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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-154

No. COA19-1152

Filed 20 April 2021

Mecklenburg County, No. 16 CVD 9730

CARMEN COUSIN, Plaintiff,

v.

TERRY COUSIN, Defendant.

Appeal by defendant from order entered 3 May 2019 by Judge Christy T. Mann in Mecklenburg County District Court. Heard in the Court of Appeals 23 February 2021.

Plumides, Romano & Johnson, P.C., by Richard B. Johnson, for plaintiff-appellee.

Collins Family Law Group, by Rebecca K. Watts, for defendant-appellant.

ARROWOOD, Judge.

¶ 1 Mr. Terry Cousin (“defendant”) appeals from the district court’s 3 May 2019 order for permanent child support, alimony, and attorney’s fees. For the following reasons, we vacate and remand.

I. Background

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¶ 2 Carmen Cousin (“plaintiff”) and defendant were married in January 1999, separated in May 2016, and divorced in July 2017. They have two minor children.

¶ 3 Following their separation, in May 2016, plaintiff filed a complaint for custody, child support, post-separation support, alimony, equitable distribution, and attorney’s fees. In February 2018, the trial court conducted hearings concerning final custody, child support, alimony, equitable distribution, and attorney’s fees.

¶ 4 The trial court entered an “Order for Permanent Child Support, Alimony and Attorney’s Fees” on 3 May 2019 (the “Order”). Previously, on 13 July 2018, the district court entered an equitable distribution order; defendant subsequently appealed this order, and this Court affirmed on 21 July 2020 (COA19-566). As of the date of the Order, the district court had not yet entered a custody order, though the court stated that such decree will be entered separately following the entry of the 3 May 2019 decision. Based on evidence presented at the February 2018 hearings, the district court found defendant’s annual income to have been \$205,156.00 and \$272,266.00 for tax years 2016 and 2017, respectively. The district court also found, as of the date of trial in February 2018, that defendant’s gross monthly income from all sources amounted to \$23,021.00, which computes to roughly \$272,266.00 per year. Evidence in the record indicates that defendant received employment bonuses of \$48,000.00 in 2016 and \$103,000.00 in 2017, which the district court considered in calculating defendant’s annual income for those years. However, the only evidence

regarding defendant's 2018 income was testimony from defendant himself and a financial affidavit in which defendant claimed monthly gross income of \$15,628.06. Defendant testified that he did not (or at least had not) received an employment bonus in 2018.

¶ 5 In addition, the court found that the parties' combined adjusted gross income (\$29,642.52) exceeded the upper income threshold for determining child support under the 2015 North Carolina Child Support Guidelines (\$25,000.00 per month) and thus awarded child support using a non-guideline determination. This analysis required the court to consider, *inter alia*, the actual, reasonable needs of the children and the respective abilities of the parents to provide support. Based on this calculus, the district court ordered defendant to pay plaintiff permanent child support in the amount of \$3,779.00 per month.

¶ 6 Furthermore, the court found that defendant had surplus income each month from which he could pay permanent alimony to plaintiff. Defendant was ordered to pay plaintiff \$700.00 per month in alimony on an indefinite basis. The district court also required defendant to pay plaintiff's attorney's fees in the amount of \$30,000.00.

¶ 7 Defendant filed a notice of appeal on 21 May 2019. This appeal is properly before this Court pursuant to N.C. Gen. Stat. § 50-19.1 (2019). *See also Duncan v. Duncan*, 366 N.C. 544, 742 S.E.2d 799 (2013); *Beasley v. Beasley*, 259 N.C. App. 735, 816 S.E.2d 866 (2018).

II. Discussion

¶ 8 Defendant argues that the trial court erred by miscalculating his income for purposes of child support and applied the wrong child-support guidelines for determining the same. Defendant further argues that the district court erred by entering an alimony award that was not based upon the financials of the parties as of the date of the entry of the Order.

A. Child Support

¶ 9 Defendant first maintains that the court miscalculated his income and applied the wrong guidelines for determining his monthly child-support obligations.

¶ 10 “Upon appellate review, a trial court’s determination of the proper child support payment will not be disturbed absent a clear abuse of discretion.” *State v. Williams*, 163 N.C. App. 353, 356, 593 S.E.2d 123, 126 (2004) (citing *Bowers v. Bowers*, 141 N.C. App. 729, 731, 541 S.E.2d 508, 509 (2001)). In order for such an award to be overturned, the “appellant must show that the trial court’s actions were manifestly unsupported by reason.” *Id.* (citation omitted).

¶ 11 The district court determines the amount of child support by using the statewide presumptive guidelines established pursuant to N.C. Gen. Stat. § 50-13.4(c)(1). *See* N.C. Gen. Stat. § 50-13.4(c) (2019). However, “[i]f, after considering the evidence, the Court finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of

the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate the Court may vary from the guidelines.” *Id.* In such a case, “the court shall make findings of fact as to the criteria that justify varying from the guidelines and the basis for the amount ordered.” *Id.*

¶ 12 It is well established that a “party’s ability to pay child support is ordinarily determined by his or her actual income at the time the award is made or modified.” *Greer v. Greer*, 101 N.C. App. 351, 355, 399 S.E.2d 399, 402 (1991) (citations omitted). However, a district court may “permissibly utilize a parent’s income from prior years to calculate the parent’s gross monthly income for child support purposes.” *State o/b/o Midgett v. Midgett*, 199 N.C. App. 202, 208, 680 S.E.2d 876, 880 (2009); *see also Diehl v. Diehl*, 177 N.C. App. 642, 650, 630 S.E.2d 25, 30 (2006). If the district court employs past years’ income to decide the award, the court must make findings of fact as to why the court needed to do so. *Green v. Green*, 255 N.C. App. 719, 735, 806 S.E.2d 45, 56 (2017) (citations omitted) (reversing and remanding for findings of fact regarding defendant’s actual income and noting that the trial court may consider prior years’ income only if it finds as fact that defendant’s actual income is “not credible, or is otherwise suspect.”).

¶ 13 As noted above, the district court found that defendant’s annual income was \$205,156.00 and \$272,266.00 for tax years 2016 and 2017, respectively. These figures took into consideration bonuses received by defendant in 2016 and 2017 in the

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amounts of \$48,000.00 and \$103,000.00, respectively. The district court determined, as of the date of trial in February 2018, that defendant's gross monthly income from all sources amounted to \$23,021.00. However, the only evidence regarding defendant's 2018 income was testimony from defendant himself and a financial affidavit in which defendant claimed monthly gross income of \$15,628.06 (\$13,750.00 in wages; \$333.10 in monthly rental income; and approximately \$1,544.86 in predicted monthly bonus income). Defendant testified that he did not (or at least had not) received an employment bonus in 2018. Nevertheless, the trial court found that defendant's income for 2018 would be the same as he received in 2017 (minus the additional \$333.00 in monthly rental income in 2018). The district court, though, failed to make any findings of fact as to why it needed to do so. Likewise, the district court proffered no basis for presuming that defendant would receive a bonus in 2018 in an amount equal to or greater than the bonuses he received in the two prior years (particularly 2017) and that such speculative monies should be factored into the computation of defendant's total gross monthly income. Regardless of whether the trial court imputed future income (and bonuses) or used past years' income (and bonuses) in its child-support calculus, the trial court was required to make written findings of fact to support the approach. *See generally Diehl*, 177 N.C. App. at 650, 630 S.E.2d at 30. Furthermore, the trial court erred by failing to make any findings suggesting that the evidence proffered by defendant concerning his 2018 income was

unreliable, not credible, or otherwise suspect. Accordingly, we vacate the child-support award in the Order and remand for further findings regarding defendant's 2018 income and for the entry of a child-support order on that basis. *Holland v. Holland*, 169 N.C. App. 564, 568, 610 S.E.2d 231, 235 (2005) (reversing and remanding order due to trial court's failure to make findings of fact supporting its use of prior years' income to compute child support). Based on this holding, we do not reach defendant's remaining argument regarding the miscalculation of child support due to the court's alleged application of the wrong child-support guidelines.

B. Alimony

¶ 14 “Decisions 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.” *Kelly v. Kelly*, 228 N.C. App. 600, 601, 747 S.E.2d 268, 272 (2013). “ ‘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.’ ” *Williamson v. Williamson*, 217 N.C. App. 388, 390, 719 S.E.2d 625, 626 (2011) (quoting *Oakley v. Oakley*, 165 N.C. App. 859, 861, 599 S.E.2d 925, 927 (2004)). The district court's “determination of whether a party is entitled to alimony is reviewable *de novo* on appeal.” *Carpenter v. Carpenter*, 245 N.C. App. 1, 4, 781 S.E.2d 828, 832 (2016) (citation omitted). Moreover, the trial court “shall exercise its discretion in

determining the amount, duration, and manner of payment of alimony.” N.C. Gen. Stat. § 50-16.3A(b) (2019). In determining alimony, the court must consider any relevant factor enumerated in N.C. Gen. Stat. § 50-16.3A(b)(1)-(16). *Id.*

¶ 15 For the same reasons discussed above, we hold that the district court erred by failing to make findings of fact to support using past years’ income (and bonuses) to calculate defendant’s actual gross monthly income for the purpose of determining alimony. *See Green*, 255 N.C. App. at 735, 806 S.E.2d at 56; *see also Kowalick v. Kowalick*, 129 N.C. App. 781, 787, 501 S.E.2d 671, 675 (1998) (citation omitted) (“Alimony is ordinarily determined by a party’s *actual* income, from all sources, at the time of the order.”); *Whedon v. Whedon*, 58 N.C. App. 524, 527, 294 S.E.2d 29, 32 (1982) (citation omitted) (“Unless the court finds that a supporting spouse is deliberately depressing his income in disregard of his marital obligation to provide reasonable support . . . a supporting spouse’s ability to pay alimony is ordinarily determined by his income at the time the award is made.”). As such, the Order is vacated and remanded in this respect, as well. *See Collins v. Collins*, 243 N.C. App. 696, 709, 778 S.E.2d 854, 861 (2015) (vacating and remanding due to district court’s failure to make sufficient findings of fact supporting its use of the parties’ incomes and expenses in various years preceding the hearing).

¶ 16 Based on the foregoing, those portions of the Order purporting to compute defendant’s actual total gross monthly income and award child support and alimony

therefrom must be vacated. In addition, this matter is remanded for additional findings regarding defendant's current income as well as re-computation of defendant's total gross monthly income and for the entry of new child support and alimony orders based on such findings.

¶ 17 In light of holdings above, we do not address defendant's remaining arguments, including whether the trial court erred by entering the Order roughly fifteen months after the date of trial. Indeed, this issue is rendered moot by this decision. Nor do we address whether the trial court erred in applying the 2015 North Carolina Child Support Guidelines.

¶ 18 Defendant does not challenge the grant of attorney's fees on appeal; thus that portion of the Order is affirmed. *See* N.C.R. App. P. 28(b)(6).

III. Conclusion

¶ 19 For the foregoing reasons, we vacate the portions of the Order regarding child support and alimony, and remand for further proceedings not inconsistent with this opinion. On remand, the district court may consider new evidence regarding defendant's income if necessary—so long as the evidence is proffered pursuant to applicable law and procedure.

VACATED IN PART; REMANDED.

Judges CARPENTER and GORE concur.

Report per Rule 30(e).