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NO. COA01-938

NORTH CAROLINA COURT OF APPEALS

Filed: 4 June 2002

CHRISTINE STALAS COOPER

Plaintiff,

v.

Guilford County
No. 98 CVD 11311

STANLEY R. COOPER

Defendant.

Appeal by defendant from judgment entered 26 January 2001 by Judge Patrice A. Hinnant in Guilford County District Court. Heard in the Court of Appeals 25 April 2002.

Woodruff & Associates, by Carolyn J. Woodruff, for plaintiff-appellee.

John W. Lunsford for defendant-appellant.

MARTIN, Judge.

In December 1998, plaintiff filed a complaint against defendant seeking divorce from bed and board, custody of their two minor children, and spousal and child support. Defendant filed an answer denying plaintiff's allegations and he asserted a counterclaim for joint custody of the couple's children, a deviation from child support guidelines, and equitable distribution.

On 27 September 2000, the trial court conducted a hearing

limited to the issues of alimony, child support, visitation, and distribution of the family's Self-Employment Pension. Briefly summarized, the evidence at that hearing showed that the parties were married on 17 December 1978 and that two children were born of the marriage: Andrew, age 17, and Katherine, age 15. Defendant formed a wholly-owned corporation, RACK Communications, Inc., which provided public relations services for corporations sponsoring NASCAR race teams. Plaintiff served as treasurer for RACK and received a salary from the corporation. On 8 June 1998, plaintiff testified that defendant told her that he had met another woman and intended to leave the family. The couple attempted to reconcile, but eventually the marriage ended. According to plaintiff, defendant stopped providing for the family financially in July 1999. Defendant stopped paying plaintiff her salary from the family business, and did not send any money to plaintiff in August and September 1999. Plaintiff provided the trial court with a breakdown of the family's monthly expenses. Additional evidence necessary to an understanding of the issues raised in this appeal will be summarized later in this opinion.

On 26 January 2001, the trial court entered judgment finding that defendant had committed marital misconduct in the form of adultery and abandonment of the family, granted custody of the children to plaintiff, and awarded plaintiff child support, alimony, and partial attorney's fees. Defendant was also ordered to pay child support in arrears and to release to plaintiff his remaining interest in his Self-Employment Pension. Defendant

appeals.

I.

Though defendant cites no authority in support of his first five assignments of error, he nonetheless takes issue with the trial court's findings of fact that he abandoned his family; that he engaged in an illicit sexual relationship with Lisa Shealy; that he stayed away from the marital home to reside with Shealy and continue his illicit relationship with her; that he failed to provide subsistence to his family; and, finally, that plaintiff was the custodian of the children. Defendant argues that these findings were unsupported by admissible evidence because the findings were based on the testimony of plaintiff, which defendant claims included non-admissible hearsay and privileged marital communications. These arguments have no merit.

First, evidence of defendant's adultery was not inadmissible as a confidential marital communication. Although defendant does not cite the statute, G.S. § 8-56 provides that "[n]o husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage." The privilege is limited to confidential communications. *Hicks v. Hicks*, 271 N.C. 204, 155 S.E.2d 799 (1967). However, the evidence of defendant's adultery in this case did not consist of privileged confidential marital communications. Defendant's statement to plaintiff that he had met another woman and planned to leave the family was overheard by one of their children. In addition,

defendant admitted that during the period when he was deciding whether to leave his marriage, he would go back and forth from his marital home to Lisa Shealy's house. Plaintiff testified that another woman repeatedly called her home.

In addition, defendant's statements to his wife were admissions of a party opponent and were admissible pursuant to G.S. § 8C-1, Rule 801(d) ("A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement, in either his individual or a representative capacity"). Defendant's assignments of error regarding the findings of fact of the trial court are overruled.

II.

In his second argument, defendant combines five assignments of error, contending the trial court erred in calculating the family's standard of living and the parties' respective incomes, and that accordingly the amount of plaintiff's alimony award was error. We find no merit in these contentions.

G.S. § 50-16.3A(a) provides that the court "shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors, including those set out in subsection (b) of this section." G.S. § 50-16.3A(b) provides that the trial court "shall exercise its discretion in determining the amount, duration, and manner of payment of alimony" after consideration of "all relevant factors, including:"

- (1) The marital misconduct of either of the spouses. Nothing herein shall prevent a court from considering incidents of post date-of-separation marital misconduct as corroborating evidence supporting other evidence that marital misconduct occurred during the marriage and prior to date of separation;
- (2) The relative earnings and earning capacities of the spouses;
- (3) The ages and the physical, mental, and emotional conditions of the spouses;
- (4) The amount and sources of earned and unearned income of both spouses, including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others;
- (5) The duration of the marriage;
- (6) The contribution by one spouse to the education, training, or increased earning power of the other spouse;
- (7) The extent to which the earning power, expenses, or financial obligations of a spouse will be affected by reason of serving as the custodian of a minor child;
- (8) The standard of living of the spouses established during the marriage;
- (9) The relative education of the spouses and the time necessary to acquire sufficient education or training to enable the spouse seeking alimony to find employment to meet his or her reasonable economic needs;
- (10) The relative assets and liabilities of the spouses and the relative debt service requirements of the spouses, including legal obligations of support;
- (11) The property brought to the marriage by either spouse;
- (12) The contribution of a spouse as homemaker;
- (13) The relative needs of the spouses;
- (14) The federal, State, and local tax ramifications of the alimony award;
- (15) Any other factor relating to the economic circumstances of the parties that the court finds to be just and proper.
- (16) The fact that income received by either party was previously considered by the court in determining the value of a marital or divisible asset in an equitable distribution of the parties' marital or divisible property.

Id. In addition, the court must "set forth the reasons for its award or denial of alimony and, if making an award, the reasons for its amount, duration, and manner of payment." N.C. Gen. Stat. § 50-16.3A(c). The award of alimony is within the trial court's discretion and will not be disturbed on appeal absent a showing of an abuse of discretion. *Sayland v. Sayland*, 267 N.C. 378, 148 S.E.2d 218 (1966) (citation omitted).

In determining a party's income, our Supreme Court has stated:

where a substantial portion of a party's total worth is stock in a closely held corporation, certain information from the corporation's business records may well be relevant to the personal litigation involving that party. This is particularly true where, as here, the trial court must determine the true worth and income of the parties.

Quick v. Quick, 305 N.C. 446, 460, 290 S.E.2d 653, 662 (1982). See also *Ahern v. Ahern*, 63 N.C. App. 728, 731, 306 S.E.2d 140, 142 (1983) (the trial court properly considered the supporting spouse's total income, which included his "mode of living through the years, largely at the company's expense," based on his sole ownership of the profitable business).

In the present case, the trial court found that defendant's gross annual income for 1999, based on his W-2 statement, was \$62,107.00. However, there was also evidence that defendant derives income from RACK in addition to his annual salary. Defendant did not deny receiving a Chevrolet automobile for his personal use from one of the RACK Communications clients. The trial court found that defendant paid \$41,000 in non-employee compensation to Lisa Shealy, the woman with whom he was found to be

having an affair, ostensibly for her contract labor on behalf of a RACK client. The trial court also found that defendant diverted \$49,509.00 in corporate funds to himself as part of a repayment of a "Shareholders Loan." Form 1120 (Schedule L) of RACK Communications' U.S. Corporate Income Tax Return for 1999 shows "loans from shareholders" was reduced by \$49,509 in that tax year. Based on the evidence of record, the trial court determined that defendant's annual income "is not less than \$152,616.00."

In addition, plaintiff testified that corporate money was used to pay certain family expenses during the parties' marriage, including health insurance, gas for the family vehicles, dry cleaning, and clothing. When asked if he were aware that he failed to send money to his family in August and September 1999, defendant testified: "Sometimes I transferred from one business account to the other, and I don't remember what months I did not do that." Defendant admitted that Chevrolet, a RACK client, partially paid for a family trip to Daytona Beach, Florida. The trial court found that plaintiff was employed by RACK Communications prior to defendant's abandonment of his family, after which she was "terminated by Defendant through no fault of her own." The court further found that plaintiff earned \$1,000 per month as a consultant for the Guilford County Schools, and that she currently does not have the means to earn more. Finally, the trial court found that plaintiff had expenses, which were itemized in the judgment, totaling \$4,000 per month. Based on these findings, the trial court concluded that plaintiff was entitled to alimony in the

amount of \$4,000 per month.

In addition, plaintiff testified that defendant stopped supporting the family in July 1999:

He stopped paying me a salary from RACK Communications without any warning at all, and he stopped paying any - sending any money for the month of August and September to us at all. I had no income from him at all. He did not send - he was ordered to pay me money for September, but he never paid it.

The trial court found that "[d]efendant willfully failed to provide necessary subsistence according to his means and condition so as to render the financial condition of Plaintiff intolerable." On this record, we discern no abuse of discretion in the award of spousal support to plaintiff, including arrearages for past unpaid support in the amount of \$19,202.40. These assignments of error are overruled.

III.

Defendant next argues the trial court erred in calculating child support. An order of child support by the trial court will be overturned "'only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.'" *Biggs v. Greer*, 136 N.C. App. 294, 297, 524 S.E.2d 577, 581 (2000) (citing *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). G.S. § 50-13.4(c) provides that the trial court may order child support for the benefit of the minor child "in such amount as to meet the reasonable needs of the child for health, education, and maintenance." In addition, "[t]he Court may make adjustments for extraordinary expenses and order payments for such term and in

such manner as the Court deems necessary." North Carolina Child Support Guidelines (2002) ("Other extraordinary expenses include: (1) Any expenses for attending any special or private elementary or secondary schools.").

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.

N.C. Gen. Stat. § 50-13.4(c).

In the present case, the trial court, utilizing the North Carolina Child Support Guidelines and attaching a schedule, ordered defendant to pay child support payments for both children in the amount of \$1,810.00 per month. In addition to this child support award, the trial court made the following finding of fact:

Further, Andrew has extraordinary educational expenses necessarily incurred as a result of his inability to function in public school due to his emotional distress over his father's abandonment and his difficulty in coping with his father's behavior. Andrew was enrolled in private school by and with the consent of Defendant, and Defendant is obligated to pay for all tuition, fees, insurance and transportation (at this time, Defendant has provided Andrew with a vehicle, and should continue to provide that vehicle and all vehicle insurance) related to those educational expenses, whether at Oak Ridge Military Academy or any other school found by Plaintiff to be necessary for Andrew's well-being. Plaintiff, as her share of Andrew's expenses, should pay for all of Andrew's uniforms and school clothing and books and supplies not included in the regular tuition and fees.

This finding supported the trial court's deviation from the North Carolina Child Support Guidelines, and the order requiring

defendant to provide financial support to allow Andrew to continue attending Oak Ridge Military Academy was not so arbitrary as to constitute an abuse of the court's discretion. Defendant's assignment of error is overruled.

IV.

Defendant next contends the evidence does not support the trial court's finding that defendant "dropped insurance coverage on his children." However, the finding of fact states further that defendant has "complied with the order of the Court that he provide coverage for the children." In addition, defendant admitted that insurance coverage on the children was interrupted for a period of time. The record supports the finding, and defendant's assignment of error is overruled.

V.

Defendant next contends the trial court erred in failing to follow the factors set forth in G.S. § 50-16.3A in determining that plaintiff qualified for alimony from defendant. G.S. § 50-16.3A(b) requires that the trial court consider "all relevant factors" when making a determination of the amount and duration of alimony. See *Rhew v. Rhew*, 138 N.C. App. 467, 472, 531 S.E.2d 471, 474 (2000) ("Although we do not suggest that the court is required to set out specific findings as to each factor listed in section 50-16.3A(b), the court must provide sufficient detail to satisfy a reviewing court that it has considered 'all relevant factors.'"). The trial court made detailed findings regarding the marital misconduct of defendant, the relative earnings of the spouses, the mental and

emotional condition of plaintiff, the amount and sources of earned and unearned income, the standard of living of the spouses during the marriage, the education of plaintiff, the relative assets and liabilities of the spouses, the relative needs of the spouses, and other factors. The trial court properly set out the relevant factors as required by G.S. § 50-16.3A(b); moreover, as explained above in Section II, the court did not err in ordering defendant to pay past due amounts for alimony. Defendant's assignments of error to the contrary are overruled.

VI.

Defendant next contends the trial court erred by ordering that plaintiff receive the remainder of defendant's Self Employment Pension because the distribution exceeded the scope of the 27 September 2000 hearing. However, at the start of the hearing, plaintiff's counsel stated that plaintiff intended to address the distribution of the retirement fund; counsel for defendant responded, "That's fine." See *Karp v. University of North Carolina*, 78 N.C. App. 214, 216, 336 S.E.2d 640, 641 (1985) ("In North Carolina admissions of attorneys are binding upon their clients, and are generally conclusive."). Defendant cannot now complain that the issue was improperly addressed because his counsel consented to a hearing on the issue.

VII.

Finally, defendant contends the trial court erred in ordering defendant to pay partial attorney's fees to plaintiff's counsel. The trial court may order the supporting spouse to pay the

dependent spouse's counsel fees when the dependent spouse, who is entitled to alimony, makes application for such fees. N.C. Gen. Stat. § 50-16.4 (2001).

The purpose of the allowance of counsel fees is to enable the dependent spouse, as litigant, to meet the supporting spouse, as litigant, on substantially even terms by making it possible for the dependent spouse to employ adequate counsel.

Bookholt v. Bookholt, 136 N.C. App. 247, 252, 523 S.E.2d 729, 732 (1999) (citing *Williams v. Williams*, 299 N.C. 174, 190, 261 S.E.2d 849, 860 (1980)) (emphasis in original). Before counsel fees may be awarded, however, the trial court must make "a threshold finding that the dependent spouse has insufficient means to defray her litigation expenses." *Id.* In addition, the trial court must make findings that the amount of the award is reasonable. *Upchurch v. Upchurch*, 34 N.C. App. 658, 239 S.E.2d 701 (1977), *disc. review denied*, 294 N.C. 363, 242 S.E.2d 634 (1978).

The proper order awarding counsel fees in a child support or alimony action must contain a finding or findings upon which a determination of the reasonableness of the award can be based, such as the nature and scope of the legal services rendered, the time and skill required, and the attorneys hourly rate in comparison to the customary charges of attorneys practicing in that general area.

Weaver v. Weaver, 88 N.C. App. 634, 641, 364 S.E.2d 706, 711 (citation omitted), *disc. review denied*, 322 N.C. 330, 368 S.E.2d 875 (1988).

In the present case, the trial court found that defendant fired plaintiff from her job with their wholly-owned corporation, RACK Communications; plaintiff has since found work as a consultant

with the Guilford County Schools, earning \$1,000 per month. The trial court found that "[p]laintiff is unable by reason of her status as a dependent spouse and her financial condition to defray the expenses of this action and is entitled to an award of court costs, including attorney's fees." The court then found that plaintiff had expended \$8,000 in attorney's fees, of which she had paid \$3,000. However, the trial court made no specific findings from which a determination of the reasonableness of the attorney's fee may be based. Rather, the court found only that the amount of the fee is "more than reasonable in light of the record of court appearances in this matter." The trial court's findings of fact do not indicate the amount of time the attorney devoted to the matter, or the attorney's hourly rate, or the nature and scope of the legal services rendered; accordingly, this Court can not determine whether the award of partial attorney's fees is reasonable. We therefore vacate that portion of the judgment awarding partial attorney's fees to plaintiff, and remand this case to the trial court for findings of fact as to the reasonableness of the attorney's fee awarded plaintiff.

Defendant has made no argument nor cited authority for his remaining assignments of error. These assignments of error are therefore deemed abandoned. N.C.R. App. P. 28(b)(5).

Affirmed in part, vacated in part, and remanded.

Judges TYSON and THOMAS concur.

Report per Rule 30(e).