

IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-22

No. COA19-860

Filed 16 February 2021

Iredell County, No. 18CVD054

HENDRIKUS KLAVER, Plaintiff,

v.

LORI KLAVER, Defendant.

Appeal by plaintiff from order entered 2 April 2019 by Judge Deborah P. Brown in District Court, Iredell County. Heard in the Court of Appeals 17 March 2020.

Pope McMillan, P.A., by Alex M. Graziano, for plaintiff-appellant.

No brief for defendant-appellee.

STROUD, Chief Judge.

¶ 1 Plaintiff-husband appeals an order awarding wife \$3,000 in alimony per month for 120 months. The trial court made uncontested findings of fact which support its discretionary determination of the amount and duration of alimony, so we affirm the trial court's order.

I. Background

¶ 2 On 9 January 2018, plaintiff-husband filed a verified complaint against defendant-wife and requested equitable distribution. Wife filed a verified answer and counterclaims for equitable distribution, post separation support and alimony, and

attorney fees. On 2 August 2018, the trial court entered a consent order on equitable distribution; this order is not at issue on appeal. On 25 September 2018, the trial court entered a post separation support order; this order is also not at issue on appeal. On 2 April 2019, the trial court entered an alimony and attorney fee order. The trial court found:

2. The parties were married to one another on May 6, 1996, and separated from one another on December 12, 2017. There were no children born of their marriage.

. . . .

4. The Defendant was in a very serious automobile accident in 1993, resulting in numerous injuries, including a broken shoulder and neck. As a result of that injury, she has had numerous surgeries, including 4-5 surgeries on her shoulder. The Defendant was allowed to return to work in 1994, which is when she met the Plaintiff. Although the Defendant has been able to work for periods of time, the long term effects of her injuries have increased in severity as she has gotten older. When the parties were contemplating the move to North Carolina, the Defendant was awaiting several additional surgeries, and the parties decided that she would stay at home for a period of time and care for the large home they purchased in Statesville. The Defendant has not returned to work after moving to Statesville and her health issues have persisted to the point where she is pursuing a claim for social security disability. The Defendant does not have an attorney assisting her with her disability claim.

5. The Plaintiff continues to be employed at Kewaunee, where he earns a gross monthly income of \$11,543, after adding his yearly bonus. The Plaintiff has been covering the Defendant on his medical and dental insurance, but testified he intends to stop that coverage as soon as the parties are divorced. The coverage for both the Plaintiff and Defendant is \$811.00 per month, and for purposes of this order, the Court will assume one-half of that amount is for the Defendant's benefit. The other large deduction from the Plaintiffs check per month is his voluntary contribution to his retirement fund, in the amount of \$2,178.00. The Plaintiff testified that he is putting such a large sum into his retirement account so that he can retire at an earlier age. In addition, the Plaintiff also puts \$500.00 into an IRA account each month. (The Court does take note of the fact that the Defendant is receiving a large distribution of these retirement funds in the parties' Consent Order regarding the Equitable Distribution of their marital property.)
6. The Plaintiff has reasonable monthly needs and expenses as follows:
 - A. Housing - The Plaintiff received the marital residence in the Equitable Distribution Consent Order. When he refinanced the residence to pay the Defendant a \$50,000.00 distribution award, he was able to lower his mortgage payment to \$1,652.00. The Court finds \$1,952.00 to be reasonable in this category.^[1]
 -
 - J. Other - The Plaintiff is claiming a \$500.00 expense for this contribution which is

¹ Plaintiff has not raised any argument regarding the discrepancy between the amount of the mortgage payment (\$1652.00) and the "reasonable" expense (\$1952.00). The discrepancy appears to be a typographical error and has no effect on our review.

completely voluntary, to his IRA. The Court will not consider this to be a “reasonable need” and is deducting it from the Plaintiff’s total.

7. The Defendant is currently receiving \$203.00 per month in post separation support from the Plaintiff. This is currently the only income of the Defendant. The Defendant has average monthly financial needs and expenses as follows:

- A. Housing - Since shortly after the date of separation, the Defendant has been residing at the Courtyard Marriott at a cost of \$85.00 per night. The Defendant testified that she initially went to a “safe house” but they would not allow her to stay because she “falls a lot”. The Plaintiff paid for her to stay at the hotel for the first three months, but has not continued to pay for her stay. The Defendant testified that she has tried to rent an apartment or a house but has been unsuccessful because all landlords she has contacted require her to have a verified source of income.

The Court is aware that the Defendant was in control of the monies in a credit [u]nion account in both parties’ names on the date of separation. This account had somewhere between \$50,000.00 to \$80,000.00 in i[t] on the date of separation and the Court feels the Defendant could have secured housing at a more reasonable cost than \$2,700.00 per month she is claiming on her affidavit. The Court finds that the Defendant should be able to find an adequate apartment for the reasonable cost of \$1,500.00.

- B. Utilities - The Defendant has reported \$100.00 in this category, which the court finds to be reasonable.
- C. Household Maintenance - not applicable.

- D. Food - The Court finds \$600.00 in food cost to be reasonable.
- E. Clothing/Grooming - The Court finds \$210.00 to be reasonable.
- F. Transportation - The Court finds \$250.00 to be reasonable.

[G]. Health & Medical - The Defendant is currently being covered by the Plaintiff's Health insurance plan, which he stated he intends to discontinue. The Defendant has applied for Social Security Disability, and has been told there will be a decision in May, 2019. If the Defendant is granted disability, she will have medical coverage, but it is not certain that she will be awarded disability. The Court is going to order the Plaintiff to maintain the Defendant's health coverage until the disability decision is made.

The Defendant has had numerous surgeries, as stated previously. The Defendant also has had to have all of her teeth removed and currently has temporary dentures. The Defendant also takes a number of medications for which she pays co-pays, including \$130.00 per month just for her Cymbalta. The Defendant sees a mental health counselor on a regular basis, who prescribes anti-anxiety medication. The Defendant also attends a pain clinic, where she is prescribed oxycodone. The Court finds that \$759.00 in this category is reasonable.

....

- I. Personal/Entertainment - The Court deems \$129.00 per month to be reasonable.

....

- 8. The Defendant has total reasonable monthly needs and expenses of \$3,548.00. The Defendant has no income other than post separation support, which

will be supplanted by this alimony order. The Plaintiffs monthly net income is \$6,129.00 while his needs and expenses are \$4,356.00, leaving a surplus of \$1,773.00. However if he were not to put \$2,178.00 into his voluntary retirement account each month he has a surplus of \$3,951.00 each month, which would be sufficient to cover the Defendant's monthly needs until such time as her disability payments begin.

9. The Court finds that the Plaintiff is a supporting spouse and the Defendant is a dependent spouse and that an award of alimony is equitable after considering the factors set out in NCGS § 50-16.3. As to the amount and duration, the Court finds as follows:
 - (1) There was no marital misconduct alleged by either party.
 - (2) The Court has previously discussed the relative earnings and earning capacities of the spouses. The Court does not find that the Defendant is currently capable of working. Should the Defendant be awarded Social Security Disability, the amount of this award should be reviewed.
 - (3) The Plaintiff is 53 years of age and appears to be in good health. The Plaintiff did not testify that he had any health issues. As previously discussed, the Defendant has had many health issues and at the age of 55, it is not expected that her health will significantly improve.
 - (4) The earnings of the parties has been previously discussed. In the parties' Consent Order for Equitable Distribution, filed August 2, 2018, the Defendant was awarded several IRA accounts and one-half of the Plaintiffs Kewaunee retirement, totaling approximately \$300,000.00. The Defendant

would suffer significant tax ramifications if she were required to “cash out” the retirement accounts to maintain her standard of living and the Court is not considering that as income to her.

- (5) The parties were married for twenty one years prior to the date of separation.
- (6) There was no evidence presented that either spouse contributed to the education, training or increased earning power of the other.
- (7) There were no children born of the marriage.
- (8) The parties’ standard of living during the marriage was not clearly established during the trial. While the parties’ home was purchased in 2004 for \$380,000.00, it appears that they were fairly frugal when it came to their spending habits. There was no evidence regarding any luxury items, such as boats or vacation homes or fancy vehicles. It appears that much of their discretionary funds were put into their retirement accounts. There was some testimony that the parties would vacation in Holland yearly.
- (9) The Plaintiff testified that he had a four year degree from a university, while the Defendant testified that she had a high school diploma. Given the Defendant’s health problems, it does not appear that additional education or training would assist the Defendant in meeting her economic needs.
- (10) The parties have equally divided their marital assets, and there was no other evidence presented that one or the other had assets outside the marriage. Neither of the parties had any legal obligations to support any ex-spouses or children.
- (11) There was no evidence presented showing either party brought any property of any significance into the marriage.

- (12) The Defendant did work outside the home during the early years of the marriage; however she did not work outside the home in the final thirteen years of the marriage. The Defendant was a homemaker during the last thirteen years, even though the Plaintiff offered some evidence that she did not cook or clean the house prior to the separation.
- (13) The Court has previously discussed the financial needs of the parties in detail. The Defendant will need financial support from the Plaintiff to maintain her standard of living.
- (14) The parties did not offer any evidence regarding the tax ramifications of an alimony award.
- (15/16) There was no evidence presented as to these factors.

¶ 3

The trial court then concluded,

- 2. The Defendant is a dependent spouse in that she is actually substantially dependent upon the Plaintiff for her maintenance and support, and the Defendant is substantially in need of maintenance and support from the Plaintiff.
- 3. The Plaintiff is a supporting spouse and is capable of paying maintenance and support for the Defendant.
- 4. That based upon all of the factors considered under NCGS§50-13A, an award of alimony is equitable under the circumstances.

¶ 4

The trial court decreed:

- 1. That beginning March 1, 2019, and continuing on the first day of each month thereafter, for the next

120 months, the Plaintiff is to pay the Defendant the sum of \$3,000.00 each month for her support and maintenance.

2. That this award of alimony may terminate prior to the 120 months upon the following:
 - A. Death of the Plaintiff/husband;
 - B. Death of the Defendant/Wife;
 - C. Remarriage of Defendant/Wife;
 - D. Cohabitation of Defendant/Wife (as that term is defined and interpreted by North Carolina General Statutes and relevant case law)
3. The Defendant's request for attorney fees is denied.
4. Plaintiff shall continue to cover the Defendant on his health insurance until a decision is made regarding Defendant's application for Social Security Benefits, which is expected in May of 2019.

Thus, the order decreed that Husband would pay wife \$3,000 a month for 120 months in alimony. Husband appeals.

II. Alimony

¶ 5

Husband contends “[t]his case is about the extent to which a trial court may disregard the parties’ established pattern of contributions to retirement and savings accounts, and, instead, order an amount and duration of alimony that constructively prohibits [Husband] from contributing in the future. Husband argues “the trial court committed an abuse of discretion when it disregarded the parties’ established pattern of saving during the marriage, based the amount of alimony on a speculative future

event, and failed to make adequate findings of fact justifying the amount and duration of its alimony award.” (Original in all caps.)

A. Standard of Review

¶ 6

Husband does not challenge the trial court’s findings of fact, so those are binding on appeal. *Alexvale Furniture, Inc. v. Alexander & Alexander of the Carolinas*, 93 N.C. App. 478, 481, 385 S.E.2d 796, 798 (1989) (“It is also the law that a trial court’s unchallenged findings of fact are binding upon appeal, and the order appealed from contains unchallenged findings of fact and conclusions of law that clearly support all the discretionary rulings made.” (citation omitted)). Husband argues only that the trial court abused its discretion in setting the amount and duration of alimony.

[T]he 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 and the findings of fact show the trial court properly applied the law in the case. The findings of fact need not set forth the weight given to the factors in section 50–16.3A(b) by the trial court when determining the appropriate amount, duration, and manner of payment, as the weight given the factors is within the sound discretion of the trial court.

Friend–Novorska v. Novorska, 143 N.C. App. 387, 395–96, 545 S.E.2d 788, 794 (footnote omitted), *aff’d per curiam*, 354 N.C. 564, 556 S.E.2d 294 (2001). Further,

[d]ecisions regarding the amount of alimony are left to the sound discretion of the trial judge and will not be

disturbed on appeal unless there has been a manifest abuse of that discretion. 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.

An abuse of discretion has occurred if the decision is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision.

Kelly v. Kelly, 228 N.C. App. 600, 601, 747 S.E.2d 268, 272–73 (2013) (citations and quotation marks omitted).

B. Alimony Factors

¶ 7

North Carolina General Statute § 50-16.3A sets forth the factors the trial court shall consider in establishing an alimony award. *See* N.C. Gen. Stat. § 50-16.3A (2017).

The court shall exercise its discretion in determining the amount, duration, and manner of payment of alimony. The duration of the award may be for a specified or for an indefinite term. In determining the amount, duration, and manner of payment of alimony, the court shall consider all relevant factors, including:

- (1) The marital misconduct of either of the spouses. Nothing herein shall prevent a court from considering incidents of post date-of-separation marital misconduct as corroborating evidence supporting other evidence that marital misconduct occurred during the marriage and prior to date of separation;
- (2) The relative earnings and earning capacities of the spouses;

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- (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.

(c) Findings of Fact.--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.

Id.

C. Accustomed Standard of Saving

¶ 8 As noted while Husband contends that “[t]his case is about the extent to which a trial court may disregard the parties’ established pattern of contributions to retirement and savings accounts” Husband actually challenges none of the trial court’s detailed findings of fact or the evidence underlying those findings of fact addressing the factors listed in North Carolina General Statute § 50-16.3A. The trial court made findings of fact regarding the parties’ retirement and savings and correctly considered these facts to be one of many factors addressed in the order.

¶ 9 Husband contends that because it was uncontroverted that the parties had an established practice of substantial contributions to their retirement accounts, the trial court abused its discretion “to erase [Husband]’s retirement contributions in his monthly expenditures and enter an order that required him to pay an amount of alimony that made it financially infeasible to continue contributing to this retirement in any way resembling what the parties practiced during the marriage.” Husband argues that because he was accustomed to saving a certain amount of money the trial

court *must* allow him to substantially save the same amount, but this is simply not the law nor does Husband cite any authority indicating that the trial court should underfund Wife’s alimony so Husband may continue to save at the same rate as he contends here.

¶ 10 Husband cites several cases contending “each case involves the consideration of the parties’ pattern of savings and retirement contributions as it pertains to the parties’ accustomed standard of living[,]” but we need not analyze those cases here because the issue is not the trial court’s failure to consider the parties’ established pattern of saving as it pertained to their standard of living. The trial court’s findings addressed the parties’ pattern of saving for retirement but also made findings regarding Wife’s medical issues and resultant inability to work. The trial court did exactly what Husband argues it should do -- considered “the parties’ pattern of saving and retirement contributions as it pertains to the parties’ accustomed standard of living[;]” the trial court simply came to a different conclusion than Husband would like when, in its discretion, it weighed the various factors and the relative needs of the parties. *See generally Friend–Novorska*, 143 N.C. App. at 395–96, 545 S.E.2d at 794.

¶ 11 When the trial court considered “the parties’ pattern of savings and retirement contributions as it pertains to the parties’ accustomed standard of living” it determined that Husband would need to save less to meet the alimony obligation

owed to Wife. The trial court made findings regarding Wife's inability to work, substantial medical needs, and lack of any income other than post-separation support or alimony. The trial court order tracks the necessary findings in North Carolina General Statute § 50-16.3A(b). *See id.* Husband does not contest the findings of fact as unsupported by the evidence, including those regarding his or Wife's abilities to work, income or lack thereof, or reasonable monthly needs. Indeed, the trial court's order makes its rationale for the alimony award clear: Wife has substantial medical issues and cannot work, while Husband is in good health and earns a substantial income. The trial court did not abuse its discretion by determining that Husband would have to reduce his voluntary retirement contributions to provide alimony sufficient to meet Wife's basic needs:

The Defendant has total reasonable monthly needs and expenses of \$3,548.00. The Defendant has no income other than post separation support, which will be supplanted by this alimony order. The Plaintiffs monthly net income is \$6,129.00 while his needs and expenses are \$4,356.00, leaving a surplus of \$1,773.00. *However if he were not to put \$2,178.00 into his voluntary retirement account each month he has a surplus of \$3,951.00 each month, which would be sufficient to cover the Defendant's monthly needs until such time as her disability payments begin.*

(Emphasis added.) This argument is overruled.

D. Pre-tax Contributions

¶ 12

The trial court found without Husband's retirement contributions Husband would have "a surplus of \$3,951.00 each month[,] and the trial court only ordered Husband to pay Wife \$3,000 of that surplus. Plaintiff contends "[t]he trial court added this pre-tax contribution, [his retirement contributions], 'dollar for dollar' to his monthly 'surplus' without accounting for the fact that if Appellant ceases these retirement contributions, his tax obligations increase such that his net income will not increase at a dollar for dollar rate." It is well established that the trial court need not consider tax consequences of an alimony award if the parties have not presented evidence regarding the tax consequences. *See Plummer v. Plummer*, 198 N.C. App. 538, 548–49, 680 S.E.2d 746, 753 (2009) ("There is a statutory basis for the trial court to have considered plaintiff's use of his retirement funds and his opinion regarding what was equitable. Therefore, the trial court did not err in considering those factors. Although there also is a statutory basis for the trial court to consider tax consequences, because no evidence of tax consequences was presented, the trial court should not have considered that distributional factor.").

¶ 13

Here, the trial court found, "The parties did not offer any evidence regarding the tax ramifications of an alimony award." We recognize that Husband's argument takes the tax consequences argument one step further, as he contends that the change in his expenditures required by the alimony award would have a tax consequence which the trial court should have considered. Although a trial court

could consider this type of tax consequences in the appropriate case, here Husband acknowledges he did not present any evidence to support any findings regarding the change, if any, of his disposable income based on a change in his contributions to retirement.² The trial court did not abuse its discretion by failing to address this theoretical argument.

E. Social Security Disability

¶ 14 Husband also argues “[i]t appears that the trial court justified the amount of the award based on the speculative possibility that [Wife] would be receiving Social Security Disability payments in the near future[.]” based upon finding of fact 8. The trial court found in finding of fact 8:

The Defendant has total reasonable monthly needs and expenses of \$3,548.00. The Defendant has no income other than post separation support, which will be supplanted by this alimony order. The Plaintiffs monthly net income is \$6,129.00 while his needs and expenses are \$4,356.00, leaving a surplus of \$1,773.00. However if he were not to put \$2,178.00 into his voluntary retirement account each month he has a surplus of \$3,951.00 each month, which would be sufficient to cover the Defendant’s monthly needs *until such time as her disability payments begin*.

(Emphasis added.)

² Husband’s brief states in a footnote that this issue was raised only in his closing argument before the trial court and does not cite to any *evidence* regarding potential tax consequences.

¶ 15 Again, Husband did not challenge the trial court's findings of fact as unsupported by the evidence. Wife testified regarding her substantial medical problems and her pending application for Social Security disability. The trial court's order simply acknowledged that *if* Wife began receiving disability income, this change in her financial situation may allow Husband to request a modification of alimony. To assist Husband in this regard, the trial court ordered:

5. Defendant shall provide to Plaintiff a release authorizing Plaintiff's counsel to obtain documents relevant to Defendant's claim for Social Security benefits so that it can be ascertained whether a decision has been made and whether this matter can be reviewed as ordered herein. This matter shall be reviewed if Defendant is awarded Social Security Disability.

This argument is overruled.

F. Duration of Alimony

¶ 16 The trial court ordered Husband to pay alimony for 120 months. Husband contends that "the court's order is completely silent as to the rationale for the duration." We disagree. The trial court's order includes detailed findings of fact regarding the relevant factors in North Carolina General Statute § 50-16.3A. Some factors supporting the duration of the alimony award are over 20 years of marriage, the ages of the parties, the Wife's high school education, and Wife's serious medical

problems which prevent her from maintaining employment. The trial court did not abuse its discretion in setting the duration of the alimony award. This argument is overruled.

III. Conclusion

¶ 17 Because the trial court properly exercised its discretion in setting the alimony award in accord with North Carolina General Statute § 50-16.3A, we affirm.

AFFIRMED.

Judges DIETZ and HAMPSON concur.

Report per Rule 30(e).