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NO. COA01-736

NORTH CAROLINA COURT OF APPEALS

Filed: 16 April 2002

DEBORAH W. COLEMAN,
Plaintiff

v.

Pender County
No. 99 CVD 277

STEVE M. COLEMAN,
Defendant

Appeal by defendant from judgment entered 8 September 2000 *nunc pro tunc* for 5 June 2000 by Judge Elton G. Tucker in Pender County District Court. Heard in the Court of Appeals 13 March 2002.

No brief for plaintiff-appellee.

James K. Larrick for defendant-appellant (after filing brief, motion to withdraw as counsel was allowed).

HUNTER, Judge.

Steve M. Coleman ("defendant") appeals a judgment awarding Deborah W. Coleman ("plaintiff") an unequal division of the marital property, alimony in the amount of \$500.00 per month, and attorney's fees in the amount of \$2,500.00. Defendant brings forth several assignments of error on appeal; however, we need not address all arguments, as we agree with defendant that the trial court's findings of fact are insufficient to show that the trial court considered all appropriate and required factors in entering

the judgment. Accordingly, we vacate and remand for further proceedings.

Plaintiff and defendant were married 9 August 1970 and separated in late 1998. On 12 February 1999, plaintiff filed this action seeking, among other things, a divorce, equitable distribution, alimony and post-separation support, and attorney's fees. On 30 June 1999, the trial court entered an order of post-separation support which provided plaintiff with possession of the parties' home, and required that defendant pay the parties' mortgage, homeowners insurance, ad valorem taxes, plaintiff's car payments and insurance, \$100.00 per week to plaintiff, and that he maintain plaintiff on his health insurance policy. The parties were subsequently divorced, and on 5 June 2000, the matters of equitable distribution, alimony, and attorney's fees came before the trial court.

On 8 September 2000, the trial court entered judgment in which it found that plaintiff was entitled to an unequal division of the marital property, that she was a dependent spouse, that defendant had committed marital misconduct in abandoning her, and that plaintiff was entitled to alimony in the amount of \$500.00 per month. The trial court ordered defendant to pay \$2,500.00 in attorney's fees. Defendant appeals from this order. We agree with defendant's arguments that the trial court's findings of fact are insufficient to support the equitable distribution judgment, the alimony award, and the award of attorney's fees.

Under N.C. Gen. Stat. § 50-20 (1999), there exists a presumption that “[t]he marital property is to be distributed equally, unless the court determines equal is not equitable.” *Crowder v. Crowder*, __ N.C. App. __, __, 556 S.E.2d 639, 642 (2001) (citation omitted). “If the trial court divides property unequally, it must make findings of fact based on the evidence in support of its conclusion that an equal division would not be equitable.” *Khajanchi v. Khajanchi*, 140 N.C. App. 552, 558, 537 S.E.2d 845, 849 (2000). The statute sets forth twelve distributional factors for the court to consider in making its determination. See N.C. Gen. Stat. § 50-20(c).

In *Rosario v. Rosario*, 139 N.C. App. 258, 533 S.E.2d 274 (2000), we held that the trial court is required to make findings of fact as to each distributional factor for which evidence was presented. *Id.* at 261, 533 S.E.2d at 276. “[A] finding stating that the trial court has merely given ‘due regard’ to the section 50-20 factors is insufficient as a matter of law.” *Id.* at 262, 533 S.E.2d at 276. We concluded in *Rosario* that the trial court’s findings were insufficient to support its equitable distribution judgment where the trial court simply stated that it had considered statutory factors and listed some of the factors, but failed to make specific findings on the ultimate facts which it considered in applying those factors. *Id.* at 267, 533 S.E.2d at 279.

In the present case, the trial court summarily concluded that an “unequal division and distribution of the marital property is equitable, considering the factors set forth in N.C.G.S. § 50[-

20](c)(1), (3), (5), (6), (9), (11) [and] (11a).” The judgment fails to set forth specific findings as to each of these factors and the ultimate facts which the court considered in applying these factors. The trial court’s bare assertion that it considered these factors is insufficient as a matter of law, see *Rosario*, 139 N.C. App. at 262, 533 S.E.2d at 276, and the judgment must accordingly be vacated.

Further, the trial court’s order fails to show that it gave appropriate consideration to evidence of factors that are properly considered as distributional factors. Defendant presented evidence of his post-separation debt payments, including his payments on the parties’ home mortgage, which type of payments has been held to be properly considered as a distributional factor under either subdivision (11a) or (12) of N.C. Gen. Stat. § 50-20(c). See *Hay v. Hay*, __ N.C. App. __, __, 559 S.E.2d 268, 272 (2002). The trial court found that the parties had various marital debts owing on the date of separation and that the parties had made payments on those debts since the separation, and it referred to plaintiff’s Exhibit 2, which set forth the history of debts and payments. However, there was no finding of fact as to how the trial court accounted for such payments in determining how to divide the marital property and debts.

In *Dolan v. Dolan*, __ N.C. App. __, 558 S.E.2d 218 (2002), we recently held that the trial court’s findings were insufficient to support the equitable distribution judgment where it failed to consider whether a party’s post-separation activity should be

considered as a distributional factor. Citing *Rosario*, we noted that where evidence of distributional factors exists, the trial court is required to make findings as to each factor for which evidence was presented. *Id.* at __, 558 S.E.2d at 220. Although the trial court made a finding in *Dolan* that the plaintiff had received post-separation rental income and had paid certain expenses, we held the trial court erred in failing "to make sufficient findings based on the evidence as to whether the rental income should be a distributional factor." *Id.*

In the present case, the trial court's finding with respect to post-separation payments for the benefit of the marital estate is insufficient in that it fails to reveal how the trial court took such evidence into account, if at all. We note that on remand, the trial court is not required to treat the post-separation payments as a distributional factor, but may instead elect to award a credit for such payments, or require that plaintiff reimburse defendant for his payments. See *Hay*, __ N.C. App. at __, 559 S.E.2d at 273. Indeed, the trial court may elect to treat the payments as a distributional factor to which it gives little weight. See *id.* at __, 559 S.E.2d at 272. Nevertheless, the trial court must make an appropriate finding from which it may be determined on appeal the manner in which the court elected to consider defendant's post-separation payments. The trial court must also make specific findings regarding any other distributional factors for which evidence is offered.

We further hold that the trial court's findings of fact with respect to the alimony award are also insufficient. N.C. Gen. Stat. § 50-16.3A(b) (1999) states that the trial court "shall" consider all relevant factors listed when making a determination of alimony. N.C. Gen. Stat. § 50-16.3A(b). We have observed that this provision is "mandatory" and "a vital part" of the trial court's order. See *Vadala v. Vadala*, 145 N.C. App. 478, 479, 550 S.E.2d 536, 537 (2001). The trial court's findings with respect to these factors must be specific enough to indicate that the court actually considered each of the factors in making a determination of alimony. *Rhew v. Rhew*, 138 N.C. App. 467, 470, 531 S.E.2d 471, 473 (2000). "'In the absence of such findings, appellate courts cannot appropriately determine whether the order of the trial court is adequately supported by competent evidence, and therefore such an order must be vacated and the case remanded for necessary findings.'" *Id.* (citation omitted).

In *Vadala*, we held that the trial court failed to make sufficient findings to justify its alimony award where evidence was presented as to some of the N.C. Gen. Stat. § 50-16.3A(b) factors, but the trial court failed to make any findings regarding those factors. *Vadala*, 145 N.C. App. at 480, 550 S.E.2d at 538. Similarly, in *Rhew*, we held that the alimony award must be vacated where evidence was presented relevant to various factors listed in N.C. Gen. Stat. § 50-16.3A(b), but the trial court failed to make findings of fact specific enough to establish proper consideration of the factors. *Rhew*, 138 N.C. App. at 472, 531 S.E.2d at 474. We

noted that the trial court failed to make findings regarding the parties' standard of living during the marriage, or their respective living expenses since the separation. *Id.*

In the present case, the trial court concluded that plaintiff was entitled to recover alimony from defendant "in light of the factors set forth in N.C.G.S. § 50-16.3A(b) (1), (2), (3), (4), (5), (8), (9), (10), (11), (12), (13), (14), and (16)." However, the trial court again failed to make findings of fact with respect to each of these factors. As noted above, the trial court's summary conclusion that it considered various factors under N.C. Gen. Stat. § 50-16.3A(b) is insufficient and cannot be a substitute for findings on the ultimate facts which the trial court considered with respect to each factor.

The record affirmatively reveals that evidence was presented relevant to various N.C. Gen. Stat. § 50-16.3A(b) factors for which the trial court failed to make any findings of fact. For instance, N.C. Gen. Stat. § 50-16.3A(b) (3) requires the trial court to make findings on evidence pertaining to each party's physical condition. Defendant testified to his physical condition, specifically, his back problems which have had a continued, significant impact on his ability to earn wages, and often require that he see a chiropractor daily. However, the trial court made no finding regarding defendant's condition. Nor did the trial court make any findings regarding the parties' standard of living during the marriage, or the party's living expenses since the separation, although evidence was presented regarding these factors. The trial court's findings

with respect to alimony are not sufficiently specific to indicate that the trial court considered all of the necessary factors under N.C. Gen. Stat. § 50-16.3A(b) as required.

In addition, N.C. Gen. Stat. § 50-16.3A(c) requires the trial court to set forth the reasons for the award, and "the reasons for its amount, duration, and manner of payment." N.C. Gen. Stat. § 50-16.3A(c). In *Williamson v. Williamson*, 140 N.C. App. 362, 536 S.E.2d 337 (2000), this Court held that the trial court's findings of fact regarding alimony were insufficient where it failed to provide any reasoning for setting the amount of alimony at \$1,500.00 per month and making it permanent. *Id.* at 365, 536 S.E.2d at 339. Likewise, the trial court here failed to make any finding as to why it set the amount of alimony at \$500.00 per month, and the judgment makes no mention of the duration of defendant's alimony obligation. The award of alimony must also be vacated and the case remanded for entry of findings consistent with N.C. Gen. Stat. § 50-16.3A(b) and (c).

Finally, we observe that the trial court's award of attorney's fees pursuant to N.C. Gen. Stat. § 50-16.4 (1999) is likewise unsupported by sufficient findings of fact and must be vacated. When awarding attorney's fees under N.C. Gen. Stat. § 50-16.4, the trial court must not only make a finding that the spouse to whom fees are awarded is the dependent spouse, but also ". . . 'that the spouse is without sufficient means to subsist during the prosecution of the suit and to defray the necessary expenses.'" *Friend-Novorska v. Novorska*, ___ N.C. App. ___, ___, 545 S.E.2d 788,

795 (citation omitted), *affirmed*, 354 N.C. 564, 556 S.E.2d 294 (2001). Moreover, our courts have held that in awarding fees, the trial court is required to “make findings of fact as to the nature and scope of legal services rendered, the skill and the time required upon which a determination of reasonableness of the fees can be based.” *Williamson*, 140 N.C. App. at 365, 536 S.E.2d at 339 (citation omitted); *see also Cox v. Cox*, 133 N.C. App. 221, 231, 515 S.E.2d 61, 68 (1999).

The judgment in this case contains no findings as to whether plaintiff was without sufficient means to subsist during the prosecution of the suit and to defray the necessary expenses, nor as to the nature and scope of legal services rendered, and the skill and time required for such services. “This failure effectively precludes this Court from determining whether the trial court abused its discretion in setting the amount of the award.” *Williamson*, 140 N.C. App. at 365, 536 S.E.2d at 339.

The judgment appealed from is hereby vacated and the case remanded to the trial court for a redetermination of its equitable distribution judgment, alimony award, and award of attorney’s fees, and for entry of a judgment containing sufficient findings of fact as discussed herein. On remand, the trial court may rely on the existing record to enter a new order, or may, in its discretion, receive additional evidence as it deems necessary to comply with this opinion. *See, e.g., Rhew*, 138 N.C. App. at 472, 531 S.E.2d at 475; *Heath v. Heath*, 132 N.C. App. 36, 38, 509 S.E.2d 804, 805

(1999). We have reviewed defendant's remaining assignments of error, and conclude they are without merit.

Vacated and remanded.

Judges WALKER and BRYANT concur.

Report per Rule 30(e).