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NO. COA12-285
NORTH CAROLINA COURT OF APPEALS

Filed: 2 October 2012

BETTY M. ROCHELLE,
Plaintiff,

v.

Orange County
No. 09 CVD 875

GEORGE H. ROCHELLE,
Defendant.

Appeal by defendant from order entered 4 August 2011 by Judge Lunsford Long in Orange County District Court. Heard in the Court of Appeals 29 August 2012.

Steffan & Associates, P.C. by Kim K. Steffan for plaintiff-appellee.

Bishop & Smith, PLLC by Keith A. Bishop for defendant-appellant.

STEELMAN, Judge.

The trial court's findings of fact supporting its award of alimony were supported by competent evidence in the record. These findings, in turn, supported the trial court's conclusion of law awarding alimony to plaintiff. The trial court did not abuse its discretion in making an unequal distribution of the

marital estate. The trial court did not err in awarding attorney's fees to plaintiff, based upon the award of alimony.

I. Factual and Procedural History

On 1 June 2009, Betty M. Rochelle (plaintiff) filed a complaint against George H. Rochelle (defendant) seeking an absolute divorce, equitable distribution, alimony and post separation support, child support, injunctive relief, and attorney's fees. On 4 August 2011, the trial court entered an order awarding plaintiff 52% of the marital property, alimony, and attorney's fees.

Defendant appeals.

II. Alimony

In his first argument, defendant contends that finding of fact 14, which set forth the basis for the award of alimony, was unsupported by the evidence. We disagree.

A. Standard of Review

"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." *Williamson v. Williamson*, ___ N.C. App. ___, ___, 719 S.E.2d 625, 626 (2011).

B. Analysis

Entitlement to alimony is governed by N.C. Gen. Stat. § 50-16.3A(a). According to that section, a party is entitled to alimony if three requirements are satisfied: (1) that 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).

In the instant case, the trial court made the following findings of fact:

14. An award of alimony is equitable under NCGS § 50-16.3A for the following reasons and factors:

a. Defendant engaged in marital misconduct by exercising financial, social and personal control over the Plaintiff. As a result of Defendant's demands in the marriage, Plaintiff was isolated and had very few friends, and Plaintiff was limited in her ability to go anywhere or do anything. Defendant belittled and criticized Plaintiff often in the marriage, including in front of the parties' children. Defendant was very demanding of having money spent and managed as he saw fit. Plaintiff left the marital home for good cause. Defendant caused Plaintiff to suffer indignities that made her life burdensome.

b. During the marriage and since, Defendant has greater income and income potential than Plaintiff, as described above. Subsequent to this order, Plaintiff will have income of \$147.51 per month from a QDRO as to

Defendant's pension plan.

c. Plaintiff has serious health problems, including rheumatoid arthritis, a heart condition, cancer of the blood, and depression. Defendant has been determined to be disabled by the Social Security Administration, but he receives monthly disability income, monthly pension income, and could receive monthly rental income if he chose.

d. The marriage was lengthy, being 20 years in duration.

e. Plaintiff provided services as a homemaker and took care of the daily needs of raising the children during the marriage.

f. Defendant has a substantial separate estate, described herein, and Plaintiff has none.

g. Plaintiff is in need of an award of alimony.

Defendant argues that plaintiff's "testimony was conclusory and without credible evidentiary bases" "It is well settled that it is within a trial court's discretion to determine the weight and credibility that should be given to all evidence that is presented during trial." *Megremis v. Megremis*, 179 N.C. App. 174, 182, 633 S.E.2d 117, 123 (2006) (internal quotation marks omitted). "The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight

and credibility to be given to evidence disclosed by the record on appeal." *Id.* Evidence presented at the hearing supported the trial court's finding of fact.¹ The trial court did not err in making this finding of fact.

Defendant further argues that the trial court erred in awarding alimony. Defendant challenges only the second requirement in N.C. Gen. Stat. § 50-16.3A(a): that the other party is a supporting spouse.

"To be a supporting spouse, one must be the spouse upon whom the other spouse is either actually substantially dependent or substantially in need of maintenance and support." *Barrett*, 140 N.C. App. at 373, 536 S.E.2d at 645 (internal quotation marks omitted). "A surplus of income over expenses is sufficient in and of itself to warrant a supporting spouse classification." *Id.*

In the instant case, defendant failed to comply with the trial court's order compelling discovery. The trial court found numerous violations. "Defendant failed to produce any documentation showing what he did with the \$32,446.00 paid to

¹ Defendant objected to plaintiff's testimony as to a statement of her son, presumably on the basis that it was hearsay. The trial court did not rule on this objection. Defendant objected to plaintiff's testimony as to statements of another son, also presumably on the basis that it was hearsay. The trial court sustained the objection.

him by Social Security Administration in January, 2010." Defendant stipulated that he withdrew \$6500 from a retirement account in 2008, but produced no bank statements as to where the funds were deposited. "Defendant produced no documentation of any bank account he had access to, individually or as part of Rochelle Transit or R&R Transit at BB&T or at any other bank." "Defendant clearly failed to list all sources of income he has had since January 1, 2005 to the present, and the details of each, as required[.]"

The trial court found that defendant regularly deposited sufficient undocumented funds into a bank account to pay his bills. "Because Defendant's cash deposits are always more than enough to cover his fluctuating monthly expenses, it can be inferred that there is additional cash elsewhere to be able to cover additional expenses, such as alimony." Defendant does not challenge this finding of fact on appeal. The inferred income surplus adequately supports the trial court's conclusion that defendant was a supporting spouse.

This argument is without merit.

III. Distribution of Marital Estate

In his second argument, defendant contends that the trial court erred in making an unequal distribution of the marital

estate. We disagree.

A. Standard of Review

"The trial court has discretion in distributing marital property and the exercise of that discretion will not be disturbed in the absence of clear abuse." *McNeely v. McNeely*, 195 N.C. App. 705, 709, 673 S.E.2d 778, 781 (2009) (internal quotation marks omitted). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.*

B. Analysis

"N.C. Gen. Stat. § 50-20 provides that, in an equitable distribution proceeding, the trial court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties[.]" *McNeely*, 195 N.C. App. at 709, 673 S.E.2d at 781 (alteration in original) (internal quotation marks omitted).

If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably. The court shall consider all of the following factors under this subsection:

- (1) The income, property, and liabilities of

each party at the time the division of property is to become effective.

(2) Any obligation for support arising out of a prior marriage.

(3) The duration of the marriage and the age and physical and mental health of both parties.

(4) The need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects.

(5) The expectation of pension, retirement, or other deferred compensation rights that are not marital property.

(6) Any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services, or lack thereof, as a spouse, parent, wage earner or homemaker.

(7) Any direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse.

(8) Any direct contribution to an increase in value of separate property which occurs during the course of the marriage.

(9) The liquid or nonliquid character of all marital property and divisible property.

(10) The difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest, intact and free from any claim or interference by the other party.

(11) The tax consequences to each party, including those federal and State tax consequences that would have been incurred if the marital and divisible property had been sold or liquidated on the date of valuation. The trial court may, however, in its discretion, consider whether or when such tax consequences are reasonably likely to occur in determining the equitable value deemed appropriate for this factor.

(11a) Acts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert the marital property or divisible property, or both, during the period after separation of the parties and before the time of distribution.

(11b) In the event of the death of either party prior to the entry of any order for the distribution of property made pursuant to this subsection:

a. Property passing to the surviving spouse by will or through intestacy due to the death of a spouse.

b. Property held as tenants by the entirety or as joint tenants with rights of survivorship passing to the surviving spouse due to the death of a spouse.

c. Property passing to the surviving spouse from life insurance, individual retirement accounts, pension or profit-sharing plans, any private or governmental retirement plan or annuity of which the decedent controlled the designation of beneficiary (excluding any benefits under the federal social security system), or any other retirement accounts or contracts, due to the death of a spouse.

d. The surviving spouse's right to claim an "elective share" pursuant to G.S. 30-3.1 through G.S.30-33, unless otherwise waived.

(12) Any other factor which the court finds to be just and proper.

N.C. Gen. Stat. § 50-20(c) (2011).

Defendant disputes the distribution of the marital home, which is subject to a mortgage, to him and the parties' other house, which has no mortgage, to plaintiff. The trial court awarded 52% of the marital estate to plaintiff and 48% to defendant. The trial court supported this award with findings of fact, in compliance with N.C. Gen. Stat. § 50-20(c) (2011). The findings of fact are as follows:

13. The marital estate equals \$230,472.09. The distribution reflected herein is Plaintiff \$119,021.18 and Defendant \$111,450.91, plus each party receiving one-half of the household furnishings. This is a division of 52% to Plaintiff and 48% to Defendant. This distribution of the marital estate is equitable because of the following factors:

a. Defendant's separate estate is valued at \$165,778.31. Plaintiff has no separate estate.

b. However, Defendant is older than Plaintiff (62 as opposed to 51). In addition, Defendant has been found to be disabled by the Social Security Administration. Plaintiff has serious health problems and may be disabled, but no determination of disability has been made by

the Social Security Administration in her case which is on appeal.

c. Defendant has greater income than Plaintiff.

d. Plaintiff is in need of cash, or assets that can be sold or converted to cash, in order to make overdue repairs on her home, to pay her attorney, and to address other financial needs she has had to delay due to lack of access to funds.

e. Plaintiff is in need of the marital portion of the pension so that she will have some income by it.

f. Defendant has intentionally withheld information and documentation concerning assets and income. The Court finds that it is reasonable to conclude that there are other marital assets in existence that Defendant has failed to disclose and prevented the Court from accounting for them. The Court finds that it is reasonable to conclude there are additional separate property assets in existence, which would make the Defendant's separate property estate even larger than the number listed herein. Pursuant to NCGS section 50-21(e), the Court shall impose an appropriate sanction on Defendant, as he has willfully obstructed or unreasonably delayed discovery proceedings and failed to make discovery pursuant to Rule 37, and the obstruction, delay and failure are prejudicial to the interests of the Plaintiff.

g. The marriage was lengthy, 20 years in duration.

Defendant does not dispute these findings on appeal. These findings support the trial court's conclusion of law that an

"unequal distribution of marital property is equitable." The trial court did not abuse its discretion in the distribution of the marital estate.

This argument is without merit.

IV. Attorney's Fees

In his third argument, defendant contends that the trial court erred in awarding attorney's fees to plaintiff because he is not a supporting spouse. We disagree.

"At any time that a dependent spouse would be entitled to alimony pursuant to G.S. 50-16.3A . . . the court may, upon application of such spouse, enter an order for reasonable counsel fees[.]" N.C. Gen. Stat. § 50-16.4 (2011).

As previously discussed, the trial court did not err in awarding alimony to plaintiff. The trial court was authorized by statute to award attorney's fees.

This argument is without merit.

AFFIRMED.

Judges HUNTER, Robert C. and BRYANT concur.

Report per Rule 30(e).