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NO. COA02-358

NORTH CAROLINA COURT OF APPEALS

Filed: 17 December 2002

ROWAN COUNTY DEPARTMENT
OF SOCIAL SERVICES, o/b/o
MARY H. HARRISON,

Plaintiff,

v.

Rowan County
No. 01-CVD-1119

JERRY L. HAMILTON,

Defendant.

Appeal by plaintiff from orders entered 24 August 2001 and 7 January 2002 by Judge Charles E. Brown in Rowan County District Court. Heard in the Court of Appeals 12 November 2002.

Robert A. Lester for plaintiff-appellant.

Carole Carlton Brooke for defendant-appellee.

MARTIN, Judge.

Plaintiff Rowan County Department of Social Services, on behalf of Mary H. Harrison ("Harrison"), appeals the entry of orders denying its request for reimbursement from defendant Jerry L. Hamilton for past paid public assistance and dismissing its motion for a new trial or amendment to the prior order as untimely served on defendant. We affirm the order of the trial court denying plaintiff's request for reimbursement for past paid public assistance, but reverse the dismissal of plaintiff's motion for a

new trial or amendment to the order and remand for consideration of that motion on the merits.

Defendant and Harrison were married from 1979 until 1990; two children were born of the marriage. On 19 January 1995, an order was entered in Rowan County District Court awarding defendant exclusive care, legal custody, and control of the two children. In a related matter, on 22 March 1995, the Iredell County District Court entered an order determining defendant had legal custody of the children effective 18 January 1995, and that from 1 September 1994 through 18 January 1995, defendant had temporary custody of the children. The order suspended defendant's child support obligation effective 10 March 1995, and noted defendant's arrears on AFDC and non-AFDC payments were zero. On 1 November 1995, the Rowan County District Court entered an order modifying the prior arrangement and giving legal custody and control of one child to defendant and the other to plaintiff. The order terminated defendant's child support obligation effective 21 September 1995. The order provided that thereafter, Harrison would exclusively support one child and would not be entitled to seek reimbursement for support expenses for that child after 21 September 1995. Likewise, defendant was obligated to support the other child exclusively and would not be permitted to seek reimbursement for support expenses after that date.

On 24 May 2001, plaintiff moved to intervene in the matter and to reinstate defendant's child support obligation and obtain reimbursement for any past paid public assistance for both children

pursuant to G.S. § 110-135. Following a hearing on plaintiff's motion, the trial court entered an order on 24 August 2001 allowing plaintiff's motion to intervene, ordering that defendant pay \$310.00 in monthly support to Harrison for the child living with her, and denying plaintiff's request for reimbursement from defendant for past paid public assistance in the amount of \$12,201 which the court found Harrison received for the support of the child in her custody from October 1995 through December 2000. In denying reimbursement, the trial court found that the order in the Iredell County District Court case, which was later transferred to Rowan County, suspended defendant's support obligation as of 10 March 1995, and that plaintiff would not be permitted to seek reimbursement for arrears that accrued during the time when defendant's support obligation was suspended. The order was served on defendant by mail on 14 August 2001.

On 29 August 2001, plaintiff filed a motion pursuant to G.S. § 1A-1, Rule 59 seeking a new trial, or in the alternative, a hearing to establish the amount of arrears for past paid public assistance owed by defendant and amendment of the order to establish a monthly arrears obligation for defendant. In support of its motion, plaintiff averred that under G.S. § 110-135, receipt of past paid public assistance creates a debt to the State by the responsible parents, and that plaintiff had timely filed its motion to intervene and for reimbursement within five years of Harrison's receipt of the last grant of public assistance, as required by the statute. Plaintiff asserted it was an error of law for the trial

court to have concluded otherwise. Plaintiff served a copy of the Rule 59 motion on defendant in accordance with Rule 5 of the Rules of Civil Procedure by depositing it in the mail on 29 August 2001, 5 days after entry of the order. Plaintiff also personally served defendant with a copy of the motion on 5 September 2001.

On 7 January 2002, the trial court entered an order dismissing plaintiff's Rule 59 motion as untimely after finding the motion was personally served on defendant on 5 September 2001, more than the permissible 10 days after the 24 August 2001 filing of the order. The trial court did not make any findings regarding plaintiff's service of the motion by mail on 29 August 2001. Plaintiff appeals from the order entered 24 August 2001 concluding it was not entitled to reimbursement from defendant, and the order entered 7 January 2001 dismissing its Rule 59 motion for a new trial, or in the alternative, amendment of the prior order.

I.

Plaintiff first argues the trial court erred in denying its request for reimbursement from defendant for past paid public assistance. In support thereof, plaintiff cites G.S. § 110-135, providing in relevant part:

Acceptance of public assistance by or on behalf of a dependent child creates a debt, in the amount of public assistance paid, due and owing the State by the responsible parent or parents of the child. Provided, however, that in those cases in which child support was required to be paid incident to a court order during the time of receipt of public assistance, the debt shall be limited to the amount specified in such court order. This

liability shall attach only to public assistance granted subsequent to June 30, 1975, and only with respect to the period of time during which public assistance is granted, and only if the responsible parent or parents were financially able to furnish support during this period

No action to collect such debt shall be commenced after the expiration of five years subsequent to the receipt of the last grant of public assistance.

N.C. Gen. Stat. § 110-135 (2002). Plaintiff argues the trial court erred in denying its request because, assuming the request for reimbursement was timely, and plaintiff asserts it was, the sole limitation on its ability to obtain reimbursement under the statute is a finding that the parent is financially unable to reimburse the State. Plaintiff notes the trial court made no such finding here. Plaintiff concedes, however, that in determining whether to order reimbursement, the trial court is entitled to consider a variety of additional factors, including the parties' conduct, the equities of the case, and other relevant facts.

In *Moore County v. Brown*, 142 N.C. App. 692, 543 S.E.2d 529, *disc. review denied*, 353 N.C. 728, 550 S.E.2d 780 (2001), this Court recently held that a trial court is vested with discretion to consider equity in determining whether to order reimbursement under G.S. § 110-135, and that a court's denial of a request for reimbursement due to equitable considerations should be afforded substantial deference. In so holding, we noted "[t]rial court orders regarding the obligation to pay child support 'are accorded substantial deference by appellate courts and our review is limited to a "determination of whether there was a clear abuse of

discretion.””” *Id.* at 694-95, 543 S.E.2d at 531 (citations omitted). We observed the trial court “was not required to grant DSS’ motion simply because DSS moved to establish arrearages within the applicable statute of limitations;” rather, the court possessed “considerable discretion to consider both law and equity in determining whether to grant DSS’ motion.” *Id.* at 695, 543 S.E.2d at 531.

Here, plaintiff maintains the trial court failed to make findings of its consideration of any such additional factors in this case, and thus, its order cannot stand. Significantly, however, the trial court made findings that the Iredell County District Court suspended defendant’s support obligation and zeroed out his arrears as of 10 March 1995, and that the public assistance was paid to Harrison between October 1995 and December 2000 when defendant’s support obligation was not in effect. In addition, the record establishes that on 1 November 1995, the Rowan County District Court awarded each parent custody of one child; terminated defendant’s support obligation as of 21 September 1995; determined defendant would only be responsible for providing support to the child in his custody; and ordered that Harrison not be permitted to seek reimbursement from defendant for support expenses for the child in her custody, for whom she subsequently sought public assistance. There is no evidence in the record, and the trial court made no finding, that this order terminating defendant’s support obligation and prohibiting Harrison from seeking reimbursement for support expenses was ever modified during the

period in which Harrison received public assistance.

In light of the trial court's ability to consider equitable factors in determining whether to order reimbursement, and in light of the highly deferential standard under which we must review its order, we hold this evidence sufficient to show that the trial court's denial of plaintiff's request was not wholly unsupported by reason, or otherwise a manifest abuse of discretion.

II.

In its second argument, plaintiff maintains the trial court erred in dismissing its Rule 59 motion as untimely. We agree. The trial court dismissed the motion after finding it was personally served on defendant on 5 September 2001, more than the permitted 10 days from the 24 August 2001 entry of the order to which plaintiff excepted. However, the trial court failed to consider or make findings with respect to plaintiff's asserted service of the motion on defendant by mail on 29 August 2001, only 5 days after the order was entered. Service by mail was a valid means of service for the Rule 59 motion. N.C. Gen. Stat. 1A-1, Rule 5(b) (2001).

As our Supreme Court has noted, a motion under Rule 59 must be served no later than 10 days after the entry of the order. *Stem v. Richardson*, 350 N.C. 76, 78, 511 S.E.2d 1, 2 (1999). Additionally, "[a]ccording to the clear language of Rule 58, the moving party is entitled to three additional days to file a motion for a new trial pursuant to Rule 59 if service of the [order] was made by mail." *Id.* Thus, "the moving party is allowed a total of thirteen days from the date that the [order] is entered to serve by mail a motion

for a new trial, rather than the ten-day period provided in Rule 59(b).” *Id.* (emphasis added). Therefore, under the clear language of *Stem*, not only was plaintiff entitled to serve its Rule 59 motion by mail, but it had 13 days from entry of the order to do so, given that the order was served by mail on 14 August 2001. Plaintiff’s motion was served on defendant by mail on 29 August 2001, 5 days after entry of the order, and well within the 13-day time frame for doing so.

Plaintiff’s subsequent attempt to effectuate personal service on defendant does not nullify its earlier timely and valid service by mail. Accordingly, we reverse the dismissal of plaintiff’s Rule 59 motion, and remand to the trial court for a consideration of the motion on its merits.

Affirmed in part; reversed in part, and remanded.

Chief Judge EAGLES and Judge GREENE concur.

Report per Rule 30(e).