IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1352

Filed: 17 November 2015

Orange County, No. 11 CVD 311

ANGELA LYNN FIPPS, Plaintiff,

v.

JEFFREY AARON FISHER, Defendant.

Appeal by defendant from order entered 25 July 2014 by Judge Beverly Scarlett in Orange County District Court. Heard in the Court of Appeals 23 April 2015.

Ronald W. Merritt for plaintiff-appellee.

Leigh Peek, Attorney at Law, P.C., by Leigh A. Peek, for defendant-appellant.

GEER, Judge.

Defendant Jeffrey Aaron Fisher appeals from an order requiring him to pay $2,425.50 in child support arrearage for the period from November 2013 to July 2014. On appeal, we agree with defendant that the trial court erred in calculating child support based on the North Carolina Child Support Guidelines ("the Guidelines") when the parties' combined incomes exceeded $300,000.00. We do not, however, find persuasive defendant's contention that the trial court erred by including in defendant's income, for purposes of calculating child support, $60,000.00 in

consultant fees paid by the limited liability company solely owned by defendant to his current wife. The trial court was entitled to find, based on the evidence, that this sum was used to actually benefit defendant and lessen his living expenses. We, therefore, affirm in part and reverse and remand in part.

Facts

Plaintiff and defendant were married on 15 May 2002 and have one child together, Frederick,[1] who was born 11 August 2002. On 31 March 2008, the parties separated, and on 1 June 2009, the parties were granted an absolute divorce.

Defendant is the sole owner of Unique Places, LLC, ("Unique Places") a company that is engaged in land conservation and development. On 1 March 2011, defendant married Svetlana Andrianova, a businesswoman from Russia. Ms. Andrianova formed SvetCo, LLC ("SvetCo") in September 2012 as the managing member. In November and December 2012, Unique Places transferred $146,100.00 to SvetCo in professional fees.

On 14 February 2013, the parties entered into a consent order that granted permanent shared custody of Frederick with each parent having physical custody 50% of the time. The order also provided that the parties would exchange income information on 16 October 2013 so that child support could be recalculated based on the parties' respective incomes during 2012. The new child support amount would be

[1]"Frederick" is a pseudonym used throughout this opinion to protect the identity of the minor child and for ease of reading.

effective 1 November 2013 and remain in effect for the following two years, at which time child support would again be recalculated.

On 11 March 2014, plaintiff filed a motion for child support, alleging that the $146,100.00 paid by Unique Places to SvetCo should have been included in defendant's income for purposes of determining the amount of child support owed by defendant to plaintiff for the year 2012. In response, defendant filed a motion arguing that the fees paid to Ms. Andrianova should not be used to calculate defendant's child support obligation, seeking the return of attorneys' fees previously paid, and requesting a protective order barring any discovery request pertaining to payments made by Unique Places to Ms. Andrianova.

On 25 July 2014, the trial court entered an Order for Child Support. The court found that "[a]fter deducting his business expenses, including as an expense the said sum paid to his current wife's company, Defendant's total income for 2012, as reflected upon his federal tax return, was $202,093.00." The court further found, however, that $60,000.00 of the money paid to the limited liability company owned by defendant's current wife "was used to directly benefit Defendant and lessen his living expenses in that it was used to purchase real estate which was titled in the joint names of Defendant and his new wife, and as such, said sum was available to Defendant for child support purposes within the meaning of the [Guidelines]." Including the $60,000.00 amount, the court then determined that defendant's total

income in 2012 for purposes of calculating child support was $262,093.00. Plaintiff's income was $48,152.00.

Although the parents' total income exceeded $300,000.00, the trial court concluded: "The amount that the parties' combined incomes exceed the maximum amount set forth in the Guidelines is not substantial and it is appropriate to use to [sic] the Guidelines to determine the amount of child support in this case." Based on Worksheet B, the court found that defendant's monthly child support obligation was "$1,140.50 beginning November 1, 2013 and continuing until his child support obligation is recalculated pursuant to this Court's previous order on November 1, 2015." Because defendant had paid $871.00 per month in child support from November 2013 through July 2014, he owed $269.50 per month, which amounted to a total of $2,425.50 in arrears for his child support obligation through July 2014. Defendant timely appealed the child support order to this Court.

Standard of Review

" 'Child support orders entered by a trial court are accorded substantial deference by appellate courts[.]' " *Ludlam v. Miller*, 225 N.C. App. 350, 356, 739 S.E.2d 555, 559 (2013) (quoting *Moore v. Onafowora*, 208 N.C. App. 674, 676, 703 S.E.2d 744, 746 (2010)). " 'In reviewing child support orders, our review is limited to a determination whether the trial court abused its discretion. Under this standard of review, the trial court's ruling will be overturned only upon a showing that it was

so arbitrary that it could not have been the result of a reasoned decision. The trial court must, however, make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law.' " *Id.* at 355, 739 S.E.2d at 558 (quoting *Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005)).

I

Defendant first argues that the trial court erred in concluding that $60,000.00 of the amount paid by Unique Places to SvetCo should be included in his income for purposes of calculating his child support obligation. The General Assembly has determined that "[t]he court shall determine the amount of child support payments by applying the presumptive guidelines established pursuant to [N.C. Gen. Stat. § 50-13.4(c1) (2013)]." N.C. Gen. Stat. § 50-13.4(c).

The Guidelines define "income" as:

> a parent's actual gross income from any source, including but not limited to income from employment or self-employment (salaries, wages, commissions, bonuses, dividends, severance pay, etc.), ownership or operation of a business, partnership, or corporation . . . .
>
> . . . .
>
> Except as otherwise provided, income does not include the income of a person who is not a parent of a child for whom support is being determined regardless of whether that person is married to or lives with the child's parent or has physical custody of the child.

Guidelines, 2015 Ann. R. N.C. 51.

In challenging the inclusion of the $60,000.00 as part of his income, defendant argues only that the trial court "erred in concluding that a portion of Svetlana's income should be available to her step-son for the purposes of establishing a child support obligation due to its use to purchase jointly held real property." (Initial capitalization and emphasis omitted.) Defendant has misconstrued the trial court's order. Nothing in the court's order suggests that the court was including a portion of Ms. Andrianova's income, as step-parent, as part of defendant's income. Although the court's order could have been more specific, it is still apparent that the court found, instead, that the $60,000.00 was not an actual business expense of Unique Places and, therefore, should not be deducted from defendant's income.

When a parent is self-employed, as defendant is, the Guidelines determine a parent's income as "gross receipts minus ordinary and necessary expenses required for self-employment or business operation." *Id.* Additionally, "[e]xpense reimbursements or in-kind payments . . . received by a parent in the course of . . . self-employment[] or operation of a business are counted as income if they are significant and reduce personal living expenses." *Id.* This Court has explained further: " '[T]he Guidelines vest the trial court with the discretion to disallow the deduction of any business expenses which are inappropriate for the purposes of calculating child support, [and] the trial court's decision . . . to disallow the claimed expenses must be

upheld unless it is manifestly unsupported by reason and therefore an abuse of discretion.' " *Cauble v. Cauble*, 133 N.C. App. 390, 395, 515 S.E.2d 708, 712 (1999) (quoting *Kennedy v. Kennedy*, 107 N.C. App. 695, 700, 421 S.E.2d 795, 798 (1992)).

Here, the question before the trial court was whether the $60,000.00 "constitute[d] an ordinary and necessary expense[.]" *Barham v. Barham*, 127 N.C. App. 20, 25, 487 S.E.2d 774, 778 (1997), *aff'd per curiam*, 347 N.C. 570, 494 S.E.2d 763 (1998). Defendant's evidence showed that a portion of the $146,100.00 (at least $64,558.50) was for consulting services that Ms. Andrianova performed prior to the formation of SvetCo in September 2012; that Ms. Andrianova did not know whether she would be paid for those services until defendant announced to her in September 2012 that he would pay her (including for her time dating back to April 2012); that some of the invoices were prepared in September 2012; and that although the invoices showed hourly billing, Ms. Andrianova did not typically bill her clients hourly. The evidence also showed that Ms. Andrianova used $60,000.00 of the money received from Unique Places to purchase real estate jointly owned with defendant.

The trial court could reasonably conclude, based on this evidence, that Unique Places' payment of $60,000.00 to SvetCo for consulting was not an ordinary and necessary expense, and, therefore, we conclude that the trial court's decision to include that amount in defendant's income was not manifestly unsupported by reason. *See Spicer*, 168 N.C. App. at 289, 607 S.E.2d at 683 (holding trial court did

not err in concluding $300.00 per month in value that defendant father received in housing was properly included in his income); *Barham*, 127 N.C. App. at 26, 487 S.E.2d at 778 (holding trial court erred in excluding from calculation of father's gross income father's business' cash reserves because, though encumbered, reserves "constitute[d] value retained" by father and "it was [father's] choice to pledge [the funds] to the bank in exchange for business financing").

II

Defendant next argues that the trial court erred in calculating the total child support obligation based on the Guidelines. The Guidelines provide that "[i]n cases in which the parents' combined adjusted gross income is more than $25,000 per month ($300,000 per year), the supporting parent's basic child support obligation cannot be determined by using the child support schedule. In cases in which the parents' combined income is above $25,000 per month, the court should set support in such amount as to meet the reasonable needs of the child . . . . The schedule of basic child support may be of assistance to the court in determining a minimal level of child support." Guidelines, 2015 Ann. R. N.C. 50.

This Court has held: "[O]ur case law is explicit, in accordance with the Guidelines, that when the monthly maximum contemplated by the Guidelines is exceeded, the trial court is required to order a child support award based on the particular facts and circumstances of the case and not merely to extrapolate from the

Guidelines." *Diehl v. Diehl*, 177 N.C. App. 642, 652, 630 S.E.2d 25, 31 (2006). *See also Meehan v. Lawrance*, 166 N.C. App. 369, 383-84, 602 S.E.2d 21, 30 (2004) ("The Guidelines are inapplicable [when the combined monthly adjusted gross income of the parties exceeds $20,000.00] . . . and the trial court [i]s required to make a case-by-case determination.").

Although the trial court concluded that the combined income of the parties exceeded $300,000.00 in 2012 (more than the monthly maximum), the trial court made no findings of fact as to Frederick's reasonable needs and, contrary to *Diehl* and *Meehan*, based the child support obligation solely on the Guidelines worksheet. This Court has previously held that the failure of a district court, in deciding child support, to make findings of fact regarding the reasonable needs of the child, when required, mandates remand for further findings of fact. *State ex rel. Gillikin v. McGuire*, 174 N.C. App. 347, 351, 620 S.E.2d 899, 902 (2005). *See also* N.C. Gen. Stat. § 50-13.4(c) ("If the court orders an amount other than the amount determined by application of the presumptive guidelines, the court shall make findings of fact as to the criteria that justify varying from the guidelines and the basis for the amount ordered.").

Plaintiff, however, argues that defendant was not prejudiced by the trial court's failure to make findings as to Frederick's reasonable needs and expenses because defendant did not offer relevant evidence. We disagree. At the hearing, defendant argued to the trial court that if the $60,000.00 paid to Ms. Andrianova

were added back to defendant's income, the trial court would have to "look at [the] actual expenses of the child, and need." When plaintiff presented evidence of Frederick's needs and expenses, defendant also vigorously contested those expenses at the hearing. Because defendant adequately raised this issue below, we conclude that the trial court erred in failing to consider Frederick's reasonable needs and expenses in determining the amount of child support owed by defendant. We, therefore, reverse and remand for further findings of fact. "On remand, the court may take additional evidence as necessary to make a properly supported determination of the issue." *Doan v. Doan*, 156 N.C. App. 570, 573, 577 S.E.2d 146, 149 (2003).

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges ELMORE and DILLON concur.

Report per Rule 30(e).