NO. COA01-1596

NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2002

EILEEN VIERA,
Plaintiff

v.

Wake County
No. 00 CVD 11702

JOSE VIERA,
Defendant

Appeal by defendant from an order entered 29 January 2001 by Judge Anne B. Salisbury in Wake County District Court. Heard in the Court of Appeals 18 September 2002.

Hatch, Little & Bunn, L.L.P., by Helen M. Oliver, for plaintiff-appellee.

Kurtz & Blum, PLLC, by Judy Y. Tseng, for defendant-appellant.

HUNTER, Judge.

Jose Viera ("defendant") appeals an order requiring him to pay child support, child support arrearage, a percentage of his child's medical and/or dental expenses, and attorney's fees to Eileen Viera ("plaintiff"). We affirm the court's order regarding defendant's financial obligations to his child; however, we vacate and remand the court's order regarding attorney's fees.

Plaintiff and defendant were married on or about 17 February 1973. There is a dispute as to whether the parties divorced in 1982. Nevertheless, a minor daughter was born to the parties on 29

September 1986, and they continued to live together until August of 2000. Plaintiff and defendant also have a son who has reached the age of majority.

During the time the parties resided together, defendant's annual income was substantially more than plaintiff's. In 1999, defendant's base salary was $63,000.00 a year as a computer analyst/programmer for Blue Cross/Blue Shield. As of March of 2000, plaintiff's base salary was $35,000.00 a year as an employee of UNC Healthcare.

In February of 2000, defendant enrolled in a massage therapy class. Shortly after completing the class, defendant rented a space at Gold's Gym on 10 July 2000 to provide massage therapy services. Four days later, on 14 July 2000, defendant quit his job at Blue Cross/Blue Shield after an argument with his manager. Plaintiff had no prior knowledge of defendant's intention to terminate his employment. Thereafter, defendant decided to devote his time and efforts to his massage therapy business. At the time defendant quit his job, he only had one massage therapy client.

The parties separated on 3 August 2000. On 10 October 2000, plaintiff filed a complaint in the Wake County District Court alleging several claims, two of which were for child support and attorney's fees. A hearing on these two claims was held on 12 December 2000. On 29 January 2001, the court entered an order stating:

> 27. The Defendant has paid $153.00 to the Plaintiff for the benefit of the minor child since August 3, 2000. $153.00 since August 3, 2000 is not adequate child support

> for a 14-year-old child. The Court finds that the Defendant has voluntarily suppressed his income and is under employed. . . .
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> . . . .
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> 32. Defendant has the ability to earn at least $63,000.00 per year and the Court imputes $63,000.00 per year to the Defendant as income.

Based on this imputed income, the court ordered defendant to pay $655.65 per month in child support, $2,258.10 in child support arrearage, sixty-one percent (61%) (defendant's proportionate share) of the child's medical and/or dental expenses in excess of $100.00 per year and unreimbursed by insurance, and $1,100.00 of plaintiff's $3,626.00 bill for attorney's fees. Defendant appeals.

I.

The first issue presented to this Court is whether the trial court erred in computing defendant's financial obligations to his child based on his capacity to earn $63,000.00.

Generally, a party's child support obligations should be determined based on that party's actual income at the time child support is awarded. *Sharpe v. Nobles,* 127 N.C. App. 705, 708, 493 S.E.2d 288, 290 (1997). However, a party's capacity to earn income may become the basis of a child support order "if it is found that the party deliberately depressed its income or otherwise acted in deliberate disregard of the obligation to provide reasonable support for the child." *Askew v. Askew*, 119 N.C. App. 242, 244-45, 458 S.E.2d 217, 219 (1995). To apply this principle, referred to as "the earnings capacity rule, the trial court must have sufficient evidence of the proscribed intent." *Wolf v. Wolf*, ___

N.C. App. ___, ___, 566 S.E.2d 516, 519 (2002) (citations omitted). Evidence of such intent generally can be proven, if at all, only by circumstantial evidence. *Wachacha v. Wachacha*, 38 N.C. App. 504, 509, 248 S.E.2d 375, 378 (1978). Once a judge determines what is a proper amount of child support, the trial court's order will not be disturbed on appeal absent a clear abuse of discretion. *Plott v. Plott*, 313 N.C. 63, 69, 326 S.E.2d 863, 868 (1985). If there is competent evidence to support the order, it will not be disturbed even if there is conflicting evidence. *Evans v. Craddock*, 61 N.C. App. 438, 440-41, 300 S.E.2d 908, 910 (1983).

In the case *sub judice*, defendant contends that since there was no evidence that his decision to change careers was made in bad faith or as an attempt to intentionally suppress his income, the court erred in using an imputed income of $63,000.00 to determine his financial obligations with respect to (1) child support, (2) child support arrearage, and (3) his child's medical and/or dental expenses. However, after considering the evidence offered by both parties, the court determined defendant's obligations based on the following findings of fact:

> 10. Defendant decided at some point that it was his desire to make a career change. Plaintiff was not involved in Defendant's decision to make a career change and the career change was not a mutual decision of the parties.
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> . . . .
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> 14. At the time of the hearing, Defendant is giving approximately 15 massages a month at either 30 minutes or 60 minutes a massage for which he is paid. The Court finds that this is approximately three and a half-

> hours a week of work. There are thirty-six and a half-hours a week that Defendant is not working. The Defendant is capable of working the other thirty-six and half-hours per week. . . .
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> 16. At the time of the hearing, the Defendant earned $695.00 per month as gross income based upon his financial affidavit. Based upon a forty-hour work week, this equates to $4.00 per hour.
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> 19. The Defendant made an unwise financial decision when he quit his job at Blue Cross/Blue Shield, did not seek a small business loan and started his business with credit cards with higher interest rates. Defendant's decision to quit his job was a voluntary decision and a poor financial decision in disregard of the debts of the family and the monthly expenses of the child.

These findings and others, none of which were disputed by defendant, all indicate that defendant acted in deliberate disregard of his financial obligations to his family. Likewise, the court's findings indicate that had defendant not acted with such disregard, he would have been capable of earning at least $63,000.00 a year. Thus, the trial court had competent evidence by which to use defendant's earning capacity to determine his financial obligations to his child.

II.

The second issue presented to this Court is whether the trial court erred in awarding plaintiff attorney's fees in the sum of $1,100.00.

The trial court is granted considerable discretion in allowing or disallowing attorney's fees in child support cases. *Brandon v. Brandon*, 10 N.C. App. 457, 463, 179 S.E.2d 177, 181 (1971). Pursuant to Section 50-13.6 of the North Carolina General Statutes:

> In an action or proceeding for the custody or support, or both, of a minor child, . . . 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[.]

N.C. Gen. Stat. § 50-13.6 (2001). In interpreting this provision for purposes of a child support action, there must be (1) an allegation and proof that the party seeking attorney's fees is acting in good faith and has insufficient means to defray the expenses, and (2) a finding by the trial court that the party ordered to furnish support has refused to provide adequate support under the circumstances existing at the time of the proceeding. *Hudson v. Hudson*, 299 N.C. 465, 472-73, 263 S.E.2d 719, 723-24 (1980). If an award of attorney's fees is ultimately granted, it will generally be stricken only if the award constitutes an abuse of discretion. *Clark v. Clark*, 301 N.C. 123, 136, 271 S.E.2d 58, 67 (1980).

In the present case, the court concluded that "Plaintiff is an interested party acting in good faith without sufficient means to defray the expense of this action and the Defendant has failed to

support the minor child adequately." However, this conclusion was based on no specific finding that plaintiff had insufficient means to defray her expenses. On the contrary, the findings made by the court actually establish that plaintiff would have sufficient means if she eliminated various extraordinary expenses of the child that were not a necessity, stopped 401(k) contributions and the automatic draft at her bank, and found less expensive forms of entertainment. In light of such findings, we are compelled to vacate the award of attorney's fees and remand this case for additional findings on this issue as required by Section 50-13.6. *See Gibson v. Gibson*, 68 N.C. App. 566, 575, 316 S.E.2d 99, 105 (1984).

Affirmed in part; vacated and remanded in part.

Judges WALKER and McGEE concur.

Report per Rule 30(e).