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NO. COA10-1438

NORTH CAROLINA COURT OF APPEALS

Filed: 4 October 2011

DAVID S. COUICK,  
Plaintiff,

v.

Union County  
No. 08 CVD 211

KATHY L. COUICK,  
Defendant.

Appeal by defendant from order entered 9 March 2010 by Judge Christopher W. Bragg in Union County District Court. Heard in the Court of Appeals 11 April 2011.

*Stepp Lehnhardt Law Group, P.C., by Donna B. Stepp and Penelope L. Hefner, for plaintiff-appellee.*

*James, McElroy & Diehl, P.A., by Amy E. Simpson, for defendant-appellant.*

GEER, Judge.

Defendant Kathy L. Couick appeals from an order addressing permanent child custody, child support, and her motion for attorneys' fees. While we disagree with defendant's contentions regarding the trial court's calculation of plaintiff David S.

Couick's child support obligation, we agree with defendant that the trial court failed to make sufficient findings of fact to support its denial of her motion for attorneys' fees. We, therefore, affirm in part and reverse and remand in part for further findings of fact regarding defendant's motion for attorneys' fees.

#### Facts

Plaintiff and defendant married on 15 May 1993. They had three children during the marriage, born in 1995, 1996, and 2001. Plaintiff was the primary income earner during the marriage and, at the time of the parties' separation, had an average gross monthly income of \$7,170.00. From 1996 through 2002, defendant was a full-time homemaker. In 2003, defendant started a massage therapy business named Stillwaters Massage Therapy, Inc. Defendant has never shown a profit from her massage therapy business.

On 20 September 2007, defendant informed plaintiff that she wanted to separate and end the marriage. On 22 January 2008, plaintiff filed a complaint seeking, among other things, temporary custody of the minor children and child support. On 24 March 2008, defendant filed an answer and counterclaims, also asserting claims for custody of the minor children and child support (as well as claims for relief not relevant here).

Plaintiff and defendant formally separated on 2 May 2008, when defendant left the former marital residence pursuant to an agreement reached by the parties through counsel. On 9 May 2008, defendant filed a motion asking, among other things, that the trial court deviate from the North Carolina Child Support Guidelines ("Guidelines").

After plaintiff filed his complaint, but before plaintiff and defendant legally separated, plaintiff sold shares of stock in one company for \$214,248.00 and moved the proceeds from the sale into accounts in his own name. He also liquidated \$24,088.00 worth of other investments and closed the parties' only joint bank account. From these proceeds, on 1 February 2008, he paid \$12,277.80 to Metrolina Christian Academy for the children's tuition for the 2008-2009 school year and \$10,000.00 for the 2009-2010 school year.

Defendant presented evidence that she did not have access to any of these proceeds and that she sought assistance from her mother to hire legal counsel. Her mother took out a loan for \$40,000.00, she loaned the money to defendant, and defendant used the funds to hire counsel to represent her in this matter.

On 17 July 2008, plaintiff paid defendant an interim distribution of \$50,000.00 and on 27 August 2008, a second interim distribution of \$10,000.00. Defendant presented

evidence that she repaid her mother out of these funds, but that she then ended up borrowing another \$40,000.00 from her mother in order to pay legal expenses.

The trial court entered a temporary order on 31 October 2008, awarding the parties joint legal and physical custody of the minor children and requiring plaintiff to pay defendant temporary child support in the amount of \$1,323.00 per month pursuant to the Guidelines. Prior to that date, the children had primarily resided with defendant and had visitation with plaintiff.

In November 2009, the trial court conducted a hearing on permanent child custody, permanent child support, and defendant's claim for attorneys' fees for the child custody and support proceedings. On 9 March 2010, the court entered an order on permanent child custody, child support, and attorneys' fees. The court found that it was in the best interests of the children that plaintiff and defendant be awarded joint legal and physical custody on a permanent basis.

The court then found that plaintiff had an average gross monthly income of \$6,463.00. While defendant contended that her gross monthly income was \$7.00, the trial court concluded that it was appropriate to impute income to her in the amount of

\$7.25 per hour (minimum wage) for 40 hours per week, which amounted to an average gross monthly income of \$1,256.00.

The trial court declined to deviate from the Guidelines and, using Worksheet B of the Guidelines, calculated plaintiff's child support obligation as \$560.60 per month. The court found that \$560.60 "is reasonable and does in fact meet the reasonable needs for the minor children herein."

With respect to defendant's motion for attorneys' fees, the trial court found that defendant was an interested party acting in good faith. It denied the motion, however, because it found that defendant had "sufficient assets by which she can defray her own costs, expenses, and attorney's fees in this case."

On 19 March 2010, defendant filed a motion pursuant to Rules 52 and 59 of the Rules of Civil Procedure, asking the court to take additional evidence, amend and make new findings of fact, and amend and make new conclusions of law or alternatively grant a new hearing. The trial court denied the motion on 1 July 2010. Defendant timely appealed to this Court.

#### Discussion

Defendant does not challenge the trial court's award of joint legal and physical custody or any of the provisions of the order regarding custody. On appeal, she limits her arguments to the trial court's refusal to deviate from the Guidelines, the

court's use of Worksheet B to calculate child support, and the court's denial of her motion for attorneys' fees. We address each issue in turn.

Child Support Guidelines

N.C. Gen. Stat. § 50-13.4(c1) (2009) directs the Conference of Chief District Judges to "prescribe uniform statewide presumptive guidelines for the computation of child support obligations of each parent." "Child support set in accordance with the Guidelines 'is conclusively presumed to be in such amount as to meet the reasonable needs of the child and commensurate with the relative abilities of each parent to pay support.'" *Beamer v. Beamer*, 169 N.C. App. 594, 596, 610 S.E.2d 220, 222-23 (2005) (quoting *Buncombe Cnty. ex rel. Blair v. Jackson*, 138 N.C. App. 284, 287, 531 S.E.2d 240, 243 (2000)).

N.C. Gen. Stat. § 50-13.4(c) provides with respect to the Guidelines:

The court shall determine the amount of child support payments by applying the presumptive guidelines established pursuant to subsection (c1) of this section. However, upon request of any party, the Court shall hear evidence, and from the evidence, find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support. If, after considering the evidence, the Court finds by the greater weight of the evidence that the application

of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate the Court may vary from the guidelines. If the court orders an amount other than the amount determined by application of the presumptive guidelines, the court shall make findings of fact as to the criteria that justify varying from the guidelines and the basis for the amount ordered.

As defendant points out, this Court has held that deviation from the Guidelines requires a four-step process:

First, the trial court must determine the presumptive child support amount under the Guidelines. N.C.G.S. § 50-13.4(c). Second, the trial court must hear evidence as to "the reasonable needs of the child for support and the relative ability of each parent to provide support." *Id.* Third, the trial court must determine, by the greater weight of this evidence, whether the presumptive support amount "would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate." *Id.*; Child Support Guidelines, 1999 Ann. R. N.C. 32 ("The Court may deviate from the Guidelines in cases where application would be inequitable to one of the parties or to the child(ren)."); *Brooker v. Brooker*, 133 N.C. App. 285, 290-91, 515 S.E.2d 234, [238] (1999). Fourth, following its determination that deviation is warranted, in order to allow effective appellate review, the trial court must enter written findings of fact showing the presumptive child support amount under the Guidelines; the reasonable needs of the child; the relative ability of each party to provide support; and that application of the Guidelines would exceed

or would not meet the reasonable needs of the child or would be "otherwise unjust or inappropriate." N.C.G.S. § 50-13.4(c); Child Support Guidelines, 1999 Ann. R. N.C. 32.

*Sain v. Sain*, 134 N.C. App. 460, 465-66, 517 S.E.2d 921, 926 (1999).

Defendant contends that the trial court erred in failing to make the findings of fact required by the four-part test. With respect to the four-part test, however, *Sain* establishes that findings are only required "following [the trial court's] determination that deviation is warranted." *Id.* at 466, 517 S.E.2d at 926. Since, in this case, the trial court chose not to deviate from the Guidelines, the findings of fact at step four of the *Sain* test were not necessary. See *Head v. Mosier*, 197 N.C. App. 328, 337-38, 677 S.E.2d 191, 198 (2009) (holding that four-step process "is applied only after a trial court decides to deviate" and when trial court decides not to deviate, it is not "obligated to apply a four-step process, take any evidence, make any findings of fact, or enter any conclusions of law relating to the reasonable needs of the child for support and the relative ability of each parent to pay or provide support").

Defendant, however, argues that *Buncombe County* holds that effective appellate review also requires findings to support a



denial of a party's request for deviation. The father in *Buncombe County* was required to pay child support pursuant to the Guidelines that was equal to 66% of his gross income. *Buncombe Cnty.* 138 N.C. App. at 289, 531 S.E.2d at 244. This Court did not hold that the four-part *Sain* test applies to a decision not to deviate, but rather it reversed and remanded because "the order of the trial court does not reveal any findings as to whether the support set pursuant to the Guidelines would exceed, meet, or fail to meet the reasonable needs of the children, or whether support set pursuant to the Guidelines would be unjust or inappropriate." *Id.* (internal quotation marks omitted). The Court instructed the trial court on remand that "any order entered must ensure that [the father] has 'sufficient income to maintain a minimum standard of living based on the 1997 federal poverty level for one person.'" *Id.* at 289-90, 531 S.E.2d at 244 (quoting N.C. Child Support Guidelines, 2000 Special Supp. at R-2).

The findings required by the *Buncombe County* Court are those required by N.C. Gen. Stat. § 50-13.4(c), which provides that if asked to deviate from the Guidelines, the trial court must hear evidence and "find the facts relating to the reasonable needs of the child for support and the relative ability of each parent to provide support." Here, the trial

court made specific findings regarding the parties' incomes and payments made by plaintiff for health insurance and tuition (payments totaling \$1,513.00 per month). It then found further:

9. Pursuant to Worksheet B of the North Carolina Child Support Guidelines, the Plaintiff's obligation to pay child support to the Defendant is \$560.60 per month.

10. The Court finds that \$560.60 as calculated using Worksheet B of the North Carolina Child Support Guidelines is reasonable and does in fact meet the reasonable needs for the minor children herein.

11. The Defendant has shown no good cause as to why this Court should deviate from the calculation of guideline child support in this case.

The trial court's findings demonstrate that the court determined the presumptive amount of child support, heard evidence regarding the children's needs and the ability of the parents to provide support, and determined that the presumptive Guidelines provided reasonable support for the children. The findings regarding income and the lack of "good cause" for deviation relate to the ability of each parent to provide support. We hold that these findings of fact adequately satisfy N.C. Gen. Stat. § 50-13.4(c) and support the trial court's decision not to deviate from the Guidelines.

Defendant further challenges the trial court's refusal to deviate by citing evidence favoring deviation. A trial court's

"determination as to the proper amount of child support will not be disturbed on appeal absent a clear abuse of discretion, i.e. only if manifestly unsupported by reason.'" *Row v. Row*, 185 N.C. App. 450, 461, 650 S.E.2d 1, 8 (2007) (quoting *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 644, 507 S.E.2d 591, 593 (1998)). Defendant's argument relies on the disparity between her income -- ignoring the trial court's imputation of income to her -- and plaintiff's income. The presumptive child support rate calculated under the Guidelines, however, already takes into account the parties' disparate incomes, as well as adjusting for expenses directly paid by each parent. Defendant's arguments do not demonstrate that the trial court's decision to use the presumptive rate was manifestly unreasonable.

Defendant next argues that even if the trial court could properly decide not to deviate from the Guidelines, the trial court nonetheless did not make sufficient findings of fact to establish that Worksheet B was the proper worksheet for calculating plaintiff's child support obligation. Worksheet B is used for joint custody situations when the children live with each parent for at least 123 nights during the year and each parent assumes financial responsibility for the children's expenses while with that parent. N.C. Child Support Guidelines,

2011 Ann. R. N.C. 53. Defendant contends that the trial court did not make findings of fact that the children spent at least 123 nights a year with each parent.

While defendant is correct that the order contains no finding regarding the number of nights the children spent with each parent, the worksheet itself requires that the trial court specify the "OVERNIGHTS with each parent (must total 365 x total number of children)." AOC-CV-628, Rev. 10/06. The order states that Worksheet B "is attached hereto and incorporated herein by specific reference." However, Worksheet B was omitted from the record -- it appears neither in the Record on Appeal nor in the exhibits.

As this Court has previously noted, "[w]hether the court enters a child support order determined under the Guidelines or deviates from the Guidelines, a copy of the worksheet used to determine a parent's presumptive child support obligation should be attached to the child support order, incorporated by reference in the child support order, or included in the case record. An appellant should include the Guidelines worksheet in the record on appeal." *Head*, 197 N.C. App. at 337, 677 S.E.2d at 198. "It is the appellant's duty to insure that the record is properly prepared and transmitted." *Sloan v. Sloan*, 87 N.C. App. 392, 397-98, 360 S.E.2d 816, 820 (1987).

Because defendant has failed to include Worksheet B in the record, we are unable to review this issue on appeal. See *Hodges v. Hodges*, 147 N.C. App. 478, 483 n.1, 556 S.E.2d 7, 10 n.1 (2001) ("We note the record to this Court fails to include the Guidelines worksheet used by the trial court in determining the child support. Thus, we are unable to determine with certainty the amount placed in the Defendant's gross income column.").

Defendant next contends that although the trial court included the cost incurred by plaintiff in providing health insurance for the children and paying their tuition in calculating plaintiff's basic child support amount, the trial court erred in not requiring that the parties share the uninsured medical expenses of the minor children in the same proportion to their incomes. On this issue, the trial court ordered:

18. Each party shall be responsible for his or her pro rata percentage of uninsured medical, dental, optometric, orthodontic, prescription, and other expenses incurred on behalf of the minor children herein. Specifically, the Plaintiff will be responsible for 84% of such uninsured expenses and the Defendant will be responsible for 16% of such uninsured expenses incurred on behalf of the minor children after the Defendant pays the first \$250 of all such expenses per calendar year. The party incurring the uninsured expense will thereafter send written proof

of such expense to the other party within thirty (30) days of the receipt of the bill for such expense. The party receiving notice shall pay his or her respective percentage of such expense to the other party within thirty (30) days.

Defendant complains that while the order purports to require pro rata sharing of the expenses, the sharing is not in fact pro rata because defendant must pay the first \$250.00 of expenses.

Defendant has, however, overlooked the applicable provisions of the Guidelines. The Guidelines explain that "[t]he child support schedule that is a part of the guidelines is based on economic data which represent adjusted estimates of average total household spending for children between birth and age 18, excluding child care, health insurance, *and health care costs in excess of \$250 per year.*" N.C. Child Support Guidelines, 2011 Ann. R. N.C. 50 (emphasis added). The Guidelines then specify that "[t]he amount that is, or will be, paid by a parent . . . for health . . . insurance for the children for whom support is being determined is added to the basic child support obligation and prorated between the parents based on their respective incomes." *Id.* at 53. With respect to uninsured medical expenses, however, the Guidelines provide: "In any case, . . . the court may order that *uninsured medical or dental expenses in excess of \$250 per year* or other uninsured health care costs . . . be paid by either parent or both parents

in such proportion as the court deems appropriate." *Id.* (emphasis added).

The trial court, therefore, had discretion to proceed precisely as it did. Apart from defendant's complaint that \$250.00 was excluded from the pro rata calculation, defendant has made no showing that the trial court's order constituted an abuse of discretion. *Holland v. Holland*, 169 N.C. App. 564, 571-72, 610 S.E.2d 231, 236-37 (2005) ("Given the wide discretion afforded our trial courts in matters concerning the allocation of uninsured medical or dental expenses, then, such decisions cannot be disturbed on appeal absent a manifest abuse of discretion.").

Defendant also challenges the trial court's decision to include school tuition as an extraordinary expense while not including other expenses associated with school, such as books, fees, and field trips. The Guidelines provide that "[o]ther extraordinary child-related expense" such as "expenses related to special or private elementary or secondary schools to meet a child's particular educational needs" may be added to the basic child support obligation "and ordered paid by the parents in proportion to their respective incomes if the court determines the expenses are reasonable, necessary, and in the child's best interest." N.C. Child Support Guidelines, 2011 Ann. R. N.C. 53.

Defendant first argues that the trial court failed to find that the private school tuition was "reasonable, necessary, or in the children's best interest," as required by the Guidelines. However, in *Biggs v. Greer*, 136 N.C. App. 294, 298, 524 S.E.2d 577, 582 (2000), the trial court included private school expenses as extraordinary expenses but did not make a specific finding that the expenses were "'necessary for the children's welfare.'" This Court concluded, in light of the circumstances and the fact that the objecting party acknowledged the expenses were "'extraordinary expenses,'" that "we cannot say that the trial court's deeming, as opposed to finding as fact, those expenses to be necessary for the children's welfare, Child Support Guidelines, was manifestly unsupported by reason." *Id.* at 299-300, 524 S.E.2d at 582-83 (internal quotation marks omitted).

Similarly here, defendant does not argue that the private school tuition was not an extraordinary expense -- rather, she argues that other expenses related to school should have been included. We, therefore, hold, under *Biggs*, that the trial court's decision to include the tuition as an extraordinary expense was not an abuse of discretion. In addition, we do not find manifestly unreasonable the trial court's decision not to



include as extraordinary expenses routine school expenses not specifically related to the private school education.

Attorneys' Fees

Defendant contends that the trial court failed to make sufficient findings of fact to support the court's denial of her request for attorneys' fees. Pursuant to N.C. Gen. Stat. § 50-13.6 (2009):

In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; provided however, should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable attorney's fees to an interested party as deemed appropriate under the circumstances.

Here, the sole finding of fact addressing defendant's request for attorneys' fees stated: "Defendant is an interested party acting in good faith; however, she has sufficient assets by which she can defray her own costs, expenses, and attorney's

fees in this case." Based on this finding, the court "in its discretion, denie[d] an award of attorney's fees for the Defendant as the same relates to child custody and child support."

When a party makes a request for attorneys' fees and the trial court denies the request, it must make findings of fact adequate to enable this Court to review the denial. *Gowing v. Gowing*, 111 N.C. App. 613, 620, 432 S.E.2d 911, 915 (1993) (holding that trial court erred by failing to make any findings of fact to support its denial and only ordering that request was denied). Defendant, in this case, argues that the trial court's findings are not sufficient to allow this Court to review whether the trial court properly determined that she had sufficient "means to defray the expense of the suit," as set out in N.C. Gen. Stat. § 50-13.6.

This Court has previously determined that "[i]t would be contrary to what we perceive to be 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 where her separate estate is smaller than that of the other party." *Cobb v. Cobb*, 79 N.C. App. 592, 596-97, 339 S.E.2d 825, 828 (1986). Here, the trial court pointed to defendant's "assets" as providing the necessary means, but did

not identify the assets to which it was referring. The order addresses only defendant's income, which -- after imputing income at the minimum wage level -- the trial court found to be an average gross monthly income of \$1,256.00.

The order contains no findings regarding what other assets defendant has or why those assets are sufficient to meet the expenses of litigation without unreasonably depleting defendant's separate estate. See *Lawrence v. Tise*, 107 N.C. App. 140, 153-54, 419 S.E.2d 176, 185 (1992) (reversing denial of request for attorneys' fees as unsupported by evidence when party's "income from her law practice [was] not sufficient to pay her legal expenses, and she [was] not required to deplete her small estate in order to pay these expenses"); *Cobb*, 79 N.C. App. at 597, 339 S.E.2d at 828-29 (upholding award of attorneys' fees when plaintiff had no liquid assets and her actual income did not meet her living expenses).

In the absence of such findings, we cannot determine whether the trial court properly exercised its discretion, consistent with this Court's prior decisions, in determining that defendant had sufficient means to defray the expenses of this litigation. While plaintiff proposes various theories for why the trial court denied the motion for attorneys' fees, we

cannot tell from the order whether those theories were in fact the basis for the trial court's decision.

We, therefore, reverse the denial of the request for attorneys' fees and remand for further findings of fact. See *Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005) (holding that even with respect to discretionary decisions, "[t]he trial court must, however, make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law"). We express no opinion on the merits of defendant's request for attorneys' fees, and we leave to the discretion of the trial court whether to make the findings of fact based on the existing record or whether to hear additional evidence.

Affirmed in part; reversed and remanded in part.

Chief Judge MARTIN and Judge ELMORE concur.

Report per Rule 30(e).