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NO. COA01-416

NORTH CAROLINA COURT OF APPEALS

Filed: 2 July 2002

ANNA SIMPSON HAYES,  
Plaintiff-Appellee,

v.

New Hanover County  
No. 97 CVD 4238

PHILLIP HAYES,  
Defendant-Appellant.

Appeal by defendant from judgment signed 15 November 2000 by Judge J.H. Corpening, II in District Court, New Hanover County. Heard in the Court of Appeals 19 February 2002.

*No brief filed for plaintiff-appellee.*

*Ray C. Blackburn, Jr. for defendant-appellant.*

McGEE, Judge.

Anna Simpson Hayes (plaintiff) and Phillip Hayes (defendant) were married on 11 June 1977. The parties separated on 25 August 1997 and were divorced on 9 October 1998. Plaintiff filed an action on 3 December 1997 seeking post separation support, alimony, child custody, child support, equitable distribution of marital and/or divisible property, and attorney's fees. The issues of post separation support, child custody and child support were resolved prior to trial. The remaining issues were tried on 10 June 1999. This appeal only involves plaintiff's claim for alimony.

At trial, the evidence tended to show that plaintiff was

employed by the Pender County Board of Education as the finance officer at Burgaw Middle School, that defendant had been self-employed as the owner-operator of Shiloh Travel Service since 1990, and that defendant had an ownership interest in Old Southern Cooking d/b/a Dilsey's Restaurant (Old Southern Cooking). Evidence at trial also showed that defendant paid personal expenses out of the Shiloh Travel Service business account and also made large contributions to his church. Documentary evidence introduced at trial included the parties' joint and individual tax returns, plaintiff's financial standing affidavit, and a summary of defendant's business and personal expenses.

Following the trial, the trial court entered an order signed 15 November 2000 that included the following pertinent findings of fact, which defendant challenges as not supported by competent evidence in the record:

34. Since 1996, the Defendant has had an interest with his brother, in a restaurant in Pender County known as Old Southern Cooking, d/b/a Dil[s]ey's Restaurant.

. . .

40. Although the Defendant contends that he does not make much money from his businesses, the Court finds that the Defendant's contentions are unreasonable, given the fact that:

- A. A significant amount of money passes through his hands each month[.]
- B. The Defendant pays all of his living expenses from his business accounts.
- C. The Defendant takes "care of"

Floyd Robinson from his business account, disbursing \$10,565.40 for the use and benefit of Mr. Robinson from his business account in the year 1997 according to the Defendant's own records.

- D. The Defendant pays significant amounts of money to or for the use and benefit of Shiloh Baptist Church . . . as shown by his "Summary of Personal Expenses" . . . .

41. Although the value of the Defendant's ownership of Shiloh Travel Service, and the value of Defendant's part-ownership of Old Southern Cooking are not before the Court, and the Court makes no indication as to its opinion, if any, as to the value of these two businesses, it is clear, and the Court finds, that each of these businesses provides a substantial income stream to the Defendant each month, and that the income the Defendant may derive from each of these businesses is entirely in his discretion as to Shiloh Travel Service and substantially in his discretion as to Old Southern Cooking.

The trial court's conclusions of law, challenged by defendant as not supported by competent evidence, included:

10. The amount of alimony herein ordered is reasonable and necessary under the present circumstances of the parties, taking into account such amounts as the Court has found are necessary so as to meet the reasonable needs of the Plaintiff for her subsistence, having due regard to the estates, earnings, conditions, accustomed standard of living of the parties, and the other facts in this case as found hereinabove.

11. The Defendant is fully capable of providing alimony to the Plaintiff as ordered herein.

The trial court ordered defendant to pay plaintiff permanent

alimony in the amount of \$1,300.00 per month. Defendant was also ordered to pay to plaintiff the sum of \$22,100.00 "by way of retroactive periodic permanent alimony payment[.]" Defendant appeals.

Defendant first argues that the trial court erred in its findings of fact as to alimony because they are not supported by competent evidence in the record. Specifically, defendant contests the trial court's findings on his income, estate and earning capacity.

In an action for alimony, "the 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) (1999). In an order awarding or denying alimony, the trial court "shall 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(c) (1999). These findings must be "'sufficiently specific to indicate that the trial judge properly considered each of the factors . . . for a determination of an alimony award.'" *Rhew v. Rhew*, 138 N.C. App. 467, 470, 531 S.E.2d 471, 473 (2000) (quoting *Lamb v. Lamb*, 103 N.C. App. 541, 545, 406 S.E.2d 622, 624 (1991) (quoting *Skamarak v. Skamarak*, 81 N.C. App. 125, 128, 343 S.E.2d 559, 561 (1986))).

"Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there

is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto."

*Quick v. Quick*, 305 N.C. 446, 458, 290 S.E.2d 653, 661 (1982) (quoting *Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980)). If supported by competent evidence, the trial court's findings of fact are conclusive on appeal, notwithstanding that evidence has been offered at trial to the contrary. *Spencer v. Spencer*, 133 N.C. App. 38, 43, 514 S.E.2d 283, 287 (1999). The issue in this case is whether there is a gap between the evidence presented at trial and the findings of fact made by the trial court.

Defendant argues that "[t]here is no evidence of any 'substantial income stream' to the [d]efendant" from Old Southern Cooking. We agree with defendant that findings of fact numbers 40 and 41, with regard to Old Southern Cooking, are unsupported by evidence in the record. There is no evidence in the record that "[a] significant amount of money [from Old Southern Cooking] passes through [defendant's] hands each month" as the trial court found. There was no testimony at trial from either party regarding defendant's monthly income from Old Southern Cooking and the trial court made no specific findings as to defendant's monthly income and/or expenses from Old Southern Cooking. The evidence shows that in tax year 1996, defendant earned wages from Old Southern Cooking in the amount of \$14,788.00, which defendant reported as his total income for the year. Defendant testified he had a \$9,829.00 tax loss that year for the restaurant.

In tax year 1997, the evidence shows that defendant earned wages from Old Southern Cooking in the amount of \$18,876.00, with his total income for the year being \$23,499.00. The evidence shows that defendant took a tax loss of \$18,077.00 that year for the restaurant. There is no evidence of wages or losses from Old Southern Cooking after tax year 1997.

Further, there is no evidence in the record to support the trial court's finding that the income defendant derives from Old Southern Cooking is substantially within his discretion. Although defendant owned an interest in Old Southern Cooking, there was no testimony from either party that defendant has substantial discretion in the income he receives from the restaurant. In fact, defendant testified that he had not participated in restaurant operations for a period of two and one-half years. Findings of fact numbers 40 and 41 with regard to Old Southern Cooking are not supported by competent evidence in the record.

Defendant next argues the trial court erred in finding that defendant could receive substantial income from Shiloh Travel Service because the evidence in the record does not support this finding. First, there is no evidence in the record to support the trial court's finding that "[a] significant amount of money passes through [defendant's] hands each month[,]" because there was no testimony by either party as to any monthly income defendant receives from Shiloh Travel. The evidence shows, and the trial court found, that with regard to Shiloh Travel, in tax year 1994 defendant reported gross receipts of \$141,193.93, and losses of

\$15,637.57. In tax year 1995, defendant reported \$151,399.00 in gross receipts with a profit of \$3,312.00. In tax year 1996, defendant reported \$299,612.00 in gross receipts with a loss of \$204.00. Also, in tax year 1997, defendant testified to receiving \$599,000.00 in receipts, with a profit of \$4,623.00. Finally, in tax year 1998, defendant had gross receipts totaling \$573,144.00 and losses totaling \$12,490.00. Defendant testified that he only had one banking account out of which he paid personal as well as business expenses. In 1998, his personal expenses, including donations, totaled \$33,006.13. None of this evidence supports a finding as to defendant's "significant" *monthly* income stream.

The evidence at trial, however, does support the trial court's finding that defendant "pays all of his living expenses" from his Shiloh Travel business account because defendant testified to that fact at trial. Further, the evidence also supports the trial court's finding that defendant takes "care of" Floyd Robinson from his Shiloh Travel business account. The evidence at trial showed that Floyd Robinson was an employee of defendant's at Shiloh Travel and left that employment in May 1998. In 1997, defendant paid Floyd Robinson's Bell South bill, City of Wilmington bill and child support bill and testified that "[a]ll of that was deducted from as salary." In 1997, defendant paid Floyd Robinson \$10,555.40.

Finally, the evidence in the record does support the trial court's finding that defendant pays significant amounts of money to or for Shiloh Baptist Church from his business account.

We find that finding of fact number 40 is not supported by

competent evidence, in part, and finding of fact number 41 is not supported by competent evidence. Because we are unable to determine what weight the trial court gave to each of these findings when concluding that the amount of monthly alimony awarded was reasonable and that defendant is "fully capable of providing alimony to plaintiff in the amount of \$1300.00 per month," we must reverse and remand the trial court's order. *Alvarez v. Alvarez*, 134 N.C. App. 321, 327, 517 S.E.2d 420, 424 (1999).

Finally, defendant argues in his brief to our Court that the trial court failed to make specific findings as to the relative earnings and earning capacities of the spouses, as well as the amount and sources of earned and unearned income pursuant to N.C. Gen. Stat. § 50-16.3A(b) (2) and (4) (1999). However, we are unable to review these contentions on appeal because in his assignment of error on appeal, defendant only contends that the findings of fact were not supported by competent evidence, and does not challenge the sufficiency of the findings. N.C.R. App. P. 10 ("[T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this [r]ule.").

We reverse the order of the trial court and remand the matter for new findings of fact supported by the evidence in the record.

Reversed and remanded.

Judges GREENE and THOMAS concur.

Report per Rule 30(e).