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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-430

Filed: 3 September 2019

Guilford County, No. 14 CVD 7368

MARGARET R. GILLIS, Plaintiff,

v.

MICHAEL R. GILLIS, Defendant.

Appeal by defendant from orders entered 7 November 2016 and 29 September 2017 by Judge Teresa H. Vincent, and from judgment entered 16 October 2017 by Judge Susan R. Burch in Guilford County District Court. Heard in the Court of Appeals 26 February 2019.

Hill Evans Jordan & Beatty, PLLC, by William W. Jordan, for plaintiff-appellee.

Law Office of Lee M. Cecil, by Lee M. Cecil, for defendant-appellant.

DIETZ, Judge.

Michael Gillis challenges two orders requiring him to pay post-separation support and an alimony judgment in this family law proceeding. He contends that the trial court improperly forced him to testify as an expert witness at the post-

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separation support hearing “over his objection and without prior notice.” He also argues that the court’s alimony award is not supported by sufficient findings.

Mr. Gillis’s first issue—whether a litigant can be called as an adverse witness, qualified as an expert, and forced to give expert testimony against his will—is a question of first impression in this State. It is also a question we need not resolve today. Mr. Gillis’s testimony was almost entirely fact testimony about the parties’ finances. The only portions that arguably included expert testimony—statements about Ms. Gillis’s estimated income tax bracket—were duplicative of other admitted evidence. Accordingly, any error by the trial court was harmless.

With respect to the alimony award, guided by recent precedent from this Court, the trial court’s findings are sufficient to engage in meaningful appellate review and the trial court’s ruling was within its sound discretion. We therefore affirm both the post-separation support orders and the alimony judgment.

Facts and Procedural History

After thirty-one years of marriage, Plaintiff Margaret Gillis and Defendant Michael Gillis separated in 2013 and later divorced. Their separation and divorce proceedings included lengthy litigation concerning post-separation support and alimony.

In July 2015, at one of many post-separation support hearings, Mr. Gillis testified. Mr. Gillis is a certified public accountant but none of the questions on direct

examination had anything to do with Mr. Gillis's work as an accountant or his knowledge of tax accounting.

Then, during cross-examination, Ms. Gillis's counsel began questioning Mr. Gillis about his CPA license, his many years of work as an accountant, his experience preparing tax returns for people paying or receiving alimony, and his familiarity with the tax code provisions concerning alimony. After concluding these questions, Ms. Gillis's counsel, with no prior notice to Mr. Gillis, announced that "I'm going to tender him as an expert, Your Honor, on alimony taxation."

Mr. Gillis's counsel objected on the grounds that Mr. Gillis was a fact witness and had no notice that he would be called as an expert witness. The trial court overruled the objection and qualified Mr. Gillis as "an expert in tax law." Mr. Gillis then answered a series of questions concerning the parties' finances and various tax decisions Mr. Gillis made about the parties' finances.

The trial court later entered a post-separation support order requiring Mr. Gillis to pay Ms. Gillis \$11,000 per month in post-separation support from 1 August 2014 until entry of a final alimony order. The trial court also entered an order requiring Mr. Gillis to pay \$83,359.86 in post-separation support arrears for the period from 1 August 2014 through 31 July 2015. After a non-jury alimony trial, the trial court ordered Mr. Gillis to pay \$10,000 of alimony per month "until the death of

either party or plaintiff's earlier remarriage or cohabitation within the purview of N.C. Gen. Stat. § 50-16.9.”

Mr. Gillis appealed both the post-separation support orders and the alimony judgment.

Analysis

I. Compelling Mr. Gillis to testify as an expert witness

Mr. Gillis first argues that the trial court erred by qualifying him as an expert witness in the post-separation support hearing “over his objection and without prior notice.” As Mr. Gillis observed in his brief, this argument raises an issue of first impression in our State: can a trial court, with no prior notice, compel a party to offer unpaid expert testimony for the opposing party at a hearing?

The federal courts have adopted various tests to answer this question under the federal equivalent of our Rule 702. *See, e.g., In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 304 F.R.D. 379, 382 (S.D.N.Y. 2015). Courts in other states have grappled with this issue for many years. *See Right to elicit expert testimony from adverse party called as witness*, 88 A.L.R.2d 1186 (1963).

At some point, our State's appellate courts will need to wrestle with this issue and adopt our own legal test. But this case is not the right vehicle to do so. Although the trial court qualified Mr. Gillis as “an expert in tax law,” Mr. Gillis offered little, if any, opinion testimony using that expertise. His testimony addressed tax issues

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that were fact-based (such as how much the parties paid in taxes) and questions addressing whether Mr. Gillis used his tax expertise to benefit himself (at the expense of Ms. Gillis) in this family law proceeding.

The only “expert” testimony to which Mr. Gillis directs us in his appellate brief is Mr. Gillis’s statement that Ms. Gillis likely would be in the 25% tax bracket for income taxes:

Q. And in her tax bracket, it would probably somewhere around 25 percent, would you agree with that, state and federal, at least?

A. I don’t think it would be more than 25 percent. It might be 25 percent, yeah.

Even assuming it was error for the trial court to compel Mr. Gillis to offer this expert testimony, it was not a reversible error. “Appellate courts do not set aside verdicts and judgments for technical or harmless error.” *Faucette v. 6303 Carmel Rd., LLC*, 242 N.C. App. 267, 274, 775 S.E.2d 316, 323 (2015). “The appellant thus bears the burden of showing not only that an error was committed below, but also that such error was prejudicial—meaning that there was a reasonable possibility that, but for the error, the outcome would have been different.” *Id.*

Here, none of the trial court’s findings and conclusions relied on Mr. Gillis’s purported expert testimony; rather, the court’s findings were based on facts about the parties’ financial information introduced through fact, not expert, testimony. Indeed, even with respect to Ms. Gillis’s tax bracket, Ms. Gillis also introduced into evidence

her income and tax information, and copies of the 2014 and 2015 tax rate schedules, providing an alternative source for this information. Thus, Mr. Gillis has not shown a reasonable possibility that, had the trial court not qualified him as an expert in tax law, the outcome of this proceeding would have been different. Accordingly—and taking no position on the legality of compelling an adverse party to provide expert testimony—we find that any error in this case was harmless.

II. Alimony duration

Mr. Gillis also challenges the alimony judgment, arguing that the trial court failed to make necessary findings to support the conclusion that alimony should continue until either parties' death or Ms. Gillis's remarriage or cohabitation. This argument is barred by recent precedent from this Court.

When entering an alimony award, a trial court must consider sixteen statutory factors and then exercise its discretion to choose the award's amount, duration, and manner of payment. N.C. Gen. Stat. § 50-16.3A(b). The court also must enter findings setting forth the reasons for the amount, duration, and manner of paying the award. *Williamson v. Williamson*, 140 N.C. App. 362, 365, 536 S.E.2d 337, 339 (2000) (citing N.C. Gen. Stat. § 50-16.3A(c)). These findings “must be more than mere evidentiary facts; they must be the specific ultimate facts sufficient for an appellate court to determine that the judgment is adequately supported by competent evidence.” *Williamson*, 140 N.C. App. at 363–64, 536 S.E.2d at 338.

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As a result, whether an alimony award survives appellate review often turns on whether this Court believes the trial court's findings reflect its "reasons" for the alimony decision, as opposed to simply reciting the statutory factors. *Compare Ellis v. Ellis*, 238 N.C. App. 239, 241–42, 767 S.E.2d 413, 415–16 (2014), *with Squires v. Squires*, 178 N.C. App. 251, 264, 631 S.E.2d 156, 163 (2006). This Court, in a divided opinion, recently offered some guidance on what language is sufficient to reflect the court's "reasons." *See Rea v. Rea*, ___ N.C. App. ___, ___, 822 S.E.2d 426, 433–34 (2018).

In *Rea*, the trial court's order made findings on several of the statutory factors "in detail, including marital misconduct; the relative earnings and earning capacities of the parties; the duration of the marriage; the good health and ages of the parties; the standard of living established during the marriage; the relative assets and liabilities of the parties; and the relative needs of the parties." *Id.* at ___, 822 S.E.2d at 433. The trial court also stated that its determination of the amount, duration, and manner of payment were based on those detailed findings. This Court held that to be enough. *Id.* at ___, 822 S.E.2d at 433–34.

Here, the trial court's order includes findings regarding the statutory factors, including the length of the marriage, the parties' incomes, Mr. Gillis's marital fault, and Ms. Gillis's health issues. Then, in the conclusions of law, the order concludes that the alimony award should be continuous "[c]onsidering the dependency of the plaintiff, the defendant's status as a supporting spouse, and the marital fault of the

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defendant, the findings of fact relative to the parties' financial circumstances and needs and the other factors addressed hereinabove." Under *Rea*, the trial court's findings and conclusions are sufficient to permit this Court to engage in meaningful appellate review and confirm that this alimony determination was an exercise of the trial court's sound discretion. We therefore affirm the trial court's award of alimony.

Conclusion

We affirm the trial court's orders and judgment.

AFFIRMED.

Chief Judge McGEE and Judge COLLINS concur.

Report per Rule 30(e).