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NO. COA01-1211

NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2002

NANCY O. PICKARD,
Plaintiff-Appellant,

v.

Mecklenburg County
No. 99 CVD 17562

JAMES H. PICKARD,
Defendant-Appellee.

Appeal by plaintiff from order entered 21 March 2001 by Judge Eric L. Levinson in Mecklenburg County District Court. Heard in the Court of Appeals 22 May 2002.

Helms, Henderson & Porter, P.A., by Christian R. Troy, for plaintiff appellant.

Justice, Eve & Edwards, P.A., by R. Michael Eve, Jr., for defendant appellee.

McCULLOUGH, Judge.

This case arises out of a divorce proceeding between plaintiff Nancy Pickard and defendant James Pickard. The relevant facts are as follows: The Pickards were married on 23 March 1985. Two children were born of the marriage: James, born 4 December 1986; and Luke, born 28 December 1988. The parties separated on 5 March 1999. On 19 November 1999, plaintiff filed a complaint and brought forth issues of child custody and support, post separation support, alimony, and equitable distribution. On 28 January 2000, defendant

filed an answer and counterclaim requesting that the trial court dismiss plaintiff's complaint and award custody of the children to him; he also requested "a reasonable sum from the Plaintiff for the support and maintenance of the minor children."

On 14 August 2000, the parties entered into a consent order resolving the issues of child custody, post-separation support and temporary child support. The consent order provided that:

1. The Defendant shall pay directly to the Plaintiff on or before the 1st day of each month beginning on May 1, 2000, post-separation support in the amount of \$1,000.00 per month without prejudice to either party. Said post-separation support shall be tax deductible by the Defendant and shall continue for eighteen (18) months, or until the alimony trial in this action, the Plaintiff's death, remarriage, or cohabitation, whichever shall first occur.

2. As temporary child support, the Defendant shall pay the monthly mortgage payment on the marital home in the approximate amount of \$673.00 per month. Defendant shall also be responsible for a pro rata share of the property tax on a monthly basis beginning on January 1, 2000, and continuing until a permanent child custody and support order is entered. Defendant shall not be required to convey his interest in the marital home to the Plaintiff as a part of the equitable distribution, until a permanent child custody and support order is entered, so that he may deduct said property tax payment on his state and federal income tax returns.

The Pickards' divorce became final on 8 December 2000. The issues of permanent child support and permanent alimony were tried at the 11 January 2001 Session of Mecklenburg County District Court. The evidence at the bench trial showed that Mr. Pickard has a law degree, and Mrs. Pickard has a college degree in history and a

minor in economics. Mr. Pickard practiced law until 1995, then pursued work as a salesman. At the time of trial, he earned approximately \$6,347.00 gross monthly wages and also had income from investments. By mutual agreement of the parties, Mrs. Pickard remained at home with the couple's two sons. In 1996, Mrs. Pickard began exploring work options in the field of international commerce. She also performed part-time temporary clerical and secretarial jobs which permitted her to be at home when her sons were at home. When the trial court entered its order for alimony and child support in March 2001, plaintiff was earning \$10.00 per hour in a temporary assignment.

Over the span of the marriage, defendant's drinking became problematic. Though defendant promised plaintiff he would seek treatment, he did not do so. As defendant's drinking increased, plaintiff began distancing herself both physically and emotionally from him. However, other factors also contributed to plaintiff's behavior. During the last years of the marriage, defendant attempted to continue the parties' relationship; however, plaintiff intended to separate from defendant and did so on 5 March 1999.

The trial court made several findings regarding the parties' financial status and employment histories, the custody of their children, and the breakup of their fourteen-year marriage. The trial court noted that "[d]efendant's use of alcohol was a serious and significant factor in the break up [sic] of the marriage." The trial court also found that plaintiff's physical and emotional estrangement from defendant was caused, only in part, by

defendant's drinking, and that "[t]his behavior by Plaintiff [her physical and emotional estrangement] was a serious and significant factor in the break up [sic] of the marriage." The trial court found that the financial affidavits of both parties were reasonable. The trial court noted that plaintiff incurred over \$14,000.00 in credit card debt; however, it also found that "[w]hile she may make some bad decisions in spending, she is not a spendthrift."

The trial court concluded plaintiff was the dependent spouse under N.C. Gen. Stat. § 50-16.1A(2) (2001) and ordered that defendant pay her child support of \$1,054.00 per month (the Guideline amount). Additionally, plaintiff was awarded alimony of \$1,100.00 per month from 1 February 2001 to 1 May 2002, with annual reductions in the amount of alimony through November 2005, as well as attorney fees of \$3,000.00. From the trial court's order dated 21 March 2001, plaintiff appealed.

On appeal, plaintiff contends the trial court committed reversible error by (I) awarding a reduced amount of alimony to her; and (II) failing to make required findings of fact as to the amount and duration of the alimony award. For the reasons set forth herein, we disagree with plaintiff's arguments and affirm the order of the trial court.

I.

By her first assignment of error, plaintiff contends the trial court incorrectly awarded her a reduced amount of alimony because

she presented reasonable expenses of \$1,860.00 per month, but was awarded only \$1,100.00 per month. Plaintiff also argues the trial court's order does not provide sufficient findings of fact to explain its "reduced" award.

According to plaintiff, the trial court gave undue weight to the fact that she physically and emotionally estranged herself from defendant during the last years of their marriage. Though defendant's answer presented several defenses to plaintiff's claim for alimony, she believes the trial court ultimately discredited all but one of those defenses -- her physical and emotional estrangement. Thus, plaintiff contends the only finding by the trial court which could possibly explain the alimony reduction was Finding of Fact 15, which stated:

15. Plaintiff physically and emotionally estranged herself from Defendant. Defendant's drinking was not the sole reason for the Plaintiff shutting the Defendant out of her life. This behavior by Plaintiff was a serious and significant factor in the break up [sic] of the marriage.

During the last years of the marriage, Defendant made efforts to preserve the marriage. Plaintiff did not wish to do so and her intentions to separate were unambiguous.

Plaintiff also notes that the trial court's memorandum to the parties' attorneys stated, "In addition to everything we discussed, I am giving additional weight and importance to the 'emotional shut out/down' I am finding with respect to Ms. Pickard." Plaintiff maintains this is further proof that the trial court improperly used that single finding to reduce her alimony award.

Plaintiff admits the trial court could have awarded her a reduced amount of alimony if it found that she engaged in marital misconduct or if her earning capacity warranted a reduction. However, plaintiff believes that, even if Finding of Fact 15 is read liberally, her conduct did not amount to marital misconduct under N.C. Gen. Stat. § 50-16.3A(b) (1) (2001). "Marital misconduct" is defined by N.C. Gen. Stat. § 50-16.1A(3) (2001) and includes, among other things: "f. Indignities rendering the condition of the other spouse intolerable and life burdensome[.]" Plaintiff notes that both spouses have an equal burden to preserve their marriage and the failure to preserve a marriage is not an indignity. "[W]e do not believe the failure to protect or preserve the marital relationship standing alone would constitute an indignity rendering a dependent spouse's condition intolerable and life burdensome as required by [the statute]." *Vann v. Vann*, 128 N.C. App. 516, 519, 495 S.E.2d 370, 372-73 (1998).

"\ . . . The fundamental characteristic of indignities is that it must consist of a *course* of conduct or *continued* treatment which renders the condition of the injured party intolerable and life burdensome. The indignities must be *repeated and persisted in* over a period of time.'" *Traywick v. Traywick*, 28 N.C. App. 291, 295, 221 S.E.2d 85, 88 (1976) (quoting 1 Robert E. Lee, *North Carolina Family Law* § 82, at 311) (emphasis added)). See also 1 Suzanne Reynolds, *Lee's North Carolina Family Law* § 6.11, at 569 (5th ed. 1993). Plaintiff contends her actions did not rise to the level of indignities, and therefore, did not constitute marital misconduct.

Plaintiff also argues the trial court did not make adequate findings regarding her earning capacity. The evidence at trial was that plaintiff earned \$10.00 per hour in a temporary assignment. Plaintiff had a bachelor's degree in history and a minor in economics and an interest in international commerce, but had not established a career in that field. The trial court found that "[p]ursuit of employment in her field of interest, international commerce, has been one cause of her underemployment. She will need time to get into a career position that will pay her a better wage." Plaintiff concedes, however, that the trial court did determine her earning capacity to a point, as it found she was 43 years old, had a college degree, and suffered no physical limitations.

Plaintiff believes the trial court did not indicate which factors in N.C. Gen. Stat. § 50-16.3A(b) it relied upon to reduce her alimony award, and did not state that alimony was being reduced. She believes the trial court considered her failure to preserve the marriage an indignity (and hence marital misconduct), and used it to reduce her alimony award. She further contends the trial court did not make adequate findings of fact (as it is required to do by N.C. Gen. Stat. § 50-16.3A(c)) on either her alleged marital misconduct or on the subject of her earning capacity. These shortfalls, plaintiff argues, amounted to reversible error.

Defendant argues, and we agree, that plaintiff wrongly assumes the trial court awarded a reduced amount of alimony. Upon review

of the record, we discern nothing that supports plaintiff's argument on that point, nor does the record reflect that the trial court's consideration of her "emotional shut down/out" outweighed the trial court's fifteen other findings of fact regarding alimony. Even assuming the trial court "reduced" plaintiff's alimony and the reduction was made solely based on plaintiff's "emotional shut down/out," defendant contends the reduction is proper, because plaintiff not only withheld her love and affection, but also constructively abandoned him by actively, physically, and emotionally estranging herself from him during the last five years of their marriage. Defendant points to *Ellinwood v. Ellinwood*, 88 N.C. App. 119, 362 S.E.2d 584 (1987), which states that a willful failure to fulfill obligations of the marriage (such as love, affection, and concern) constitutes constructive abandonment, which is a form of marital misconduct, and in turn, supports a reduced alimony award. In the present case, defendant argues plaintiff's behavior is marital misconduct, which supports a reduced alimony award.

We note that the trial court's order for alimony and child support indicates that oral testimony was presented; however, that testimony was not provided in the record on appeal. Because there is no transcript of the testimony for this Court to review, "the [trial] court's findings of fact are presumed to be supported by competent evidence." *Fellows v. Fellows*, 27 N.C. App. 407, 408, 219 S.E.2d 285, 286 (1975). Based on the record before us, we cannot say the trial court committed reversible error in this case.

Accordingly, plaintiff's first assignment of error is overruled.

II.

By her second assignment of error, plaintiff contends the trial court committed reversible error because its alimony award was not supported by appropriate findings of fact and conclusions of law.

N.C. Gen. Stat. § 50-16.3A governs actions for alimony; section (b) dictates that "[t]he court shall exercise its discretion in determining the amount, duration, and manner of payment of alimony." In reaching an alimony award, the trial court must consider the sixteen factors set forth in section (b) and "make a specific finding of fact on each of the factors . . . if evidence is offered on that factor." N.C. Gen. Stat. § 50-16.3A(b), (c). Furthermore, N.C. Gen. Stat. § 50-16.3A(c) states that "[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."

Plaintiff introduced her financial affidavit at trial, which showed monthly needs and expenses of \$1,860.00 per month. The trial court awarded plaintiff \$1,100.00 per month in alimony, with annual reductions, until alimony finally terminated on 1 December 2005. Plaintiff contends the trial court erred because it did not make findings of fact regarding the amount or duration of the alimony, except to find that plaintiff's monthly expenses were "reasonable." Plaintiff admits the duration of alimony is a determination left to the sole discretion of the trial court. She

maintains, however, that there is no "starting point" from which to understand the trial court's alimony award. She contends there are no findings of fact regarding her earning capacity, no conclusions of law explaining the reduction in alimony, and no alimony amount stated in the conclusions of law. Lastly, plaintiff points to *Friend-Novorska v. Novorska*, 131 N.C. App. 867, 509 S.E.2d 460 (1998) (*Friend-Novorska I*) for the proposition that failure to make these findings of fact constitutes reversible error. We do not agree.

In *Friend-Novorska I*, the plaintiff-wife sought alimony and presented evidence that she needed over \$1,300.00 from her former husband "to maintain the standard of living to which she has become accustomed during the last several years of the marriage[.]'" *Friend-Novorska I*, 131 N.C. App. at 868, 509 S.E.2d at 461. When the trial court awarded her alimony in the sum of \$600.00 per month for 30 months, the plaintiff-wife appealed. A panel of our Court vacated and remanded the portions of the trial court's order regarding alimony and instructed the trial court to "make a new award of alimony and make specific findings justifying that award, both as to amount and duration." *Id.* at 871, 509 S.E.2d at 462. Upon remand, the trial court did not hear additional evidence regarding the plaintiff-wife's claim for alimony. The trial court's order contained additional findings of fact, but awarded the plaintiff-wife the same amount of alimony as before. The plaintiff-wife again appealed. *Friend-Novorska v. Novorska*, 143 N.C. App. 387, 545 S.E.2d 788, *aff'd*, 354 N.C. 564,

556 S.E.2d 294 (2001) (*Friend-Novorska II*).

In *Friend-Novorska II*, this Court addressed the plaintiff-wife's argument that the trial court's findings of fact did not support the amount and duration of its alimony award. In affirming the trial court's order, our Court noted the similarities between the statutory schemes for alimony and equitable distribution and stated:

[B]ecause the discretionary powers granted to the trial court in equitable distribution actions is [sic] similar to the discretion granted to the trial court in alimony actions, . . . we hold the findings of fact required to support the amount, duration, and manner of payment of an alimony award are sufficient if findings of fact have been made on the ultimate facts at issue in the case and the findings of fact show the trial court properly applied the law in the case. The findings of fact need not set forth the weight given to the factors in section 50-16.3A(b) by the trial court when determining the appropriate amount, duration, and manner of payment, as the weight given the factors is within the sound discretion of the trial court.

Id. at 395-96, 545 S.E.2d at 794 (footnote omitted). Thus, findings of fact concerning *some* of the factors in N.C. Gen. Stat. § 50-16.3A(b) support the amount, duration, and manner of payment of alimony. Absent an abuse of discretion, the trial court's decision will not be disturbed on appeal. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

In the present case, the trial court made findings of fact on at least nine of the sixteen factors in N.C. Gen. Stat. § 50-16.3A(b). The trial court need not cover each and every factor set

forth in the statute. Rather, findings of fact which clearly show the trial court is considering the appropriate factors will be deemed sufficient upon our review. See *Friend-Novorska II*, 143 N.C. App. 564, 556 S.E.2d 294. Given the fact that plaintiff had an earning capacity of at least \$10.00 per hour, the trial court could reasonably have determined that an \$1,100.00 award of alimony, coupled with her own income (even if she worked only part-time) was sufficient to enable plaintiff to meet her reasonable monthly expenses and maintain her lifestyle. Indeed, the same result was reached in *Friend-Novorska I* and was affirmed in *Friend-Novorska II*. We also believe the duration of the alimony award and its annual reductions are reasonable. The trial court found that plaintiff expressed a desire to work in international commerce, but "need[s] time to get into a career position that will pay her a better wage." The trial court's decision to award alimony on an annual reduction basis gave plaintiff time to get into a better paying position. Finally, we note that plaintiff cannot complain about the findings of fact or the underlying evidence because she did not provide a transcript of the trial court proceedings. See *Fellows*, 27 N.C. App. 407, 219 S.E.2d 285. Plaintiff's second assignment of error is overruled.

After examining the order in its entirety, we believe the trial court properly considered the factors set forth in N.C. Gen. Stat. § 50-16.3A(b) and correctly applied the law to the facts before it. Upon careful review of the proceedings and the arguments of the parties, we conclude the trial court's order was supported by the evidence and was reasonable in all respects. The order of the trial court is hereby

Affirmed.

Judges WALKER and BRYANT concur.

Report per Rule 30(e).