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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA24-710

Filed 16 April 2025

Mecklenburg County, No. 20CVD017711

ASHLEY A. STEWART, Plaintiff,

v.

DANIEL S. BRICKMAN, Defendant.

Appeal by defendant from judgment entered 28 September 2023 by Judge Christy T. Mann in Mecklenburg County Superior Court. Heard in the Court of Appeals 19 March 2025.

Epperson Law Group, PLLC, by James L. Epperson, and Lauren E. R. Watkins, for the plaintiff-appellant.

Hamilton Stephens Steele & Martin PLLC, by K. Mitchell Kelling, and Kyle A. Frost, for the defendant-appellee.

TYSON, Judge.

Ashley A. Stewart (“Plaintiff”) appeals the judgment entered concluding Daniel S. Brickman (“Defendant”) could not defray his attorney’s fees and ordering Plaintiff to pay Defendant’s attorney’s fees. We affirm in part, vacate in part, and remand.

I. Background

Plaintiff and Defendant were married on 4 April 2012 and are parents of two minor children. Plaintiff and Defendant separated on 8 May 2021. Both parties reside in Mecklenburg County.

Plaintiff filed an action for divorce from bed and board, child custody, child support, and sought attorney's fees on 31 December 2020. Defendant filed his answer, asserted claims for child custody, child support, divorce from bed and board, and also sought attorney's fees on 17 March 2021. Defendant was represented by K. Mitchell Kelling, Esq. of the law firm Offit Kurman, PA.

Both Plaintiff and Defendant submitted financial affidavits. Plaintiff failed to timely file her financial affidavit according to Rules 8.1 and 8.3 of the 26th Judicial District Family Court Division Local Rules of Domestic Court, and her affidavit was excluded. On 24 October 2023, the trial court ordered Plaintiff to pay Defendant's attorney's fees related to the claims for child support and child custody, but did not enter a specific amount.

On 2 February 2024, the trial court ordered Plaintiff to pay Defendant's counsel \$75,000.00 for his attorney's fees. Plaintiff was not allowed to present her own evidence. Plaintiff also failed to cross-examine the evidence offered by Defendant regarding the value of his 401(k) retirement account or the value of the legal services Defendant's counsel had rendered. In arriving at its conclusion, the trial court made the following findings of fact:

25. [Defendant] has been represented by K. Mitchell

Kelling of the law firm Offit Kurman, PA, in connection with the parties' respective claims for child custody and child support and Father's Motions to Compel. Ms. Kelling has been assisted by various paralegals and staff employed at Offit Kurman, PA.

26. Ms. Kelling is a duly-licensed attorney in the State of North Carolina.

27. Ms. Kelling is an experienced attorney, and her practice exclusively involves representing clients in domestic cases. Ms. Kelling has been a Board-Certified Specialist in Family Law since 2003.

28. Ms. Kelling charged [Defendant] for services related to the parties' respective claims for child custody and child support and [Defendant]'s Motions to Compel at the rate of \$450.00 per hour for time spent in providing her services. These charges are competitive with the rates charged by other attorneys in Mecklenburg County with similar experience and reputation.

29. The services provided by Ms. Kelling included[,] but were not limited to, the following: meetings with client; telephone conversations with client; drafting pleadings; preparing for the trial in this case; and attending trial for these issues.

30. On September 28, 2023[,] counsel for [Defendant] submitted an Attorney's Fee Affidavit (the "Fee Affidavit") related to child custody and child support. The Fee Affidavit was tendered to the [trial c]ourt on September 28, 2023.

31. [Plaintiff]'s attorney did not cross examine Ms. Kelling about the Fee Affidavit or the time entries.

32. The amount of legal fees incurred by [Defendant] in connection with the parties' claims for child custody and child support is not less than \$224,536.00.

33. The amount of legal fees incurred by [Defendant] in connection with his Motion to Compel Discovery filed on December 22, 2021 is not less than \$3,992.50. The Fee Affidavit associated with this Motion was filed on March 3, 2023. The fees reflected on this affidavit were reserved for hearing and were heard at the permanent child support hearing.

34. The amount of legal fees incurred by [Defendant] in connection with his Motion to Compel Discovery filed on October 27, 2022 is not less than \$2,366.00. The Fee Affidavit associated with this Motion was dated September 27, 2023. The fees reflected on this affidavit were reserved for hearing and were heard at the permanent child support hearing.

35. The amount of legal fees incurred by [Defendant] in connection with his Motion to Compel Discovery filed on July 3, 2023 is not less than \$1,996.00. The Fee Affidavit associated with this Motion was filed on August 18, 2023. The fees reflected on this affidavit were reserved for hearing and were heard at the permanent child support hearing.

36. The amount of legal fees incurred by [Defendant] in connection with the parties' respective claims for child custody and child support and [Defendant]'s Motions to Compel is reasonable under the circumstances of this case.

37. [Defendant] is an interested party, acting in good faith, with insufficient means to defray the expense of this suit related to the parties' respective claims for child custody and child support.

38. [Defendant] should be awarded reasonable attorney's fees in this matter related to the parties' respective claims for child custody and child support, in the amount of \$75,000.00.

On these findings, the trial court entered conclusions of law, *inter alia*:

3. The terms of this Order are fair, reasonable, necessary and both parties are capable of complying therewith.

...

6. Child support, as ordered herein, is in such amount as to meet the reasonable needs of the minor children for health, education and maintenance, having due regard to the estates, earnings, conditions, accustomed standards of living of the minor children and the parties, the childcare and homemaker contributions of each party, and other facts of this particular case.

...

8. [Defendant] is an interested party, acting in good faith, with insufficient means to defray the expense of this suit related to the parties' respective claims for child custody and child support.

9. [Defendant] should be awarded reasonable attorney's fees in this matter related to the parties' respective claims for child custody and child support, in the amount of \$75,000.00.

10. [Plaintiff] has the means and ability to pay \$75,000 in attorney[s] fees by June 1, 2024.

11. [Defendant] should be awarded reasonable attorney's fees related to his three (3) Motions to Compel in the amount of \$7,834.00. [Plaintiff] shall make this payment within forty-five (45) days from the entry of this Order to be paid directly to counsel for [Defendant].

The trial court ordered Plaintiff to pay Defendant's counsel \$75,000.00 towards his attorney's fees incurred in the custody dispute. Plaintiff timely appealed on 29 February 2024.

II. Jurisdiction

This Court possesses jurisdiction pursuant N.C. Gen. Stat. § 50-19.1 (2023).

III. Issues

Plaintiff asserts the trial court erred in ordering her to pay \$75,000.00 for Defendant's attorney's fees. Plaintiff argues the trial court abused its discretion by finding and concluding Defendant did not have the means to defray the cost of his legal representation; in finding Plaintiff has the means to pay Defendant's attorney's fees; and, ordering \$75,000.00 to be paid by Plaintiff.

IV. Attorney's Fees

Plaintiff argues the trial court abused its discretion by finding Defendant cannot defray the costs of his legal representation.

A. Standard of Review

"In an action or proceeding for the custody or support, or both, of a minor child, . . . the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit." N.C. Gen. Stat. § 50-13.6 (2023). "Whether a party has satisfied these requirements is a question of law fully reviewable on appeal." *Hinshaw v. Kuntz*, 234 N.C. App. 502, 509, 760 S.E. 2d 296, 301 (2014) (internal citations omitted). *See also Cox v. Cox*, 133 N.C. App. 221, 228, 515 S.E.2d 61, 66 (1999) (citations omitted).

If the statutory requirements for awarding attorney's fees "have been satisfied, the amount of the [attorney's fee] award is within the discretion of the trial judge and will not be reversed in the absence of an abuse of discretion." *Smith v. Barbour*, 195

N.C. App. 244, 255, 671 S.E.2d 578, 586 (2009) (citation, internal quotation marks, and alterations omitted).

B. Defraying the Cost of Legal Representation

North Carolina follows the “American Rule” wherein “each litigant is required to pay his or her attorney’s fees, unless a statute or agreement between the parties provides otherwise.” *Davignon v. Davignon*, 245 N.C. App. 358, 365, 782 S.E. 2d 391, 396 (2016). N.C. Gen. Stat. § 50-13.6 (2023) explicitly permits the trial court, upon supported findings and conclusions, to award attorney’s fees in a child custody proceeding in compliance therewith. *Id.*

“On appeal, our focus hinges on whether [a party seeking funds] had sufficient funds to defray the costs of litigation.” *Hinshaw*, 234 N.C. App. at 509, 760 S.E. 2d at 302. “[A] court should generally focus on the disposable income and estate of just that spouse, although a comparison of the two spouses’ estates may sometimes be appropriate.” *Barrett v. Barrett*, 140 N.C. App. 369, 374, 536 S.E. 2d 642, 646 (2000). The statute permits an award of attorney’s fees to allow both parents to be on equal footing during the litigation. N.C. Gen. Stat. § 50-13.6 (2023); *Dixon v. Gordon*, 223 N.C. App. 365, 372, 734 S.E. 2d 299, 304 (2012) (internal citations and quotations omitted).

The trial court found Defendant was acting in good faith in seeking reimbursement for his fees. The trial court found Defendant’s estate consisted of a \$24,000.00 savings account, a 401(k) retirement account with an unknown balance,

and \$1,478,561.09 of debt, resulting in a negative net worth.

The trial court also calculated Plaintiff's net worth. The trial court found Plaintiff's estate consisted of multiple accounts, one of which had a balance of \$6,244.00 in May 2023, after it had previously held a balance of \$406,895.00 in January 2022. Regarding Plaintiff's two other accounts, the trial court found they had balances of \$202,834.00 and \$9,116.00. Plaintiff had credit card balances totaling \$32,932.00 and no additional debts shown. The trial court found Plaintiff's estate had a net value of approximately \$170,000.00.

The trial court concluded Defendant had insufficient means to defray the expenses of defending the suit. The trial court awarded Defendant \$75,000 in attorney's fees.

C. Means to Pay

Plaintiff's second argument is two-fold. She first argues the trial court "was not restricted from comparing the estates of the parties." Second, she asserts the trial court's exclusion of her untimely Financial Affidavit prevented the trial court from accurately comparing the relative values of the two estates.

Plaintiff correctly acknowledges trial courts are permitted to compare each party's estate before awarding attorney's fees, but trial courts are not mandated to do so. *Barrett*, 140 N.C. App. at 374, 536 S.E. 2d at 646; *Van Every v. McGuire*, 348 N.C. 58, 60, 497 S.E. 2d 689, 690 (1998) ("The fact that N.C.G.S. § 50-13.6 does not require the trial court to compare the relative estates of the parties does not

automatically mean that it does not allow or permit the trial court to do so in a proper case.”).

Our Supreme Court in *Van Every* permitted the trial court on remand to “order[] such additional evidence, if any,” as the trial court may, in its discretion, “determine is necessary to permit a proper finding by the trial court as to [mother]’s ability, or lack thereof, to pay her expenses from income or from her estate or from some combination thereof without unreasonable depletion of her estate[.]” *Id.* at 62; 497 S.E. 2d at 691. Although “the trial court should focus on the disposable income and estate of [mother], it should not be placed in a straitjacket by prohibiting any comparison with [father]’s estate, for example, in determining whether any necessary depletion of [mother]’s estate by paying her own expenses would be reasonable or unreasonable.” *Id.*

Here, the trial court conducted the comparative analysis Plaintiff seeks, because the trial court compared Defendant’s net worth to Plaintiff’s net worth. *Id.* Plaintiff nevertheless asserts the trial court’s calculation of her net income was erroneous, because the trial court had excluded her untimely Financial Affidavit. Plaintiff was required to file her Financial Affidavit ten days prior to trial, as required by local rules. Rules 8.1 and 8.3 of the 26th Judicial District Family Court Division Local Rules of Domestic Court. The reason the trial court excluded Plaintiff’s Financial Affidavit was due to Plaintiff’s own error to timely file. Plaintiff has failed to show the trial court abused its discretion by awarding attorney fees. *Id.*

D. Reasonableness

“The trial court *must* make findings of fact to support and show the basis of the award, including: the nature and scope of the legal services, the skill and time required, and the relationship between the fees customary in such a case and those requested.” *Davignon*, 245 N.C. App. at 365, 782 S.E. 2d at 396-97 (emphasis supplied) (internal citations and quotations omitted).

Under the statutory authority stated in North Carolina General Statute Chapter 84-23 (2023), the North Carolina State Bar has issued Rule 1.5 regarding attorney’s fees and the reasonableness thereof:

(a) A lawyer shall not make an agreement for, charge, or collect an *illegal or clearly excessive fee or charge or collect a clearly excessive amount for expenses*. The factors to be considered in determining whether a fee is clearly excessive include the following:

- (1) *the time and labor required*, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the *fee customarily charged in the locality* for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

N.C. Rev. R. Prof. Conduct 1.5(a)-(b) (emphasis supplied).

Here, the trial court made several findings of fact prior to awarding Defendant's attorney's fees. The trial court found Defendant's attorney's fees were reasonable and referenced the uncontested value of services. The trial court used these findings to award \$75,000.00 to Defendant in attorney's fees in its discretion.

The trial court, however, failed to find the amount of time spent by Defendant's attorney and her firm's staff's rates in rendering legal services. In compliance with *Davignon* and the State Bar's Rules of Professional Conduct, the trial court must make supported findings concerning the amount and reasonableness of time(s) spent by counsel, her staff, and her firm on this matter. *Id.*; *Davignon*, 245 N.C. App. at 365, 782 S.E. 2d at 396-97; N.C. Gen. Stat. § 50-13.6 (2023); N.C. Rev. R. Prof. Conduct 1.5(a)-(b). We vacate the attorney's fee award and remand for further supported findings of fact and conclusions.

V. Conclusion

The trial court did not abuse its discretion in awarding attorney's fees in favor of Defendant. The trial court failed to make supported findings of fact and conclusions on the amount and reasonableness of hours spent by counsel and the

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firm's staff for Defendant. We vacate the award and remand for additional factual findings and conclusions by the trial court. *Id.* The trial court may receive and consider additional evidence, as necessary. *It is so ordered.*

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges STADING and FREEMAN concur.

Report per Rule 30(e).