

NO. COA14-451

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

LIANE ELLIS,
Plaintiff,

v.

Mecklenburg County
No. 11 CVD 22967 CTM

WILLIAM D. ELLIS,
Defendant.

Appeal by plaintiff from order entered 23 September 2013 by Judge Christy T. Mann in Mecklenburg County District Court. Heard in the Court of Appeals 22 October 2014.

The Law Office of Richard B. Johnson, PA, by Richard B. Johnson, for plaintiff-appellant.

Hamilton Stephens Steele & Martin, PLLC, by Amy Simpson Fiorenza, for defendant-appellee.

BRYANT, Judge.

Where the trial court made findings of fact to support its award of alimony for a specific period, and properly considered condoned acts of marital misconduct by a dependent spouse in making its decision regarding alimony, we affirm the order of the trial court. Awarding of attorneys' fees in a claim for alimony is within the discretion of the trial court.

Plaintiff Liane Ellis and defendant William D. Ellis, both Canadian citizens, were married on 29 December 1996. Two minor children were born of the marriage.

In 2007, defendant was transferred by his employer to England with his family. Two years later, while residing in England, defendant discovered that plaintiff had engaged in an extra-marital affair with a hockey player beginning in 2006. Plaintiff and defendant agreed not to separate and underwent marital counseling to repair their marriage.

In 2010, defendant was promoted by his employer and transferred to Charlotte, North Carolina with his family. On 21 December 2011, plaintiff filed a complaint against defendant for child custody, child support, equitable distribution, post-separation support and alimony, divorce from bed and board, and interim distribution. Defendant filed an answer and counterclaim seeking a temporary parenting arrangement, a forensic examination, child custody, child support, and equitable distribution. An order adopting the parties' interim agreement was entered 6 March 2013.

On 21 May 2013, plaintiff and defendant agreed to a permanent custody and visitation consent order. On 26 May, plaintiff filed a motion alleging defendant was in contempt for

violating the interim order. A trial was held on 31 May concerning the parties' claims for equitable distribution, child support, alimony, attorneys' fees, and contempt. On 23 September, the trial court entered an order regarding the claims for equitable distribution, child support, alimony, and attorneys' fees, and denying plaintiff's motion for contempt. Plaintiff appeals.

Plaintiff raises three issues on appeal addressing whether the trial court erred in: (I) awarding plaintiff only two years of alimony; (II) considering plaintiff's marital misconduct in calculating its award of alimony; and (III) not awarding attorneys' fees to plaintiff.

I.

Plaintiff argues the trial court erred in awarding plaintiff only two years of alimony. We disagree.

"Decisions regarding the amount of alimony are left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion." *Bookholt v. Bookholt*, 136 N.C. App. 247, 249-50, 523 S.E.2d 729, 731 (1999) (citation omitted), *superseded on other grounds by statute as stated in Williamson v. Williamson*,

142 N.C. App. 702, 543 S.E.2d 897 (2001). "An abuse of discretion is a decision manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998) (citations omitted).

Plaintiff contends the trial court erred in its award of alimony because the trial court failed to make specific findings of fact addressing why it awarded only two years of alimony when other findings of fact made by the trial court indicated plaintiff was entitled to more than two years of alimony. Pursuant to North Carolina General Statutes, section 50-16.3A, "[t]he court shall exercise its discretion in determining the amount, duration, and manner of payment of alimony. The duration of the award may be for a specified or for an indefinite term." N.C. Gen. Stat. § 50-16.3A(b) (2013). "In determining the amount, duration, and manner of payment of alimony," the trial court must consider sixteen relevant factors, including marital misconduct, duration of marriage, and earning capabilities of the parties. *Id.*

In its order awarding alimony, the trial court made findings of fact addressing all sixteen statutory factors before concluding plaintiff was entitled to an award of alimony lasting

for two years. Plaintiff's argument that the trial court failed to make any findings of fact concerning why it limited its award of alimony to two years is without merit, since the trial court clearly stated in its first finding of fact that:

Plaintiff/Mother engaged in illicit sexual misconduct during the marriage and prior to the [date of separation]. Specifically, she engaged in sexual intercourse with a professional hockey player that she met while working at the arena in Canada. Plaintiff/Mother was not separated from Defendant/Father at the time and engaged in the behavior without his knowledge or approval. Plaintiff/Mother felt she was entitled to have this extramarital affair because she was a "bored housewife" and she felt she gave up the right to pursue her career goals to support Defendant/Father's career goals.

The Court finds that Defendant/Father did condone the illicit sexual misconduct of Plaintiff/Mother so the behavior cannot act as a bar to alimony. *However, the Court considers the nature of the behavior and Plaintiff/Mother's resulting disrespect for and mistreatment of the marriage in determining the amount and duration of alimony.*

(emphasis added). It is well-established by this Court that "a trial court's failure to make any findings regarding the reasons for the amount, duration, and the manner of payment of alimony violates N.C. Gen. Stat. § 50-16.3(A)(c)." *Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 421, 588 S.E.2d 517, 522-23

(2003) (emphasis added) (citation omitted); see also N.C. Gen. Stat. § 50-16.3(A)(c) (2013) (holding that where a trial court decides, in its discretion, to award alimony, the trial court must give its reasons for the award's amount, duration, and manner of payment).

Here, the trial court clearly stated that it had considered plaintiff's "resulting disrespect for and mistreatment of the marriage in determining the amount and duration of alimony." As such, this finding of fact is sufficient to explain the trial court's reasoning in awarding plaintiff alimony for a duration of two years. Further, we note that the trial court made other findings of fact that could also support its decision to award alimony for only two years, including finding of fact eight ("Plaintiff/Mother was a spendthrift who consistently and regularly lived above the family's means."), and fifteen ("Plaintiff/Mother has not participated in this litigation in good faith. Her actions have resulted in the depletion of her own savings and share of the marital estate. She has contributed to her own poor economic circumstances. Additionally, she has not been diligent about finding a job or contributing [to] the family's overall economics."). Accordingly, plaintiff's argument is overruled.

II.

Plaintiff next argues the trial court erred in considering plaintiff's marital misconduct in calculating its award of alimony. We disagree.

As discussed above in *Issue I*, pursuant to N.C. Gen. Stat. § 50-16.3A(b), the trial court must, in deciding whether to award alimony, consider sixteen statutory factors including marital misconduct. Where the trial court determines that "the dependent spouse has engaged in uncondoned 'illicit sexual behavior' during the marriage and prior to the date of separation, the trial court cannot award alimony[.]" *Romulus v. Romulus*, 215 N.C. App. 495, 522, 715 S.E.2d 308, 325 (2011) (citing N.C.G.S. § 50-16.3A(a) (barring an award of alimony to a dependent spouse where that spouse engaged in illicit sexual behavior during the marriage)).

Here, both parties acknowledged that plaintiff had had an affair beginning in 2006 while married to defendant, and that rather than pursue a divorce, defendant and plaintiff underwent marriage counseling beginning in 2009. The parties remained married until plaintiff separated from defendant in December 2011. We disagree with plaintiff's contention that the trial court could not consider plaintiff's marital misconduct in

determining her award of alimony for, although N.C.G.S. § 50-16.3A(a) clearly bars alimony for a dependent spouse who has engaged in uncondoned marital misconduct, here defendant condoned plaintiff's actions and sought to salvage his marriage. Indeed, the trial court noted in its first finding of fact concerning marital misconduct that defendant "did condone the illicit sexual misconduct of [plaintiff] so the behavior cannot act as a bar to alimony[,]" and ultimately awarded plaintiff alimony for two years. Further, there is nothing in N.C.G.S. § 50-16.3A(b) to indicate that the trial court cannot consider a spouse's condoned marital misconduct in calculating its award of alimony to the dependent spouse. Rather, N.C.G.S. § 50-16.3A(b) indicates that the trial court can consider acts of condoned marital misconduct as part of its determination of an award of alimony. See N.C.G.S. § 50-16.3A(b)(1) (noting that the trial court can consider instances of marital misconduct by either or both spouses as one of the sixteen statutory factors relevant to whether alimony should be awarded). Therefore, plaintiff's contention that the trial court could not consider plaintiff's condoned acts of marital misconduct in its decision to award alimony, albeit for only a two-year period, to plaintiff is without merit.

III.

Finally, plaintiff contends the trial court erred in failing to award plaintiff attorneys' fees. We disagree.

"[T]he award of . . . attorney's fees in matters of child custody and support, as well as alimony, is within the discretion of the trial court." *McKinney v. McKinney*, ___ N.C. App. ___, ___, 745 S.E.2d 356, 361 (2013), *review denied*, 2014 N.C. LEXIS 46 (Jan. 23, 2014), *review dismissed as moot*, 2014 N.C. LEXIS 50 (Jan. 23, 2014).

North Carolina General Statutes, section 50-16.4, states that:

At any time that a dependent spouse would be entitled to alimony pursuant to G.S. 50-16.3A, or post[-]separation support pursuant to G.S. 50-16.2A, the court *may*, upon application of such spouse, enter an order for reasonable counsel fees, to be paid and secured by the supporting spouse in the same manner as alimony.

N.C. Gen. Stat. § 50-16.4 (2013) (emphasis added).

Plaintiff argues that the trial court erred in denying her claim for attorneys' fees because the trial court's findings of fact contained elsewhere in the order indicated that plaintiff was a dependent spouse who was currently unemployed and lacked the financial means to cover the costs of litigation and,

therefore, plaintiff was entitled to an award of attorneys' fees.

Here, the trial court made the following findings of fact regarding both parties' claims for attorneys' fees:

44. Plaintiff/Mother asserted a claim for attorney's fees with respect to her claim for child custody and child support and her claim for post-separation support and alimony.

45. The Court finds that Plaintiff/Mother is not entitled to a recovery of attorney's fees with respect to her claim for child custody and child support because she is not an interested party acting in good faith with insufficient means to defray the costs and expenses of suit as required by statute.

46. Specifically, the Court finds that Plaintiff/Mother has acted contrary to the custody terms outlined in the Interim Order since it was entered and she has continually acted with a conscious disregard to and in defiance of Defendant/Father's rights with regard to the children.

47. The Court finds that Plaintiff/Mother is not entitled to a recovery of attorney's fees with respect to her claim for post-separation support and alimony because Defendant/Father has paid his spousal support voluntarily, acted in good faith at all times with this process, and that as a result of the equitable distribution Plaintiff/Mother has sufficient means to defray the costs and expenses associated with her claims for spousal support.

48. Defendant/Father made a request that the Court award him attorney's fees associated

with his claim for child custody.

49. Despite the ultimate resolution by consent, the issue of child custody, both temporary and permanent was a very contentious issue and required a significant amount of legal resources to address by both parties. Specifically, the children are estranged from their father due to no fault of their father. Neither the court-appointed therapist nor the involvement of the Council for Children's Rights ("CFCR") could repair the relationship. All reasonable efforts were made in this regard by everyone but Plaintiff/Mother. Plaintiff/Mother, both intentionally and unintentionally, supported the continued estrangement between the children and their father. Defendant/Father's request for attorney's fees as related to child custody was made as a result of how much time, attention and cost had to be devoted to the issue of child custody, either because of or in spite of Plaintiff/Mother.

50. While the Court finds that Defendant/Father was an interested party acting in good faith, the Court cannot find that Defendant/Father has insufficient means with which to defray the costs and expenses of suit.

Plaintiff's argument that the trial court erred in denying her claim for attorneys' fees is without merit, since under N.C.G.S. § 50-16.4, the trial court's decision to award attorneys' fees is clearly discretionary rather than mandatory. See *id.* Moreover, the trial court made specific findings of fact that plaintiff was not entitled to attorneys' fees because

plaintiff failed to act in good faith during the litigation. As such, the trial court acted within its discretion when it denied plaintiff's claim for attorneys' fees. Plaintiff's argument is, therefore, overruled.

Affirmed.

Judges ELMORE and ERVIN concur.