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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-913

Filed: 2 June 2020

Chowan County, No. 17 CVD 295

LOUIS RUSSELL DEVINE, Plaintiff-Appellant,

v.

CRISTY CORPREW¹ DEVINE, Defendant-Appellee.

Appeal by Plaintiff from order entered 27 June 2019 by Judge Meader W. Harriss, III, in Chowan County District Court. Heard in the Court of Appeals 15 April 2020.

Pritchett & Burch, PLLC, by Lloyd C. Smith, III, for plaintiff-appellant.

No brief for defendant-appellee.

BERGER, Judge.

Louis Russell Devine (“Plaintiff”) appeals from an order granting Cristy Corprew Devine (“Defendant”) child support, alimony, and attorney’s fees (“Order”). Plaintiff argues that the trial court abused its discretion in finding that his gross

¹ The correct spelling is “Corprew.” It is misspelled “Corpew” in the Order on appeal.

monthly income is \$5,900.00 for the purpose of establishing a child support and alimony award. We agree.

Factual and Procedural Background

Plaintiff and Defendant married in 2002, and they separated in July 2017. There were three children born of the marriage. In November 2017, Plaintiff filed a complaint for child custody, child support, and attorney's fees. Defendant filed an answer and counterclaims for child custody, payment of uninsured medical expenses, postseparation support, alimony, and attorney's fees. In April 2018, a child custody consent order was entered, granting joint legal custody of the three minor children to both parties, sole decision-making authority concerning one daughter's diabetes treatment to Defendant, primary physical custody of the minor children to Defendant, and visitation to Plaintiff.

In May 2018, Defendant filed a motion seeking child support, payment of uninsured medical expenses, and attorney's fees. Plaintiff filed a response, including a motion for attorney's fees. On June 27, 2019, the trial court filed the Order awarding Defendant child support, alimony, and attorney's fees, and made the following findings of fact relevant to its determination of Plaintiff's gross income:

22. Based on the parties' 2016 Federal Income Tax Return, . . . Plaintiff reported gross sales of \$53,263.00 from his business. Plaintiff deducted \$26,834.00 as an expense for his business for supplies; however, Plaintiff's customers paid Plaintiff for supplies incurred on their jobs. Plaintiff's gross earnings in 2016 were \$80,097.00, which includes the

sum of \$53,263.00 in receipts plus \$26,834.00 for expenses paid by Plaintiff's customers. After giving Plaintiff credit for the other expenses listed on Schedule C of the return, Plaintiff's net profit in 2016 was \$67,369.00.

. . . .

26. In January 2017, Plaintiff purchased a 7x16 tandem axle covered wagon trailer Plaintiff paid \$4,250.00 for the trailer and did not take out a loan. Plaintiff uses the trailer for his business.

. . . .

35. Defendant's financial affidavit showed that the monthly expenses during the marriage were \$5,896.98 and included several monthly expenses not listed by Plaintiff in his discovery responses.

. . . .

40. Plaintiff's bank statements reflected the following monthly balances: May 2018 - \$8,945.04; June 2018 - \$4,975.72; July 2018 - \$4,223.03; August 2018 - \$5,996.47; and September 2018 - \$4,936.72.

. . . .

43. Since the separation, Plaintiff has purchased dirt bikes for [two of the children] and a four-wheeler for [the other child]. Plaintiff spent approximately \$2,000.00 fixing up the dirt bikes.

44. In November 2018, Plaintiff spent \$2,000.00 at Discount Mattress and Furniture for furniture, including beds, sectional couch and recliner.

45. Since the separation, Plaintiff purchased a 2005 Yamaha motorcycle and a 2002 BMW 325i. As of the date of trial, Plaintiff owned a 2018 Ram 2500, a 2003 Chevrolet Silverado and the 2005 Yamaha motorcycle.

46. Since the separation, Plaintiff has gotten two additional tattoos, purchased helmets, jackets and gloves for his motorcycle and secured a monthly gym membership.

47. In October 2018, Plaintiff moved to his current residence . . . [where he] rents a room in a mobile home for \$400.00 a month

48. Since the date of separation, Plaintiff has paid attorney's fees totaling \$7,100.00 to attorneys representing him in this action.

. . . .

56. Based upon the evidence presented to the Court, including the parties' monthly expenses prior to the separation as well as Plaintiff's end of the month bank balances and Plaintiff's purchases after the date of separation, Plaintiff's gross income each month is \$5,900.00.

. . . .

60. The Court considered Plaintiff's Exhibits 1 through 28, which included Plaintiff's bank statements and evidence of expenses and the parties' lifestyles.

Plaintiff timely appeals, alleging the trial court abused its discretion when it determined his gross monthly income was \$5,900.00 for the purpose of establishing a child support and alimony award. Specifically, Plaintiff argues that the trial court failed to make findings of fact to explain why it did not consider Plaintiff's current income in determining Plaintiff's gross income and that the trial court's determination of gross income is not supported by competent evidence. We agree.

Standard of Review

Issues concerning child support and alimony are reviewed under an abuse of discretion standard. *Zurosky v. Shaffer*, 236 N.C. App. 219, 230, 763 S.E.2d 755, 762 (2014). "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.” *Wiencek-Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992) (citations omitted).

Analysis

I. Plaintiff’s Monthly Gross Income

Plaintiff first argues that the trial court abused its discretion when it failed to make sufficient findings of fact to support the conclusion that Plaintiff’s monthly gross income was \$5,900.00.

“To support the trial court’s award of alimony and child support, the trial court’s findings must be sufficiently specific to allow the reviewing court to determine if they are supported by competent evidence and support the trial court’s award.” *Wise v. Wise*, ___ N.C. App. ___, ___, 826 S.E.2d 788, 792 (2019) (citations omitted). “It is well established that child support obligations are ordinarily determined by a party’s actual income at the time the order is made or modified.” *Ellis v. Ellis*, 126 N.C. App. 362, 364, 485 S.E.2d 82, 83 (1997) (citations omitted). When a trial court declines to use an obligor’s actual, current income, and instead uses historical or other evidence of income in calculating an alimony or child support obligation, the trial court is required to make specific findings of fact. *Green v. Green*, 255 N.C. App. 719, 734-35, 806 S.E.2d 45, 55-56 (2017). In addition, a trial court “may only use prior years’ incomes if the trial court finds as fact that Defendant’s actual income is not credible, or is otherwise suspect.” *Id.* at 735, 806 S.E.2d at 56 (citations omitted).

Here, the trial court failed to make any findings regarding Plaintiff's current income, whether his current purported income was reliable, or that it lacked sufficient evidence to determine his current annual income. Further, the Order failed to include sufficient findings that Plaintiff was acting in bad faith or otherwise suppressing his income. Even if Plaintiff did not present evidence of his current income, the trial court was required to make express findings stating the reasons his current income was not used, and why it relied on the prior income in the calculation. *See id.* at 735, 806 S.E.2d at 56 (citations omitted). Thus, the "order contained no ultimate finding of fact establishing [Plaintiff's] income at the time the award [was] made." *Id.* at 733, 806 S.E.2d at 55 (quotation marks omitted).

II. Determination of Income Not Supported by Competent Evidence

Plaintiff next argues that the trial court's determination of gross income is not supported by competent evidence. We agree with Plaintiff that even if we assume the trial court made sufficient findings of fact, those findings were not supported by competent evidence.

Plaintiff contends that the trial court erred when it determined that Plaintiff had a net profit of \$67,369.00 for his business in 2016. Plaintiff specifically argues that the trial court's finding that "Plaintiff deducted \$26,834.00 as an expense for his business for supplies; however, Plaintiff's customers paid Plaintiff for supplies incurred on their jobs" was not based on competent evidence.

Plaintiff testified,

I just simply can't take money out of the business and put over there if I have materials I have to buy with that money. If I came and did a job for you and you gave me money, if I used your money to pay her child support and didn't have all your material, you'd be upset.

This testimony supports Plaintiff's argument in challenging the trial court's finding.

Plaintiff further argues that, "assuming arguendo that he was reimbursed for said costs by clients," the trial court erred in its calculation of his net profit because "the amount of \$26,834.00 should only be removed from the deduction of reasonable expenses, not added to the gross income of the business."

We agree that the trial court erred in calculating Plaintiff's net profit in 2016 as \$67,369.00 where the trial court both removed the \$26,834.00 from the reasonable expenses listed on Plaintiff's tax return and added the same \$26,834.00 to Plaintiff's gross receipts. Accordingly, the portion of finding of fact 22 that "Plaintiff's net profit in 2016 was \$67,369.00" was not supported by competent evidence.

III. Purchases, Expenses, and Bank Statements

Because we have determined that the trial court abused its discretion when it determined Plaintiff's gross income and that the trial court's findings of fact were not supported by competent evidence, we need not address the remainder of Plaintiff's arguments. However, we do note that the trial court's findings on these issues do not provide substantive evidence of Plaintiff's gross income.

DEVINE V. DEVINE

Opinion of the Court

Conclusion

We reverse the trial court's awards of alimony and child support and remand to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges TYSON and COLLINS concur.

Report per Rule 30(e).