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NO. COA09-1203

NORTH CAROLINA COURT OF APPEALS

Filed: 19 October 2010

MARY B. WEBB,  
Plaintiff,

v.

Alamance County  
No. 02 CVD 2363

GEORGE TRAVERS WEBB, III,  
Defendant.

Appeal by defendant from orders entered 22 January 2008 and 1 June 2009 by Judge James K. Roberson in Alamance County District Court. Heard in the Court of Appeals 10 February 2010.

*Walker & Bullard, P.A., by Daniel S. Bullard, for plaintiff-appellee.*

*Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene, Tobias S. Hampson, and Edward Eldred, for defendant-appellant.*

STEELMAN, Judge.

Where evidence in the record established that plaintiff had an income-expense deficit each month and that defendant had an income-expense surplus each month, the trial court properly classified plaintiff as a dependent spouse and defendant as a supporting spouse. The trial court's fifty-seven findings of fact were sufficient to demonstrate the trial court's consideration of the statutory factors in N.C. Gen. Stat. § 50-16.3A(b) as to the amount, duration, and manner of payment of alimony. Where the trial court miscalculated the amount of income generated by the

apartment complex owned by Webb and Associates, this case must be remanded for the trial court to consider whether this affects the amount of alimony awarded to plaintiff. Although plaintiff had \$75,000.00 available at the time of the hearing, she was not required to substantially deplete her estate to pay attorney's fees. The trial court properly awarded her partial attorney's fees.

#### I. Factual and Procedural Background

Mary B. Webb (plaintiff) and George Travers Webb, III (defendant) were married on 13 March 1982 and separated on 19 October 2002. Three children were born of the marriage. On 24 October 2002, plaintiff filed a complaint against defendant seeking divorce from bed and board, child custody and support, post-separation support, permanent alimony, equitable distribution, interim distribution of marital assets and indebtedness, a temporary injunction, and attorney's fees. Defendant filed an answer and sought equitable distribution and the dismissal of plaintiff's claims for post-separation support and alimony. On 4 March 2003, the trial court awarded plaintiff \$4,000.00 a month in post-separation support and \$2,174.00 a month in child support. In May 2003, the trial court entered an order approving the parties' parenting agreement.

In May 2006, defendant filed a motion for reduction of child support. In July 2006, plaintiff filed a motion seeking to have defendant held in contempt for failing to pay child support and failing to maintain health insurance. Plaintiff also requested

attorney's fees. Defendant filed a motion alleging overpayment of post-separation support and child support. In October 2006, a consent order was entered on equitable distribution. A hearing was conducted over sixteen days during a three month period on the issue of alimony, plaintiff's motion for contempt,<sup>1</sup> and defendant's motion for modification of child support. On 22 January 2008, the trial court entered an order concluding that plaintiff was a dependent spouse and defendant was a supporting spouse, and that plaintiff was entitled to alimony and an award of attorney's fees. The trial court awarded plaintiff permanent alimony of \$5,000.00 a month. If defendant received bonuses or other compensation from his employer over and above his regular salary of \$200,000.00 per year, his alimony payments would be increased, but not to exceed \$97,608.00 per calendar year. Defendant appealed this order.

On 5 May 2009, this Court dismissed defendant's appeal as interlocutory because plaintiff's claim for attorney's fees was still pending before the trial court. *See Webb v. Webb*, 196 N.C. App. 770, 677 S.E.2d 462 (2009). On 1 June 2009, the trial court entered an order awarding plaintiff attorney's fees in the amount of \$40,000.00. Defendant appeals the orders entered 22 January 2008 and 1 June 2009.

## II. Permanent Alimony

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<sup>1</sup> Plaintiff's motion for contempt had been withdrawn by the time the trial court's order was filed.

In his first argument, defendant contends the trial court did not make sufficient findings of fact to enter an award of alimony pursuant to N.C. Gen. Stat. § 50-16.3A. We disagree.

Standard of Review

We review the trial court's determination on whether a party is entitled to alimony *de novo*. *Barrett v. Barrett*, 140 N.C. App. 369, 371, 536 S.E.2d 642, 644 (2000). If a party is entitled to alimony, a determination is made as to the amount of alimony to be awarded. We review this inquiry for an abuse of discretion. *Id.*

Dependent and Supporting Spouse Classification

N.C. Gen. Stat. § 50-16.3A(a) (2007) provides, in part, that "[t]he 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, including those set out in subsection (b) of this section." A dependent spouse is defined as "a spouse, whether husband or wife, 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) (2007). A supporting spouse is defined as "a spouse, whether husband or wife, upon whom the other spouse is actually substantially dependent for maintenance and support or from whom such spouse is substantially in need of maintenance and support." N.C. Gen. Stat. § 50-16.1A(5) (2007).

Plaintiff as Dependent Spouse

Our Supreme Court has held that "actually substantially dependent" means "the spouse seeking alimony must have actual dependence on the other in order to maintain the standard of living in the manner to which that spouse became accustomed during the last several years prior to separation." *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E.2d 849, 854 (1980) (emphasis omitted). "[T]o properly find a spouse dependent the court need only find that the spouse's reasonable monthly expenses exceed her monthly income and that the party has no other means with which to meet those expenses." *Beaman v. Beaman*, 77 N.C. App. 717, 723, 336 S.E.2d 129, 132 (1985) (citation omitted); *see also Helms v. Helms*, 191 N.C. App. 19, 22, 661 S.E.2d 906, 909, *disc. review denied*, 362 N.C. 681, 670 S.E.2d 233 (2008); *Barrett*, 140 N.C. App. at 372, 536 S.E.2d at 645; *but see Knott v. Knott*, 52 N.C. App. 543, 546, 279 S.E.2d 72, 75 (1981) ("[A] mere comparison of plaintiff's expenses and income is an improperly shallow analysis.").

In the instant case, the trial court found that plaintiff's reasonable monthly expenses, measured by the standard of living to which she had become accustomed, exceeded \$9,000.00 per month. Plaintiff's net monthly income was \$866.00. The trial court specifically found that "[p]laintiff needs a monthly payment of alimony in the amount in excess of \$9,000.00, less her monthly net income of \$866 (\$8,134 per month = \$97,608 per year), in order to maintain the standard of living she enjoyed during the several years prior to and leading up to the separation of the parties." Thus, plaintiff had an income-expense deficit of \$8,134.00 per

month. This supports the trial court's classification of plaintiff as a dependent spouse. See *Barrett*, 140 N.C. App. at 372, 536 S.E.2d at 645. In addition, the trial court considered plaintiff's earning capacity, her role as the primary homemaker during the course of the marriage, and made specific findings regarding the monies she was awarded in equitable distribution. The trial court properly classified plaintiff as a dependent spouse pursuant to N.C. Gen. Stat. § 50-16.1A(2).

Defendant as Supporting Spouse

Evidence that one spouse is dependent does not necessarily infer the other spouse is the supporting spouse. *Williams*, 299 N.C. at 186, 261 S.E.2d at 857. "A surplus of income over expenses is sufficient in and of itself to warrant a supporting spouse classification." *Barrett*, 140 N.C. App. at 373, 536 S.E.2d at 645. In the instant case, the trial court found that defendant's net annual income was \$165,298.00 and his net monthly income was \$13,775.00. The trial court found that defendant's reasonable expenses, measured by the standard of living to which he had become accustomed, exceeded \$9,000.00 per month. Defendant's Affidavit of Financial Standing listed his current monthly expenses to be in excess of \$11,000.00. However, the trial court found that "[s]ome of the defendant's listed expenses, such as \$708 monthly (\$8,496 annually) for clothes, shoes, and accessories, and \$270 monthly for personal expenses in addition to groceries and household supplies (\$3,240 annually), are not reasonable under the Defendant's current

financial situation." Defendant's income-expense surplus supports the conclusion that defendant is a supporting spouse. *Id.*

Amount, Duration, and Manner of Payment of Alimony

In determining whether to award alimony, the trial court must also consider the relevant sixteen factors set forth in N.C. Gen. Stat. § 50-16.3A(b). N.C. Gen. Stat. § 50-16.3A(a). N.C. Gen. Stat. § 50-16.3A(b) (2007) provides that "[t]he court shall exercise its discretion in determining the amount, duration, and manner of payment of alimony. The duration of the award may be for a specified or for an indefinite term." In determining the amount, duration, and manner of payment of alimony, the trial court must make a specific finding of fact on each of the factors in subsection (b) if evidence is offered on that factor. N.C. Gen. Stat. § 50-16.3A(c) (2007). "The trial court must at least make findings sufficiently specific to indicate that the trial judge properly considered each of the factors . . . for a determination of an alimony award." *Lamb v. Lamb*, 103 N.C. App. 541, 545, 406 S.E.2d 622, 624 (1991) (quotation omitted).

The trial court addressed these factors in finding of fact 48 and its subparts:

48. In considering the amount of alimony and the method of payment, the Court has considered all of the admissible evidence presented by the parties, including, but not limited to, the following:

A. N.C.G.S. 50-16.3A(b) (1): The marital misconduct of either of the parties. The Court finds that the Defendant has engaged in adultery on numerous occasions during the marriage and prior to the separation of the parties, and was

engaged in an adulterous relationship at the time of the separation of the parties.

B. N.C.G.S. 50-16.3A(b) (2): The relative earnings and earning[] capacities of the parties as set forth herein.

C. N.C.G.S. 50-16.3A(b) (3): The ages and physical, mental, and emotional conditions of the spouses. The Plaintiff is 47 years of age and is generally in reasonably good physical condition. The Defendant is 51 years of age and is generally in reasonably good physical condition. The Court recognizes that each party has certain physical ailments about which each testified.

D. N.C.G.S. 50-16.3A(b) (4): The amount and sources of income of both spouses as set forth and considered herein.

E. N.C.G.S. 50-16.3A(b) (5): The duration of the marriage, which was over twenty years as of the date of separation.

F. N.C.G.S. 50-16.3A(b) (6): The contribution by the Plaintiff to the increased earning power of the Defendant through her maintenance of the household and the care provided to her children which enable the Defendant to devote significant time to his career and earning potential.

G. N.C.G.S. 50-16.3A(b) (8): The standard of living of the spouses established during the marriage, as set forth herein.

H. N.C.G.S. 50-16.3A(b) (9): The fact that the Plaintiff was out of the mainstream workforce for a significant period of time during the marriage, and it will take for her [sic] to attempt to achieve training for better opportunities in the job market.

I. N.C.G.S. 50-16.3A(b) (10): The relative assets and liabilities of the parties and the relative debt service requirements of the spouses, including the legal



obligations of each to support the minor child.

J. N.C.G.S. 50-16.3A(b) (11): The property brought into the marriage by either party.

K. N.C.G.S. 50-16.3A(b) (12): The contributions of the parties as homemakers. The Court finds that the Plaintiff primarily served this role during the marriage and provided care for the home and children throughout the twenty years of marriage of the parties.

L. N.C.G.S. 50-16.3A(b) (13): The relative needs of the parties as testified to by the parties and as found herein.

M. N.C.G.S. 50-16.3A(b) (14): The federal, State, and local tax ramifications of the alimony award, including the testimony of accountant Hunter Webb and the federal and State income tax schedules for 2006 which were entered into evidence.

N. N.C.G.S. 50-16.3A(b) (7): The Court does not find that the Plaintiff's earning[] power and expenses are affected by her role as the primary custodian of the minor child, and the time required during the week to serve as such custodian for the minor child.

O. N.C.G.S. 50-16.3A(b) (15): Other factors relating to the economic circumstances of the parties as set forth herein.

Defendant contends that "this recitation alone is insufficient to establish the trial court's consideration of these factors." Defendant first argues that the trial court failed to consider evidence of plaintiff's marital misconduct. This is incorrect. Defendant points to 57 pages of transcript wherein defendant describes the parties' contentious relationship. The trial court found that "Plaintiff has on occasion insulted and disparaged the

Defendant. The Plaintiff has told the Defendant that he did not measure up to other family members." The trial court also specifically found that "Defendant alleged, upon information and belief, that the Plaintiff committed adultery. The Court finds that the Plaintiff did not commit adultery." The trial court considered defendant's allegations of adultery and did not find them to be credible.

Defendant next argues that the trial court failed to consider evidence of the standard of living of the parties during the marriage. However, the trial court made findings of fact that both plaintiff's and defendant's reasonable monthly expenses, measured by the standard of living to which he or she had become accustomed, exceeded \$9,000.00 per month. The trial court further found that:

Defendant has the means and ability to pay \$5,000 in alimony per month to the Plaintiff. The Court recognizes that this award does not fully meet the Plaintiff's needs to maintain the standard of living enjoyed at the time of separation, and also does not allow the Defendant to meet the standard of living enjoyed at the date of separation. This award requires each party to reduce their standard of living and is fair and reasonable.

The trial court's findings of fact establish that it properly considered the parties' standard of living during the marriage.

Defendant also challenges subparts I, J, L, M, and O as merely a recitation of the evidence. However, the trial court's other 56 findings of fact demonstrate that the trial court fully considered these factors.

We hold that the trial court's findings of fact were sufficient to demonstrate the trial court's consideration of the

statutory factors in N.C. Gen. Stat. § 50-16.3A(b). This argument is without merit.

Defendant also argues that the trial court erred in making alimony permanent without provision for its termination in the event of defendant's death. However, N.C. Gen. Stat. § 50-16.9(b) (2007) expressly states that "[p]ostseparation support or alimony shall terminate upon the death of either *the supporting* or the dependent spouse." Therefore, the trial court's omission is without consequence.

### III. Imputed Income

In his second argument, defendant contends the trial court erred in attributing the income of two additional companies as direct income to defendant. We disagree.

Defendant argues that the trial court "merely assigned the earnings of [defendant's] businesses to [d]efendant as his own personal income" and challenges the following findings:

37. That the apartment complex owned by Webb and Associates had no mortgage on it at the time the Defendant purchased the other ½ interest. Based upon the defendant's most recent tax return, which was for calendar year 2004, after deducting all expenses from the gross rents produced by the apartments, excluding depreciation, the apartment complex produced approximately \$3,270.00 in monthly income for the Defendant.

38. That the Defendant is a fifty percent owner of a limited liability company called Webb Brothers, LLC. The other fifty percent owner is the defendant's brother, Kelly Webb. Webb Brothers, LLC owns the land and building which houses certain expansion of the Meredith-Webb facilities. Meredith-Webb, pursuant to the terms of a lease agreement with Webb Brothers, LLC, is responsible for

payment of all expenses related to the operation and repair of such facility, with the exception of major structural repairs which might be necessary. In addition, Meredith-Webb pays to Webb Brothers, LLC the sum of \$16,000.00 per month as rent. Webb Brothers, LLC pays a mortgage, secured by this real property, in the amount of \$12,259.80 per month. The Defendant and his brother pay the entire \$16,000 rent payment toward the monthly mortgage, thereby voluntarily contributing additional funds monthly to pay down the mortgage further. The Defendant derives approximately \$1,870.10 per month in income on the land and building. This does not include depreciation. This also does not include the principle reduction resulting from the regular monthly payment.

"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) (citation omitted and emphasis added)).

At the time of the hearing, defendant owned 99% of Webb and Associates and 50% of Webb Brothers, LLC. Defendant cannot discount these monies because they were first funneled through a corporation. It is clear that the trial court considered all of the income defendant received in calculating an appropriate amount of alimony. The trial court did not "impute" income to defendant. However, plaintiff concedes that the trial court miscalculated the amount of income generated by the apartment complex owned by Webb and Associates. The trial court found that the apartments produce \$3,270.00 per month when the correct amount is \$2,958.00, a difference of \$312.00 per month. This case must be remanded in order for the trial court to consider whether this miscalculation affects the amount of alimony awarded to plaintiff.

Defendant also contends that the trial court failed to consider the payment on the \$890,000.00 loan taken by defendant before trial to purchase the other half of the apartment complex. However, finding of fact 36 specifically states:

Subsequent to entry of the October 20, 2006 Consent Judgment/Order, the Defendant purchased the other ½ interest of Webb and Associates from the other owner of the partnership, and now owns 99% of such partnership, with his current wife having a 1% ownership. The Defendant obtained a loan for \$890,000.00 to, among other things, purchase such other interest. This loan is secured by the real property (Colonial Arms Apartments) owned by Webb and Associates, as well as some other properties owned by the Defendant. From these funds the Defendant also paid the distributive award to the Plaintiff and paid certain of [sic] the marital debt he was allocated. . . .

Finding of fact 36 is sufficient to show the trial court considered the loan in its determination. This argument is without merit.

#### IV. Additional Alimony

In his third argument, defendant contends that the trial court erred in awarding plaintiff additional alimony of one-half of any payments in excess of his \$200,000.00 current salary base. We disagree.

The trial court ordered:

If the Defendant receives a bonus, dividend or other payment from Meredith-Webb in excess of his current regular salary of \$200,000 per year, the Defendant will pay directly to the Plaintiff ½ of the gross amount of such payment to Plaintiff as alimony within thirty days of receipt, but in no event will the total of alimony payments to the Plaintiff exceed \$97,608 in a calendar year.

Defendant challenges this directive as being erroneous as a matter of law on the bases that (1) there was no competent evidence that defendant's actual income at the time of the hearing included a bonus and (2) the trial court failed to make a finding that he was deliberately depressing his income in bad faith to avoid his alimony obligation.

In North Carolina, it is well-established that "[u]nless the court finds that a supporting spouse is deliberately depressing his income in disregard of his marital obligation to provide reasonable support, and applies the 'capacity to earn' rule, a supporting spouse's ability to pay alimony is ordinarily determined by his income at the time the award is made." *Whedon v. Whedon*, 58 N.C. App. 524, 527, 294 S.E.2d 29, 32, *disc. review denied*, 306 N.C. 752, 295 S.E.2d 764 (1982); *see also Megremis v. Megremis*, 179 N.C. App. 174, 182, 633 S.E.2d 117, 123 (2006) ("Ordinarily, alimony is determined by a party's actual income at the time of the alimony order. It is well-established that a trial court may consider a party's earning capacity only if the trial court finds the party acted in bad faith." (citations omitted)).

A review of the evidence before the trial court shows that Meredith-Webb is a family-owned printing business. The major stockholders are as follows: defendant (23%); defendant's brother (23%); and defendant's father (51%). The remaining 4% was split between defendant's and defendant's brother's children. Defendant was a salesman and made a significant income from 1999 until 2006 working for the company: \$419,128.00 in 1999; \$326,924.51 in 2000;

\$484,190.00 in 2001; \$339,196.03 in 2002; \$187,162.42 in 2003; \$180,187.08 in 2004; \$619,721.48 in 2005; and \$200,000.00 in 2006. Defendant's income consisted of a base salary and commission until 2006. In 2003 and 2004, defendant earned commissions, but was not paid the commissions until 2005. At the end of 2005, before the alimony hearing, the Board of Directors set the salary for defendant as \$200,000.00, with a bonus of 10% of the net earnings of the corporation. Defendant asserted at the hearing that he did not receive a bonus for 2006. Defendant's income was essentially cut in half. The Board of Directors consisted of George Webb, Jr. (father), Betty Webb (mother), defendant, Kelly Webb (brother), and Dean Daniels. Defendant and his family control when and how much he is paid in salary.

The requirement of a finding of bad faith in order to support an award based upon earning capacity rather than actual income is not applicable to the specific facts of this case. Defendant works for a closely held family corporation, where he has substantial input as to his own compensation. At the time of the entry of the alimony award, defendant's income was not just his base salary of \$200,000.00, but rather that sum, plus a bonus of 10% of the net earnings of the corporation. The trial court held that plaintiff's reasonable needs were \$97,608.00 annually, but that upon defendant's base salary, he could only afford to pay \$5,000.00 per month, or \$60,000.00 per year in alimony. This left an annual shortfall of \$37,608.00 in alimony. It was not unreasonable for the trial court to order defendant to pay one-half of any bonus as

additional alimony, up to a total sum of \$97,608.00 annually. The trial court's cap on additional alimony limited the payments to the plaintiff's actual needs. The trial court's order was based upon defendant's actual income for any given year, and it was not required to make findings of bad faith on the part of defendant.

This argument is overruled.

#### V. Attorney's Fees

In his fourth argument, defendant contends that the trial court erred by awarding plaintiff partial attorney's fees. We disagree.

N.C. Gen. Stat. § 50-16.4 (2007) provides, "At any time that a dependent spouse would be entitled to alimony pursuant to G.S. 50-16.3A, . . . the court may, upon application of such spouse, enter an order for reasonable counsel fees for the benefit of such spouse, to be paid and secured by the supporting spouse in the same manner as alimony." In order to establish that a spouse is entitled to attorney's fees they must be "(1) the dependent spouse, (2) entitled to the underlying relief demanded (e.g., alimony and/or child support), and (3) without sufficient means to defray the costs of litigation." *Barrett*, 140 N.C. App. at 374, 536 S.E.2d at 646. Our holdings above dispose of the first two requirements. We therefore focus upon whether plaintiff was without sufficient means to defray the costs of litigation. "This means the dependent spouse must be unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit." *Larkin v. Larkin*, 165 N.C. App. 390, 398,



598 S.E.2d 651, 656 (2004), *aff'd per curiam as modified*, 359 N.C. 316, 608 S.E.2d 754 (2005). Defendant argues that the trial court failed to make findings of fact as to plaintiff's present income and ignored evidence of assets plaintiff had available to her to employ adequate counsel, including a \$217,000.00 cash distributive award, a \$250,000.00 IRA, and an additional \$350,000.00 from defendant's 401K.

As stated above, the trial court made extensive findings on plaintiff's income and found that she had a income-expenses deficit of over \$8,000.00 per month. The trial court also entered findings regarding the monies plaintiff received as a result of equitable distribution. The sum of \$242,359.00 was transferred from defendant's retirement account to plaintiff. She placed the money into a rollover IRA on 28 December 2005. An additional distribution of \$350,000.00 from defendant's 401K plan was ordered, but at the time of the hearing it had not been distributed. Plaintiff was awarded a cash distributive award in the amount of \$217,000.00. Plaintiff paid various debts and expenses, including \$65,392.00 on her mortgage and \$56,000.00 in attorney's fees. The trial court found that at the time of the hearing plaintiff had approximately \$75,000.00 remaining. The trial court also found that defendant had paid no post-separation support since June 2006 with the exception of \$4000.00. An arrearage was established in the amount of \$91,000.00. The trial court determined that "[p]laintiff is an interested party without sufficient resources to fully defray the cost of this action . . . ."

Although plaintiff had \$75,000.00 available at the time of the hearing, she is not required to substantially deplete her estate to pay attorney's fees. See *Cobb v. Cobb*, 79 N.C. App. 592, 596-97, 339 S.E.2d 825, 828 (1986) (holding it would be contrary to the intent of the legislature to require one seeking an award of attorney's fees to meet the expenses of litigation through the unreasonable depletion of her separate estate). The trial court's findings of fact support its determination that plaintiff was without sufficient means to fully defray the cost of the action. This argument is without merit.

AFFIRMED IN PART; REMANDED IN PART.

Judges MCGEE and BEASLEY concur.

Report per Rule 30(e).