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IN THE COURT OF APPEALS OF NORTH CAROLINA

Nos. COA22-923, 23-1

Filed 01 August 2023

Union County, No. 15 CVD 305

STEPHANIE KAPLAN, Plaintiff,

v.

KEITH KAPLAN, Defendant.

Appeal by plaintiff from order entered 26 July 2022 and appeal by plaintiff and cross-appeal by defendant from order entered 30 September 2022, both by Judge William F. Helms, III, in Union County District Court. Heard in the Court of Appeals 7 June 2023.

Stephanie Kaplan, pro se, Plaintiff-Appellant.

Leonard G. Kornberg, Attorney for Defendant-Appellee.

DILLON, Judge.

By order entered on 26 July 2022, the trial court denied the motion by Plaintiff Stephanie Kaplan for an award of alimony. Plaintiff appeals from that order. The docket number at our Court for this appeal is COA 22-923.

By order entered two months later, on 30 September 2022, the trial court found

Defendant *not* in contempt for failing to make payments to Plaintiff as ordered in a post-separation order. In the contempt order, however, the trial court awarded Plaintiff attorney's fees. Plaintiff appeals the order finding Defendant not to be in contempt. Defendant cross-appeals the award of attorney's fees to Plaintiff. The docket number at our Court for this appeal and cross-appeal is COA 23-1.

As both appeals and the cross-appeal arise from the same domestic matter, we address both in this opinion.

I. Background

Plaintiff and Defendant Keith Kaplan were married in 1996. In 2014, they legally separated and divorced sometime thereafter. During the marriage, the parties had one minor child, who is now above the age of majority.

Defendant worked as a medical doctor for most of the marriage. At the time of separation, Defendant was working as a doctor and earning income from other sources, including wages earned as a medical blogger and as a consultant. Plaintiff was a stay-at-home mother for most of the marriage and was not working at the time of separation.

In February 2015, Plaintiff filed a motion seeking post-separation support ("PSS"), alimony, and other relief. In August 2015, the trial court ordered Defendant to pay \$20,000/month in PSS through May 2018 (the "PSS Order"). In September 2017, Defendant ceased making PSS payments, leaving \$180,000 (nine payments) still owed under the PSS Order, claiming he suffered from medical issues.

Plaintiff moved for an order to find Defendant in contempt of the PSS Order. In January 2018, the trial court entered an order finding Plaintiff failed to meet her burden of proving Defendant had the present means to comply with the PSS Order.

For the next year and a half, Defendant made no payments towards the arrearages he owed under the PSS Order. Accordingly, in August 2019, Plaintiff again moved for an order finding Defendant in contempt of the PSS Order and requested that Defendant pay the PSS arrearages of \$180,000 (nine months at \$20,000/month) as well as Plaintiff's attorney's fees.

On 26 July 2022, the trial court entered an order denying Plaintiff's request for alimony. On 30 September 2022, the trial court entered an order denying Plaintiff's request that Defendant be found in civil contempt for failing to pay PSS as previously ordered *but* awarding Plaintiff attorney's fees.

II. Analysis

A. Denial of Alimony

We first address Plaintiff's appeal of the order denying her alimony.

We review a trial court's determination as to whether a party is entitled to alimony *de novo*. *Rickert v. Rickert*, 282 N.C. 373, 379, 193 S.E.2d 79, 82 (1972). We review *the amount* of alimony awarded, however, for abuse of discretion. *Sayland v. Sayland*, 267 N.C. 378, 382, 148 S.E.2d 218, 221 (1966).

Our General Assembly has directed that a court "shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the

other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors[.]” N.C. Gen. Stat. § 50-16.3A(a) (2021). Our General Assembly, however, has mandated that “[i]f the court finds that the supporting spouse participated in an act of illicit sexual behavior . . . during the marriage and prior to or on the date of separation, then the court *shall* order that alimony be paid to a dependent spouse...[unless] the court [also] finds that the dependent *and* the supporting spouse each participated in an act of illicit sexual behavior during the marriage and prior to or on the date of separation, [in which case] alimony shall be denied or awarded in the discretion of the court after consideration of all of the circumstances.” *Id.* (emphasis added). We “have consistently held that the use of the word ‘shall’ in a statute indicates what actions are required or mandatory.” *Morningstar v. Warren Cty.*, 233 N.C. App. 23, 28, 755 S.E.2d 75, 79 (2014).

Here, the trial court found that Defendant was the supporting spouse, Plaintiff was the dependent spouse, and Defendant committed illicit sexual misconduct during the marriage. Further, the trial court did not find that Plaintiff had engaged in illicit sexual misconduct during the marriage, prior to the date of separation. Therefore, an award of alimony was mandatory, instead of discretionary.

The trial court, however, determined Plaintiff was not entitled to an award of alimony after considering the factors listed in N.C. Gen. Stat. § 50-16.3A(b). This was error. Accordingly, we reverse the trial court’s order denying alimony and remand with instructions to award Plaintiff some amount of alimony in accordance

with the statutory mandate of Section 50-16.3A(a), after giving due consideration of the factors contained in Section 50-16.3A(b).

B. PSS in Arrears

We next consider Plaintiff's appeal from the order finding Defendant not in willful civil contempt for his failure to pay towards the \$180,000 he owes in PSS. *See Jarrell v. Jarrell*, 241 N.C. 73, 74, 84 S.E.2d 328, 329 (1954) (concluding that to hold one in contempt for failing to pay money as previously ordered, it must be found that the failure to pay was "willful").

When reviewing a trial court's order on civil contempt, our appellate review is limited to whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. *See O'Briant v. O'Briant*, 313 N.C. 432, 436-37, 329 S.E.2d 370, 373-74 (1985). "However, findings of fact to which no error is assigned are presumed to be supported by competent evidence and are binding on appeal." *Tucker v. Tucker*, 197 N.C. App. 592, 594, 679 S.E.2d 141, 142-43 (2009) (citations, quotation marks, and brackets omitted). The trial court's conclusions of law drawn from the findings of fact are reviewable *de novo*. *Grissom v. Cohen*, 261 N.C. App. 576, 583, 821 S.E.2d 454, 459 (2018).

Here, the trial court found that Defendant did not have "the present ability to comply" due to his alleged medical issues. In so determining, the trial court adopted seven findings from its July 2022 order on alimony which stated that Defendant's income had decreased because of his health and market conditions. The court also

found that Defendant had paid over \$750,000 since the parties' separation to provide support to Plaintiff. However, the trial court's finding recognized there was a dispute as to whether these sums satisfied Defendant's obligation, and stated it was not going to resolve the dispute, whether monies were still owed under the PSS Order.

We conclude that, assuming monies are still owed by Defendant under the PSS Order, the bare findings relied upon by the trial court are not sufficient to show Defendant had no ability to pay *at least some* amount. We remand with instructions to make findings sufficient to show whether Defendant had any ability to pay and if so, whether Defendant actually owes anything under the PSS Order.

We note Plaintiff's argument that, based on the wording of the following provision in the PSS Order, Defendant's obligation to pay \$20,000/month did not cease in May 2018:

Defendant shall pay post separation support to Plaintiff in the amount of \$20,000 monthly for the next thirty six (36) months, beginning June 1, 2015, and to be paid each month on the 1st of each month until either the permanent alimony claim is ruled upon, or there is a contrary decision by the Court.

Plaintiff contends that since the order denying her alimony claim was not entered until July 2022, Defendant's obligation to pay \$20,000/month under the PSS Order extended four extra years, to July 2022. We disagree. We construe the PSS Order as limiting the payments thereunder to 36 months.

C. Attorney's Fees

Finally, we address Defendant's argument on cross-appeal that the attorney's fees award was improper because he was not found to be in willful contempt.

Generally, a party is not entitled to an award of attorney's fees "unless such a recovery is expressly authorized by statute." *Stillwell v. Interstate*, 300 N.C. 286, 289, 266 S.E.2d 812, 814 (1980). Here, we analyze two statutes to determine whether the trial court had the authority to award attorney's fees in this case.

We first analyze our civil contempt statutes as a possible source of authority to award attorney's fees. We have held "[a]s a general rule, attorney's fees in a civil contempt action are not available unless the moving party prevails." *Ruth v. Ruth*, 158 N.C. App. 123, 127, 579 S.E.2d 909, 912 (2003). However, we have further held that "in the limited situation where contempt fails because the alleged contemnor complies with the previous orders after the motion to show cause is issued and prior to the contempt hearing, an award of attorney's fees is proper." *Id.*

Here, Defendant was found not to be in contempt, *not* because he paid his obligation after the contempt filing, *but because* he had no ability to pay. The "limited situation" presented in *Ruth* does not appear and is not applicable in this case." *See Walter v. Walter*, 279 N.C. App. 61, 72, 864 S.E.2d 534, 541 (2021). Plaintiff has not otherwise advanced any argument explaining why the contempt powers of a trial court should include the award of attorney's fees in the present case.

We now turn to N.C. Gen. Stat. § 50-16.4 as a source of authority to award attorney's fees. This statute provides that:

At any time that a dependent spouse would be entitled to alimony . . . or postseparation support . . . , the court may, upon application of such spouse, enter an order for reasonable counsel fees[.]

Id. Our Supreme Court has held that a party is not entitled to attorney’s fees under this statute *unless* that party shows three things, including that she “is entitled to the relief demanded[.]” *Rickert*, 282 N.C. at 378, 193 S.E.2d at 82.

In the present case, the trial court held that Plaintiff was not entitled to the relief she sought, which was to have Defendant held in civil contempt. Therefore, we conclude that Section 50-16.4 does not apply.¹

Notwithstanding, as we are vacating the portion of the order finding Defendant not to be in civil contempt, we also vacate the portion awarding Plaintiff attorney’s fees. On remand, the trial court shall enter a new order regarding Defendant’s contempt and may award attorney’s fees only if the court finds Defendant to be in civil contempt or has otherwise recently purged his civil contempt based on *Ruth*. It is within the trial court’s discretion whether to base any new order on the current record or whether to allow additional evidence.

III. Conclusion

¹ We note that a spouse who does not prevail at a hearing involving child custody does qualify for an attorney’s fee award under Section 50-13.6. However, that statute contains language authorizing a trial court to a movant “acting in good faith who has insufficient means to defray the expense of the suit.” N.C. Gen. Stat. § 50-13.6 (2021). See *Blanchard v. Blanchard*, 279 N.C. App. 269, 279, 865 S.E.2d 686, 692-93 (2021) (movant need not prevail to be entitled to attorney’s fees under Section 50-13.6). Section 50-16.4 which deals with alimony and PSS, however, does not contain this language.

We reverse the order denying Plaintiff alimony. On remand, the trial court shall enter an award of alimony in some amount to be determined in the trial court's discretion. The trial court, in its discretion, *may* consider additional evidence which is relevant as to *the amount* of the award.

We also vacate the order finding Defendant not to be in contempt of his obligation under the PSS order and awarding Plaintiff attorney's fees. On remand, the trial court shall enter a new order, determining whether Defendant was in contempt for willfully failing to pay towards his PSS obligation, and whether Plaintiff is entitled to attorney's fees. The trial court, in its discretion, may consider additional evidence that may be relevant on either or both issues.

REVERSED IN PART, VACATED IN PART, AND REMANDED.

Judges ZACHARY and COLLINS concur.

Report per Rule 30(e).