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NO. COA01-1140

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

GAIL PATRICIA KELLY,
Plaintiff,

v.

Wake County
No. 94 CVD 1377

DANIEL JOSEPH KELLY,
Defendant.

Appeal by plaintiff from order filed 30 November 2000 by Judge Fred M. Morelock in Wake County District Court. Heard in the Court of Appeals 11 June 2002.

Lynne M. Kay for plaintiff appellant.

Sokol & LeFante, by Marc W. Sokol, for defendant appellee.

GREENE, Judge.

Gail Patricia Kelly (Plaintiff) appeals an order filed 30 November 2000 denying her permanent alimony and attorney's fees. The record shows Plaintiff filed a complaint against Daniel Joseph Kelly (Defendant) on 14 February 1994 seeking a divorce, child custody and support, alimony, equitable distribution, and attorney's fees.¹ On 7 October 1994, the trial court entered an order for alimony *pendente lite* in favor of Plaintiff. The

¹All claims in the complaint were resolved prior to Plaintiff's appeal in this case.

judgment and order for equitable distribution, which awarded Plaintiff approximately seventy-five percent of the marital estate, was not entered until 29 November 2000. On 30 November 2000, the trial court entered an order, pursuant to the alimony statute in existence prior to 1995 and applicable to this case, finding Plaintiff to be a dependent spouse but denying alimony and attorney's fees on the basis of Plaintiff's distributive award under the equitable distribution order and Defendant's payment of spousal support for a period of nearly seven years prior to 30 November 2000.

The issues are whether the trial court: (I) erred in finding Plaintiff's estate consisted of seventy-five percent of the marital estate; (II) abused its discretion in finding the parties' reasonable expenses not pertinent to its decision to deny alimony; (III) abused its discretion in finding the parties' reasonable expenses; (IV) erred in finding that "Plaintiff has made no effort to complete her education or to advance in her career, or to change her employment"; and (V) erred in finding the family's monthly net cash flow during the last few years of the parties' marriage to be approximately \$7,100.00 without considering Defendant's pay increase during the six months prior to the parties' separation.

I

Plaintiff argues the trial court committed error in finding in its alimony order that her estate consisted of seventy-five percent of the marital estate. We agree. This finding, which was taken

directly from the equitable distribution order, reflects the amount of marital property distributed to Plaintiff based on its date-of-separation value almost seven years prior to the alimony order. Consideration of the parties' separate estates for purposes of alimony, however, must be based on "[t]he value of property within a reasonable time before or after the commencement of an action seeking an award of permanent alimony." *Clark v. Clark*, 301 N.C. 123, 135, 271 S.E.2d 58, 67 (1980). Accordingly, the trial court erred in attributing to Plaintiff an estate based on its date-of-separation value.

II

Plaintiff next argues the trial court abused its discretion in finding the parties' reasonable expenses irrelevant to its decision to deny alimony. Under our case law prior to 1995, an alimony award had to be "in such amount as the circumstances render[ed] necessary, having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case." N.C.G.S. § 50-16.5(a) (1987) (repealed 1995). Thus, an alimony order is valid only if the trial court has made findings as to these factors. *Hunt v. Hunt*, 112 N.C. App. 722, 727, 436 S.E.2d 856, 680 (1993).

In this case, the trial court entered findings of fact as to the factors listed above, including the parties' reasonable expenses. While the entry of findings as to required factors will normally be read as an implicit consideration of those factors by the trial court in reaching its decision, see *Hanley v. Hanley*, 128

N.C. App. 54, 60, 493 S.E.2d 337, 340-41 (1997), the trial court in this case expressly found its findings regarding the parties' reasonable expenses "not pertinent" to its conclusion to deny alimony. As such, it failed to give any weight to the parties' reasonable expenses and thereby abused its discretion. *Sayland v. Sayland*, 267 N.C. 378, 382, 148 S.E.2d 218, 221 (1966) (alimony award not reviewable absent abuse of discretion); see *Quick v. Quick*, 305 N.C. 446, 457, 290 S.E.2d 653, 660 (1982) (an alimony award must be fair and just to both parties).

III

Plaintiff also assigns as error the trial court's finding that her reasonable expenses are equal to one third of the total family expenses prior to the date of separation. As noted in *Bookholt v. Bookholt*, the trial court "'is not required to accept at face value the assertion of living expenses offered by the litigants themselves.'" Implicit in this is the idea that the trial judge may resort to his own common sense and every-day experiences in calculating the reasonable needs and expenses of the parties." *Bookholt v. Bookholt*, 136 N.C. App. 247, 250, 523 S.E.2d 729, 731 (1999) (citation omitted). As the total family expenses previously covered four other family members in addition to Plaintiff, including the private school tuition of the parties' children, we cannot say that the trial court abused its discretion in finding Plaintiff's reasonable expenses to be one third of this amount.

As to Defendant's reasonable expenses, Plaintiff argues the trial court erred because it included payments for vehicles driven

by their two daughters, ages twenty and twenty-two, as well as the lease on an apartment occupied by one of their daughters. While Defendant asserts he is contractually liable for these payments, the question remains whether the expenses should be deemed *reasonable*. It is an abuse of discretion for a trial court to allow a supporting spouse to reduce his net monthly income, and thus his obligation to his dependent spouse, based not on necessity but instead on the voluntary assumption of additional obligations. *Sayland*, 267 N.C. at 383, 148 S.E.2d at 222; *Friend-Novorska v. Novorska*, 131 N.C. App. 867, 869, 509 S.E.2d 460, 461 (1998). Because Defendant's expenses as they relate to the vehicle and rent payments for the parties' daughters constitute a voluntary assumption of legal obligations, the trial court abused its discretion in including them in Defendant's reasonable expenses.

IV

Plaintiff further contends there is no competent evidence to support the trial court's finding that she "has made no effort to complete her education or to advance in her career, or to change her employment." Although Defendant testified he knew of other people with similar credentials as Plaintiff who earned between \$10,000.00 and \$30,000.00 a year more than Plaintiff, he knew nothing about Plaintiff's attempts to find a higher paying position. Furthermore, Plaintiff's testimony is undisputed that she searched diligently for a period of six months and could not obtain a higher paying job than the one she had accepted and that pursuit of a bachelor's degree, even if she could afford it, would

not increase her income potential because she already worked at a level requiring a degree. In light of this evidence, the trial court's finding was in error. See *Marks v. Marks*, 316 N.C. 447, 460, 342 S.E.2d 859, 867 (1986) (findings must be supported by competent evidence).

V

Finally, Plaintiff contends the trial court erred in finding the family's monthly net cash flow during the last few years of the parties' marriage to be approximately \$7,100.00, a figure not reflecting Defendant's pay increase during the six weeks prior to the parties' separation. Apparently, the trial court purposefully omitted consideration of Defendant's pay increase because it noted Defendant also became responsible for paying his own self-employment taxes from that point forward. As this additional finding does not reflect whether the self-employment taxes offset Defendant's pay increase, this issue must be remanded to the trial court for entry of an appropriate finding of fact.²

For the reasons stated in this opinion, this case is reversed and remanded for new findings based on the record.

Reversed and remanded.

Judges TIMMONS-GOODSON and HUNTER concur.

Report per Rule 30(e).

²Plaintiff also attacks Defendant's net cash flow calculation, which the trial court adopted as incompetent evidence; however, in the absence of an objection to the evidence at trial, such a contention is not reviewable on appeal. See N.C.R. App. P. 10(b)(1).