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NO. COA11-162  
NORTH CAROLINA COURT OF APPEALS

Filed: 6 December 2011

JAMES MICHAEL RUSSO,  
Plaintiff,

v.

Craven County  
No. 08 CVD 504

DEIRDRE ELIZABETH RUSSO,  
Defendant.

Appeal by plaintiff from order entered 2 September 2010 by Judge Joyce A. Hamilton in Craven County District Court. Heard in the Court of Appeals 17 August 2011.

*Chesnutt, Clemmons & Peacock, P.A., by Carolyn T. Peacock, for plaintiff-appellant.*

*Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson; and Green & Wilson, P.A., by Kelly L. Greene and Thomas R. Wilson, for defendant-appellee.*

GEER, Judge.

Plaintiff James Michael Russo appeals from an order denying his motion for termination of alimony based on the alleged cohabitation of his former wife, defendant Deirdre Elizabeth Russo. The standard of review is dispositive of this appeal: the trial court's findings of fact support its conclusions of

law and those findings of fact are in turn based on sufficient evidence in the record. We therefore affirm the trial court's order.

#### Facts

The Russos married on 30 May 1998, separated on 23 March 2007, and divorced on 3 June 2008. At the time of their separation, the Russos entered into a separation agreement that was later incorporated into the trial court's divorce judgment. The separation agreement required Mr. Russo to pay Ms. Russo, among other things, \$3,000.00 per month in alimony from 24 March 2007 until 20 September 2022. Mr. Russo's obligation to pay alimony would terminate if Ms. Russo remarried or cohabited.

On 30 November 2009, Mr. Russo filed a motion, pursuant to N.C. Gen. Stat. § 50-16.9, to terminate or, alternatively, to modify his alimony obligation based on his claim that Ms. Russo was cohabitating with Bryan Fisher. Ms. Russo's response denied that she and Mr. Fisher were cohabitating.

Following an evidentiary hearing, the trial court entered an order on 2 September 2010 denying Mr. Russo's motion. In support of its conclusion that Ms. Russo had not been cohabitating, the trial court found that while Ms. Russo and Mr. Fisher had engaged in a primarily exclusive sexual relationship from March 2009 to June 2010 and Mr. Fisher had stayed overnight

at Ms. Russo's home two to three nights per week during October and November 2009, he had spent the night with Ms. Russo on an infrequent basis during the remainder of the relationship. The trial court further found that during the relationship, Mr. Fisher continued to live with his parents and since August 2009 (after he had worked for three to four months out of town), he had spent the majority of his time at his parents' home. Mr. Fisher kept his clothes at his parents' house, he showered there, and he ate his meals there.

The trial court found that no one had observed Ms. Russo and Mr. Fisher showing any display of love and affection towards each other. According to the trial court's findings, the two did not exchange gifts or purchase items without being reimbursed for money spent. Ms. Russo and Mr. Fisher did not share bills or financial obligations and did not have a joint checking account. Mr. Fisher did not have a key to Ms. Russo's residence or his own key to Ms. Russo's car. When other people were present at Ms. Russo's house, Mr. Fisher would, at times, call Ms. Russo before coming over, and he would knock or ring the doorbell before entering.

At some point during October and November 2009, a private investigator found in Ms. Russo's garbage a Western Union money transfer receipt showing money sent by Ms. Russo to Mr. Fisher

(a neighbor had given Ms. Russo the money for tile work that Mr. Fisher did for the neighbor). No other mail addressed to Mr. Fisher was found, although the garbage did contain a paper hat similar to one Mr. Fisher wore at work.

The nanny for the Russos' children observed men's clothes and shoes in Ms. Russo's home during early September 2009, usually deposited in a pile beside the bed in the master bedroom or in the laundry hamper. When the nanny supervised Ms. Russo's visitation with the children, about three days a week, Mr. Fisher would be at the house or would call the house and arrive shortly after the nanny had arrived.

Although Ms. Russo purchased work clothes for Mr. Fisher on two occasions at yard sales, the clothes were for Mr. Fisher to use when he did yard work for Ms. Russo. Mr. Fisher helped Ms. Russo in maintaining her household by doing yard work, tending her dogs, taking out the trash, putting up Christmas lights, and handing out Halloween candy. He also did grocery shopping and purchased household items using Ms. Russo's money. Other than making a salad on one occasion and, on another, cutting up a chicken, he did not ever assist in meal preparation.

Ms. Russo allowed Mr. Fisher to drive her car after her driver's license was suspended due to a DWI conviction. Mr. Fisher would transport Ms. Russo to places that she needed to

go, but he also drove Ms. Russo's car without her being present with him. Ms. Russo had, however, also allowed other friends to use her car to run errands for her.

Mr. Fisher's parents went to Ms. Russo's home to visit with Mr. Fisher and his children in the summer or fall of 2009. In December 2009, Mr. Fisher's children spent the night at Ms. Russo's home, and Mr. Fisher's parents, as well as Ms. Russo's parents, had dinner at Ms. Russo's home during the Christmas holidays in 2009.

Based upon these findings of fact, the trial court determined that Mr. Russo had failed to prove that Ms. Russo and Mr. Fisher "dwelled together continuously and habitually in a private heterosexual relationship or that they voluntarily assumed those marital rights, duties, and obligations which are usually manifested by married people, as is required to prove cohabitation." The trial court, therefore, concluded that Mr. Russo had failed to show that Ms. Russo had cohabited denied Mr. Russo's motion to terminate alimony.

The trial court determined, however, that although Mr. Russo had the ability to pay Ms. Russo's attorneys' fees, Mr. Russo "had good cause for the filing of this motion even though he has failed to prove cohabitation," and Ms. Russo had failed to show that she was without adequate means to defray her

litigation expenses. The trial court, therefore, denied Ms. Russo's request for attorneys' fees. Mr. Russo timely appealed to this Court from the order denying his motion to terminate alimony.

#### Discussion

Our standard of review of the trial court's order requires us to determine "'whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.'" *Oakley v. Oakley*, 165 N.C. App. 859, 861, 599 S.E.2d 925, 927 (2004) (quoting *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992)). "If the court's factual findings are supported by competent evidence, they are conclusive on appeal, even though there is evidence to the contrary." *Lagies v. Myers*, 142 N.C. App. 239, 246, 542 S.E.2d 336, 341 (2001). A trial court's conclusions of law are reviewable de novo. *Wright v. T & B Auto Sales, Inc.*, 72 N.C. App. 449, 452, 325 S.E.2d 493, 495 (1985).

Mr. Russo contends, however, that even though we may be bound by findings of fact supported by competent evidence, we are not bound by the inferences that the trial court drew from those facts and from the evidence. In support of this contention, Mr. Russo relies upon our Supreme Court's holding in

*Heath v. Kresky Mfg. Co.*, 242 N.C. 215, 218, 87 S.E.2d 300, 302-03 (1955): "While this Court cannot question the facts found, it is not bound by the conclusions or inferences the trial court draws from them."

Subsequent to *Heath*, however, the Supreme Court adopted a different standard in *Knutton v. Cofield*, 273 N.C. 355, 160 S.E.2d 29 (1968), and *Hodges v. Hodges*, 257 N.C. 774, 127 S.E.2d 567 (1962). In *Hodges*, 257 N.C. at 779, 127 S.E.2d at 571, the Supreme Court held that "it was in [the trial judge's] province to determine the credibility of the witnesses and the weight to be attached to their testimony, and the inferences legitimately to be drawn therefrom, in exactly the same sense that a jury should do in the trial of a case." When "different reasonable inferences can be drawn from the evidence, the determination of which reasonable inferences shall be drawn is for the trial judge." *Id.*

Consequently, a trial judge is entitled, after considering all the evidence, to draw "'inferences as [are] reasonable and proper under the circumstances, even though another different inference, equally reasonable, might also be drawn therefrom.'" *Id.* at 780, 127 S.E.2d at 571 (quoting *Main Realty Co. v. Blackstone Valley Gas & Electric Co.*, 59 R.I. 29, 193 A. 879, 886 (1937)). See also *Knutton*, 273 N.C. at 359, 160 S.E.2d at

33 (holding that, in a bench trial, "[i]f different inferences may be drawn from the evidence, [the trial judge] determines which inferences shall be drawn and which shall be rejected"). Consequently, we cannot accept Mr. Russo's invitation that we revisit the inferences drawn by the trial judge in this case.

N.C. Gen. Stat. § 50-16.9(b) (2009) governs Mr. Russo's motion to terminate alimony and provides in pertinent part that "[i]f a dependent spouse who is receiving postseparation support or alimony from a supporting spouse under a judgment or order of a court of this State remarries or engages in cohabitation, the postseparation support or alimony shall terminate." The statute defines cohabitation as

the act of two adults dwelling together continuously and habitually in a private heterosexual relationship, even if this relationship is not solemnized by marriage, or a private homosexual relationship. Cohabitation is evidenced by the voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people, and which include, but are not necessarily dependent on, sexual relations.

*Id.*

Our Supreme Court has held that a finding of cohabitation demands evidence of both (1) two adults "'dwelling together continuously and habitually'" and (2) a "'voluntary mutual assumption of those marital rights, duties, and obligations



which are usually manifested by married people.'" *Bird v. Bird*, 363 N.C. 774, 779-80, 688 S.E.2d 420, 423 (2010) (quoting N.C. Gen. Stat. § 50-16.9(b)). Here, the trial court determined that Mr. Russo failed to show either that Ms. Russo and Mr. Fisher had continuously and habitually dwelled together or that they had assumed those marital rights, duties, and obligations that are usually manifested by a married couple.

With respect to the requirement that Ms. Russo and Mr. Fisher have dwelled together continuously and habitually, the trial court acknowledged that Ms. Russo and Mr. Fisher had a sexual relationship for 15 months that was exclusive on the part of Ms. Russo and exclusive until "recently" on the part of Mr. Fisher. The trial court further found, however, that Mr. Fisher never moved into Ms. Russo's house, but rather maintained an active residence with his parents and stayed overnight at Ms. Russo's home "on an infrequent basis" with the exception of a two-month period (October and November 2009) when he spent two to three nights per week there. As further support for its determination that Mr. Fisher did not dwell with Ms. Russo, the trial court noted that Mr. Fisher called before going over to Ms. Russo's house, he did not have his own key to her residence or car, and his mail was not found at her residence.

Mr. Russo, however, points to the trial court's findings that the nanny saw Mr. Fisher's clothes at Ms. Russo's house, that a private investigator observed Mr. Fisher spending the night at Ms. Russo's house on multiple occasions, and that the private investigator found other evidence of Mr. Fisher's presence at Ms. Russo's house. Those findings were not, however, inconsistent with the trial court's findings regarding the frequency of Mr. Fisher's overnight stays with Ms. Russo throughout their relationship and his continuing to maintain his residence with his parents -- findings that support the trial court's ultimate determination that Ms. Russo and Mr. Fisher did not abide together continuously and habitually.

Turning to the question whether Ms. Russo and Mr. Fisher voluntarily assumed "'those marital rights, duties, and obligations which are usually manifested by married people,'" *id.* (quoting N.C. Gen. Stat. § 50-16.9(b)), the trial court was required to consider the totality of the circumstances. See *Oakley*, 165 N.C. App. at 862, 599 S.E.2d at 928. Under the "totality of the circumstances" test, a court must evaluate "'all the circumstances of a particular case'" and "isolated factors no longer control." *Fletcher v. Fletcher*, 123 N.C. App. 744, 750, 474 S.E.2d 802, 806 (1996) (quoting Black's Law Dictionary 1490 (6th ed. 1990)).

In this case, the trial court found, on the one hand, that Mr. Fisher assisted Ms. Russo in the maintenance of her home such as by mowing the lawn, trimming the hedges, working on Ms. Russo's car, and doing grocery shopping. Mr. Fisher did not participate in any meal preparation other than making a salad once and cutting up a chicken once. Ms. Russo purchased Mr. Fisher clothing at yard sales on two occasions, visited Mr. Fisher when he was working out of town, allowed Mr. Fisher to use her cell phone and car, had Mr. Fisher's children stay with her, and had Mr. Fisher's parents over for dinner on two occasions.

On the other hand, the trial court found that Mr. Fisher maintained an active residence at his parent's home and that the parties did not share financial obligations, exchange gifts or purchase items for each other without being reimbursed for the money spent. Further, while the trial court found that Mr. Fisher used Ms. Russo's car, it further found that he had no car of his own, Ms. Russo's license had been suspended, and Ms. Russo allowed other friends to use her vehicle as well.

These findings regarding the totality of the evidence support the trial court's determination that Ms. Russo and Mr. Fisher had not assumed "those marital rights, duties, and obligations which are usually manifested by married people."

*Bird*, 363 N.C. at 779-80, 688 S.E.2d at 423 (quoting N.C. Gen. Stat. § 50-16.9(b)). While the trial court found that Ms. Russo and Mr. Fisher were engaging in some domestic activities, it did not find an assumption of marital rights and obligations extending beyond an intimate friendship and rising to the level of a married couple -- such as, for example, joint financial obligations, open displays of affection, sharing of a home, blending of finances, or consistent merging of families. See *Oakley*, 165 N.C. App. at 863, 599 S.E.2d at 928 ("As defendant in the instant case presented no evidence of activities beyond plaintiff's and Smith's sexual relationship and their occasional trips and dates, we see no assumption of any 'marital rights, duties, and obligations which are usually manifested by married people . . . ." (quoting N.C. Gen. Stat. § 50-16.9(b) (2003))). Compare *Rehm v. Rehm*, 104 N.C. App. 490, 492-93, 409 S.E.2d 723, 724 (1991) (upholding trial court's conclusion that cohabitation occurred based on trial court's finding of as many as five overnight stays per week, couple kissing goodbye at door, overnight trips together for more than one night (often including minor child), as well as trial court's finding that parties had exclusive monogamous relationship "for both sexual and regular domestic purposes").

The trial court's findings, in this case, regarding both statutory factors were, therefore, sufficient to support its conclusion that Ms. Russo did not cohabit with Mr. Fisher. However, Mr. Russo further argues that (1) certain of the trial court's findings of fact are not supported by competent evidence, (2) the trial court erred in failing to make other findings of fact, and (3) the trial court erred in drawing certain inferences or by improperly characterizing the evidence.

Based on our review of the record, while there may be evidence contradicting some of the findings, the record also contains evidence supporting those findings. They are, therefore, binding on appeal. See *Laughter v. Lambert*, 11 N.C. App. 133, 137, 180 S.E.2d 450, 452 (1971) ("[C]redibility, contradictions, and discrepancies are all matters to be resolved by the trier of the facts.").

Nonetheless, Mr. Russo contends that the findings of fact are not supported by competent evidence because that evidence was not "objective evidence," which Mr. Russo appears to define as being evidence from purportedly unbiased third parties or documentary evidence. It seems that Mr. Russo, in making this argument, has misunderstood this Court's analysis in *Oakley*.

In *Oakley*, this Court concluded that the standards employed in determining whether a separated couple had resumed marital

relations within the meaning of N.C. Gen. Stat. § 52-10.1 were "instructive in determining what constitutes marital rights, duties and obligations under N.C. Gen. Stat. § 50-16.9." 165 N.C. App. at 862, 599 S.E.2d at 928. The Court summarized the law under N.C. Gen. Stat. § 52-10.1:

Our courts use one of two methods to determine whether the parties have resumed their marital relationship, depending on whether the parties present conflicting evidence about the relationship. . . . In the first test, . . . where there is objective evidence, that is not conflicting, that the parties have held themselves out as man and wife, the court does not consider the subjective intent of the parties. . . . The other test grew out of the opinion in *Hand v. Hand*, 46 N.C. App. 82, 264 S.E.2d 597, *disc. rev. denied*, 300 N.C. 556, 270 S.E.2d 107 (1980), and addresses cases where the objective evidence of cohabitation is conflicting and thus allows for an evaluation of the parties' subjective intent.

*Id.* at 863, 599 S.E.2d at 928.

The reference to "objective evidence" in *Oakley* and subsequently in *Bird* does not place a limit on the source of the evidence that may be considered by the trial court, but rather directs the trial court to look at overt actions and behaviors (classified as objective evidence) rather than the parties' expressions of subjective intent regarding cohabitation. See *Bird*, 363 N.C. at 783, 688 S.E.2d at 425 (reviewing objective evidence of cohabitation such as overnight stays, man's moving

personal belongings into woman's home, man's home seeming vacant, and couple sharing chores and family activities; also noting, "[a]s evidenced by plaintiff and [her male friend's] denial of cohabitation, there is also a genuine dispute regarding the subjective intent of plaintiff and [her male friend] with respect to their relationship").

In this case, the trial court based its decision on objective evidence, within the meaning of *Oakley* and *Bird*. The court considered only evidence regarding Ms. Russo's and Mr. Fisher's behaviors and actions -- objective manifestations of whether the parties were cohabitating. The court did not make any findings regarding evidence of Ms. Russo's or Mr. Fisher's subjective intent -- in other words, whether they admitted or denied cohabitating. The court concluded that the objective facts -- as it had found them to be -- were sufficient to establish a lack of cohabitation without any consideration of subjective intent.

Next, with respect to Mr. Russo's contention that the trial court erred in failing to make certain findings, this Court has explained:

The trial court need not recite in its order every evidentiary fact presented at hearing, but only must make specific findings on the ultimate facts established by the evidence, admissions, and stipulations that are determinative of the questions raised in the

action and essential to support the conclusions of law reached.

*Mitchell v. Lowery*, 90 N.C. App. 177, 184, 368 S.E.2d 7, 11 (1988).

In this case, in some instances, Mr. Russo has argued only generally that the trial court disregarded "significant" testimony of a particular witness without identifying what portions of that testimony were overlooked or why those portions were material, especially in light of the other findings of fact. In any event, we cannot conclude that Mr. Russo's omitted findings are "determinative of the questions raised" or "essential to support the conclusions of law reached." *Id.*

Indeed, Mr. Russo's arguments primarily challenge the trial court's decisions regarding what weight to give the various pieces of evidence. It is, however, well established that "'it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal.'" *Megremis v. Megremis*, 179 N.C. App. 174, 182, 633 S.E.2d 117, 123 (2006) (quoting *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994)).

Likewise, Mr. Russo's final contention on appeal -- that the trial court erred in drawing certain inferences and in mischaracterizing the evidence -- asks us to disregard the standard of review. Based on our review of the record, the



claimed mischaracterizations amount simply to a disagreement regarding the inferences to be drawn from the evidence. Since the inferences are reasonable, the fact that the trial court could have drawn different inferences -- as urged by Mr. Russo -- is immaterial under our standard of review.

In sum, we hold that the trial court's findings of fact are properly supported by competent evidence and those findings in turn support the conclusions of law. Accordingly, we affirm the decision of the trial court denying Mr. Russo's motion to terminate or, alternatively, to modify alimony.

Affirmed.

Judges BRYANT and BEASLEY concur.

Report per Rule 30(e).