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NO. COA05-1244

NORTH CAROLINA COURT OF APPEALS

Filed: 6 June 2006

THERESA GRINER KUNZE,
Plaintiff-Appellee,

v.

Cabarrus County
No. 01-CVD-2466

STEVEN WAYNE KUNZE,
Defendant-Appellant.

Appeal by defendant from order entered 5 May 2005 by Judge Martin B. McGee in District Court, Cabarrus County. Heard in the Court of Appeals 29 March 2006.

Hartsell & Williams, P.A., by Christy E. Wilhelm, for plaintiff-appellee.

Ferguson, Scarbrough, Hayes & Price, P.A., by James E. Scarbrough, for defendant-appellant.

McGEE, Judge.

Theresa Griner Kunze (plaintiff) and Steven Wayne Kunze (defendant) were married 13 February 1982 and divorced 16 December 2002. Four children were born of the marriage. Plaintiff filed a complaint for child custody, child support, and alimony on 29 October 2001. By order entered 23 October 2002, defendant was ordered to pay child support in the amount of \$1,542.76 per month and post-separation support in the amount of \$1,269.00 per month. An order for permanent alimony was entered 19 May 2003, which required defendant to pay \$1,404.76 per month. The order also

instructed defendant to seek review of alimony after plaintiff received her undergraduate degree from the University of North Carolina at Charlotte, or at the end of the 2004 spring semester, whichever occurred first. At that time, upon motion by defendant, the trial court would consider whether to modify or terminate the current award of alimony.

Defendant filed a motion on 21 June 2004 seeking termination of his alimony obligation. By motion filed 2 February 2005, defendant also sought modification of his child support obligation.

Defendant's motions were heard on 7 February 2005. At the time of the hearing, defendant had remarried, but plaintiff had not. Defendant's monthly income had increased from \$6,973.73 at the time of the prior order to \$8,563.50 at the time of the hearing. Defendant and his new wife sold defendant's mobile home and purchased a new home with monthly payments of \$1,411.83; they also purchased two new vehicles with monthly payments of \$912.50. Defendant's new wife had monthly income of \$3,050.00. Plaintiff's gross monthly income was \$2,244.00, including an anticipated bonus. After hearing evidence, the trial court entered an order on 5 May 2005 modifying defendant's alimony and child support obligations. Defendant was ordered to pay alimony in the amount of \$950.00 per month until 31 May 2013, and was ordered to pay child support in the amount of \$1,242.30 per month as of 1 August 2005. Defendant appeals. Defendant's assignments of error pertain to the portion of the order addressing alimony.

By his first assignment of error, defendant argues the trial

court abused its discretion in modifying the alimony award by failing to refer to the circumstances and factors in the original order, and thereby increasing plaintiff's marital standard of living. Defendant cites *Britt v. Britt*, 49 N.C. App. 463, 271 S.E.2d 921 (1980), to argue that the trial court should have compared the circumstances of the parties at the time of the hearing with the circumstances existing at the time of the original alimony award in order to determine if there was a substantial change in circumstances. However, *Britt* is inapplicable to the present case. The rule in *Britt* applies to the trial court's threshold determination of a substantial change in circumstances. *Britt* at 474, 271 S.E.2d at 928 (holding that the present overall circumstances of parties must be compared with the circumstances existing at the time of the original award in order to determine if there has been a substantial change in circumstances warranting modification). Defendant does not assign error to the trial court's conclusion that defendant met his burden of proving changed circumstances. This assignment of error is overruled.

Defendant's next five assignments of error argued in his brief state that five of the trial court's findings of fact were not supported by the evidence. While defendant identifies assignment of error number six as being argued in his brief, no argument, in fact, is made in defendant's brief as to that assignment of error. Accordingly, assignment of error number six is deemed abandoned. N.C.R. App. P. 28(b)(6). Defendant argues the following five findings of fact are unsupported by the evidence:

15. The Plaintiff testified that she has expenses of \$2,384.78 after pro-rating her family's monthly expenses between herself and her four minor children. These figures are based on actual expenses and are in accordance with the parties accustomed standard of living during the marriage. Specifically, [plaintiff] testified that her and the children's monthly expenses are as follows:

. . . .

16. The Court finds that the expenses provided in Paragraph 15 above are reasonable. Thus, the Plaintiff has reasonable monthly expenses totaling \$2,384.72.

17. The Defendant testified that he and his current wife have reasonable monthly expenses of \$9,192.60. [Defendant] pro-rated these expenses at sixty-two percent (62%) for himself and thirty-eight percent (38%) for his current wife. Using this formula, [defendant] determined that his monthly expenses total \$6,923.97. The Defendant did not provide a reasonable explanation as to why he divided the expenses 62%/38%.

. . . .

19. The Plaintiff is living below the standard of living that she was accustomed to during the marriage. She has relied, in part, on gifts from family and friends and credit card use to meet her monthly expenses.

. . . .

21. The Defendant is capable of making a permanent alimony payment of \$950 per month.

In alimony cases where a trial court sits without a jury, the trial court must "find the facts specially and state separately its conclusions of law thereon[.]" N.C. Gen. Stat. § 1A-1, Rule 52(a)(1)(2005). The trial court must find "specific ultimate facts . . . sufficient for [an] appellate court to determine that the judgment is adequately supported by competent evidence."

Montgomery v. Montgomery, 32 N.C. App. 154, 156-57, 231 S.E.2d 26, 28 (1977). Findings of fact required to support the amount of an alimony award are sufficient if the findings address the ultimate facts at issue and show the trial court properly applied the law. *Friend-Novorska v. Novorska*, 143 N.C. App. 387, 395, 545 S.E.2d 788, 294, *affirmed*, 354 N.C. 564, 556 S.E.2d 294 (2001).

Defendant argues that finding of fact number fifteen, a list of plaintiff's expenses, is merely a recitation of testimony and not a finding of ultimate facts at issue. Mere recitations of testimony do not constitute ultimate findings of fact by the trial court because "they do not reflect the processes of logical reasoning required by [N.C.G.S. §] 1A-1, Rule 52(a)(1)." *Appalachian Poster Advertising Co. v. Harrington*, 89 N.C. App. 476, 479, 366 S.E.2d 705, 707 (1988) (internal quotation omitted). We agree with defendant that finding fifteen contains a mere recitation of testimony. However, the trial court's next finding of fact, number sixteen, is an ultimate finding that references the expenses enumerated in finding fifteen. In so doing, finding of fact number sixteen is sufficient to show the trial court's process of logical reasoning in finding plaintiff's expenses. See *id.* Similarly, we find that finding of fact number eighteen is sufficient to show that the trial court's finding number seventeen, although a recitation of testimony, is the result of the trial court's reasoning in finding defendant's expenses.

Defendant disputes only one of plaintiff's expenses listed in finding fifteen: \$239.93 for anticipated orthodontic work.

Defendant argues his original child support obligation included all orthodontic expenses, and therefore the children's orthodontic work was not an expense to be incurred by plaintiff. Under the original order, defendant was obligated to maintain the children on his health care insurance plan and to pay eighty-nine percent of any health care expenses, including dental expenses, not covered by his insurance. However, no evidence was presented at the modification hearing as to whether defendant's dental insurance covered the children's orthodontic procedures. If defendant's insurance did not cover orthodontics, then plaintiff would incur eleven percent of the uninsured cost. Plaintiff anticipated that defendant's insurance would not cover the entire cost of the children's orthodontics, and included \$239.93 per month as her share of the orthodontic expenses. In finding sixteen, the trial court found this expense to be reasonable. However, upon review of the record, we find no competent evidence to support the trial court's finding that the plaintiff would incur this or any orthodontic expenses. The trial court's finding of orthodontic expenses in finding number fifteen is therefore erroneous.

Defendant further argues there was no evidence to support finding nineteen, that plaintiff was living below the standard to which plaintiff was accustomed during the marriage. We disagree. Finding nineteen is supported by plaintiff's testimony that her expenses exceeded her income and alimony payments, and that she relied upon credit cards and gifts from family and friends to purchase household necessities and to meet expenses. This

assignment of error is overruled.

In finding twenty-one, the trial court found that defendant was capable of paying \$950.00 per month in alimony. Defendant does not contest that his gross monthly income at the time of the hearing was \$8,563.50, an increase from defendant's \$6,973.73 gross monthly income at the time of the prior order. Moreover, defendant does not dispute the trial court's finding that defendant's alleged expenses at the time of the hearing were unreasonable. However, defendant argues that the trial court failed to make a specific finding as to what amount of defendant's expenses was reasonable. We agree and remand for further findings as to defendant's reasonable living expenses at the time of the modification hearing. The trial court, upon making such findings, shall determine the amount of alimony in accordance with those findings of fact.

We also remand for findings as to the duration of defendant's alimony obligation. In conclusion five, the trial court stated that "the circumstances render it necessary" for defendant to make alimony payments until 31 May 2013. However, the trial court made no findings as to why defendant's obligation should continue until 31 May 2013. Pursuant to the express provisions of N.C. Gen. Stat. § 50-16.3A(c) (2005), a trial court making an alimony award must set forth "the reasons for its amount, duration, and manner of payment." Failure to make any findings regarding the reasons for the amount, duration, or manner of payment violates the alimony statute. *Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 421, 588 S.E.2d 517, 522-23 (2003). Accordingly, we remand for further

findings of fact on the trial court's reasons for the duration of defendant's alimony obligation. See *Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675 (2005) (remanding for further findings concerning the duration of an alimony award); *Fitzgerald* (remanding for further findings of fact explaining the trial court's reasoning for the duration of alimony award and method of payment).

Defendant's assignment of error number twelve, not argued in defendant's brief on appeal, is deemed abandoned pursuant to N.C.R. App. P. 28(b)(6).

Vacated and remanded.

Judges HUNTER and STEPHENS concur.

Report per Rule 30(e).