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NO. COA07-831

NORTH CAROLINA COURT OF APPEALS

Filed: 6 May 2008

JENNIFER HAMES,

Plaintiff,

v.

Burke County
No. 05 CVD 805

KEITH HAMES,

Defendant.

Court of Appeals

Appeal by defendant from an order entered 19 January 2007 by Judge Burford A. Cherry in Burke County District Court. Heard in the Court of Appeals 10 January 2008.

Slip Opinion

Simpson Kuehnert Vinay & Jones, by Jonathan L. Jones, for plaintiff-appellee.

Lucy R. McCarl, for defendant-appellant.

JACKSON, Judge.

Keith Hames ("defendant") appeals from an order of the trial court entered 19 January 2007 granting Jennifer Hames ("plaintiff") alimony and attorneys' fees. For the following reasons, we affirm.

Plaintiff and defendant were married on 3 June 1989, and they are the biological parents of three children ("the children"), born on 19 March 1992, 1 December 1994, and 17 July 2001, respectively. According to the trial court's findings of fact: "Plaintiff was a

faithful and dutiful spouse during the marriage of the parties and committed no act of marital fault." However, during the marriage and prior to separation, defendant engaged in an ongoing romantic relationship with his co-worker, Kellie Tallent ("Tallent"), that "includ[ed] acts of sexual intercourse and oral sex."

On 14 February 2005, plaintiff and defendant separated , and on 13 May 2005, plaintiff filed a complaint for child custody, child support, equitable distribution, post-separation support, and alimony. On 15 July 2005, the trial court entered an order: (1) providing for the interim distribution of a portion of the parties' property and debt; (2) granting plaintiff temporary child support in the amount of \$568.47 per month pursuant to Worksheet A of the North Carolina Child Support Guidelines; and (3) denying plaintiff's claim for post-separation support, but ordering defendant to continue providing medical insurance coverage for plaintiff pending resolution of plaintiff's alimony claim. On 12 September 2006, plaintiff and defendant entered into a memorandum of judgment settling the issue of equitable distribution of marital property. On 19 January 2007, the trial court entered an order granting plaintiff alimony and attorneys' fees. Thereafter, defendant filed timely notice of appeal.

On appeal, defendant contends that the trial court erred in its alimony award by (1) including the children's monthly expenses in plaintiff's total monthly expenses; (2) finding that defendant's net monthly income was \$2,000.00; (3) concluding that he had the

present ability to pay alimony; and (4) labeling him the supporting spouse solely because he committed adultery.

As this Court has explained,

when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable *de novo*.

Lee v. Lee, 167 N.C. App. 250, 253, 605 S.E.2d 222, 224 (2004) (internal quotation marks and citations omitted). "[F]ailure to assign error to specific findings of fact of the trial court renders those findings binding on this Court." *Hedingham Cmty. Ass'n v. GLH Builders, Inc.*, 178 N.C. App. 635, 642, 634 S.E.2d 224, 228, *disc. rev. denied*, 360 N.C. 646, 636 S.E.2d 805 (2006).

In his first argument, defendant contends that the trial court erred by including the children's monthly expenses in plaintiff's total monthly expenses to reach the conclusion that plaintiff is a dependent spouse for purposes of alimony. We disagree.

In order to receive an award of alimony, the party seeking alimony must establish that: "(1) [the] party is a dependent spouse; (2) the other party is a supporting spouse; and (3) an award of alimony would be equitable under all the relevant factors." *Barrett v. Barrett*, 140 N.C. App. 369, 371, 536 S.E.2d 642, 644 (2000). A "dependent spouse" is "a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is

substantially in need of maintenance and support from the other spouse." N.C. Gen. Stat. § 50-16.1A(2) (2005). A "supporting spouse" is "a spouse, whether husband or wife, upon whom the other spouse is actually substantially dependent for maintenance and support or from whom such other spouse is substantially in need of maintenance and support." N.C. Gen. Stat. § 50-16.1A(5) (2005).

"[I]n determining the needs of a dependent spouse, all of the circumstances of the parties should be taken into consideration including the property, earnings, earning capacity, condition and accustomed standard of living of the parties.'" *Fink v. Fink*, 120 N.C. App. 412, 418, 462 S.E.2d 844, 849 (1995) (quoting *Peeler v. Peeler*, 7 N.C. App. 456, 461, 172 S.E.2d 915, 918 (1970)), *disc. rev. denied*, 342 N.C. 654, 467 S.E.2d 710 (1996). In *Fink*, our Court concluded that "child care expenses incurred by a custodial spouse should be taken into account in a finding of dependency." *Id.* at 419, 462 S.E.2d at 850. The Court, acknowledging that "the distinction between the two kinds of payments [- alimony and child support -] is easily blurred," nevertheless found its holding to be "consistent with the overriding principle of fairness which guides the determination of alimony" in North Carolina. *Id.* at 420, 462 S.E.2d at 851 (internal quotation marks and citations omitted). In 1995, "the General Assembly . . . essentially codif[ied] our *Fink* decision by mandating that trial courts consider the expenses and financial obligations related to serving as a custodian of a minor child when setting the amount and duration of an alimony award."

Harris v. Harris, __ N.C. App. __, __, 656 S.E.2d 316, 319 (2008) (citing N.C. Gen. Stat. § 50-16.3A(b) (7) (2005)).

Although "the trial court . . . [must] take into account the custodial spouse's financial and caregiving obligations in determining dependency, 'fairness' unquestionably requires that the noncustodial spouse's contributions in this area also be considered." *Fink*, 120 N.C. App. at 422, 462 S.E.2d at 852. When a prior child support order establishes the noncustodial spouse's "child support obligation under the Guidelines, the parties are collaterally estopped, absent a motion for modification, from asserting amounts different from those set out in the previous order relating to the child[ren]'s needs and the parties' obligations arising therefrom." *Id.* at 423, 462 S.E.2d at 852 (citing N.C. Gen. Stat. § 50-13.7). It is well-settled that child "support set consistent with the guidelines is *conclusively presumed* to be in such amount as to meet the reasonable needs of the child for health, education and maintenance.'" *Id.* at 423, 462 S.E.2d at 853 (quoting *Browne v. Browne*, 101 N.C. App. 617, 624, 400 S.E.2d 736, 740 (1991)). Therefore, one spouse "may not receive the benefit of a finding of dependency based in part upon [his or] her *actual* child support expenditures where [the other spouse] is credited only with his [or her] Guideline *proportionate* share." *Id.* at 424, 462 S.E.2d at 853; see also Suzanne Reynolds, 2 *Lee's North Carolina Family Law* § 9.27, at 350 (5th ed. 1999) (discussing *Fink*).

In the instant case, much as in *Fink*, a child support order setting support in an amount consistent with the child support guidelines was in effect at the time the alimony order was entered. Although the support order in the instant case was for *temporary* child support, the child support was ordered to continue "pending further orders of the Court," and the parties would have been "collaterally estopped, absent a motion for modification, from asserting amounts different from those set out in the previous order relating to the child[ren]'s needs and the parties' obligations arising therefrom." *Fink*, 120 N.C. App. at 423, 462 S.E.2d at 852.

However, unlike in *Fink*, "plaintiff [did] not receive the benefit of a finding of dependency based in part upon her *actual* child support expenditures where defendant [wa]s credited only with his Guideline *proportionate* share." *Id.* at 424, 462 S.E.2d at 853. The trial court closely examined the affidavits submitted by both parties, and noted that defendant had failed to file "an updated, amended affidavit" to supplement his affidavit filed sixteen months prior to the alimony hearing. In its findings, the trial court added the child support paid by defendant to plaintiff's "total monies available" to pay her expenses and the children's expenses, and the court deducted this same amount from defendant's available income. Further, the trial court reviewed and considered the actual expenditures on the parties' children alleged by both parties. In doing so, the court found that defendant had inflated the amount he alleged to have spent on the children. For example,

defendant listed the following expenses for the children on his affidavit: (1) \$100.00 per month in clothing; (2) \$100.00 per month in prescriptions; and (3) \$40.00 per month in vacations. The trial court, however, found that defendant admitted at the hearing that he (1) "purchased no clothing for the children in over six months"; (2) "paid nothing in the last year for [prescriptions]"; and (3) incurred no expenses for "vacations for the children in the past year." The trial court was willing to credit both parties with their actual child support expenditures, but the evidence demonstrated that defendant made few expenditures on his children above his legal child support obligation. The trial court did not violate this Court's instruction in *Fink*, and accordingly, defendant's assignment of error is overruled.

Next, defendant contends that the trial court erred by concluding that defendant was the supporting spouse on the grounds that (1) the court's finding of defendant's net monthly income of \$2,000.00 is not supported by the evidence; and (2) the court failed to make any finding with respect to defendant's living expenses. We disagree.

First, with respect to his income, the trial court found that defendant averaged forty hours per week at a rate of \$15.00 per hour, resulting in \$2,600.00 gross monthly income. The court then added defendant's bonuses – one week holiday bonus and a standard bonus of two weeks at time-and-a-half pay – to his salary, resulting in a total gross monthly income of \$2,687.00. The trial court then found that "[a]fter deducting for taxes, social security

and insurance, defendant's net income is at least \$2000 per month. This sum is further reduced by his child support payment to Plaintiff of \$568 leaving approximately \$1432 available to pay his needs and expenses."

The evidence presented to the trial court relating to defendant's income included both defendant's affidavit and his testimony at the hearing. When conflicting evidence regarding expenses or income is presented, it is within the trial court's discretion as the finder of fact to determine which evidence is credible. See *Gibson v. Gibson*, 68 N.C. App. 566, 571, 316 S.E.2d 99, 103 (1984). At the hearing, defendant testified that his net weekly income was "230-some, 234, I think." In his affidavit, defendant listed his gross monthly income as \$2,279.00, but this amount did not reflect his raise to \$15.00 per hour, nor did it include his bonuses. The trial court, therefore, properly calculated defendant's total gross income as \$2,687.00. Therefore, the trial court's finding that defendant's net income was \$2,000.00 per month - exclusive of his child support obligation - was supported by the evidence. Accordingly, defendant's assignment of error is overruled.

In challenging the trial court's determination that he was the supporting spouse, defendant also argues that the court failed to make findings of his monthly expenses, including his total monthly expenses. Although the trial court failed to include a finding of fact as to defendant's total monthly expenses, the trial court did include a list of twelve changes to the expenses listed on

defendant's affidavit, stating "The following findings address changes to defendant's affidavit." In each finding, the trial court first stated what defendant had alleged in his affidavit and then contrasted that amount with the evidence presented to the court. Although defendant characterizes these findings as mere recitations of the evidence, the findings clearly indicate that the court did more than "merely recite[] the testimony of witnesses." *Moore v. Moore*, 160 N.C. App. 569, 572, 587 S.E.2d 74, 76 (2003). This is evident in the portions of finding of fact number 18 to which defendant did not assign error:

d. Defendant lists \$572 per month for child support expense. This expense is actually \$568 per month by Court order and has already been taken into account . . . as a deduction from defendant's available income.

. . . .

g. Defendant lists \$326 per month payments on debt which he no longer pays as a result of Filing and being discharged in Chapter 7 Bankruptcy earlier this year

. . . .

h. Defendant lists a \$375 per month Rent or Mortgage Expense. However, his girlfriend testified he pays about \$200 per month. This is actually an obligation owed by defendant's girlfriend by reason of a note and deed of trust she owed before Defendant began living with her.

. . . .

l. Defendant indicates no new debt except for his attorney fees in this action. Before the Defendant started "sharing" expenses with his girlfriend, when he first separated from the Plaintiff, he was making the house payment at the former marital home in the amount of \$747 per month. He paid this in February, March and April of 2005 (See findings in June, 2005 Order). The Defendant also paid the

monthly water, cable and Sprint bills coming due at the marital residence after the parties' separation through April of 2005. The Defendant stopped paying such bills at that time when he began paying a portion of the electricity, cable and telephone bills at the residence of his girlfriend, Ms. Kelly Tallent. (See findings in June, 2005 Order)

(R. pp. 67-68). Contrary to defendant's contention, the trial court made extensive findings concerning his actual expenses, and accordingly, his assignment of error is overruled.

Next, defendant contends that the trial court erred when it concluded that he had the present ability to pay alimony. We disagree.

After determining that plaintiff was the dependent spouse and that defendant was the supporting spouse, the trial court was required to "consider all relevant factors" in determining the amount and duration of alimony. See N.C. Gen. Stat. § 50-16.3A(b) (2005). Section 50-16.3A(b) enumerates fifteen relevant, but non-exclusive, factors. See *id.* "The trial court must at least make findings sufficiently specific to indicate that the trial judge properly considered each of the factors . . . for a determination of an alimony award." *Rhew v. Rhew*, 138 N.C. App. 467, 470, 531 S.E.2d 471, 473 (2000), *rev. denied*, 360 N.C. 648, 636 S.E.2d 810 (2006) (quoting *Lamb v. Lamb*, 103 N.C. App. 541, 545, 406 S.E.2d 622, 624 (1991)). As this Court has held,

[a]ctual ability to pay is not a factor requiring findings of fact under [section] 50-16.3A(b). Furthermore, "the failure of the court to make a specific finding of fact as to [the supporting spouse's] ability to pay is not deemed a sufficient ground for disturbing the court's order." Although actual ability to pay is relevant to the court's

determination of fairness to the parties, it is not error for a court to omit a specific finding of actual ability to pay where the court clearly considered the defendant's actual ability to pay.

Swain v. Swain, 179 N.C. App. 795, 800-01, 635 S.E.2d 504, 508 (2006) (quoting *Mills v. Mills*, 257 N.C. 663, 666, 127 S.E.2d 232, 234 (1962)), *disc. rev. denied*, 361 N.C. 437, 649 S.E.2d 897 (2007). In the instant case, much as in *Swain*, "the court clearly considered [defendant's] ability to pay the alimony, as evidenced by its extensive findings as to [the parties'] income, living expenses, and estate." *Id.* Accordingly, defendant's assignment of error is overruled.

In his final argument, defendant contends that the trial court erred in finding that plaintiff was entitled to alimony. We disagree.

Once a determination is made pursuant to North Carolina General Statutes, section 50-16.1A(5) as to which, if either, of the spouses is the supporting spouse, the court may make a determination as to marital misconduct, and "[i]f the court finds that the supporting spouse participated in an act of illicit sexual behavior . . . during the marriage and prior to or on the date of separation, then the court shall order that alimony be paid to a dependent spouse." N.C. Gen. Stat. § 50-16.3A(a) (2005) (emphasis added).

Although defendant argues that the trial court concluded that he was the supporting spouse "essentially due to his adultery," the trial court's conclusion that plaintiff was the dependent spouse and that defendant was the supporting spouse is fully supported by

the findings of fact, and the findings are fully supported by the evidence. In addition to the findings of fact discussed *supra*, the trial court also found:

13. At the time of the separation of the parties, the Plaintiff herein was actually and substantially dependent upon the Defendant to help her pay her monthly expenses and was in need of defendant's maintenance and support to pay such expenses. Plaintiff has continued since the separation of the parties to be without sufficient financial means without defendant's assistance to meet her monthly needs and expenses as measured by the standard of living the parties had when together.

. . . .

19. Plaintiff has had to depend upon monies received from family and members of her church to meet the monthly expenses . . . or else, at times, she simply does not pay a particular bill when due or chooses to skip a payment for one bill to pay another in a given month. This has resulted in delinquencies in payment of several bills which she has never been able to keep up with.

Defendant failed to assign error to these findings of fact, and therefore, they are deemed binding on appeal. See *Hartsell v. Hartsell*, __ N.C. App. __, __, 657 S.E.2d 724, 726 (2008).

Contrary to his contention, defendant's adulterous affair did not render the trial court's determination of dependency a *fait accompli*; instead, his adulterous affair required a determination whether he, as the supporting spouse, should pay alimony. See N.C. Gen. Stat. § 50-16.3A(a) (2005). Defendant has not challenged the trial court's finding that he engaged in illicit sexual behavior during the marriage and prior to separation, nor has he challenged the reasonableness of the specific amount and duration of the

award, *i.e.*, \$500.00 per month for eight years. Accordingly, defendant's assignment of error is overruled.

Defendant's remaining assignment of error not argued in his brief is deemed abandoned. See N.C. R. App. P. 28(b)(6) (2007).

Affirmed.

Judge TYSON concurs.

Judge ARROWOOD concurs in the result.

Report per Rule 30(e).