IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1214

Filed: 17 July 2018

Yancey County, No. 16-CVD-315

YANCEY COUNTY on behalf of JESSICA A. BUCHANAN, Plaintiff,

v.

JONATHON S. JONES, Defendant.

Appeal by defendant from order entered 20 July 2017 by Judge Larry Leake in Yancey County District Court. Heard in the Court of Appeals 18 April 2018.

*Donny J. Laws for plaintiff-appellee.*

*Blackwell Law, PLLC, by Jenna L. Blackwell, for defendant-appellant.*

ZACHARY, Judge.

Defendant-father Jonathon S. Jones appeals from a child support order entered by the trial court on 20 July 2017. Defendant-father contends that the trial court erred by concluding as a matter of law that only defendant-father had a duty to provide support for the parties' minor children, and by failing to impute income to the voluntarily unemployed plaintiff-mother. After careful review, we affirm.

**Background**

Plaintiff-mother Jessica Buchanan and defendant-father Jonathon Jones were married in 2003, separated in 2014, and divorced in 2015. During the marriage, two children were born. After separation, plaintiff-mother and defendant-father shared equal physical custody of their two minor children, and although plaintiff-mother had substantially more income than did defendant-father, plaintiff-mother did not pay child support to defendant-father.

Plaintiff-mother then remarried and became pregnant with her daughter. The parties continued to share custody of their two children. Plaintiff-mother worked full-time as a registered nurse throughout her pregnancy in 2015. However, after her daughter was born in December 2015, plaintiff-mother obtained a new position as a registered nurse and worked three twelve-hour shifts per week. In April 2016, plaintiff-mother became pregnant with twin boys. The pregnancy was considered high-risk and she stopped working. The twin boys were born five weeks premature in late 2016. Plaintiff-mother has not returned to work as a nurse. The Yancey County Child Support Enforcement Agency brought this action seeking child support from defendant-father on behalf of plaintiff-mother for the parties' two minor children by filing a complaint on 28 December 2016. Defendant-father filed his answer on 31 January 2017.

After a hearing on 24 May 2017, the trial court deviated from the North Carolina Child Support Guidelines and entered an order establishing, *inter alia*,

defendant-father's child support obligation to be $368.00 per month, together with the provision of health insurance coverage for the parties' two minor children at a cost of $180.00 per month. Defendant-father was also ordered to pay child support arrears of $1,840.00 at the rate of $50.00 per month until paid in full. The trial court determined that plaintiff-mother had no income and no child support obligation, "specifically reject[ing] any conclusion based on the evidence that [plaintiff-mother] ha[d] acted in bad faith so as to impute any income to [plaintiff-mother]." Defendant-father now appeals from this order.

**Standard of Review**

On appeal, "[c]hild support orders entered by a trial court are accorded substantial deference . . . and our review is limited to a determination of whether there was a clear abuse of discretion." *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002) (citing *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). "[O]nly upon a showing that [the child support order] was so arbitrary that it could not have been the result of a reasoned decision" will the order be overturned. *Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005) (citing *Leary*, 152 N.C. App. at 441, 567 S.E.2d at 837). However, the trial court must "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.* (citing *Leary*, 152 N.C. App. at 441-42, 567 S.E.2d at 837).

**Discussion**

First, defendant-father argues that the trial court abused its discretion by concluding as a matter of law that only defendant-father had a duty to provide support for the parties' minor children. Specifically, defendant-father contends that "[t]he trial court's findings do not support its conclusion as a matter of law, nor its ensuing judgment, that only [defendant-father] owed 'a legal duty to provide support for the minor children . . .' while remaining silent as to [plaintiff-mother's] duty to provide support for the same children."

Defendant-father's following arguments are of a similar nature. He next asserts that the trial court abused its discretion in failing to impute income to plaintiff-mother. Defendant-father challenges the trial court's conclusion of law "specifically reject[ing] any conclusion based on the evidence that [plaintiff-mother] has acted in bad faith so as to impute any income to [plaintiff-mother]." All of defendant-father's arguments raise essentially the same issue: may the trial court decline in its discretion to impute income to a parent who is voluntarily unemployed?

Our Supreme Court has established that both parents have an equal duty to provide support for their children. *See Plott v. Plott*, 313 N.C. 63, 68, 326 S.E.2d 863, 867 (1985) ("Today, the equal duty of both parents to support their children is the

rule. . . ."); *see also* N.C. Gen. Stat. § 50-13.4(b) (2017) ("In the absence of pleading and proof that the circumstances otherwise warrant, the father and mother shall be primarily liable for the support of a minor child."). Moreover, the North Carolina Child Support Guidelines "are based on the income shares model[,] which itself is based on the concept that 'child support is a shared parental obligation and that a child should receive the same proportion of parental income he or she would have received if the child's parents lived together.' "

"Child support obligations are ordinarily determined by a party's actual income at the time the order is made or modified." *Sharpe v. Nobles*, 127 N.C. App. 705, 708, 493 S.E.2d 288, 290 (1997) (citing *Askew v. Askew*, 119 N.C. App. 242, 244-245, 458 S.E.2d 217, 219 (1995)). However, a party's capacity to earn income may be used to determine the party's appropriate child support obligation where the trial court finds "that the party deliberately depressed [the party's] income or otherwise acted in deliberate disregard of the obligation to provide reasonable support for the child." *Askew*, 119 N.C. App. at 245, 458 S.E.2d at 219 (citation omitted); *see also, Bowers v. Bowers,* 141 N.C. App. 729, 732, 541 S.E.2d 508, 510 (2001) ("Our Supreme Court has held that 'earning capacity' to determine child support can only be used where there are findings, based on competent evidence, to support a conclusion that the supporting spouse or parent is deliberately suppressing his or her income to avoid family responsibilities.").

Accordingly, "a showing of bad faith income depression by the parent is a mandatory prerequisite for imputing income to that parent." *Hartsell v. Hartsell,* 189 N.C. App. 65, 77, 657 S.E.2d 724, 731 (2008) (quoting *Sharpe,* 127 N.C. App. at 706, 493 S.E.2d at 289). "The dispositive issue is whether a party is motivated by a desire to avoid his reasonable support obligations." *Wolf v. Wolf*, 151 N.C. App. 523, 527, 566 S.E.2d 516, 519 (2002) (citing *Wachacha v. Wachacha*, 38 N.C. App. 504, 508, 248 S.E.2d 375, 377-78 (1978)).

In order to make a finding of bad faith, "the finder of fact must have before it sufficient evidence of the proscribed intent. Intent being a mental attitude, it must ordinarily be proven, if proven at all, by circumstantial evidence, that is, by proving facts from which the fact sought to be proven may be inferred." *Roberts v. McAllister*, 174 N.C. App. 369, 378, 621 S.E.2d 191, 198 (2005) (quoting *Bowes v. Bowes,* 287 N.C. 163, 173-74, 214 S.E.2d 40, 46 (1975)). Moreover, "the determination of bad faith . . . is best made on a case by case analysis by the trial court." *Pataky v. Pataky,* 160 N.C. App. 289, 307, 585 S.E.2d 404, 416 (2003), *aff'd per curiam,* 359 N.C. 65, 602 S.E.2d 360 (2004).

In the present case, the trial court concluded "[t]hat the [d]efendant[-father] is a reasonable parent and has a legal duty to provide support for the minor children[] . . . " and "specifically reject[ed] any conclusion based on the evidence that [plaintiff-mother] has acted in bad faith so as to impute any income to [plaintiff-mother]."

Defendant-father contends that the conclusion that there was no evidence plaintiff-mother acted in bad faith was not supported by the trial court's findings of fact. In advancing this argument, defendant-father argues that (1) "[e]vidence was introduced at trial that [plaintiff-mother] had elected to stay at home with her three after-borne children, all under age three, from a subsequent marriage"; (2) that the trial court found that [plaintiff-mother] "is neither physically nor mentally incapacitated"; (3) that "evidence was presented at trial that the Agency knew of no reason why [plaintiff-mother] was not employable"; and (4) that the "evidence presented to the trial court showed that [plaintiff-mother] had (a) failed to exercise her reasonable capacity to earn, (b) deliberately avoided her family's financial responsibilities, (c) acted in deliberate disregard for her support obligations, [and] (d) refused to seek gainful employment."

In *Roberts v. McAllister*, this Court affirmed the trial court's imputation of income to the mother where she was voluntarily unemployed, had no intention of obtaining employment, and had provided negligible support for the children despite having substantial financial assets. 174 N.C. App. at 379-80, 621 S.E.2d at 198-99. There, the trial court imputed income to the mother upon a finding that she had acted with "a naive indifference to [her children's] need for financial support from her." *Id.* at 379, 621 S.E.2d at 198.

In *Osbourne v. Osbourne*, 129 N.C. App. 34, 497 S.E.2d 113 (1998), we upheld a trial court's imputation of income to the father where the father had taken an early retirement:

> [Father] retired at age 51 with a three-year-old daughter to support. It was his choice to take early retirement and it was his choice to remain unemployed despite his many skills. The personnel supervisor of his former employer, the City of Winston-Salem, testified that [father] remained eligible to work for the City and that he could earn at least $ 20,000.00 annually without decreasing the $ 22,000.00 he received each year in retirement benefits. On these facts, the trial court's choice to award child support based on [father's] potential income was well within its discretion, and we find no error.

*Id*. at 40, 497 S.E.2d at 117.

Here, the only evidence presented to the trial court was the testimony of the Yancey County Child Support Enforcement Agency child support agent. From the testimony of the child support agent, the trial court found that plaintiff began working part-time in 2016 "for the purpose[] of freeing up more time during the week for [plaintiff-mother] to spend time with and provide for the needs of all of her children." The trial court also found that plaintiff-mother quit working in 2016 upon discovering that her pregnancy with twin boys was high risk, and that plaintiff-mother is currently a full-time stay-at-home mother caring for her three youngest children "on a full-time basis and caring for the two (2) children she has with [defendant-father] on a one-half (1/2) time basis." These facts support the contention

of defendant-father that plaintiff-mother is voluntarily unemployed. However, there was no additional evidence presented regarding the conduct of plaintiff-mother that would require a finding of bad faith income depression on part of plaintiff-mother, and "a voluntary reduction in income is insufficient, without more, to support a finding of deliberate income depression or bad faith." *Pataky,* 160 N.C. App. at 307, 585 S.E.2d at 416 (citation omitted).

Furthermore, "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." *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994). "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." *Coble v. Coble*, 300 N.C. 708, 712-13, 268 S.E.2d 185, 189 (1980)(citation omitted). Accordingly, given the evidence admitted at the child support hearing, we conclude that the trial court did not abuse its discretion in determining that there was no bad faith on the part of plaintiff-mother and in declining to impute income to her.

**Conclusion**

For the reasons stated above, the trial court's order is

AFFIRMED.

Judges ELMORE and TYSON concur.

Report per Rule 30(e).