IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1114

Filed: 2 October 2018

Iredell County, No. 11 CVD 2012

PATRICIA CATES GAINES, Plaintiff,

v.

HENRY PEDEN GAINES, Defendant.

Appeal by Defendant from Order entered 1 May 2017 by Judge L. Dale Graham in Iredell County District Court. Heard in the Court of Appeals 5 April 2018.

Pope McMillan, P.A., by Alex M. Graziano, for Plaintiff-Appellee.

Homesley, Gaines, Dudley, & Clodfelter, LLP, by Leah Gaines Messick, for Defendant-Appellant.

INMAN, Judge.

Defendant Henry Peden Gaines ("Husband") appeals from an order modifying an award of alimony to his ex-wife, Patricia Cates Gaines ("Wife"). Husband contends that three of the trial court's findings of fact are unsupported by the evidence, and it therefore erred in: (1) concluding Husband was suppressing his income; (2) imputing a monthly income of $8,300; and (3) awarding alimony to Wife in the amount of $1,800

per month despite depletion of Husband's estate. After careful review, we modify and affirm the trial court's order.

I. FACTUAL AND PROCEDURAL HISTORY

Husband graduated from Clemson University in 1975 with a Bachelor's degree in mechanical engineering. Following graduation, Husband first worked for Dow Chemical Company. In 1979, Husband took an engineering position at Midrex Technologies, Inc. ("Midrex"), an international steelmaking company.

In November of 1988, Husband married Wife. No children were born between them, though Husband had children from prior marriages, and the two adopted a child together.

By 1989, Husband had progressed to chief mechanical engineer at Midrex. To make more time for his family, Husband eventually resigned from his position at Midrex and took a marketing and sales job at Associated Technologies, Inc., in Charlotte, North Carolina, instead. Husband changed companies a third time some years later, joining Controls Southeast, a thermo-maintenance heat transfer company also located in Charlotte, as vice president of sales and marketing. In 2004, Midrex recruited Husband back to the company, where he eventually became director of marketing. Husband let his engineering license lapse in 2011 or 2012 while continuing to work in marketing.

Husband thrived at Midrex. By his own account, Husband did "[t]he most profitable job in the history of the company by far[,]" and was "the most successful salesperson, sales director in the history of the company[.]" He "gleaned more contracts [than any other employee], . . . gleaned the highest revenue . . . [and] the largest volume dollar of contracts" at Midrex, and "sold the most profitable plant in the history of the company[.]" Husband described himself as someone who has "always been able to be on the top shelf, to be at the front of the action, to be the big earner, the breadwinner, [to] get—make things happen." In addition to working as director of marketing, Husband was part of Midrex's "technology improvement and approval committee[,]" which identified and certified technologies Midrex could bring to the steel market. Thus, though Husband worked in sales, in his opinion a sales professional "could not do [his] job and not be an engineer. It would be impossible."

Husband and Wife divorced in 2012. They entered into a consent order providing, among other things, for Wife to receive the marital home in Statesville, North Carolina, while Husband received certain other property and agreed to pay alimony in the amount of $2,200 per month for 120 months beginning on 1 April 2012. Following the divorce, Husband bought a Chevrolet Corvette and a home in Cramer Mountain,[1] a subdivision and country club located in Cramerton, North Carolina. He

[1] The order appealed from states the home is located in "Kramer Mountain." We adopt the spelling "Cramer" as used in the trial transcript and consistent with the spelling of the municipality with which it is associated. Act of July 3, 1967, ch. 1061, sec. 1, 1967 N.C. Sess. Laws 1566 (incorporating the Town of Cramerton).

later remarried in 2015, and with his new wife maintained both the Cramer Mountain home and Husband's new wife's home in Tega Cay, South Carolina.

In February 2016, Husband was terminated from his position at Midrex as director of marketing, losing his $160,000 gross annual salary but receiving $90,000 gross in severance. He immediately ceased paying alimony and took a cross-country trip to Seattle shortly thereafter. For the six months after his termination, Husband did nothing to alter his lifestyle.

Husband did, however, seek re-entry into the labor market the same month that he lost his job, contacting friends and former colleagues in the steelmaking industry for any openings in the Charlotte area. Husband received a job offer from one company, but before he could formally fill the position, he was named as a defendant in a trade secrets lawsuit with Midrex and the job offer was rescinded.[2] When he was unable to obtain other employment through his contacts in the industry, Husband stopped seeking any engineering, marketing, or executive-level positions, and instead applied for retail jobs with Home Depot, Advanced Auto Parts, and Lowe's Home Improvement. Husband eventually found employment with Hyatt Gun Shop in Charlotte as a part-time salesman earning $2,000 a month in gross wages. In January of 2017, almost a year after he lost his job at Midrex, Husband first attempted to rent the Cramer Mountain home as an added source of income; he

[2] Despite his argument to the contrary in his brief on appeal, Defendant testified at trial that the trade secrets lawsuit had no effect on his job search.

eventually secured a renter and began receiving roughly $1,800 in monthly gross rental proceeds thereafter.

Following Husband's cessation of alimony payments in February 2016, Wife filed a contempt motion and obtained a show cause order from the trial court for Husband's failure to pay alimony. After the show cause hearing was calendared for March 2016, Husband paid the three months of alimony then in arrears and Wife dismissed her motion. Defendant filed a motion to terminate and modify alimony in April 2016 and again ceased paying alimony in May 2016.

Husband elected to ignore his alimony payments in favor of other monetary obligations following his termination from Midrex. Husband prioritized the following expenses over paying alimony: his mortgage and homeowners' association fees on his Cramer Mountain rental property, his country club membership at Cramer Mountain, a Wells Fargo jewelry account he opened to pay for his new wife's wedding ring, and the lease on his Chevrolet Camaro. He also made payments on debts incurred by his new wife before their marriage and on which he is not a guarantor, including the mortgage on her home, utility bills, and property taxes. With the alimony payments cut off, Wife resorted to depleting her IRA in order to cover her mortgage, home repairs, property taxes, medical treatment related to degenerative eyesight, her car payment, and other associated costs of living.

In February 2017, Wife filed a second contempt motion for Husband's failure to pay alimony and obtained a show cause order. Prior to the show cause hearing, Husband's motion to terminate and modify alimony was heard by the trial court. At that hearing, Husband testified about his work history, finances, and conduct consistent with the above, though he was now a few months behind on the Cramer Mountain mortgage, the country club membership, and the jewelry account. He justified his failure to pay alimony in favor of other obligations as "morally correct[,]" testifying that "[i]f [Wife] were living with [him] she wouldn't be getting any more money, so she's not getting any more money[;]" paradoxically, he also contended he had "a moral obligation" to pay his new wife's debts over Wife's alimony because he was living in her home. As for the alimony payments almost a year in arrears, Husband testified that he owed Wife nothing whatsoever, because "at some point in time, [he's] got to look after [himself]."

On 1 May 2017, the trial court entered an order reducing Husband's monthly alimony payment from $2,200 to $1,800. In light of Husband's conduct and short-lived job search, the trial court imputed a $100,000 annual salary to Husband and concluded he "willfully suppressed his income . . . failed to exercise his reasonable capacity to earn and has deliberately avoided his financial responsibilities to his ex-spouse . . . and . . . refused to seek, in good faith, gainful employment in his professional field." The trial court further concluded, in light of the income imputed

to Husband, that he possessed the means and ability to comply with the order. Husband filed timely notice of appeal.

II. ANALYSIS

Husband presents three principal arguments on appeal: (1) the findings of fact from which the trial court ultimately found Husband deliberately suppressed his income are without evidentiary support; (2) the specific amount of income imputed is similarly without evidentiary support; and (3) the trial court erred in concluding Husband had the means and ability to comply with the modified alimony order because he will be required to deplete his estate. After careful review, we modify and affirm the trial court's order.

A. Standard of Review

In orders entered upon a motion to modify alimony:

> 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. 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.

Kelly v. Kelly, 228 N.C. App. 600, 601, 747 S.E.2d 268, 272 (2013) (citation omitted). Factual findings unchallenged on appeal are presumed to be supported by competent evidence and are binding on this Court, *Carpenter v. Carpenter*, 225 N.C. App. 269, 271, 737 S.E.2d 783, 786 (2013), while challenged findings are binding if supported

by competent evidence "even though the evidence would support contrary findings." *Spencer v. Spencer*, 133 N.C. App. 38, 43, 514 S.E.2d 283, 287 (1999) (citation and internal quotation marks omitted). We will reverse an alimony order for an abuse of discretion if it "is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Kelly*, 228 N.C. App. at 601, 747 S.E.2d at 272-73 (citation and internal quotation marks omitted).

B. Suppression of Income

As a general rule, alimony awards are " 'ordinarily determined by [the supporting spouse's] income at the time the award is made.' " *Lasecki v. Lasecki*, 246 N.C. App. 518, 535, 786 S.E.2d 286, 299 (2016) (quoting *Quick v. Quick*, 305 N.C. 446, 457, 290 S.E.2d 653, 660 (1982) (superseded in part by statute on other grounds)). A trial court may nonetheless base an alimony award on an imputed income derived from the supporting spouse's earning capacity where "it finds that the supporting spouse is deliberately depressing his or her income or indulging in excessive spending because of a disregard of the marital obligation to provide support for the dependent spouse." *Lasecki* at 539, 786 S.E.2d at 301 (citation and internal quotation marks omitted). Here, the evidence and evidentiary findings support the trial court's ultimate finding[3] that Husband was deliberately suppressing his income. *See*

[3] Our Supreme Court has drawn a distinction between "evidentiary facts" and "ultimate facts." *See, e.g., Quick*, 305 N.C. at 451-52, 290 S.E.2d at 657-58. "Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those

Megremis v. Megremis, 179 N.C. App. 174, 633 S.E.2d 117 (2006) (treating a finding that the supporting spouse did not intentionally suppress his income on review of an alimony award as an "ultimate finding").

Husband challenges only one finding relevant to whether he was deliberately depressing his income: Finding of Fact 23, which found in pertinent part that "Defendant discounted or ignored completely the possibility that he could find a job in a different engineering capacity other than his specialty." The transcript below, however, contains sufficient evidence to support this finding. When asked by Wife's counsel if he "attempt[ed] to get a job in any industry outside of the small specific iron side steelmaking [and heat transfer] business that [he] w[as] in[,]"[Husband] responded "[n]o." When asked the follow-up question of whether he "tr[ied] to get a job in any industry outside of that specific field[,]" he reiterated that "[n]o, [he] didn't." This testimonial evidence is sufficient to support Finding of Fact 23, and this evidentiary finding supports the ultimate finding of bad faith suppression of income. Husband, therefore, has failed to demonstrate any abuse of discretion on the part of the trial court in this regard.

C. Amount of Imputed Income

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subsidiary facts required to prove the ultimate facts. . . . An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts." *Id.* at 451, 290 S.E.2d at 657-58 (internal quotations and citation omitted).

Husband's remaining challenges to the trial court's findings of fact concern the amount of income imputed to Husband. Specifically, Husband challenges Findings of Fact 18 and 24, which state:

> 18. Defendant has the means and ability to earn a salary of at least $100,000.00 per year as a civil engineer. Defendant's net monthly income based on this imputation is approximately $6,500.00 per month. This imputed salary plus rental income of $1,800.00 per month leaves defendant with approximately $8,300.00.
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> . . .
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> 24. Approximately 16 years prior to taking his job at Midrex Defendant was employed as a civil engineer at another firm and made approximately $100,000 to $120,000 per year.

We agree with Husband that there was no evidence in the record to support a finding that Husband was previously employed as a civil engineer and that he has the means and ability to work in that field; all evidence in the record indicates that Husband was a mechanical engineer, rather than a civil one. We resolve this error by striking the word "civil" from these findings of fact. *See Montague v. Montague*, 238 N.C. App. 61, 66, 767 S.E.2d 71, 75 (2014) (striking a factual finding in an equitable distribution judgment and remanding on that issue but affirming the remainder). The remainder of these findings, however, are supported by sufficient evidence.

Although the evidence introduced at trial shows that Husband spent the bulk of his career in marketing, it is undisputed that he did so in the field of engineering.

The evidence further shows that, although he was no longer licensed towards the end of his tenure as director of marketing at Midrex, he still considered himself an engineer, testifying that "you could not do [that] job and not be an engineer. It would be impossible." Husband considered himself an engineer, licensure notwithstanding, and his position necessitated use of that skillset. Husband elaborated on this very point:

> [S]ince 19—say 1990, *I've been totally involved with the development of new technology*, whether it be in the thermal maintenance science or with iron reduction in getting it into the marketplace. How do you package that? Will it work? How long will it work? What's the cost-to-benefit ratio? Develop the arguments based around that once it's proven and then set up the scenario to take that to the marketplace.

(emphasis added). In short, Husband's own testimony supports the trial court's finding that Husband could still earn a salary as an engineer, as he testified he was still working in an engineering capacity when he was terminated from his position as director of marketing at Midrex.[4]

As for the amount of income the trial court found Husband could earn, he does not argue that he did not previously earn approximately $100,000 to $120,000 per

[4] We note that Defendant also testified he "was not an engineer at Midrex" moments before testifying that "[y]ou could not do [his] job and not be an engineer. It would be impossible." This contradictory testimony does not alter our analysis: "It is undisputed that . . . '[t]he trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary.' " *Cushman v. Cushman*, 244 N.C. App. 555, 558, 781 S.E.2d 499, 501 (2016) (quoting *Pegg v. Jones*, 187 N.C. App. 355, 358, 653 S.E.2d 229, 231 (2007)).

year as an engineer; rather, he posits that the trial court erred in imputing a $100,000 annual income based on a figure from a job held sixteen years prior. The amount of income imputed, however, is supported both by an unchallenged finding of fact and the evidence. Finding of Fact 8 states that Husband was earning $160,000 per year at the time of his termination, a finding Husband does not challenge. Further, the evidence discloses that Husband had earned a base salary, not including bonuses, of well over $100,000 from 2011 through his termination from Midrex. As a result, we cannot say that the trial court's finding that Husband had the capability to earn an annual salary of $100,000 is unsupported by the evidence. Husband's argument to the contrary is overruled.

D. Husband's Ability to Pay Alimony

In his final argument on appeal, Husband contends that the trial court abused its discretion in setting the amount of alimony awarded, as he will be forced to deplete his estate at his current income while Wife will not. In support of this contention, Husband relies primarily on *Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982), *superseded in part by statute as recognized in State v. Brice*, 370 N.C. 244, 251, 806 S.E.2d 32, 37 (2017), and *Swain v. Swain*, 179 N.C. App. 795, 635 S.E.2d 504 (2006). Husband's reliance on these cases, however, is misplaced.

In *Quick*, our Supreme Court held that "[a]n alimony award must be fair and just to both parties. . . . A spouse cannot be reduced to poverty in order to comply

with an alimony decree." 305 N.C. at 457, 290 S.E.2d at 660-61. There, a trial court entered an alimony award that would result in the complete depletion of the defendant's estate within five years based on his present income and failed to make the findings necessary to support such an outcome. *Id.* at 457, 290 S.E.2d at 660-61. Among those necessary findings missing from the award were "findings to indicate whether the trial court believed that [the] defendant was deliberately depressing his income or whether he was indulging in excessive spending in disregard of his marital obligation to support his dependent spouse." *Id.* at 456-57, 290 S.E.2d at 660. Absent those findings, our Supreme Court was required to review the determination of the defendant's ability to pay based on "his income at the time the award [was] made[,]" rather than earning capacity, and, "[u]nder the limited facts found by the trial court, the setting of . . . the amount of alimony appear[ed] to [the Supreme Court] to have been an abuse of discretion." *Id.* at 457, 290 S.E.2d at 660-61.

The Supreme Court in *Quick* did not, however, prohibit the trial court from entering an award that would deplete the supporting spouse's estate if the court made proper findings to impute income and considered the supporting spouse's earning capacity over current income. Rather, it reached the opposite conclusion; after noting that there were no findings showing a deliberate depression of income sufficient to support the trial court's alimony award and holding the amount awarded improper, the Supreme Court "hasten[ed] to add, however, that there is evidence in the record

from which findings of fact *could* be made to support the amount awarded." *Id.* at 457, 290 S.E.2d at 661 (emphasis in original).

Swain similarly contradicts Husband's argument. There, the plaintiff argued the trial court abused its discretion in entering an alimony award that required him to deplete his estate. 179 N.C. App. at 798, 635 S.E.2d at 506. After acknowledging *Quick*, this Court held that the trial court's award was not an abuse of discretion, as "the alimony awarded . . . would not deplete the plaintiff's estate for almost 12 years based on his current financial situation, and could last substantially longer if plaintiff's income increases *in accordance with the earning potential he has demonstrated*." *Id.* at 799, 635 S.E.2d at 507 (emphasis added). We went on to note that:

> Although plaintiff cites three cases from our Supreme Court that appear to disfavor alimony awards that result in estate depletion for one party or the other, *those decisions by no means prohibit such awards*. Rather, all of these cases cite "fairness and justice to all parties" as the principle to which an alimony award must conform.

Id. at 799, 635 S.E.2d at 507 (quoting *Quick*, 305 N.C. at 453, 290 S.E.2d at 658) (internal citations omitted) (emphasis added).

In this case, the trial court made adequate findings and conclusions to impute a monthly income of $6,500 to Husband for his bad faith suppression of earnings; any abuse of discretion concerning Husband's ability to pay, then, is determined based on this earning capacity rather than his actual income at the time of the award. *Quick*,

305 N.C. at 456-57, 290 S.E.2d at 660-61; *cf. Swain*, 179 N.C. App. at 799, 635 S.E.2d at 507. The trial court further found that this imputed income, combined with his rental income from the Cramer Mountain property, left him with a total monthly income of $8,300—an excess of $2,000 over his reasonable monthly expenses. The addition of the trial court's modified alimony award of $1,800 per month to those expenses, then, leaves Husband with an extra $200 to *add* to his estate. As a result, we believe the alimony award to be "fair to all of the parties[,]" *Swain* at 799, 635 S.E.2d at 507, and hold that the trial court did not abuse its discretion in setting the amount based on Husband's imputed income and reasonable expenses.

III. CONCLUSION

For the foregoing reasons, we hold that the trial court did not err in finding that Husband was suppressing his income in bad faith. We further hold that the findings of fact concerning the imputation of income as a result of Husband's bad faith are supported by sufficient evidence, and that the amount of alimony awarded is fair to all parties in light of that imputation. The trial court did err, however, in finding Husband previously worked as and possessed the ability to work as a "civil" engineer. Consequently, we strike the word "civil" from the trial court's order and affirm it as modified.

AFFIRMED AS MODIFIED.

Judges DAVIS and MURPHY concur.

Report per Rule 30(e).