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NO. COA01-553

NORTH CAROLINA COURT OF APPEALS

Filed: 16 April 2002

LILA HASSELL,  
Plaintiff

v.

New Hanover County  
No. 95 CVD 3275

WILEY HASSELL,  
Defendant

Appeal by defendant from orders entered 17 October 2000 and 5 January 2001 by Judge J.H. Corpening, II in New Hanover County District Court. Heard in the Court of Appeals 13 February 2002.

*Hosford & Hosford, P.L.L.C., by Sofie W. Hosford, for plaintiff-appellee.*

*W.T. Batchelor II for defendant-appellant.*

HUNTER, Judge.

Wiley Hassell ("defendant") appeals orders requiring that he continue in his obligation to pay alimony to Lila Hassell ("plaintiff"), and holding him in contempt of court for failure to do so. We affirm in part and vacate in part.

In pertinent part, the facts are that defendant was originally ordered to pay permanent monthly alimony to plaintiff by order entered 23 March 1997. In awarding permanent alimony, the trial court considered the length of the parties' marriage, the differences in their respective incomes, and the fact that defendant had engaged in sexual misconduct during the marriage.

Defendant was ordered to pay plaintiff monthly alimony in the amount of \$1,000.00 for a period of two years, until 1 March 1999, and thereafter, \$500.00 per month until plaintiff dies or remarries.

Defendant failed to make the ordered payments, and on 2 June 1997, plaintiff filed a motion for contempt. On 28 July 1997, the trial court found defendant to be in contempt, and ordered him to be jailed until he paid plaintiff \$9,075.00. Defendant was released from prison upon paying plaintiff \$8,075.00. Thereafter, plaintiff was required to file additional motions to enforce her right to alimony. On 11 September 1998, defendant filed a motion in the cause seeking to lower or eliminate his alimony obligation, asserting a substantial change in circumstances due to disability and a resulting significant decrease in income. By consent order entered 23 September 1998, the trial court determined that as a result of defendant's disability, it would temporarily suspend his obligation to pay permanent alimony until such time as defendant resumed working.

Plaintiff thereafter filed two motions in the cause in November 1998 and October 1999, asserting that despite defendant's return to full-time work as of 8 September 1998, he had failed to pay the total amount of alimony owed, as he was capable of doing. On 27 October 1999, defendant filed a motion in the cause seeking to lower his alimony obligation due to inability to pay. Both plaintiff's and defendant's motions came to hearing on 7 August 2000. The trial court determined that defendant was, in fact,

capable of working during the time alimony was suspended, and therefore reinstated his alimony obligation. The trial court also determined that defendant had failed to show a substantial change in circumstances sufficient to warrant a reduction in the amount of alimony, and that he had failed to show he is unable to pay the current \$500.00 per month obligation. The trial court's 7 August 2000 determination was not reduced to a final written and filed order until 5 January 2001.

However, in the meantime, plaintiff filed a motion to show cause on 22 September 2000, asserting that defendant had failed to pay alimony as ordered by the trial court on 7 August 2000. By order entered 17 October 2000, the trial court found defendant in contempt, and ordered him to be jailed until he paid plaintiff \$1,225.00. According to plaintiff, defendant paid the required amount and was released from prison. Defendant filed notice of appeal on 2 February 2001, appealing both the 17 October 2000 order of contempt, and the 5 January 2001 order reactivating his alimony obligation.

Defendant's first two arguments pertain to the 17 October 2000 order finding defendant to be in contempt of court. As plaintiff argues, defendant did not file notice of appeal from this order until 2 February 2001, which is outside the required thirty-day time-frame set forth in N.C.R. App. P. 3(c). As a general rule, failure to timely file notice of appeal subjects the appeal to dismissal. See *Berkman v. Berkman*, 106 N.C. App. 701, 702, 417

S.E.2d 831, 832 (1992). However, in this instance, we elect to grant certiorari to consider defendant's argument that the trial court had no authority to enter the 17 October 2000 contempt order where the 7 August 2000 order it purported to enforce had not yet been reduced to a final written and filed order. See N.C.R. App. P. 21(a)(1); *Anderson v. Hollifield*, 345 N.C. 480, 482, 480 S.E.2d 661, 663 (1997) ("Rule 21(a)(1) gives an appellate court the authority to review the merits of an appeal by certiorari even if the party has failed to file notice of appeal in a timely manner").

The law on this issue is clear. In *Onslow County v. Moore*, 129 N.C. App. 376, 499 S.E.2d 780, *disc. review denied*, 349 N.C. 361, 525 S.E.2d 453 (1998), this Court observed that a judgment or order is not officially "'entered'" until it is reduced to writing, signed by the judge, and filed with the clerk of court. *Id.* at 388, 499 S.E.2d at 788 (citing N.C. Gen. Stat. § 1A-1, Rule 58 (1999)). Thus, in that case, where the underlying order had not been reduced to a written order and filed, and thus was not "entered" at the time of the subsequent contempt order, the contempt order was without a proper basis. We held that "[b]ecause a person cannot be held in contempt of an order that is not 'in force,' see N.C. Gen. Stat. § 5A-21(a)(1), the trial court improperly based its finding of contempt on conduct by [the defendant] occurring prior to [actual entry of the underlying order]." *Id.* at 388-89, 499 S.E.2d at 788-89.

In this case, because the trial court's 7 August 2000 decision was not reduced to a final order until 5 January 2001, the trial

court was without authority to enter a contempt order based thereon on 17 October 2000. The trial court's 17 October 2000 order is hereby vacated.

Defendant's remaining two arguments pertain to the trial court's 5 January 2001 order. First, defendant maintains the trial court erred in placing the burden on him to establish that a substantial change in circumstances had occurred where the last order entered suspended alimony, and therefore had already established that a substantial change in circumstances had occurred. We disagree. Alimony orders may only be modified where the moving party establishes a change in circumstances. *Kowalick v. Kowalick*, 129 N.C. App. 781, 785, 501 S.E.2d 671, 674 (1998).

Here, there was never any change with regard to defendant's responsibility to pay permanent alimony, or as to the amount of that alimony. The prior order simply temporarily suspended the obligation until defendant was able to work again. The order clearly provided that the suspension would "continue until Defendant resumes a regular work schedule or upon this Court's or Plaintiff's motion and review of Defendant's employment." In its 5 January 2001 order, the trial court determined that defendant had, in fact, been able to work during the time of suspension. Thus, defendant's obligation to pay alimony was "re-activated." It was defendant's burden to then show a change in circumstances warranting a modification of this obligation notwithstanding the fact that he had been capable of earning wages.

Defendant next argues the trial court erred in failing to conclude that a substantial change in circumstances had occurred and that defendant was entitled to a reduction in alimony based upon his income, expenses, and disability. Again, we disagree. The trial court found that defendant had not carried his burden of establishing any grounds to further reduce or eliminate his alimony obligation, that he has not acted in good faith, and that he is currently able to pay the required \$500.00 per month.

As noted above, defendant, as the party seeking a modification, has the burden of establishing a change in circumstances sufficient to warrant modification. See *Kowalick*, 129 N.C. App. at 785, 501 S.E.2d at 674. Even if the moving party is able to show the necessary change in circumstances, "the trial court is not required to modify an alimony award, but may do so in its discretion." *Id.* The trial court's findings of fact with respect to any change in circumstances are conclusive on appeal where supported by competent evidence, even though the evidence would support a finding to the contrary. *Spencer v. Spencer*, 133 N.C. App. 38, 43, 514 S.E.2d 283, 287 (1999). "Therefore, '[w]hile the sufficiency of the findings to support the award is reviewable on appeal, the weight to be accorded the evidence is solely for the trier of the facts.'" *Id.* at 43-44, 514 S.E.2d at 287 (citation omitted).

In assessing a change in circumstances, "[o]nly those changed circumstances which relate to the 'factors used in the original determination of the amount of alimony awarded' are relevant."

*Kowalick*, 129 N.C. App. at 785, 501 S.E.2d at 674 (citation omitted). The purpose of examining these factors is not to re-determine the status of the parties or to determine whether the original award was proper; rather, "[t]he reference to the circumstances or factors used in the original determination is for the purpose of comparing the present circumstances with the circumstances as they existed at the time of the original determination in order to ascertain whether a material change of circumstances has occurred." *Cunningham v. Cunningham*, 345 N.C. 430, 435, 480 S.E.2d 403, 406 (1997).

In the present case, the original 23 March 1997 order awarding plaintiff permanent alimony stated that in determining that permanent alimony was warranted, the court considered "the length of the parties' marriage, the differences in their respective incomes and the sexual misconduct of the Defendant." However, defendant's evidence at the 7 August 2000 hearing focused solely on the fact that he is no longer able to work, and that he has increased expenses which surpass his income. The trial court found that defendant receives \$1,327.00 per month in Social Security Disability, and \$440.00 per month from GE in long-term disability, which finding is supported by the testimony. Defendant testified that he has monthly expenses of \$1,928.00, although he failed to produce documentation verifying his expenses, including bank statements, cancelled checks, check registers, or credit card statements. Moreover, evidence was presented tending to show that defendant's unemployed girlfriend and her three children lived with

him for approximately one and a half years, during which time his alimony obligation was suspended, and that defendant helped to support these additional four people, including paying the mortgage and all utilities. Plaintiff testified that her expenses and net income of approximately \$1,000.00 per month has essentially remained unchanged since March 1997.

In *Patton v. Patton*, 88 N.C. App. 715, 364 S.E.2d 700 (1988), we held that "[t]here cannot be a conclusion of substantial change in circumstances based solely on change in income." *Id.* at 719, 364 S.E.2d at 703. Rather, the "overall circumstances of the parties must be compared with those at the time of the award." *Id.* Thus, where the defendant's arguments only pertained to his finances, without considering the plaintiff's financial standing or accustomed standard of living, he failed to carry his burden of showing a substantial change in circumstances. *Id.* Likewise, in *Self v. Self*, 93 N.C. App. 323, 377 S.E.2d 800 (1989), we noted that "[a] conclusion of law that there has been a substantial change of circumstances based only on income is inadequate and in error.'" *Id.* at 326, 377 S.E.2d at 801 (citation omitted). Rather, the significant question is how any change ". . . 'affects a supporting spouse's ability to pay or a dependent spouse's need for support. . . .'" *Id.* (citation omitted).

In this case, defendant's evidence and arguments focused solely on his finances without regard to plaintiff's finances, her need for continued support and accustomed standard of living, or any of the other factors originally considered by the trial court.

Indeed, the evidence showed that plaintiff's expenses and approximate monthly income of \$1,000.00 had not changed since 1997, and thus her need for alimony had not changed since the original hearing. As in 1997, the evidence in August 2000 showed that defendant's monthly income still exceeds that of plaintiff. Moreover, since the original trial court ordered that defendant pay permanent alimony until plaintiff dies or remarries, the court had to have considered the fact that defendant might be required to pay alimony after he retires and is no longer working and earning the same wages.

The trial court's findings of fact are supported by competent evidence, which findings in turn support its conclusions of law. We therefore decline to hold that the trial court abused its discretion in failing to modify defendant's obligation of permanent alimony.

Affirmed in part; vacated in part.

Judges WALKER and BRYANT concur.

Report per Rule 30(e).