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NO. COA01-908

NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2002

STEVEN D. TEMPLETON,
Plaintiff-Appellant,

v.

Durham County
No. 97-CVD-1679

LYNN D. TEMPLETON,
Defendant-Appellee.

Appeal by plaintiff from order entered 19 April 2001 by Judge Ann E. McKown in District Court, Durham County. Heard in the Court of Appeals 27 March 2002.

Poe, Hoof & Reinhardt, by Martha New Milam; and Daniel B. Hill, for plaintiff-appellant.

Maxwell, Freeman & Bowman, P.A., by John A. Bowman, for defendant-appellee.

McGEE, Judge.

Steven D. Templeton (plaintiff) and Lynn D. Templeton (defendant) were married on 12 August 1972. The parties separated on 6 May 1996 and were divorced on 1 August 1997. There were three children born of the marriage. Throughout most of the marriage, plaintiff was the primary wage earner for the household. Plaintiff worked at Central Carolina Bank for approximately twenty years and was terminated from his employment on 21 March 1997. Plaintiff relocated to Alabama and remarried. Plaintiff resigned from his position at Compass Bank in Alabama after nineteen months and was

unemployed for four months. He began working for Southtrust Bank in Alabama in August 1999 but resigned in December 1999 for health reasons. Defendant was a teacher until 1981, when she left work to be a full-time homemaker. After the parties separated, defendant began working at Triangle United Way.

Following the separation, plaintiff and defendant had an oral agreement regarding support to be paid by plaintiff to defendant. Defendant remained in the marital home with two of the three children. The oldest child was enrolled in college and lived on campus during the academic year.

The parties submitted a memorandum of judgment to the trial court on 24 July 1997, which provided for a continuation of the support the parties had agreed to during the previous year. This order was modified in December 1997. The issues of alimony and equitable distribution were tried on 22 and 23 February 2000. Counsel for both parties worked on drafts for proposed orders through the end of 2000. The trial court entered an order and judgment for the equitable distribution of property and for alimony on 19 April 2001. Plaintiff appeals from this order.

I.

Plaintiff argues the trial court erred in failing to characterize as advances on defendant's share of the marital estate, those funds paid by him to or on behalf of defendant after the date of separation and prior to entry of a court order for spousal support and/or post-separation support. We disagree.

Plaintiff directs this Court to *Cobb v. Cobb*, 107 N.C. App.

382, 420 S.E.2d 212 (1992) in support of his argument. In *Cobb*, the husband made several payments to the wife after the date of separation. There was never any written agreement as to what these payments represented, and the trial court concluded the payments were advances on the wife's share of equitable distribution. This Court affirmed, noting that there "was never an order of alimony pendente lite, permanent alimony, or child support" nor was there any evidence the husband "wanted to make a gift of these payments" to the wife. *Id.* at 385, 420 S.E.2d at 213. In *Cobb*, because there was not an order for support, the Court's only choices were to classify the payments as advances or as a gift.

However, in the case before us, there was an agreement between the parties that the money plaintiff paid defendant was for spousal support and for child support. This agreement was formalized in an order on 24 July 1997. Therefore, we hold plaintiff's reading of *Cobb* is inapplicable, and the trial court properly concluded the payments should not be considered an advance on defendant's share of the marital estate.

II.

Plaintiff next argues the trial court erred by characterizing the post-separation appreciation of portions of retirement funds as passive appreciation and then treating the appreciation as marital property. Plaintiff contends the 1997 amendment to the Equitable Distribution Act, which added the concept of divisible property, is inapplicable to this case because the parties asserted their claims prior to the amendment's enactment date of 1 October 1997.

Plaintiff therefore argues this case should be decided under the pre-amendment law that post-separation appreciation of marital property was neither marital nor separate and was to be considered as a distributional factor. See *Truesdale v. Truesdale*, 89 N.C. App. 445, 366 S.E.2d 512 (1988).

Rather than distributing the sums representing the [post-separation] appreciation, the trial court must consider the existence of this appreciation, determine to whose benefit the increase in value will accrue, and then consider that benefit when determining whether an equal or unequal distribution of the marital estate would be equitable.

Gum v. Gum, 107 N.C. App, 734, 738, 421 S.E.2d 788, 790 (1992).

In the case before us, the trial court considered the post-separation appreciation of the retirement funds as a distributional factor, but also divided the appreciation between the parties. In the trial court's order under the heading "Distributional Factors[,] " the trial court stated it "considered evidence presented to support each party's claims for an unequal distribution of marital assets as follows[.]" The trial court then listed six detailed factors relating to the distribution of property. Under "Any other Factor" the trial court considered post-separation appreciation of the retirement account:

The Court finds that, if the Schwab IRAs are divided between the parties, the increases in the values of marital assets since DOS may benefit both parties. But, the benefit to the Plaintiff will be greater than the benefit to the Defendant because he is receiving a larger share of this asset.

After a consideration of all distributional factors, the trial court divided the marital estate fifty-four percent to defendant

and forty-six percent to plaintiff. The retirement account was divided fifty-five percent to plaintiff and forty-five percent to defendant. However, the appreciation or growth in the retirement account since the date of separation was also divided, fifty-five percent to plaintiff and forty-five percent to defendant. A trial court, under the earlier version of N.C. Gen. Stat. § 50-20 which applies to this case, could not "divide and distribute the amount of post-separation increase." *Fox v. Fox*, 114 N.C. App 125, 130, 441 S.E.2d 613, 616-17 (1994); see also *Truesdale*, 89 N.C. App. 445, 366 S.E.2d 512. "[I]nsofar as the judgment of the trial court attempts to do so, it is erroneous and is reversed." *Wall v. Wall*, 140 N.C. App. 303, 311, 536 S.E.2d 647, 652 (2000). Therefore, we reverse the judgment of the trial court dividing any increase in value of the retirement account since the date of separation. We remand for the trial court to consider any appreciation or increase in value of the retirement account as a distributional factor in making its overall equitable distribution. However, in accordance with *Fox* and *Truesdale*, interpreting the earlier version of N.C. Gen. Stat. § 50-20, the trial court is not permitted to divide and distribute the amount of post-separation increase.

III.

Plaintiff next argues the trial court erred by considering the estate and expenditures of plaintiff's second wife in making its determination that an equal distribution of marital property was not equitable. We disagree.

The "distribution of marital property is within the sound

discretion of the trial court and will not be overturned absent an abuse of discretion." *O'Brien v. O'Brien*, 131 N.C. App. 411, 416, 508 S.E.2d 300, 304 (1998), *disc. review denied*, 350 N.C. 98, 528 S.E.2d 365 (1999). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

In the case before us, the trial court considered numerous factors and made extensive findings of fact in determining that an equal division of property was inequitable. The trial court included twenty statements in its finding that the unequal income potential of the parties was a distributional factor supporting an unequal distribution in favor of defendant. One of the twenty statements was that plaintiff's current wife owns four homes and plaintiff and his current wife had recent travel expenditures paid for at his current wife's expense. We fail to see how this statement, under the finding that the parties' unequal income potential was a distributional factor supporting an unequal distribution for defendant, results in an abuse of discretion by the trial court. We overrule this assignment of error.

IV.

Plaintiff next argues the trial court erred in that its alimony award is not supported by sufficient findings of fact and conclusions of law. Plaintiff also argues the finding of fact that defendant's share of defendant's fixed household expenses should be

two-thirds instead of one-half is contrary to the evidence presented.

Whether a spouse is entitled to alimony is reviewable by this Court *de novo*; the amount of alimony awarded is reviewable by this court under an abuse of discretion standard. *Barrett v. Barrett*, 140 N.C. App. 369, 371, 536 S.E.2d 642, 644 (2000). Pursuant to N.C. Gen. Stat. § 50-16.3A(a) (1999), "a party is entitled to alimony if three requirements are satisfied: (1) that 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* at 371, 536 S.E.2d at 644. The parties stipulated plaintiff was a supporting spouse and defendant was a dependant spouse. Plaintiff does not assign error as to whether defendant was entitled to alimony; furthermore, we find the trial court's findings of fact to be sufficient to support its conclusion of law that an award of alimony would be equitable.

Plaintiff, however, does argue the amount of the alimony award was in error. Again, we note this issue is reviewable by this Court under an abuse of discretion standard. "The determination of what constitutes the reasonable needs and expenses of a party in an alimony action is within the discretion of the trial judge, and [the trial judge] is not required to accept at face value the assertion of living expenses offered by the litigants themselves." *Whedon v. Whedon*, 58 N.C. App. 524, 529, 294 S.E.2d 29, 32, *disc. review denied*, 306 N.C. 752, 295 S.E.2d 764 (1982). The trial court may resort to its "own common sense and every-day experiences

in calculating the reasonable needs and expenses of the party." *Bookholt v. Bookholt*, 136 N.C. App. 247, 250, 523 S.E.2d 729, 731 (1999).

Plaintiff argues the trial court erred in adjusting defendant's reasonable share of household expenses from one-half of the total to two-thirds of the total expenses. However, the trial court is not bound by the expenses put forth by the parties, but can substitute its own judgment. It was not an abuse of discretion for the trial court to adjust defendant's share of the total household expenses.

Plaintiff also argues that by excluding a bonus defendant received in 1999 and by deducting defendant's contribution to a retirement account, the trial court did not consider the appropriate total income for defendant. However, the bonus defendant received in a previous year was not guaranteed in future years. Therefore, it was within the discretion of the trial court to exclude that amount from an assessment of defendant's income. Furthermore, while a trial court must consider defendant's total income for purposes of an alimony award, the trial court has the discretion to state what reasonable expenses a party may have. The trial court determined the retirement contribution was a reasonable expense for defendant.

Plaintiff also argues there was insufficient evidence for the trial court to make a finding plaintiff depressed his income in bad faith. "Alimony is ordinarily determined by a party's actual income, from all sources, at the time of the order." *Kowalick v.*

Kowalick, 129 N.C. App. 781, 787, 501 S.E.2d 671, 675 (1998). In order for a trial court to "base an alimony obligation on earning capacity rather than actual income, the trial court must first find that the party has depressed [his or her] income in bad faith." *Id.*, citing *Wachacha v. Wachacha*, 38 N.C. App. 504, 509, 248 S.E.2d 375, 378 (1978)). "Evidence of intent such as 'bad faith' generally can be proven, if at all, only by circumstantial evidence." *Wachacha*, 38 N.C. App. at 509, 248 S.E.2d at 378. In the case before us, the trial court made a finding of bad faith, and there is competent evidence to support this finding. We overrule this assignment of error.

V.

Plaintiff next argues the trial court erred in depriving plaintiff of due process of law by taking fourteen months from the date the trial was concluded to enter a written judgment for equitable distribution. We disagree. Plaintiff relies on *Wall*, 140 N.C. App. at 314, 536 S.E.2d at 654, which held a delay of nineteen months was more than a *de minimis* delay. However, plaintiff offers only speculative possibilities as to how plaintiff's situation may have changed and as a result how plaintiff was prejudiced by this delay. We therefore dismiss this assignment of error.

Affirmed in part and remanded in part.

Judges WALKER and CAMPBELL concur.

Report per Rule 30(e).