NO. COA06-800

NORTH CAROLINA COURT OF APPEALS

Filed: 6 February 2007

LEE COUNTY DEPARTMENT OF SOCIAL SERVICES o/b/o JAN D. MARTIN,
Plaintiff-Appellee,

v.

Lee County
No. 05 CVD 1035

THOMAS W. BARBEE,
Defendant-Appellant.

Appeal by Defendant from order entered 30 January 2006 by Judge Addie Rawls in District Court, Lee County. Heard in the Court of Appeals 16 January 2007.

Beverly D. Basden, P.C., by Beverly D. Basden, for Plaintiff-Appellee.

Staton, Doster, Post & Silverman, by Kevin Foushee, for Defendant-Appellant.

McGEE, Judge.

Jan D. Martin (Plaintiff) and Thomas W. Barbee (Defendant) were married on 25 April 1987 and had three children together. Plaintiff and Defendant separated on 14 March 2000 and entered into a marital settlement agreement on 11 December 2000. Pursuant to this agreement, Defendant paid $600.00 per month in child support. The Lee County Department of Social Services filed an action on behalf of plaintiff on 22 November 2005 seeking an order requiring Defendant to pay additional amounts in child support. The trial

court heard the matter on 6 January 2006 and entered an order on 30 January 2006 requiring defendant to pay $1,141.00 per month in child support.

Defendant's sole assignment of error on appeal is that the evidence presented at the hearing did not support the trial court's inclusion in Defendant's income of an annual monetary gift of $20,000 from his parents. With respect to this amount, the trial court made the following findings of fact:

> 10. Plaintiff . . . informed the agency and testified in court that while married to . . . Defendant and for about the last five years of the marriage [Defendant's] parents provided [Plaintiff and Defendant] with checks in the fall and summer in the amount of $10,000 each. This totaled $40,000 per year.
>
> 11. Defendant denied that he received any income from his parents since the date of separation. He contended that his parents refused to provide him with any sums after his separation. This was not credible testimony.
>
> 12. [Plaintiff and Defendant] used the income received from [Defendant's] parents to raise their standard of living and used the funds to pay marital bills, take trips and do other things they would not have been able to afford without these funds. The minor children benefited [sic] from this increased income and their standard of living was raised by these gifts.
>
> 13. Gifts to a party are included in the definition of gross income in the North Carolina Child Support Guidelines. It is appropriate to include $20,000 in gifts as income for . . . Defendant.

Based on these findings, the trial court concluded that "[t]he income from . . . Defendant' parents of $20,000 per year should be included as income for . . . Defendant in addition to his other

income."

Defendant asserts that the trial court's concluding that the gift of $20,000 continued after Defendant's separation from Plaintiff in 2000 was not supported by competent evidence. "In an appeal from a judgment entered in a non-jury trial, our standard of review is whether competent evidence exists to support the trial court's findings of fact, and whether the findings support the conclusions of law." *Resort Realty of the Outer Banks, Inc. v. Brandt*, 163 N.C. App. 114, 116, 593 S.E.2d 404, 407-08, *disc. review denied*, 358 N.C. 236, 595 S.E.2d 154 (2004).

Upon direct examination by the trial court, Plaintiff testified that she and Defendant each received separate checks for $10,000 in the fall and in the spring each year for the last five or six years of their marriage. She further testified that these gifts to her stopped when the marriage ended. When asked by the trial court about whether Defendant continued to receive the gifts, Plaintiff stated only "[i]t's my belief, yes. I can't prove it, but it's my belief that it continues."

Aside from this statement, Plaintiff offered no other evidence supporting her assertion. The only other evidence on this issue was the following testimony of Defendant:

> THE COURT: All right. And what is it you want to say about the allegation that your parents [gave] you a significant amount of money during the course of the year?
>
> DEFENDANT: My parents do not give me a significant amount of money anymore. They did at the time. What [Plaintiff] spoke was the truth when we were married. We each did

> receive checks for $10,000 apiece, but since we were divorced, I no longer receive that amount.
>
> THE COURT: Why did they cut you off when you got divorced?
>
> DEFENDANT: My father told me that he would not be supporting me anymore and that he thought I ought to stand on my own two feet and take responsibility for myself and the children on my own.
>
> THE COURT: What made him say that? That doesn't make a lot of sense if he was willing to take care of you when you were married, that he's going to cut the strings when your whole family's gone.
>
> DEFENDANT: Well, he doesn't cut me off. I come home and visit. He has a house in New Jersey, and we go and visit he and my mother[.]

The trial court found that Defendant's testimony was not credible, and such a finding was well within its discretion. However, such a finding does not relieve Plaintiff of her burden to offer competent evidence to support her allegation. *See Plott v. Plott*, 313 N.C. 63, 69, 326 S.E.2d 863, 867 (1985) (holding that it is not the role of an appellate court to determine the weight and credibility of the evidence "[*i*]*f the record discloses sufficient evidence to support the findings*") (emphasis added). Plaintiff's testimony constitutes no more than a mere allegation and we hold that, standing alone, it is not competent evidence sufficient to support the trial court's finding that Defendant received and continued to receive the $20,000 gift. "Speculative assertions and mere opinion evidence do not constitute competent evidence." *MCC Outdoor, LLC v. Town of Franklinton Bd. of Comm'rs*, 169 N.C. App. 809, 815, 610 S.E.2d 794, 798, *disc. review denied*, 359 N.C. 634,

616 S.E.2d 540 (2005). Accordingly, those portions of the trial court's order imputing the $20,000 gift income to Defendant must be reversed.

Reversed and remanded in part.

Chief Judge MARTIN and Judge HUNTER concur.

Report per Rule 30(e).