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NO. COA07-1032

NORTH CAROLINA COURT OF APPEALS

Filed: 19 August 2008

MICHAELA MILLER,
Plaintiff,

v.

Harnett County
No. 03 CVD 1751

GLENN MILLER,
Defendant.

Court of Appeals

Appeal by plaintiff from order entered March 2007 by Judge Jimmy L. Love, Jr. in Harnett County District Court. Heard in the Court of Appeals 4 March 2008.

Hedahl & Radtke Family Law Center by Joan E. Hedahl, for plaintiff-appellant.

Lewis, Deese & Nance, LLP, by Renny W. Deese, for defendant-appellee.

BRYANT, Judge.

Michaela Miller (plaintiff) appeals from a order entered 5 March 2007 terminating Glenn Miller's (defendant) obligation to make alimony payments. We affirm in part and vacate and remand in part.

Plaintiff and defendant were married in November of 1996 and separated in July of 2003. No children were born of the marriage. On 12 December 2003, plaintiff and defendant entered into a consent order. The relevant terms of the consent order are:

3. That Plaintiff is entitled to an unequal distribution in her favor of the marital properties and marital debts of the parties.

. . .

20. Defendant shall pay directly to Plaintiff for spousal support and alimony the sum of \$1,750.00 on the first day of each month beginning on the first day of the month following the entry of this Order and on the first day of each month thereafter up to, and including, December 1, 2004.

21. Defendant shall pay directly to Plaintiff for spousal support and alimony the sum of \$550.00 on January 1, 2005, and on the first day of each month thereafter until the Defendant is entitled to receive benefits from Defendant's military pension, at which time, Defendant shall pay directly to Plaintiff for spousal support and alimony an amount equal to 40 (forty) per cent of the disposable amount Defendant is entitled to receive from his military pension effective the first day of the first month Defendant is entitled to receive such military pension and a sum equal to 40 (forty) per cent of the disposable amount of the said military pension on the first day of each month thereafter.

. . .

24. Defendant shall purchase and maintain a life insurance policy on the life of Defendant in the amount of \$350,000.00 (U.S.) until Defendant's termination of employment with the United States Department of Defense. Defendant shall pay all premiums for the said policy and shall furnish Plaintiff with copies of the said policy. The said policy shall name Plaintiff as sole beneficiary.

25. Following Defendant's termination of employment with the United States Department of Defense, Defendant shall purchase and maintain a life insurance policy on the life of Defendant in the amount of \$100,000.00 (U.S.) until Defendant's death and Defendant shall pay all premiums for the said policy and shall furnish Plaintiff with copies of the

said policy. The said policy shall name Plaintiff as sole beneficiary.

Sometime after the parties were divorced, defendant remarried and was stationed in Germany. Plaintiff sold the marital home and returned to Slovakia where she resides with her family.

On 7 September 2006, defendant filed a motion to modify alimony based on changed circumstances and requested termination of spousal support and alimony payments as well as termination of the requirement to maintain life insurance policies with plaintiff as the beneficiary. At the 7 February 2007 hearing, defendant presented evidence that since the prior consent order, he developed problems in his right eye, ultimately rendering him legally blind in his right eye. Because of the condition of his right eye, defendant is no longer able to perform the duties he was trained for because he cannot fire a weapon. Defendant also testified he has been diagnosed with herniated disks in his lower back and he is unable to sit for long periods of time or carry the equipment for his job as a member of the Special Forces. As a result of defendant's health conditions, he issued a letter of retirement to the Department of the Army to become effective 31 January 2008. Defendant testified his income would be reduced by approximately half upon retirement and, due to health conditions, he did not expect to find a suitable job to maintain his current income level.

On 5 March 2007, the trial court entered an order increasing defendant's alimony obligation for ten months to the amount of \$910.00 per month and terminating defendant's alimony obligation

after the ten months. The trial court also terminated defendant's obligation to maintain a life insurance policy with plaintiff as the beneficiary. Plaintiff appeals.

Plaintiff argues the trial court erred by: (I) modifying and terminating defendant's obligation to pay alimony because the consent order was an integrated agreement; (II) terminating defendant's obligation to maintain a life insurance policy with plaintiff as the beneficiary because the provision was not modifiable; (III) modifying and terminating the alimony payments because the findings of fact were not supported by the evidence; and (IV) modifying and terminating the alimony payments because there was insufficient evidence of a substantial change in circumstances. For the reasons given below, we affirm in part and vacate and remand in part.

I & II

Plaintiff argues the trial court erred by modifying and terminating defendant's obligation to make alimony payments to plaintiff and by terminating defendant's obligation to maintain life insurance policies with plaintiff as beneficiary because the consent order was an integrated agreement and the alimony provisions are not modifiable. However, based on the record before us, there is no indication plaintiff made this argument to the trial court; neither does the record reflect a ruling on this issue by the trial court. "A contention not raised in the trial court may not be raised for the first time on appeal." *Town of Chapel*

Hill v. Burchette, 100 N.C. App. 157, 159-60, 394 S.E.2d 698, 700 (1990); N.C. R. App. P. 10(b)(1) (2007). Therefore, these assignments of error are dismissed.

III

Plaintiff argues the trial court erred in modifying and terminating the alimony payments because the findings of facts are not supported by competent evidence. We disagree.

Plaintiff challenges the following findings of fact:

9. The plaintiff received all marital assets pursuant to the December 13, 2003 order.

. . .

18. That since the entry of the prior Order, a substantial change in circumstances has occurred in that the Defendant began having problems with his right eye and on November 2006 had a second surgery that rendered him legally blind in the right eye.

19. That this injury rendered the Defendant unable to shoot a gun and not able to perform the job for which he was trained.

20. The Defendant had herniated disks and since the entry of the prior Order those disks have now collapsed and the Defendant is unable to sit for a long period of time and is unable to jump as a Paratrooper [and] that is an integral part of his job with the Eighty-Second Airborne.

21. That since the entry of the prior Order, the Defendant suffers from sleep apnea, high blood pressure, hypertension, and high cholesterol. The Defendant is currently taking blood pressure medication and cholesterol reducing medication.

The standard of review for findings made by the trial court is whether the findings are supported by any competent evidence.

Hollerbach v. Hollerbach, 90 N.C. App. 384, 387, 368 S.E.2d 413, 415 (1988). "The trial court's findings of fact are conclusive if they are supported by competent evidence." *Pataky v. Pataky*, 160 N.C. App. 289, 309, 585 S.E.2d 404, 417 (2003).

Here, the trial court's findings of fact were supported by competent evidence. Defendant testified that since entry of the consent judgment he lost vision in his right eye due to an injury and subsequent surgery. Defendant also testified because of the loss of vision, he was no longer able to shoot a gun or perform other duties. As to defendant's overall health, he testified that since entry of the prior consent judgment, several herniated disks in his lower back had collapsed making it difficult for him to sit or stand for any length of time. Defendant stated he was unable to carry the equipment he used as a member of the Special Forces due to the condition of his back. Defendant also testified that he suffered from hypertension, high blood pressure and sleep apnea. The evidence presented supports the trial court's findings of fact numbered 18-21. See *Atlantic Veneer Corp. v. Robbins*, 133 N.C. App. 594, 599, 516 S.E.2d 169, 173 (1999) ("When a trial court sits as the trier of fact, the court's findings and judgment will not be disturbed on the theory that the evidence does not support the findings of fact if there is any evidence to support the judgment, even though there may be evidence to the contrary."). Although finding of fact number 9 was not wholly supported by the evidence,¹

¹ Pursuant to the Consent Order, defendant received a 1992 Ford Bronco.

the remaining findings were supported by sufficient evidence in the record.

IV

Plaintiff argues the trial court's conclusion that there was a substantial change in circumstances is not supported by the findings of fact. We agree.

When the trial court's conclusions of law are challenged, the standard of review is *de novo*. *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992). *De novo* review requires us to consider the question anew. *Tucker v. Mecklenburg Cty Zoning Bd. of Adjust.*, 148 N.C. App. 52, 55, 557 S.E.2d 631, 634 (2001). In doing so, we must determine whether the trial court's conclusions of law were supported by the findings of fact. *Shear*, 107 N.C. App. at 160, 418 S.E.2d at 845.

Pursuant to N.C. Gen. Stat. § 50-16.9 (2007), "[a]n order of a court of this State for alimony or postseparation support, whether contested or entered by consent, may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party [.]" *Id.* "As a general rule, the changed circumstances necessary for modification of an alimony order *must relate to the financial needs of the dependent spouse or the supporting spouse's ability to pay.*" *Rowe v. Rowe*, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982) (emphasis added). However, "it [i]s error for a court to modify an alimony award based only on a change in the parties' earnings." *Self v. Self*, 93 N.C. App. 323, 326, 377 S.E.2d 800, 801 (1989). "The significant inquiry is

how [a] change in income affects a supporting spouse's ability to pay or a dependent spouse's need for support." *Id.* (citation and quotation omitted). "The power of the court to modify an alimony order is . . . only to adapt the decree to some distinct and definite change in the financial circumstances of the parties." *Cunningham v. Cunningham*, 345 N.C. 430, 436, 480 S.E.2d 403, 406 (1997).

In order to determine whether a change in circumstances has occurred, "it is necessary to refer to the circumstances or factors used in the original determination of the amount of alimony awarded[.]" *Id.* at 435, 480 S.E.2d at 406. However, where the alimony order originates from a private agreement between the parties, "there may be few, if any, findings of fact as to these circumstances or factors set out in the court decree awarding alimony." *Id.* at 436, 480 S.E.2d at 406. "[D]etermining whether there has been a material change in the parties' circumstances . . . may require the trial court to make findings of fact as to what the original circumstances or factors were in addition to what the current circumstances or factors are." *Id.*

Here, the trial court's findings are not sufficient as a matter of law to support its conclusion that a substantial change in circumstances occurred since entry of the previous order as it relates to defendant's ability to pay or plaintiff's financial needs. Although the trial court found that defendant's health had declined since entry of the prior order, the evidence does not support, neither did the trial court find that defendant's income

had been reduced because of his declining health. The trial court did find that defendant had submitted a letter of resignation to the United States Army and defendant's retirement would become effective January of 2008; however, the trial court made no findings regarding what reduction in income, if any, defendant would encounter post-retirement. The trial court also found that since the prior order, defendant was stationed in Germany. However, the trial court made no findings that defendant's current station in Germany caused his living expenses to increase or decrease.

As to plaintiff's financial needs as the dependent spouse, the trial court only made findings regarding plaintiff's reasonable expenses. The trial court made no findings regarding the plaintiff's financial needs as the dependent spouse. Although the trial court made findings regarding plaintiff's reasonable and necessary living expenses, it did not make findings as to whether plaintiff's living expenses changed, i.e., increased or decreased, after she relocated to Slovakia.

Although the trial court's findings indicate that changes had occurred since the entry of the consent decree, the findings do not support a conclusion that the changes in circumstances were sufficient to justify modifying the alimony award. Because the findings do not support the conclusion that a substantial change in circumstances has occurred, we must vacate the order terminating alimony payments and remand to the trial court to make additional findings of fact regarding the financial needs of plaintiff and the

defendant's ability to pay. *Smith v. Smith*, 103 N.C. App. 488, 491, 405 S.E.2d 912, 914 (1991) (Where the trial court fails to make adequate findings, the order must be vacated and the case remanded for detailed findings of fact.). Specifically, we remand to the trial court to make findings regarding the impact, if any, defendant's declining health has had on his income; the amount of defendant's income post-retirement; the degree to which plaintiff's financial needs have changed since relocating to Slovakia; and any additional facts helpful to determining whether the change in circumstances justifies modifying or terminating the alimony award.

Affirmed in part; vacated and remanded in part.

Judges WYNN and JACKSON concur.

Report per Rule 30(e).