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NO. COA00-1299
NO. COA00-1333

NORTH CAROLINA COURT OF APPEALS

Filed: 19 February 2002

LYNNE HERBIG STEG,
Plaintiff

v.

Catawba County
No. 96 CVD 2864

BRIAN DAVID STEG,
Defendant

Appeal by defendant from order entered 26 July 2000 by Judge J. David Abernethy ("Judge Abernethy") in Catawba County District Court (COA-1299). Appeal by defendant from a separate but related order entered on 11 May 2000 also by Judge Abernethy (COA-1333). This Court on its own motion now orders that COA00-1299 and COA00-1333 be consolidated for decision. Heard in the Court of Appeals 11 September 2001.

Morrow Alexander Tash Kurtz & Porter, by John F. Morrow and W. Wallace Respess, Jr., for plaintiff-appellee.

Crowe & Davis, P.A., by H. Kent Crowe, for defendant-appellant.

CAMPBELL, Judge.

The plaintiff and defendant were married on 2 August 1975. Plaintiff possesses a Bachelor of Science degree in biology and a Master of Arts degree in nursing. Prior to the commencement of this action, plaintiff was last employed in 1980 as a registered

nurse. Defendant, a doctor of medicine, is currently engaged in the private practice of medicine as a cardiologist.

The parties separated on 30 October 1996. Plaintiff brought suit against defendant for child custody and support of their two children, post-separation support, alimony and attorneys' fees. In defendant's answer, he also sought child custody and support, and asserted a claim for equitable distribution. Since the parties settled their claims for child custody and support and both children have now reached the age of majority, there is no issue relating to the children.

The equitable distribution proceeding between the parties was concluded on 21 May 1999, and Judge Jonathan L. Jones ("Judge Jones") awarded plaintiff \$1,037,946.00 in marital property, which included an interim allocation of \$45,000.00. Prior to the entry of the equitable distribution judgment, plaintiff also received \$8,000.00 per month in post-separation support. As to defendant, the total net value of assets distributed to him was \$830,458.00. There was no appeal of the equitable distribution decision.

Plaintiff was awarded the former marital home. The trial court found this home to have a value in excess of \$900,000.00 with a fair rental value of at least \$2,000.00 per month. The mortgage debt on the home was \$99,246.00 at the date of separation, and the monthly mortgage payment was \$785.00. Despite receiving the marital home, plaintiff purchased a second home for \$350,000.00. The mortgage debt on the second home was in excess of \$230,000.00, and the monthly mortgage payment was \$1,800.00.

The alimony trial was heard before Judge Abernethy and a jury on 11 May 2000. Plaintiff testified that as a result of prolonged marital misconduct, she suffers from diagnosable signs of mental illness and requires extensive psychotherapy. At the close of all the evidence, the jury found that both parties offered indignities to the other, but that both condoned the conduct of the other. Therefore, without considering either party's misconduct, Judge Abernethy determined that plaintiff was entitled to alimony pursuant to section 50-16.1A of our statutes. The court ordered defendant to pay \$7,917.00 per month to plaintiff until the earlier of her death, co-habitation or remarriage. Defendant timely filed notice of appeal with respect to this order (COA-1333).

Judge Abernethy entered additional orders on 11 May 2000. Defendant was ordered to pay expert witness fees of \$3,140.00 to plaintiff's psychologist expert and \$6,146.00 to plaintiff's psychiatrist expert. Also, defendant was ordered to pay plaintiff's attorneys' fees connected with the alimony hearing and reimbursement of costs. Because defendant failed to include an appeal from these additional orders in his notice of appeal, he filed petitions for writ of supersedeas and writ of certiorari with this Court. These petitions were denied on 8 August 2000. However, the North Carolina Supreme Court later granted defendant's petition for writ of certiorari to review the additional orders.

Prior to the Supreme Court's decision on defendant's petition, the trial court held a contempt hearing regarding defendant's failure to comply with the additional orders. On 26 July 2000,

defendant was found to be in civil contempt for non-payment of the attorneys' fees, expert witness fees and costs. Defendant appeals from this ruling (COA-1299).

In this consolidated decision we review the appeals by defendant in the order in which they appeared before this Court.

I. COA00-1299

In the first case, the issues raised by defendant on appeal are whether the trial court erred (A) in finding defendant in contempt for non-payment of attorneys' fees and expert witness fees; and (B) in imposing interest and attorneys' fees in addition to those contained in its original orders. For the reasons stated below, we find no error by the trial court with respect to (A), but we do find error with respect to (B).

A.

Defendant argues that the order finding him in contempt for failure to pay plaintiff's attorneys' fees and expert witness fees should not be enforced because the original order may be reversed by the North Carolina Supreme Court. However, on 6 April 2001, after the filing of defendant's brief, the Supreme Court ruled that defendant's petition for writ of certiorari had been improvidently allowed. Thus, this Court's previous decision to deny defendant's petition requesting review of the trial court's underlying order stands. As a result, the trial court's order finding defendant in contempt likewise stands, since there was no appeal from this order.

B.

Defendant also argues the trial court erred when it issued a civil contempt order that imposed interest on the original award of attorneys' fees and expert witness fees, and required defendant to pay additional attorneys' fees incurred by plaintiff to enforce the original order. We agree only with respect to the imposition of interest.

In North Carolina, a proceeding for civil contempt is one instituted to preserve and enforce the rights of a private party to an action, and to compel obedience to a judgment or decree intended to benefit such parties. *Blue Jeans Corp. v. Clothing Workers*, 275 N.C. 503, 169 S.E.2d 867 (1969). Failure to comply with a court order is a continuing civil contempt as long as:

- (1) The order remains in force;
- (2) The purpose of the order may still be served by compliance with the order;
- (2a) The noncompliance by the person to whom the order is directed is willful; and
- (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

N.C. Gen. Stat. § 5A-21(a) (1999).

Absent express statutory authority, our state law does not allow for the recovery of attorneys' fees "either as an item of damages or of costs[.]" *Smith v. Smith*, 121 N.C. App. 334, 338, 465 S.E.2d 52, 55 (1996) (citing *Records v. Tape Corp. and Broadcasting System v. Tape Corp.*, 18 N.C. App. 183, 188, 196 S.E.2d 598, 602, cert. denied, 283 N.C. 666, 197 S.E.2d 880 (1973)). We have previously held that "[a]lthough labeled 'civil'

contempt, a proceeding as for contempt is by no means a civil action or proceeding to which G.S. 6-18 (when costs shall be allowed to plaintiff as a matter of course), or G.S. 6-20 (allowance of costs in discretion of court) would apply." *Records*, 18 N.C. App. at 188, 196 S.E.2d at 602. "However, a trial court may properly award attorney's fees to a plaintiff who prevails in a civil contempt action. This Court has approved the allowance of attorney's fees in contempt actions where such fees were expressly authorized by statute as in the case of child support." *Smith*, 121 N.C. App. at 339, 465 S.E.2d at 55 (citation omitted).

In the case *sub judice*, the trial court's 11 May 2000 civil contempt order awarded interest and attorneys' fees to plaintiff to enforce its previously entered alimony order. As in child custody cases, our statutes also expressly provide for the allowance of attorneys' fees in alimony cases. See N.C. Gen. Stat. §§ 50-13.6, -16.4 (1999). Therefore, the trial court did not err by issuing a civil contempt order that imposed additional attorneys' fees on defendant. However, because of the absence of statutory authority providing for the imposition of interest, the court did err when it ordered defendant to pay interest on the original award of attorneys' fees and expert witness fees.

II. COA00-1333

In the second case, defendant appeals the trial court's judgment ordering that he pay \$7,917.00 per month to plaintiff in alimony. Defendant has several assignments of error regarding this

award which present this Court with essentially three issues: namely, whether the trial court erred in determining (A) the amount of plaintiff's award (presented in assignments of error one and three); (B) the duration of the alimony award (presented in assignment of error two); and (C) that the expert testimony offered by an economist would not be admitted into evidence (presented in assignments of error four and five). For the reasons stated below, we find no error.

The party seeking alimony must establish that: "(1) [the] party is a dependent spouse; (2) the other party is a supporting spouse; and (3) an award of alimony would be equitable under all the relevant factors." *Barrett v. Barrett*, 140 N.C. App. 369, 371, 536 S.E.2d 642, 644 (2000). A dependent spouse is one who is "actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse." N.C. Gen. Stat. § 50-16.1A(2) (1999). Alimony is to be awarded on the facts that are in existence at the time of the alimony trial. See *Williams v. Williams*, 299 N.C. 174, 261 S.E.2d 849 (1980). This award should not be disturbed absent a showing of abuse of discretion by the trial judge. *Alvarez v. Alvarez*, 134 N.C. App. 321, 323, 517 S.E.2d 420, 422 (1999).

Pursuant to our statutory law, "[t]he 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.*" N.C. Gen. Stat. § 50-16.3A(c) (1999) (emphasis added).

Also, with the exception of motions where the Rules of Civil Procedure do not require specific findings, "the court shall make a specific finding of fact on each of the factors in [§ 50-16.3A(b)] if evidence is offered on that factor." *Id.* "[T]he trial court's findings of fact must be more than mere evidentiary facts; they must be the 'specific ultimate facts . . . sufficient for [an] appellate court to determine that the [award] is adequately supported by competent evidence.'" *Williamson v. Williamson*, 140 N.C. App. 362, 363-64, 536 S.E.2d 337, 338 (2000) (citing *Montgomery v. Montgomery*, 32 N.C. App. 154, 156-57, 231 S.E.2d 26, 28 (1977)). See also N.C. Gen. Stat. § 1A-1, Rule 52(a) (1999).

A.

The first issue addressed by this Court deals directly with the amount of alimony awarded to plaintiff. Essentially, defendant argues that the \$7,917.00 per month award would have been reduced if the trial court had taken into consideration: (1) that plaintiff could earn income of \$2,000.00 per month if she were to rent the marital home; and (2) that she had unilaterally increased her expenses and debt service obligations by purchasing another home. We disagree with both of defendant's arguments.

Defendant argues that the trial court erred in failing to consider plaintiff had an unearned income capacity of \$24,000.00 per year because the marital home had a \$2,000.00 per month rental value. However, at the time of the alimony judgment in May of 2000, the marital home was not rented. Instead, the home had been

listed for sale by plaintiff since the summer of 1999 and had not been sold. The trial court determined that plaintiff's initial expenses in preparing the marital home for sale were at least \$8,725.35. Plaintiff's expenses in maintaining the property for sale were at least \$2,503.53 per month. The findings of fact established that at the time of the alimony trial, plaintiff was not renting the property and had no intention of doing so. In order "[t]o base an award on capacity to earn rather than actual earnings, there should be a finding based on evidence that [the spouse in question] is [deliberately] failing to exercise his [or her] capacity to earn[.]" *Robinson v. Robinson*, 10 N.C. App. 463, 468, 179 S.E.2d 144, 147 (1971). See also *Beall v. Beall*, 290 N.C. 669, 674, 228 S.E.2d 407, 410 (1976). Neither the evidence nor the court's findings contain any facts which would support a conclusion that plaintiff's failure to rent the marital home while attempting to sell it was an attempt to deliberately depress her earning capacity. Therefore, the marital home could not be considered as a source of income which could be included in determining the award amount.

Defendant also argues that the trial court abused its discretion by awarding alimony of \$7,917.00 per month after plaintiff unilaterally increased her expenses by purchasing another home. However, the trial court calculated plaintiff's alimony award by including only her expenses related to the new home and not by including those expenses incurred in maintaining the marital home. As a whole, the new home expenses were substantially lower

than those of the marital home. Thus, there was no abuse of discretion by the trial court because by purchasing another home, plaintiff not only made the marital home available for immediate sale (which sale, when and if accomplished, may benefit both parties), but decreased her monthly household expenses as well.

B.

The second issue is whether the trial court failed to set forth sufficient reasons justifying the duration of the alimony award. We hold that the trial court provided sufficient reasons for the award's duration.

Plaintiff was awarded alimony until the earlier of her death, co-habitation or remarriage. As stated previously, our courts have held that a trial court must make specific findings justifying the reason for its award. See N.C. Gen. Stat. § 50-16.3A(c) (1999). In the case *sub judice*, the trial court made extensive findings of fact that were determined by considering all the relevant factors listed in section 50-16.3A(b) of our statutes. The court also adopted and incorporated those findings of fact in the Equitable Distribution Judgment. These findings all adequately support the alimony award's duration because they establish that plaintiff's medical condition will continue to have a significant adverse effect on her future earning capacity, very likely for the rest of her life.

C.

We next consider whether the trial court properly refused to admit testimony from William Young Davis, an expert in the field of

economics. Defendant's arguments concerning this issue are premised on the trial court's refusal to admit expert testimony with respect to: (1) a hypothetical income stream plaintiff could generate by way of investment of equitable distribution proceeds; and (2) her earning capacity as a registered nurse. We disagree with both of defendant's arguments.

Pursuant to Rule 702 of the North Carolina Rules of Evidence, "a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion." N.C. Gen. Stat. § 8C-1, Rule 702(a) (1999). "It is undisputed that expert testimony is properly admissible when such testimony can assist the jury[.]" *State v. Bullard*, 312 N.C. 129, 139, 322 S.E.2d 370, 376 (1984). However, opinion testimony can not be offered if it is based on inadequate data. See *State v. Crumbley*, 135 N.C. App. 59, 65, 519 S.E.2d 94, 98 (1999). "[W]hen such expert opinion testimony is based merely upon speculation and conjecture, it can be of no more value than that of a layman's opinion." *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000). Thus, "the trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *Bullard*, 312 N.C. at 140, 322 S.E.2d at 376.

Defendant argues that the trial judge improperly excluded expert testimony regarding a hypothetical income stream generated by one million dollars in property and cash plaintiff received by way of equitable distribution. As stated previously, plaintiff's

equitable distribution award totaled \$1,037,946.00. However, at the time of the alimony trial, nearly \$900,000.00 of plaintiff's award consisted of the estimated value of the marital home, which she had been trying to sell for months. The trial court found no facts indicating that plaintiff was doing anything to impede the sale of the house in an attempt to depress her earning capacity. Furthermore, there was no basis for determining when the house would actually sell or for how much. Until the house is sold, plaintiff will continue to incur monthly expenses to maintain the property. Thus, the court acted well within its discretion by excluding this expert testimony not only because there was no evidence plaintiff was intentionally depressing her income, but because of the degree of speculation involved as to when and what amount of assets plaintiff would generate from the sale of the house.

Defendant further asserts that the trial court erred by excluding expert testimony regarding the earning capacity of plaintiff as a registered nurse. However, there was no basis under which to admit this testimony because it did not take into account plaintiff's circumstances. Plaintiff last worked as a registered nurse in 1980. Since that time, she developed "an adjustment disorder with anxiety and depressed mood, superimposed on a dysthymic disorder." The medical testimony at trial mostly agreed that "persons having conditions similar to plaintiff may or may not significantly improve when the significant stress factors are removed[.]" Thus, the trial court was within its discretion in

determining that this excluded testimony was of no assistance because of the unlikelihood that plaintiff will ever work as a nurse again, given her mental condition and the high stress and responsibility associated with working as a nurse.

In conclusion, we find that in COA-1299 the trial court did not err in finding defendant in contempt for non-payment of attorneys' fees and expert witness fees. Secondly, we find that the court may, in a civil contempt order, impose additional attorneys' fees on defendant, but may not impose interest in such an order. We also find in COA-1333 the trial court did not err in its decision regarding the amount and duration of the alimony award, nor did it abuse its discretion in excluding certain testimony proffered by defendant's economics expert.

COA-1299: Affirmed in part and reversed in part.

COA-1333: Affirmed.

Judges GREENE and BRYANT concur.

Report per Rule 30(e).