NO. COA08-1131-2

NORTH CAROLINA COURT OF APPEALS

Filed: 21 September 2010

WILLIAM L. UNDERWOOD,
Plaintiff

v.

Catawba County
No. 97 CvD 2123

TERESA W. UNDERWOOD,
Defendant.

Appeal by Defendant from order entered 8 May 2008 by Judge Amy R. Sigmon in Catawba County District Court. Heard in the Court of Appeals 8 April 2009. On remand based upon an order entered 16 June 2010 by the Supreme Court of North Carolina requiring reconsideration of our prior opinion in light of *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983).

Blair E. Cody, III, and Wesley E. Starnes, for Plaintiff-Appellee.

Crowe & Davis, P.A., by H. Kent Crowe, for Defendant-Appellant.

ERVIN, Judge.

Defendant Teresa W. Underwood appeals from an order entered 8 May 2009 denying her motions to dismiss; terminating her alimony payments; requiring her to reimburse Plaintiff William L. Underwood for alimony paid during the pendency of his termination motion; and reserving ruling on the issue of retroactive reimbursement and attorney's fees. On 15 September 2009, this Court filed an opinion

reversing the trial court's order and remanding this case to the Catawba County District Court for further proceedings not inconsistent with our prior unpublished opinion on the grounds that the trial court lacked the authority to modify the "alimony" payments required under a Consent Order of Alimony and Equitable Distribution entered by Judge Jonathan L. Jones on 14 February 2000 with the consent of both parties. *Underwood v. Underwood*, __ N.C. App. __, __ S.E.2d __, 2009 N.C. App. Lexis 1505 (Sept. 15, 2009).

The decision set out in our prior opinion rested on a provision of the consent judgment stating that "[t]he agreements of the parties as to the payment of alimony as set forth herein have been made and are given in reciprocal consideration for the agreements of the parties as to Equitable Distribution and property settlement of the parties." As we stated at the conclusion of our prior opinion, "the provisions of the consent order clearly and explicitly make Plaintiff's 'alimony' payments and the remainder of the agreement's property settlement provisions 'reciprocal consideration' for each other, a fact which deprived the trial court of the authority to terminate or modify Plaintiff's spousal support obligation" under "prior decisions of the Supreme Court and this Court, which render consent orders containing language such as that present here unmodifiable." *Id.* at __, __ S.E.2d at __, 2009 N.C. App. Lexis at *28-*29.

On 23 October 2009, Defendant filed a Petition for Discretionary Review in which she sought review of our decision by the Supreme Court of North Carolina. On 16 June 2009, the Supreme

Court entered an order "remanding [this case] to the Court of Appeals for reconsideration in light of *Walters v. Walters*, 307 N.C. 381, 298 S.E. 2d 338 (1983)." *Underwood v. Underwood*, __ N.C. __, __, __ S.E.2d __, 2010 N.C. LEXIS 413 * 413 (June 16, 2010) (unpublished). We now undertake the reconsideration required by the Supreme Court's order.

At the time that the Supreme Court issued its opinion in *Walters*, existing North Carolina law "recognized the existence of two types of consent judgments," the first of which was "nothing more than a contract," in which "'the court merely approves or sanctions the payments . . . and sets them out in a judgment . . . ,'" and the second of which involved situations in which "'the Court adopts the agreement of the parties as its own determination of their respective rights and obligations and orders . . .' that the provisions of the separation agreement be observed." *Walters*, 307 N.C. at 384-85, 298 S.E.2d at 341 (quoting *Bunn v. Bunn*, 262 N.C. 67, 69, 136 S.E.2d 240, 242 (1964). Given its "realization that while in law those court sanctioned separation agreements in consent judgments create nothing more than a contract, in practice those non-court ordered consent judgments generate great confusion in the area of family law," the Supreme Court held that there was "no significant reason for the continued recognition of two separate forms of consent judgments within the area of domestic relations law." *Id.* 307 N.C. at 386, 298 S.E.2d at 341-42. As a result, the Supreme Court stated that:

> Instead of following this dual consent judgment approach in family law, we now

> establish a rule that whenever the parties bring their separation agreements before the court for the court's approval, it will no longer be treated as a contract between the parties. All separation agreements approved by the court as judgments of the court will be treated similarly, to-wit, as court ordered judgments. These court ordered separation agreements, as consent judgments, are modifiable, and enforceable by the contempt powers of the court, in the same manner as any other judgment in a domestic relations case. Insofar as this rule is in conflict with the previous decisions of this Court in *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964) and *Levitch v. Levitch*, 294 N.C. 437, 241 S.E. 2d 506 (1978), those cases will no longer control. This new rule applies only to this case and all such judgments entered after this decision.

Id. at 386, 298 S.E.2d at 342. As a result, the effect of the Supreme Court's decision was to make the rule enunciated in *Walters* effective for all consent judgments entered on or after 11 January 1983, such as the one at issue in this case.

In attempting to comply with the Supreme Court's order, we are first required to ascertain the basis for the Supreme Court's apparent conclusion that *Walters* should have had some impact on our analysis of the issues raised by Plaintiff's appeal. Defendant did not, as we read her petition for discretionary review, even cite *Walters*, much less argue that our prior decision conflicted with the Supreme Court's *Walters* opinion. In addition, the Supreme Court's remand order did not state any specific reason why our prior opinion was deemed potentially inconsistent with *Walters*. As a result, in the absence of more explicit guidance from the Supreme Court, we conclude that the effect of the Supreme Court's remand order is an instruction that we evaluate whether our prior opinion

erroneously failed to find that the consent judgment was not subject to modification given that it was entered after the date upon which the Supreme Court's opinion in *Walters* was filed.

This Court has previously addressed the exact issue which we believe that the Supreme Court wished us to consider. In *Hayes v. Hayes*, 100 N.C. App. 138, 394 S.E.2d 675 (1990), this Court considered whether *Walters* rendered the "alimony" provisions of a consent judgment entered on 10 November 1987 subject to modification. In answering this question in the negative, we stated that:

> The dispositive issue is whether the husband's court-ordered $280.00 per month payment to the wife is true alimony. If it is true alimony, it terminates upon remarriage of the dependent spouse. N.C. [Gen. Stat.] § 50-16.9(b) (1987). If not true alimony, it does not terminate upon remarriage of the dependent spouse.
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> Whether the support payments are in fact alimony does not depend on whether the order refers to [them] as "alimony" but instead on whether the support payments constitute "reciprocal consideration" for the property settlement provisions of the order. *White v. White*, 296 N.C. 661, 666, 252 S.E.2d 698, 701 (1979). If the support and property provisions exist reciprocally, the order is considered to reflect an integrated agreement, and the support payments are not alimony in the true sense of the word. *Marks v. Marks*, 316 N.C. 447, 455, 342 S.E.2d 859, 864 (1986). Court-ordered support payments which are part of an integrated agreement are not subject to modification by the trial court nor do they terminate as a matter of law upon remarriage of the dependent spouse. *Id.*
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> We reject any argument that the opinion in *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983), permits modification of support payments which are part of an

> integrated agreement simply because the agreement was included in a court order pursuant to the request of the parties. The *Walters* Court indeed held that "court ordered separation agreements . . . are modifiable . . . ." *Id.*, at 386, 298 S.E.2d at 342. However, the Court also held that such agreements are modifiable to the extent and "in the same manner as any other judgment in a domestic relations case." *Id.* *Walters* did not change, for example, the law in North Carolina that property settlement provisions of a separation agreement included in a consent degree are "beyond the power of the judge to modify without the consent of both parties." *Holsomback v. Holsomback*, 273 N.C. 728, 732, 161 S.E.2d 99, 102-03 (1968). This is so regardless of whether the property settlement provisions are part of an integrated agreement. Likewise, *Walters* did not change the law in North Carolina which prohibits the modification of support provisions of an integrated property settlement agreement. *See Marks*, 316 N.C. at 455, 342 S.E.2d at 864. However, since support payments not part of an integrated agreement are modifiable by law, N.C. [Gen. Stat.] § 50-16.9(a), *Walters* would allow such support provisions to be modified if included in a court ordered decree at the request of the parties.

Id. at 146-47, 394 S.E.2d at 679-80. In other words, the *Hayes* Court determined that periodic payment provisions in an integrated agreement did not constitute "true alimony" and that the only periodic payment provisions subject to modification under *Walters* were those not provided as reciprocal consideration for other portions of the overall settlement between the parties. In light of that analysis, the *Hayes* Court proceeded to "determine whether the support provision of the order at issue is part of an integrated agreement or is in fact separate" and determined that an evidentiary hearing was required to answer that question given the

absence of "explicit, unequivocal provisions on integration or non-integration." *Id.* at 147, 148, 394 S.E.2d at 680. Unlike the consent order in *Hayes*, the order here specifically provided that the "alimony" payments were "reciprocal consideration" for the provisions regarding "equitable distribution and property settlement," leaving no ambiguity as to the consent order as an integrated agreement.

As a result, this Court has previously decided that periodic payments required to be made by one spouse to another pursuant to the terms of a consent judgment entered after the date of *Walters*, even if expressly labeled as "alimony" in the consent judgment, are not subject to modification in the event that those payments were required as part of an integrated agreement. "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (citing *Monroe County, Fl. v. U.S. Dep't. of Labor*, 690 F.2d 1359 (11th Cir. 1982); *Caldwell v. Ogden Sea Transport, Inc.*, 618 F.2d 1037 (4th Cir. 1980). In our prior opinion in *Hayes*, we expressly rejected the contention that *Walters* rendered periodic support payment provisions in an integrated agreement like the one at issue here subject to modification. Neither *Hayes* nor any decision reached in reliance on the principle enunciated in *Hayes* has "been overturned by a higher court." *Id.* In order to reach a different result than that specified in our prior decision on the

basis of *Walters*, we would have to disregard *Hayes*, a step that was not addressed in the Supreme Court's remand order and that we lack the independent authority to take. As a result, given that the issue that we have been requested to examine has been definitively addressed and decided in a prior decision of this Court and given that we lack the authority to disregard that prior decision, we conclude that we are required to hold that our prior decision in this case must stand, that the trial court's order should be reversed, and that this case should be remanded to the Catawba County District Court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Judges ELMORE and STROUD concur.

Report per Rule 30(e).