 472 (citation omitted).

The circumstances of the present case require the trial court to receive additional evidence. First, "this case is unusual, particularly for a non-guideline child support case, because during the . . . hearing, the parties presented little evidence regarding their living expenses[.]" *Id.* at ___, 821 S.E.2d at 473. The parties also presented sparse evidence regarding the value of their respective estates. Given the scant evidence in the record, the trial court will need to receive additional evidence to base the findings required to support an order modifying Defendant's child support obligation.

The Guidelines were revised earlier this year to cover combined monthly incomes of up to $30,000, and apply to cases "heard on or after" 1 January 2019. N.C. Child Support Guidelines, 2019 Ann. R. N.C. at 1-2 (Supp. May 2019). The trial court found the parties' combined monthly income to be $28,712.33. Given the necessity for a further evidentiary hearing, this case may no longer be a high-income child support case when heard on remand, and instead will be presumptively governed by the Guidelines.

We instruct the trial court to hear additional evidence on remand to determine the parties' respective incomes and if this remains a high-income case under the current version of the Guidelines. If the parties incomes do not met the standard of a high-income case, the trial court shall determine and resolve the modification of child support in accordance with the Guidelines and N.C. Gen. Stat. § 50-13.4(c). If the trial court finds that the parties' aggregate income remains outside the scope of the Guidelines, it shall "hear evidence and make findings of fact on the parents' income[s], estates (e.g., savings; real estate holdings, including fair market value and equity; stocks; and bonds) and present reasonable expenses[,]" *Little*, 74 N.C. App. at 20, 327 S.E.2d at 290, as well as on the children's "actual past expenditures and present reasonable expenses." *Newman*, 64 N.C. App. at 128, 306 S.E.2d at 542.

III. CONCLUSION

For the foregoing reasons, we vacate and remand the trial court's order modifying child support for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED FOR FURTHER PROCEEDINGS.

Judges TYSON and ARROWOOD concur.

Report per Rule 30(e).