IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-37

No. COA20-203

Filed 2 March 2021

Catawba County, No. 18 CVD 357

JOHN M. FISH, Plaintiff,

v.

CECILIA FISHER FISH, Defendant.

Appeal by Plaintiff from order entered 25 September 2019 by Judge Robert A. Mullinax, Jr., in Catawba County District Court. Heard in the Court of Appeals 27 January 2021.

Pope McMillan, P.A., by Clark D. Tew, for Plaintiff-Appellant.

Wesley E. Starnes for Defendant-Appellee.

COLLINS, Judge.

¶ 1 Plaintiff John M. Fish appeals from an order determining the date of his separation from his wife, Defendant Cecilia Fisher Fish. Plaintiff argues that the trial court erred by concluding that the parties separated on 17 August 2017; instead, Plaintiff contends that they had not separated before he filed this action on 9 February 2018. We affirm the trial court's order.

I. Procedural History

¶ 2 Plaintiff instituted this action for divorce from bed and board and child custody on 9 February 2018; Defendant answered and raised defenses and counterclaims.

¶ 3 During discovery, Plaintiff served Defendant with a first set of interrogatories and requests for production on 14 August 2018, and a first set of requests for admissions on 9 April 2019. On 10 April 2019, Plaintiff moved the trial court to compel Defendant to comply with the first set of interrogatories and requests for production. On 14 May 2019, Plaintiff moved the trial court to enter an order deeming the requests for admissions to be conclusively admitted. Defendant served her responses to Plaintiff's first set of requests for admissions on 20 May 2019, after which Plaintiff moved to strike Defendant's responses and deem the requests for admissions to be admitted. Following a hearing, the trial court ordered Defendant to supplement certain portions of her responses but otherwise denied Plaintiff's requested relief by an order entered 15 July 2019 ("Discovery Order").

¶ 4 The trial court subsequently held a hearing to "determine the date if and when the parties separated." On 25 September 2019, the trial court entered an order concluding that the parties had separated on 17 August 2017 ("Separation Date Order"). Plaintiff gave timely notice of appeal from the Separation Date Order.

II. Factual Background

¶ 5 In the Separation Date Order, the trial court made the following findings of

fact relevant to this appeal:

> 1. The Plaintiff resides in the former [marital] residence [in] Hickory, Catawba County, North Carolina. . . .
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> 2. The parties were married on January 16, 1998. The parties are the parents of three daughters . . . .
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> . . . .
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> 6. In January of 2017, the Defendant enrolled at Appalachian State University in an effort to obtain a Masters' Degree. The Plaintiff paid Defendant's tuition using a joint credit card.
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> 7. The parties own a residence [in] Banner Elk, North Carolina. During the spring semester, Defendant spent the majority of overnights in the parties' Catawba County residence, only occasionally spending an overnight in Banner Elk. The Defendant continued this arrangement during the summer session in which she was enrolled.
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> . . . .
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> 9. On August 17, 2017, the parties drove separate automobiles to take their middle daughter to school at the University of Virginia. The parties spent at least one night in separate hotels somewhere in the general vicinity of Charlottesville, Virginia.
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> 10. On August 21, 2017, the Defendant had outpatient hand surgery in Charlotte, North Carolina. The Defendant's parents drove her to the surgery and back to the Banner Elk home after it concluded. The Plaintiff was not present for the surgery which resulted in Defendant having 50 stitches up her right arm. After spending some short period of time with her parents in the Banner Elk home, the Defendant spent one week in Alabama where her parents nursed her during a brief period of recuperation. The Defendant then returned to the Banner Elk home.

11. The Defendant telephoned the Plaintiff twice between August of 2017 and January 11, 2019.

12. The parties next saw one another on September 22, 2017 at their youngest daughter's field hockey game. The game took place . . . in Forsyth County, North Carolina. They arrived and left separately from the game. Their interaction was minimal and not outside the presence of others. The parties saw one another sporadically at other fall field hockey games in 2017. They continued to travel to and from games separately with contact remaining at a minimum.

13. The Defendant's uncle died in September of 2017. The Defendant attended the funeral services in Alabama that same month. She traveled alone and Plaintiff did not attend the funeral.

14. The Defendant returned to the Catawba County residence on September 30, 2017. She did so to coincide with [her daughter's] reading days at the University of Virginia. Defendant spent two or three overnights in the basement bedroom of the Catawba County residence and then returned to the Banner Elk residence.

15. In September of 2017, the Defendant accumulated $797.50 in legal fees related to preparation of a post-marital agreement at the law firm of Patrick, Harper, and Dixon.

16. The Defendant picked up the parties' youngest daughter from The Asheville School for fall break on October 7, 2017. They returned to the Catawba County residence where Defendant stayed in that same basement bedroom until October 11, 2017. On that date, Defendant returned to the Banner Elk residence and Plaintiff returned the parties' youngest daughter to The Asheville School.

17. The basement of the former [marital] residence has its

own bedroom, kitchen, bathroom, and living room. The basement allows access to a two-car garage separate from a garage accessible to the main living area. The interior entry door to and from the basement deadlocks to allow Defendant to deny anyone access from the main living area to the basement.

18. In a November 1, 2017, email from Defendant to Plaintiff she asks him not to be present at the Catawba County residence over Thanksgiving that same year. He acquiesced, spending that Thanksgiving with his elderly mother in New York. The Defendant and the parties' daughters spent Thanksgiving in the Catawba County residence. The Defendant returned to the Banner Elk home shortly after the fourth Thursday of November in 2017.

19. On December 14, 2017, the Defendant returned to the Catawba County residence where she stayed until December 27, 2017. She overnighted in the basement bedroom and her return coincided with winter breaks for the parties' youngest two daughters.

20. During this winter break, the Defendant and the parties' daughters shopped at Stein Mart, made cookies in the basement, put out approximately one hundred nut crackers, and Defendant attended two Christmas parties without Plaintiff.

21. The parties and their children attended St. Stephens Lutheran Church's Christmas Eve service. They sat in a pew near the front of the sanctuary on the church's right side. The parties' three daughters sat between them. The Defendant wore a wedding ring.

22. After the Christmas Eve service, the parties and their daughters ate dinner at Wild Wok. The following day the Defendant made a Christmas dinner in the basement kitchen of the Catawba [County] residence. The parties exchanged gifts, the Plaintiff receiving socks, a sweater, a

phone charger, and a gift certificate to Wild Wok. The Defendant received an Apple watch. The watch cost $384.13.

23. The Fish Family Christmas Card of 2015 identifies Plaintiff and Defendant specifically. The Fish Family Christmas Card of 2017 shows a picture of the parties' three daughters and makes no reference to either party.

24. In January of 2018, the Defendant sent Plaintiff a mobile text message acknowledging "living in the basement over Christmas."

25. From December 27 to December 30, 2017, the Defendant and [her daughter] skied and spent overnights at the Banner Elk residence.

26. The Defendant returned to the Catawba County residence on December 30, 2017 and spent overnights in the basement bedroom until January 14, 2018 when the parties' youngest two daughters returned to their university and boarding school. On January 14, 2018 the Defendant returned to the Banner Elk residence and has not returned to the Catawba County residence.

27. In a January 15, 2018 electronic communication to Plaintiff, the Defendant, in a desperate and pathetic attempt to seek certain funds through the issuance of a Qualified Domestic Relations Order, suggested "selling" to a judge a date of separation as far back as January of 2017.

28. As of January 22, 2018, the Plaintiff had retained the law firm of Young, Morphis, Bach, & Taylor, LLP for the purposes of reviewing a Qualified Domestic Relations Order drafted by that law firm Defendant hired in September of 2017.

29. In a January 29, 2018 electronic communication to the Plaintiff the Defendant acknowledged a "separation" from Plaintiff.

30. The parties attended college weekend at The Asheville School on February 17 and 18 of 2018. They ate dinner at The Green Tea Japanese Restaurant with their daughter, her friend, and her friends' mother. The parties wore wedding rings. The meal cost $118.44.

31. In March of 2018, the parties two youngest daughters returned to the former marital residence for their spring breaks. The Defendant did not stay in the former [marital] residence.

32. The Defendant operated a motor vehicle after failing to notify the department of motor vehicles of an address change as recently as February of 2018 and received her Masters' from Appalachian State University in May of 2019.

33. As of August 17, 2017, the parties ceased engaging in the rights, obligations, and duties usually manifested by married people.

34. After August 17, 2017, the parties did not share a marital bed nor did they attend social functions together. They did not engage in sexual intercourse or demonstrate any acts of emotional or physical intimacy or affection.

35. Regardless of Plaintiff's intent, on August 17, 2017 the Defendant physically separated from Plaintiff by ceasing cohabitation with Plaintiff. On August 17, 2017, it was the Defendant's intent to cease matrimonial cohabitation and to do so permanently. Two dinners, a single church service, and basement overnights solely for the purposes of Defendant spending time with her daughters are insufficient in the light of all evidence to the contrary presented to demonstrate to this Court and to the public at large that the parties' marriage was intact or had resumed.

36. There [was a] significant period of time and events from August 17, 2017 forward that allowed family members, neighbors, and those in the general public to observe the

parties were no longer living together.

¶ 6 Based on these findings of fact, the trial court concluded as follows:

> 1. This Court has jurisdiction over the parties and subject matter of this action.
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> 2. The Defendant separated from Plaintiff on August 17, 2017, and since that date the parties have continued to live separate and apart.

Accordingly, the trial court ordered that "[t]he parties' date of separation shall be deemed August 17, 2017."

III. Appellate Jurisdiction

¶ 7 We first determine whether Plaintiff's appeal is properly before us. Defendant has moved to dismiss the appeal as interlocutory; Plaintiff argues that the Separation Date Order is immediately appealable because it affects a substantial right.

¶ 8 The Separation Date Order is interlocutory because it determined only the date of the parties' separation and did not "dispose[] of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. City of Durham*, 231 N.C. 354, 361-62, 57 S.E.2d 377, 381 (1950). There is generally no right to immediate appeal of an interlocutory order. *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, a party may immediately appeal an interlocutory order if the order deprives the appellant of a substantial right which would be lost absent immediate review. N.C. Gen. Stat. §§ 1-277(a) and 7A-27(b)(3)(a).

¶ 9 Our courts have generally held that interlocutory orders determining the date of separation in the context of divorce proceedings do not affect a substantial right and are therefore not immediately appealable. *See, e.g.*, *Stafford v. Stafford*, 133 N.C. App. 163, 165, 515 S.E.2d 43, 45, *aff'd per curiam*, 351 N.C. 94, 520 S.E.2d 785 (1999). Plaintiff argues that this divorce proceeding is an exception because Plaintiff has asserted a claim against a third party for criminal conversation and without immediate review of the Separation Date Order, Plaintiff may be exposed to inconsistent verdicts determining the date of separation. The record before us is silent regarding the details or procedural status of the third-party claim and we cannot agree that Plaintiff has demonstrated the risk of inconsistent verdicts. However, because judicial economy will be served by reviewing the interlocutory order, and the appellate record is sufficient for us to review the order at this time, we will treat the appeal as a petition for a writ of certiorari and consider the Separation Date Order on its merits. *See Carolina Bank v. Chatham Station, Inc.*, 186 N.C. App. 424, 428, 651 S.E.2d 386, 389 (2007) (citations omitted); *see also* N.C. R. App. P. 21(a)(1) ("[T]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals . . . when no right of appeal from an interlocutory order exists . . . ."). Defendant's motion to dismiss is denied.

¶ 10 Plaintiff has also petitioned for a writ of certiorari for this Court to review the

Discovery Order. Plaintiff concedes that the Discovery Order does not affect a substantial right and Plaintiff has failed to identify any other grounds justifying immediate review of the interlocutory order. Plaintiff's petition for a writ of certiorari is denied.

IV. Discussion

¶ 11 Plaintiff argues that the trial court erred by concluding that the parties separated on 17 August 2017. Plaintiff contends that the parties had not separated before he filed this action on 9 February 2018.

¶ 12 "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." *Kelly v. Kelly*, 228 N.C. App. 600, 601, 747 S.E.2d 268, 272 (2013) (quoting *Williamson v. Williamson*, 217 N.C. App. 388, 389, 719 S.E.2d 625, 626 (2011)). Findings of fact that are not challenged are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

A. Competent Evidence Supports the Trial Court's Findings of Fact

¶ 13 The trial court made 36 findings of fact, two of which are more accurately categorized as conclusions of law and will be reviewed as such. Upon close review of Plaintiff's brief, we determine that Plaintiff only challenges the italicized portions of the following findings:

> 17. The basement of the former [marital] residence has its own bedroom, kitchen, bathroom, and living room. The basement allows access to a two-car garage separate from a garage accessible to the main living area. *The interior entry door to and from the basement deadlocks to allow Defendant to deny anyone access from the main living area to the basement.*
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> . . . .
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> 34. After August 17, 2017, the parties did not share a marital bed *nor did they attend social functions together*. They did not engage in sexual intercourse or demonstrate any acts of emotional or physical intimacy or affection.
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> . . . .
>
> 36. *There [was a] significant period of time and events from August 17, 2017 forward that allowed family members, neighbors, and those in the general public to observe that the parties were no longer living together.*

¶ 14 The challenged portion of Finding 17 stating that the "interior entry door to and from the basement deadlocks to allow Defendant to deny anyone access from the main living area to the basement" could be considered not fully accurate. Though the door at the top of the stairwell had a deadbolt lock and Defendant testified that she used the deadbolt to "minimize any interaction" with others and avoid "any surprises or [anyone] coming down there," Defendant also testified that Plaintiff and their daughters could still access the basement.

¶ 15 The challenged portion of Finding 34 that "[a]fter August 17, 2017, the parties did not . . . attend social functions together" is supported by competent evidence.

According to the testimony, on 17 August 2017, the parties helped one of their daughters move to college, but the parties drove separately and stayed in separate hotels. While there were instances where both parties attended their youngest daughter's athletic events, they testified that they did not attend together. Instead, they drove separately and had minimal interaction with each other during the events. Both parties acknowledged that Plaintiff did not accompany Defendant to her uncle's funeral following his death in September. Defendant asked Plaintiff to leave the marital home so she could spend Thanksgiving 2017 with her daughters; Plaintiff went to New York to visit his mother. Defendant also testified that she attended two Christmas parties without Plaintiff. The parties both attended their daughter's college weekend in February 2018, but by that time Plaintiff had already filed for divorce. Upon this evidence, the trial court made findings of fact, which Plaintiff does not challenge.

¶ 16 Plaintiff contends that the parties' attendance at church belies the finding that they did not attend social events together. While Plaintiff testified that the parties attended church services together on Christmas Eve and New Year's Eve of 2017, Defendant testified she did not recall attending services on New Year's Eve. Moreover, Defendant testified that on Christmas Eve the parties drove to church separately and sat separated by their daughters. The trial court found only that the parties attended Christmas Eve services, consistent with Defendant's testimony, and

we cannot disturb that finding on appeal. *See Smallwood v. Smallwood*, 227 N.C. App. 319, 322, 742 S.E.2d 814, 817 (2013) ("Evidentiary issues concerning credibility, contradictions, and discrepancies are for the trial court—as the fact-finder—to resolve . . . ."). The competent evidence, viewed as a whole, supports the trial court's finding of fact that the parties did not attend social functions together after 17 August 2017.

¶ 17 Plaintiff contends that Finding 36 is unsupported because Defendant spent multiple overnights in the Hickory home after 17 August 2017. According to the unchallenged findings of fact, Defendant stayed in the home for two or three nights in September 2017, four nights in October 2017, overnights around Thanksgiving, thirteen nights in December 2017, and fifteen nights in January 2018. Defendant testified that she slept in the basement during each of these stays; Plaintiff testified that during the September and October 2017 overnights, Defendant stayed in an upstairs bedroom belonging to one of the parties' daughters. The trial court found that Defendant stayed in the basement during these visits, and Plaintiff has not challenged that finding. It is thus binding on appeal. *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731.

¶ 18 Both parties testified that, at the time of the stays, the basement was fully furnished as a separate living space. Moreover, as the trial court's unchallenged findings of fact illustrate, Defendant's stays coincided with her daughters' breaks

from college and boarding school. Defendant was not coming and going from the marital residence as she had during the spring and summer of 2017; instead, she was occasionally staying in the separate basement living area while her daughters were home and was otherwise absent from the Hickory home. Defendant's sporadic stays in the basement of the Hickory home do not undermine the trial court's finding that "family members, neighbors, and those in the general public [could] observe the parties were no longer living together."

¶ 19 Nor does Defendant's conduct during Christmas of 2017 undermine Finding 36. Plaintiff underscores that Defendant "decorated the marital home for Christmas with her daughters . . . subsequent to the purported date of separation." Defendant testified that while she decorated the marital home with her daughters, Plaintiff did not participate, and Defendant excused herself to the basement upon Plaintiff's return home. This evidence supports the trial court's finding that the Christmas 2017 events and other sporadic instances of Defendant spending time with her daughters did not demonstrate to the public at large that the parties were living together. Viewing the record as a whole, the trial court's findings of fact are supported by competent evidence.

B. The Findings of Fact Support the Trial Court's Conclusions of Law

¶ 20 Plaintiff next challenges Findings of Fact 33 and 35, which, as Plaintiff argues,

are more accurately categorized as conclusions of law,[1] as well as Conclusion of Law 2, which read:

> 33. As of August 17, 2017, the parties ceased engaging in the rights, obligations, and duties usually manifested by married people.
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> . . .
>
> 35. Regardless of Plaintiff's intent, on August 17, 2017 the Defendant physically separated from Plaintiff by ceasing cohabitation with Plaintiff. On August 17, 2017, it was the Defendant's intent to cease matrimonial cohabitation and to do so permanently. Two dinners, a single church service, and basement overnights solely for the purposes of Defendant spending time with her daughters are insufficient in the light of all evidence to the contrary presented to demonstrate to this Court and to the public at large that the parties' marriage was intact or had resumed.
>
> . . .
>
> 2. The Defendant separated from Plaintiff on August 17, 2017, and since that date the parties have continued to live separate and apart.

¶ 21 In divorce cases, separation "implies living apart for the entire period in such manner that those who come in contact with them may see that the husband and wife are not living together." *Young v. Young*, 225 N.C. 340, 344, 34 S.E.2d 154, 157 (1945).

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[1] *See Smallwood*, 227 N.C. App. at 325, 742 S.E.2d at 819 (treating a determination that the individuals "have not both voluntarily assumed marital rights, duties and obligations that are usually manifested by married people" as a conclusion of law that the individuals were not cohabitating).

> [S]eparation may not be predicated upon evidence which shows that during the period the parties have held themselves out as husband and wife living together, nor when the association between them has been of such character as to induce others who observe them to regard them as living together in the ordinary acceptation of that descriptive phrase. . . . Separation means cessation of cohabitation, and cohabitation means living together as man and wife, though not necessarily implying sexual relations. Cohabitation includes other marital responsibilities and duties.

Id. (citations omitted).

¶ 22 The trial court's unchallenged and otherwise supported findings support the conclusion that following 17 August 2017, the parties did not hold themselves out as husband and wife living together, nor were their interactions sufficient "to induce others who observe them to regard them as living together in the ordinary acceptation of that descriptive phrase." *See id.* Accordingly, the trial court's findings support its conclusions of law concerning the parties' cessation of cohabitation and separation.

¶ 23 The trial court's unchallenged findings of fact illustrate that there was not "frequent association of the parties." *See id.* Plaintiff and Defendant traveled separately to take their daughter to college and stayed in separate hotels. Plaintiff did not accompany Defendant to her surgery and did not help her recover afterward. Instead, Defendant recovered in the care of her parents, first in the Banner Elk home, then at her parents' home in Alabama. The parties traveled separately to and from their youngest daughter's athletic events that fall, and while at the games, "[t]heir

interaction was minimal and not outside the presence of others." In September, Plaintiff did not accompany Defendant to her uncle's funeral. Before Thanksgiving in 2017, Defendant requested that Plaintiff leave the Hickory home to allow her to spend the holiday with their daughters; Plaintiff spent the holiday out of the state. In December 2017, Defendant attended Christmas parties without Plaintiff.

¶ 24 As discussed above, the trial court's unchallenged findings also show that Defendant spent the vast majority of overnights apart from Plaintiff following 17 August 2017. When Defendant did spend overnights in the Hickory home, she did not stay in the master bedroom or in another bedroom in the upstairs portion of the home, but in a separate fully-furnished basement apartment. The basement was accessible by a separate garage and by a door to the upstairs which included a deadbolt. Though the trial court's finding that the deadbolt "allow[ed] Defendant to deny anyone access from the main living area to the basement" was not entirely accurate, the remaining findings nonetheless support the trial court's conclusion that the stays in the basement did not "demonstrate . . . to the public at large that the parties' marriage was intact or had resumed."

¶ 25 The trial court's unchallenged and otherwise supported findings also indicate that Defendant's stays at the Hickory home and the parties' other interactions following 17 August 2017 were incidental to Defendant spending time with her daughters during their school breaks, at athletic events, at educational events, or in

one instance, at a church service. These stays and the related contact between the parties do not show that they held themselves out as husband and wife. *See Ledford v. Ledford*, 49 N.C. App. 226, 231, 271 S.E.2d 393, 397 (1980) (holding that the spouses' occasional driving together, three meals out together, participation in Christmas together, attending a church service together, and wife's monthly cleaning of the marital home did not "warrant finding as a matter of law that the parties held themselves out as man and wife"); *Tuttle v. Tuttle*, 36 N.C. App. 635, 636, 244 S.E.2d 447, 448 (1978) (holding that wife's overnight stay in the marital home to visit the children for Christmas did not show "that the parties held themselves out as living together").

¶ 26 The trial court's unchallenged and otherwise supported findings of fact support its conclusions that the "parties ceased engaging in the rights, obligations, and duties usually manifested by married people"; that "Defendant physically separated from Plaintiff by ceasing cohabitation with Plaintiff"; and that the parties therefore had separated on 17 August 2017.

V. Conclusion

¶ 27 We deny Plaintiff's petition for a writ of certiorari to review the Discovery Order. We treat Plaintiff's appeal of the Separation Date Order as a petition for a writ of certiorari and consider the merits of Plaintiff's argument. Competent evidence supported all but a portion of one of the challenged findings of fact, and the trial

court's unchallenged and otherwise supported findings of fact supported its conclusions of law concerning the parties' separation date. We therefore affirm the Separation Date Order.

AFFIRMED.

Judges INMAN and GRIFFIN concur.

Report per Rule 30(e).