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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1059

Filed: 15 October 2019

Wake County, No. 13 CVD 3430

MODY SYLLA, Plaintiff,

v.

LATONIA ENOS-SYLLA, Defendant.

Appeal by plaintiff from order entered 2 April 2018 by Judge Michael Denning in Wake County District Court. Heard in the Court of Appeals 11 April 2019.

Law Office of Stephanie J. Brown, by Stephanie J. Brown, for plaintiff-appellant.

Allen and Spence, PLLC, by Scott Allen, for defendant-appellee.

ZACHARY, Judge.

Plaintiff-Father Mody Sylla appeals from the trial court's order modifying his child support obligation, and holding him in contempt of court. For the reasons that follow, we reverse the trial court's order modifying Plaintiff-Father's child support obligation.

Background

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Plaintiff-Father and Defendant-Mother Latonia Enos-Sylla married in 1997, and two children were born of the marriage. The parties eventually divorced, and Plaintiff-Father commenced a civil action seeking child custody and support. On 14 October 2015, the trial court granted Plaintiff-Father legal and physical custody of their older son, and provided that the parties would share joint legal custody of the younger child, Jeb.¹ Defendant-Mother was granted primary physical custody of Jeb, and Plaintiff-Father was granted two weekend visits per month, as well as alternating weeks during the summer. The following day, the trial court entered a consent order for, *inter alia*, child support, noting that Plaintiff-Father was earning a nominal income as a handyman and was receiving \$1,658.90 per month in Social Security disability benefits.

On 28 June 2017, Defendant-Mother filed a motion for Plaintiff-Father to appear and show cause why he should not be held in contempt of court for his failure to comply with the terms of the custody order. At the hearing on 9 October 2017, Plaintiff-Father explained that he had recently become gainfully employed as a field technician and was required to travel across several states, which caused him to miss one of his scheduled visits with Jeb. On another occasion, Plaintiff-Father failed to pick Jeb up for a Christmas visit because he recorded the incorrect date in his calendar. Plaintiff-Father maintained that his new job impacted his ability to visit

¹ We use a pseudonym to protect the juvenile's identity.

Jeb because (1) the job requires a lot of traveling, and (2) he does not receive his schedule for the upcoming week until Friday. For these reasons, Plaintiff-Father encouraged the trial court to reduce the amount of time he was scheduled to spend with Jeb.

That same month, the trial court entered an order modifying Plaintiff-Father's child support obligation ("the 2017 Order"), because Defendant-Mother was receiving \$856.00 per month in Social Security benefits for Jeb as a result of Plaintiff-Father's disability. The trial court decreed that "so long as the minor child receives social security benefit due [to Plaintiff-Father's] 'disability' and there is [no] further order of the Court, [Plaintiff-Father's] child support obligation shall be \$0." Defendant-Mother subsequently filed a motion to modify the 2017 Order, asserting that there had been a substantial change in circumstances as Plaintiff-Father had recently become gainfully employed, and Defendant-Mother was no longer receiving Social Security benefits on behalf of Jeb.

On 28 March 2018, the trial court entered an order addressing the modification of Plaintiff-Father's child support obligation, as well as the issue of Plaintiff-Father's alleged contempt of court. The trial court made the following findings of fact regarding child support:

13. [Plaintiff-Father] earns \$17 per hour from his new employment and has . . . earned overtime on a regular basis. This new employment . . . [equates to an] average gross monthly income [of] \$5,000.

14. [Plaintiff-Father]’s new employment has caused the Social Security benefits that [Defendant-Mother] was receiving for the minor child for child support to terminate, with the last payment being received in September 2017. [Plaintiff-Father] has not made child support payments to . . . [Defendant-Mother] since the Social Security benefit ceased. He has made his arrears payments each month associated with the previous child support order.

Accordingly, the trial court concluded that there had been a substantial change in circumstances justifying a modification of Plaintiff-Father’s child support obligation.

The trial court also concluded that Plaintiff-Father “should be held in contempt for violation of the prior custody order.” In support of this conclusion, the trial court found that: (1) there had been three separate occasions where Plaintiff-Father violated the custody order; (2) Defendant-Mother incurred work-related child care expenses of \$145 during times when Plaintiff-Father failed to exercise his scheduled physical custody of Jeb; and (3) Plaintiff-Father’s violations of the custody order were willful and without justification.

Pursuant to Worksheet A of the North Carolina Child Support Guidelines, the trial court ordered Plaintiff-Father to pay, *inter alia*, \$690.69 per month in ongoing child support beginning April 2018. Plaintiff-Father was also ordered to reimburse Defendant-Mother \$145 for the work-related child care expenses she incurred during times when Plaintiff-Father failed to exercise his scheduled physical custody of Jeb,

and he was warned that he would be held in contempt for any future violations of the custody order. Plaintiff-Father timely appealed.

Discussion

Plaintiff-Father argues that the trial court erred by: (1) improperly calculating his monthly gross income; and (2) finding him in contempt of court for failure to exercise his visitation. We address each argument in turn.

I. Child Support

A. Standard of Review

This Court reviews child support orders entered by a trial court under an abuse of discretion standard. *Roberts v. McAllister*, 174 N.C. App. 369, 374, 621 S.E.2d 191, 195 (2005) (“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.”), *appeal dismissed*, 360 N.C. 364, 629 S.E.2d 608 (2006). On appeal, we are “bound by the trial court’s findings where there is competent evidence to support them.” *Monds v. Monds*, 46 N.C. App. 301, 302, 264 S.E.2d 750, 751 (1980). The trial court is required to “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.” *Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005).

B. Modification of Child Support

Our General Statutes provide that child support orders may be modified “upon motion in the cause and a showing of changed circumstances by either party.” N.C. Gen. Stat. § 50-13.7(a) (2017). Modifying child support is a two-step process. *Head v. Mosier*, 197 N.C. App. 328, 333, 677 S.E.2d 191, 195 (2009). “First, a court must determine whether there has been a substantial change in circumstances since the date the existing child support order was entered,” *id.*, and such a change must affect the welfare of the child, *Stanback v. Stanback*, 287 N.C. 448, 456, 215 S.E.2d 30, 36 (1975). Second, “[u]pon finding a substantial change in circumstances . . . the court [must] enter a new child support order that modifies and supersedes the existing child support order.” *Head*, 197 N.C. App. at 334, 677 S.E.2d at 196.

Once the trial court has determined that there has been a substantial change in circumstances, *see In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997), there is a presumption that the North Carolina Child Support Guidelines (“the Guidelines”) will be used to “compute the appropriate amount of child support,” *Head*, 197 N.C. App. at 334, 677 S.E.2d at 196. The Guidelines “apply as a rebuttable presumption in all legal proceedings involving the child support obligation of a parent.” N.C. Child Support Guidelines, Annotated Rules 51 (2019); *see* N.C. Gen. Stat. § 50-13.4(c) (“The court shall determine the amount of child support payments by applying the presumptive guidelines . . .”).

The gross income of the parents serves as the basis for the presumptive child support obligation. *Fink v. Fink*, 120 N.C. App. 412, 424, 462 S.E.2d 844, 853 (1995).

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, rental of property, retirement or pensions, interest, trusts, annuities, capital gains, Social Security benefits, workers compensation benefits, unemployment insurance benefits, disability pay and insurance benefits, gifts, prizes and alimony or maintenance received from persons other than the parties to the instant action.

Guidelines, at 53; *see also Simms v. Bolger*, ___ N.C. App. ___, ___, 826 S.E.2d 522, 527 (2019) (“Income is broadly defined under the Guidelines.”). For income received at irregular intervals, such as overtime pay, “the court may average or prorate the income over a specified period of time or require an obligor to pay as child support a percentage of his or her non-recurring income that is equivalent to the percentage of his or her recurring income paid for child support.” Guidelines, at 53.

C. Plaintiff-Father’s Gross Income

Plaintiff-Father challenges finding of fact number 13, in which the trial court determined that he earned a monthly gross income of \$5,000. Sixteen pay stubs—dating from the beginning of his employment to the date of the hearing—were submitted and used as evidence of Plaintiff-Father’s monthly gross income. The pay

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stubs reflected Plaintiff-Father's regular, overtime, holiday, meeting, and vacation pay. We have summarized the evidence below:

Date of Paycheck	Amount of Paycheck	Year to Date
7/7/2017	\$680.00	\$680.00
7/21/2017	\$890.38	\$1,570.38
7/28/2017	\$960.50	\$2,530.88
8/4/2017	\$960.50	\$3,491.38
8/11/2017	\$909.50	\$4,400.88
8/18/2017	\$1,241.00	\$5,641.88
8/25/2017	\$799.00	\$6,440.88
9/1/2017	\$238.00	\$6,678.88
9/8/2017	\$1,088.00	\$7,766.88
9/15/2017	\$909.50	\$8,676.38
9/22/2017	\$884.00	\$9,560.38
9/29/2017	\$1,139.00	\$10,699.38
10/6/2017	\$986.00	\$11,685.38
10/13/2017	\$1,113.50	\$12,798.88
10/20/2017	\$1,037.00	\$13,835.88
10/27/2017	\$935.00	\$14,770.88

Based on this Court's review, Plaintiff-Father earned \$14,770.88 over the sixteen-week period, amounting to a weekly average of \$923.18. Thus, Plaintiff-Father's monthly gross income was \$4,000.45, significantly less than the \$5,000 monthly gross income that the trial court attributed to him.

Plaintiff-Father's testimony concerning his use of a company vehicle and work-related expenses provided the only other potential support for determining his monthly gross income; however, this testimony does not support any addition to Plaintiff-Father's monthly gross income. The Guidelines provide that "[e]xpense reimbursements or in-kind payments . . . received by a parent in the course of

employment, self-employment, or operation of a business are counted as income *if they are significant and reduce personal living expenses.*” Guidelines, at 53 (emphasis added). In this case, Plaintiff-Father testified that any possible expenses from his work were covered by his employer:

[Counsel:] Do you get any expenses paid by your employer?

[Plaintiff-Father:] Yes.

Q. What expenses do you get paid?

A. Hotel expenses, food, drink, fuel, vehicle maintenance. I use their company vehicle.

....

Q. So do you get to use it for non-company-related matters?

A. No.

....

Q. You get a cell phone?

A. Yes.

Q. Do you get to use that for personal matters?

A. If a personal call [came] through, yeah, but I don't use it for personal matters. I have my personal cell phone.

Q. But that phone is provided to you free of charge, or is it a benefit of employment with Ply Gem, correct?

A. It's for the job. I have my personal phone for personal issues.

Plaintiff-Father also stated that he received an American Express card from his employer, but it was never used to pay for any personal expenses.

Accordingly, we reverse this matter and remand for recalculation of Plaintiff-Father's monthly gross income.

II. Contempt

Plaintiff-Father next argues that the trial court erred in finding him in contempt of court for violating the child custody order. Our review of the record, however, indicates that Plaintiff-Father was never actually held in contempt.

The trial court employed conditional and future verbiage concerning Plaintiff-Father's contempt of court: “[Plaintiff-Father] *should* be held in contempt for violation of the prior custody order.” (Emphasis added). In the decretal portion of the order, the trial court made clear that “[*s*]hould [Plaintiff-Father] fail *in the future* to exercise the visitation granted him under the custody order, the Court *shall* hold him in contempt.” (Emphases added).

The trial court never stated that Plaintiff-Father was in contempt, but rather that he *should* be held in contempt, and that *future* violations of the custody order would result in Plaintiff-Father being held in contempt. Thus, the order to pay Defendant-Mother \$145 could not have been related to any contempt sanctions. *See O'Briant v. O'Briant*, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985) (stating that civil contempt is used to “compel obedience to orders and decrees made for the benefit of

such parties”). *See generally* 17 C.J.S. *Contempt* § 5 (2014) (“[T]he contemnor must have the opportunity to purge himself or herself of contempt *by complying with the relevant court order.*” (emphasis added)). This argument is therefore rejected.

Conclusion

The trial court’s calculation of Plaintiff-Father’s monthly gross income is not supported by the record. On remand, the trial court is to re-compute Plaintiff-Father’s monthly gross income consistent with section I(C) of this opinion.

REVERSED IN PART AND REMANDED.

Judges DIETZ and TYSON concur.

Report per Rule 30(e).