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NO. COA06-556
NO. COA06-855

NORTH CAROLINA COURT OF APPEALS

Filed: 17 April 2007

DAWN ELIZABETH WEBSTER,
Plaintiff

v.

Watauga County
No. 04-CvD-559

JAMES ROBERT WEBSTER,
Defendant

Appeal by defendant from orders entered 10 October 2005 and 24 January 2006 by Judge William A. Leavell, III in Watauga County District Court. Heard in the Court of Appeals 23 January 2007.

Nancy M. Rivenbark for plaintiff-appellee.

Wyrick Robbins Yates & Ponton, LLP, by K. Edward Greene, Alyssa M. Chen, and Donald L. Beci, for defendant-appellant.

HUNTER, Judge.

James Robert Webster ("defendant") appeals an order from the trial court entered 10 October 2005 (COA06-556) and an order entered 24 January 2006 (COA06-855) that, in conjunction, granted Dawn Elizabeth Webster ("plaintiff"), *inter alia*, attorney's fees, reimbursement for all uncompensated medical/dental expenses, and a modification in custody and support arrangements. We consolidate defendant's appeals, and dispose of the appeals in one opinion. See N.C.R. App. P. 40 (Court on its own initiative may consolidate cases which involve common questions of law). This Court affirms

as to the custody modification, attorney's fees, and medical/dental expense, but vacate and remand as to the modification of support.

Defendant and plaintiff were married in April 1990. They had three children, Alexander, born 8 September 1990, Jamison, born 22 December 1993, and Duncan, born 23 November 1996. The parties divorced in Idaho on 14 January 2002. The Idaho order awarded a divorce and accepted the parties' stipulations as to property and financial settlement, custody and visitation, child support, and spousal support to plaintiff. Both parties received joint legal custody of the minor children, and plaintiff received primary physical custody subject to defendant's visitation rights.

At the time of the Idaho order plaintiff had moved to Watauga County, North Carolina, with the minor children. After the divorce, defendant took a six-month contract position in Scottsdale, Arizona. He worked in Arizona during the week and then returned to Idaho for the weekends. Later, he worked in San Diego, California, for a two week period. Defendant then took a full-time position with Nike, moved to Portland, Oregon, and sold his home in Idaho. Defendant ultimately left Nike to take a position allowing him to work at home, facilitating his move to Watauga County, North Carolina, in March 2005.

Before defendant had relocated to North Carolina, plaintiff filed her complaint on 4 October 2004. She asked the trial court to modify the custody provisions of the Idaho order by providing that the minor children be returned to her on Saturday rather than Sunday following visits with defendant in Oregon. Plaintiff also

sought enforcement of the Idaho order regarding the verification of defendant's income and life insurance policy. Additionally, she claimed complications in reimbursement between the parties as it pertained to health insurance and travel expenses. Finally, she requested that the North Carolina Child Support Guidelines be applied to determine defendant's support obligations.

Plaintiff sought a further modification of the summer visitation schedule based on the changed circumstances of (1) defendant moving to Watauga County; (2) plaintiff remarrying in June 2005; and (3) plaintiff relocating to Johnston County, North Carolina. She requested that the trial court change the Idaho order regarding summer visitation to a more "traditional" arrangement because of the parties' proximity to one another.

Defendant, in his motion in the cause, also alleged changed circumstances: (1) he had moved to Watauga County and that plaintiff was planning on remarrying; (2) he planned on making Watauga County his permanent home and had obtained a four bedroom house suitable for the minor children; (3) he had remarried in May of 2004 and his spouse was willing and able to assist in the care of the children; (4) the oldest child wished to reside with him; and (5) plaintiff and her intended spouse (who has three children of his own) did not have a suitable home for a family of six children and two adults.

The trial court's 10 October 2005 order contained the following terms: (1) plaintiff was awarded sole legal and physical custody of the minor children, subject to visitation by defendant;

(2) the parties were to provide each other with specific income documentation within five days, and to calculate child support using Worksheet A of the North Carolina Child Support Guidelines; (3) defendant was to pay all uninsured and un-reimbursed medical, prescription, eye care, dental and orthodontic care, and psychiatric, psychological and counseling costs incurred on behalf of the minor children; (4) defendant was to pay all plaintiff's reasonable costs and attorney's fees; and (5) the Idaho Decree was to remain in full force and effect except as modified by the order.

In its 24 January 2006 order, the court restated the provisions in the previous order regarding dental/medical expenses and, after making additional findings, entered the amount of attorney's fees to be awarded to plaintiff.

The issues in this case are: (1) whether the trial court properly modified the custody order of the parties' minor children; (2) whether the trial court properly calculated child support; and (3) whether the trial court improperly awarded attorney's fees to plaintiff.

In child custody cases, the trial judge is vested with broad discretion, and that discretion must be exercised to serve the welfare and needs of the children. *Woncik v. Woncik*, 82 N.C. App. 244, 247, 346 S.E.2d 277, 279 (1986). Absent a clear showing of abuse of discretion, the trial judge's decision regarding custody will not be upset on appeal, provided that the decision is based on proper findings of fact supported by competent evidence. *Id.*

Child support orders are also reviewed under an abuse of discretion standard. *Holland v. Holland*, 169 N.C. App. 564, 567, 610 S.E.2d 231, 234 (2005). A failure to follow the North Carolina Child Support Guidelines without proper findings of fact constitutes reversible error. *Id.* This Court applies a manifest abuse of discretion standard when reviewing the allocation of medical expenses for the parties' children. *Id.* at 571-72, 610 S.E.2d at 236-37.

As to attorney's fees, whether the statutory requirements have been met is a question of law and is reviewed *de novo*. *Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 724 (1980). When the statutory requirements have been met, the amount of the award is in the discretion of the trial judge and may only be reversed upon abuse of discretion. *Id.*

I.

Defendant argues that the trial court failed to make a conclusion of law that the changed circumstances affect the welfare of the children. We disagree. After the parties have entered into a consent order providing for custody and support of their children, "any modification of that order must be based upon a showing of a substantial change in circumstances affecting the welfare of the child." *Woncik*, 82 N.C. App. at 247, 346 S.E.2d at 279. The party moving for modification bears the burden of showing that a change has occurred, and findings based on competent evidence are conclusive on appeal, even if there is evidence to the contrary. *Id.*

Defendant first argues that the trial court failed to make a conclusion of law that the changed circumstances affected the welfare of the child. The trial court, however, need "not use the exact phrase 'affecting the welfare of the child[.]'" *Karger v. Wood*, 174 N.C. App. 703, 709, 622 S.E.2d 197, 202 (2005). This Court, instead, examines the entire order in determining whether the judge made proper findings. *Id.*

In *Karger*, this Court upheld a custody modification without the exact language "'affecting the welfare of the child'" because the trial court laid out a "sequential order" of facts showing a change in circumstances, and a finding that the child's school work had suffered. *Id.* This provided "the nexus between the substantial change in circumstances and the [e]ffect on the child's welfare." *Id.* Most important to the *Karger* Court was the trial judge's finding that "'[a] substantial change of circumstances that [a]ffects the minor child has occurred since the [initial order].'" *Id.* at 709-10, 622 S.E.2d at 202.

Although the trial court in the instant case did not use the word "affect," it did make sequential finding of facts showing a change in circumstance and found that these changes "justify the modifications" in custody. The only justification for a modification in a custody order is a finding that substantial changes affect the welfare of the children. *Woncik*, 82 N.C. App. at 247, 346 S.E.2d at 279. Thus, taking the record as a whole, it is clear that the trial judge found a substantial change in

circumstances that affected the welfare of the children. As to a substantial change in circumstances, the trial judge found:

11. Prior to moving to North Carolina and subsequent to the parties' divorce, the [d]efendant has moved frequently. He has resided in approximately six (6) different locations since the parties' divorce. In early 2005, he resided in a camper trailer in or around the Washington, DC area. This pattern of frequent moving existed during the parties' marriage and the [d]efendant is again relocating at this time although he testified that he does not know to where he is relocating.

. . .

13. The [d]efendant also has a history of changing employers on a frequent basis. He has changed jobs eight (8) times in the past approximate five and one-half years.

. . .

18. The [d]efendant allows his current wife, and did allow her prior to their marriage, to mete punishment to the minor children and at times her punishment has been inappropriate.

. . .

26. The [p]laintiff and her current husband have a residence appropriate for themselves and their collectively six (6) children. They are able to provide a nurturing, stable and loving environment to meet the children's physical, emotional and spiritual needs.

. . .

29. There has been a substantial and material change in circumstances since the entry of the Idaho Order that warrants modification of same as set forth herein.

As to a finding that the substantial change in circumstances affects the welfare of the children the trial court found:

15. . . . [T]he [d]efendant has made return travel arrangements that have been physically and emotionally stressful to the children. . . .

. . .

28. . . . [T]he [d]efendant told the minor children details of this pending matter and on one occasion told Alexander that the [p]laintiff would go to jail if she did not obey a temporary Order.

29. There has been a substantial and material change in circumstances since the entry of the Idaho Order that warrants modification of same as set forth herein.

30. It is in the best interests of the minor children that they reside together in one home.

31. It is in the best interests and welfare of the minor children that their sole legal and physical custody be awarded to the [p]laintiff and the [p]laintiff is a fit and proper person to have their sole and exclusive legal and physical care, custody and control.

. . .

39. There has been a substantial and material change in circumstances since the entry of the Idaho Order that justify the modification to same as set forth in the decretory portion of this Order below.

. . .

41. It is in the best interests and general welfare of the minor children that they be placed in the sole and exclusive legal and physical care, custody and control of the [p]laintiff.

Although the trial court did not use the exact phrase "affecting the welfare of the child" the trial judge did set out a sequential order of facts showing a substantial change in circumstances and made findings as to why those changes "justify" a modification of custody. As stated in *Karger*, to require buzz words "would place form over substance." *Karger*, 174 N.C. App. at 709, 622 S.E.2d at 202. Here, the trial judge cannot be said to have abused his discretion in modifying the Idaho custody order.

Defendant next argues, without citing authority, that meaningful appellate review is impossible because the trial judge did not state which changed circumstance was the basis for modifying the custody order. We reject this argument. The trial court has broad discretion in modifying a custody order upon a finding of a substantial change in circumstances that affect the welfare of the children. *Id.* at 708, 622 S.E.2d at 201. As discussed above, the trial judge has made those findings and it cannot be said that there has been an abuse of discretion.

II.

Defendant argues that the trial court committed reversible error in modifying the support order. We agree. A trial court's support order is reviewed for abuse of discretion. *Holland*, 169 N.C. App. at 567, 610 S.E.2d at 234. Failure to follow Child Support Guidelines constitutes reversible error. *Id.* "[C]hild support calculations . . . are based on the parents' current incomes at the time the order is entered." *Id.* (quoting N.C. Child Support Guidelines 2005, Ann. R. N.C. 49). In short, the

trial court "must determine [the parent's] gross income as of the time the child support order was originally entered, not as of the time of remand nor on the basis of [the parent's] average monthly gross income over the years preceding the original trial."¹ *Holland*, 169 N.C. App. at 568, 610 S.E.2d at 234 (quoting *Lawrence v. Tise*, 107 N.C. App. 140, 149, 419 S.E.2d 176, 182 (1992)) (explaining situations where deviation from this rule are permissible).

In *Holland*, the trial court expressly based the child support on a prior year rather than the current year. *Holland*, 169 N.C. App. at 568, 610 S.E.2d at 235. In that case, this Court stated that it may be permissible to use an earlier year where making findings regarding a more recent year would be difficult to determine so long as findings are made establishing that fact. *Id.*

In the instant case, the court made no findings as to defendant's current monthly gross income and we have no findings as to why it was not used. Instead, the trial court left a "blank" space to be filled in later once defendant's current income was determined. Since the trial court failed to make findings as to (1) defendant's 2004 gross monthly income or (2) why it is

¹ The actual Guidelines provide that "[d]ocumentation of current income must be supplemented with copies of the most recent tax return to provide verification of earnings over a longer period[,]" N.C. Child Support Guidelines, 2005 Ann. R. N.C. 49, but this Court has "established that child support obligations are ordinarily determined by a party's actual income at the time the order is made or modified." *Ellis v. Ellis*, 126 N.C. App. 362, 364, 485 S.E.2d 82, 83 (1997).

necessary to use an earlier income, we vacate the order as to child support and remand for further proceedings.

Defendant next argues, in the alternative, that if the trial court did not err in calculating defendant's income for purposes of modifying the support order, that the trial court impermissibly delegated its authority to the parties to determine the amount of support. Because we have found error in the use of non-current income in calculating child support, we need not fully address this issue, but we do instruct the trial court to set the amount of child support and not delegate such responsibilities to the parties. See N.C. Gen. Stat. § 50-13.4(c) (2005) (stating that "[t]he court shall determine the amount of child support payments").

Defendant next argues that the trial court erred in assigning all uncompensated dental/medical expenditures to defendant. We disagree. Absent a manifest abuse of discretion, a trial court's decision "in matters concerning the allocation of uninsured medical or dental expenses," will not be disturbed on appeal and do not depend on income calculations based on the Child Support Guidelines. *Holland*, 169 N.C. App. at 571-72, 610 S.E.2d at 236-37. In *Holland*, this Court reviewed a new provision of the Child Support Guidelines. The Guidelines stated:

The court may order that uninsured medical or dental expenses in excess of \$100 per year or other uninsured health care costs (including reasonable and necessary costs related to orthodontia, dental care, asthma treatments, physical therapy, treatment of chronic health problems, and counseling or psychiatric therapy for diagnosed mental

disorders) *be paid by the parents in proportion to their respective incomes.*

N.C. Child Support Guidelines, 2005 Ann. R. N.C. 50 (emphasis added). This Court held that the use of the word "'may'" did not "in any way alter the trial court's discretion to apportion these expenses[.]" *Holland*, 169 N.C. App. at 571, 610 S.E.2d at 236. Consequently, "uninsured medical and dental expenses are to be apportioned between the parties in the discretion of the trial court." *Lawrence*, 107 N.C. App. at 150, 419 S.E.2d at 183. This Court went on to say that:

Because the Child Support Guidelines neither require the trial courts to follow a certain formula nor prescribe what the trial court "should" or "must" do in this regard, it follows that when the trial court does not allocate uninsured medical or dental expenses consistent with the parents' "respective incomes" as revealed by the child support worksheets, such an allocation would not constitute a "deviation" from the Guidelines that would have to be supported by findings as to why application of the Guidelines would be "unjust or inappropriate."

Holland, 169 N.C. App. at 571, 610 S.E.2d at 236 (citing N.C. Gen. Stat. § 50-13.4(c) (2003)). Defendant has not alleged, nor does the record reveal, a manifest abuse of discretion. Thus, the ruling of the trial court regarding medical expenses is upheld as there is no requirement to make specific findings based on ability to pay.²

² This Court in *Holland* remanded the issue of medical expenses because the provision discussed in the Child Support Guidelines became effective between the hearing at the trial court and the decision by the trial judge. Consequently, the trial judge in *Holland* did not have an opportunity to review the Guidelines.

III.

In arguing in support of the trial court's award of attorney's fees plaintiff, in part, relies on an order entered by the trial judge after the appeal was perfected. Defendant argues that the trial court was divested of jurisdiction because of this appeal. Thus, before addressing the issue of attorney's fees, we must decide whether the trial court had jurisdiction to enter the award of attorney's fees.

N.C. Gen. Stat. § 1-294 (2005) provides that when an appeal is perfected, it stays all further proceedings in the court below upon the matter embraced therein. In light of this statute, the general rule is that "an appeal from a judgment entered in the [trial court] suspends all further proceedings in the cause in that court, pending the appeal." *Lowder v. Mills, Inc.*, 301 N.C. 561, 580, 273 S.E.2d 247, 258 (1981) (citation omitted). The trial court, however, retains jurisdiction to take action which aids the appeal and to hear motions and grant orders, so long as they do not concern the subject matter of the suit and are not affected by the judgment appealed from. *Faulkenbury v. Teachers' & State Employees' Retirement System*, 108 N.C. App. 357, 364, 424 S.E.2d 420, 422-23 (1993).

In *Surles v. Surles*, 113 N.C. App. 32, 42, 437 S.E.2d 661, 666 (1993), this Court concluded that a trial court had jurisdiction to award attorney's fees after an appeal had been brought. In that case, the trial judge had made an oral announcement expressly reserving the issue of attorney's fees at the time it had rendered

its judgment as to custody matters. *Id.* at 43, 437 S.E.2d at 667. The trial court's subsequent order regarding attorney's fees, which came after the perfected appeal, was not void for lack of jurisdiction because the order "'conformed substantially'" with the oral announcement. *Id.*

In the instant case, the trial judge reserved judgment on attorney's fees and entered an award that conformed substantially with that announcement. As to reserving judgment, the trial court stated that it "shall determine within ten (10) days . . . the reasonable costs and fees incurred to be paid by the [d]efendant and this sum *shall be reduced to Judgment* in favor of the [p]laintiff." (Emphasis added.) Clearly, this language indicates that the trial judge had yet to make a "judgment" as to the amount of attorney's fees, and as such, the trial court retained jurisdiction. The latter order conformed substantially to the prior order since it too dealt with the award of attorney's fees. Thus, the final judgment for attorney's fees was entered on 24 January 2006. Accordingly, the findings of facts and conclusions of law in both orders are properly before this Court.

The award of attorney's fees in child custody and/or support actions is governed by N.C. Gen. Stat. § 50-13.6 (2005). Under this statute, a trial judge has discretion to award reasonable attorney's fees when: (1) the party receiving the fees is an interested party acting in good faith; (2) with insufficient means to defray the expense of the suit; and (3) the judge has found as a fact that the party ordered to pay the fee has refused to provide

the support. Whether the statutory requirements have been met is a question of law and is reviewed *de novo*. *Hudson*, 299 N.C. at 472, 263 S.E.2d at 724. When the statutory requirements have been met the amount of the award is in the discretion of the trial judge and may only be reversed upon abuse of discretion. *Id.*

As to the first element, defendant does not contest that plaintiff is an interested party acting in good faith. We also note that the trial judge made such a finding. We therefore conclude the first element is established.

We also find the trial court's conclusion that plaintiff was with insufficient means to defray the cost of the litigation is supported by competent evidence. First, the judge found that plaintiff received \$500.00/month in alimony and \$1,412.00 in child support. Second, that plaintiff's parents assisted her financially during the time she was in school and living with them. Third, that plaintiff's parents paid her attorney's fees for the trial court action out of their retirement funds.

Under *Brower v. Brower*, 75 N.C. App. 425, 429, 331 S.E.2d 170, 173-74 (1985), there must also be competent evidence in the record of the paying party's income to support the finding that the other party was without sufficient means to defray the cost of litigation. The testimony of defendant before this Court reveals that defendant had a 2003 income of at least \$117,430.00 and a gross income for 2004 of \$93,000.00, \$87,000.00, or \$87,424.00. In all, there is competent evidence upon which to determine that

plaintiff was without sufficient means to defray the cost of litigation.

The final element to be eligible for attorney's fees under the statute is whether the paying party has refused to provide support. Our Supreme Court, however, has held that this requirement is not applicable where a party seeking attorney's fees is pursuing custody and support actions. *Stanback v. Stanback*, 287 N.C. 448, 462, 215 S.E.2d 30, 40 (1975). The last element need only be established in actions limited to child support. *Id.* Because plaintiff's complaint in this case sought modification of both custody and support, she need not establish the element and the trial court did not err in failing to make such a finding. Having found the first two elements established and the third inapplicable to the instant case, we reject defendant's argument that the trial court erred in applying the statute.

Defendant also argues that the trial judge made no conclusions of law relating to the award. We disagree. In the 10 October 2005 order, the trial court made the conclusion of law that "reasonable attorney's fees . . . shall be awarded" to plaintiff. Additionally, in the 24 January 2006 order, the trial court made a conclusion of law that "[p]laintiff is entitled to an award of reasonable attorney[']s fees incurred in prosecuting her action." These are conclusions of law and defendant's argument is rejected. Defendant's additional argument that these conclusions of law are not supported by competent evidence is also without merit.

Defendant's final argument is that the trial court erred in failing to make a finding that defendant had the ability to pay plaintiff's attorney's fees. Defendant cites *Brower*, a custody only action, for this proposition. *Brower* made no such holding but instead held, in relevant part, that the trial court's finding of the wife's inability to defray attorney's fees was not supported by competent evidence. *Brower*, 75 N.C. App. at 429-30, 331 S.E.2d at 175.

The *Brower* Court reached this holding on the ground that there was only competent evidence of her income in the record, and none as to the husband's. *Id.* at 430, 331 S.E.2d at 174. Nowhere in *Brower* did this Court state that a "finding" must be made that the party responsible for the payment of attorney's fees must have the ability to pay. Instead, the Court stated that "we find nothing in the record concerning the husband's gross income for any year." *Id.* As discussed above, we have already found competent evidence in the record of both parties' incomes to support the trial court's finding that plaintiff was unable to defray the cost of litigation.

Defendant has cited no competent authority, nor has our research uncovered, any requirement that a trial court make a finding of ability to pay before attorney's fees may be awarded in a custody and support action. Indeed, the plain language of N.C. Gen. Stat. § 50-13.6 contains no such requirement and we are unwilling to create one. We overrule this assignment of error.

In summary, the trial court's orders in No. COA06-556 and No. COA06-855 are affirmed with respect to the custody modification,

the medical/dental expense modification, and the award of attorney's fees, but we vacate and remand the trial court's modification of support set out in No. COA06-556.

Affirmed in part; vacated and remanded in part.

Judges WYNN and STEELMAN concur.

Report per Rule 30(e).