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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-1049

Filed: 5 May 2020

Mecklenburg County, No. 15-CVD-23619 (SPS)

JASON SMITH, Plaintiff/Father,

v.

MICHELLE SMITH, Defendant/Mother.

Appeal by Plaintiff from order entered 30 April 2019 by Judge Sean B. Smith in Mecklenburg County District Court. Heard in the Court of Appeals 15 April 2020.

Wofford Law, PLLC, by J. Huntington Wofford and Rebecca B. Wofford, for Plaintiff-Appellant.

No brief for Defendant-Appellee.

COLLINS, Judge.

Jason Smith (“Plaintiff”) appeals an order entered 30 April 2019 awarding Michelle Smith (“Defendant”) attorney’s fees. Plaintiff argues that the trial court erred by finding and concluding that Defendant is an interested party acting in good faith who has insufficient means to defray the expense of her claim for permanent child support and thus erred by ordering Plaintiff to “pay the sum of \$19,104.25 as reimbursement for Mother’s expenses and attorney’s fees” Because the trial

court failed to make sufficient findings of fact to support an award of attorney's fees to Defendant, we vacate the order and remand the case to the trial court.

I. Background

Plaintiff and Defendant, the parents of two minor children born in 2003 and 2006, separated on 15 August 2014. In April 2015, Plaintiff lost his job at Wells Fargo but received some severance income. On 22 December 2015, Plaintiff filed a verified complaint seeking temporary and permanent child custody, a motion for emergency child custody or a temporary parenting arrangement, and a motion for the court to order a substance abuse assessment of Defendant. The trial court denied the motion for temporary emergency custody on 29 December 2015. Beginning in December 2015, the children lived with Plaintiff. Plaintiff did not earn any income between January 2016 and September 2016.

On 24 December 2015, James, McElroy & Diehl, P.A. ("Diehl"), began representing Defendant in this matter. On 25 January 2016, Defendant transferred \$546,854.13 from the parties' jointly owned Fidelity Investments account into an individual Fidelity Investments account in Defendant's name. During 2016, Defendant transferred \$285,000 from this individual account into a checking account in her name. Defendant subsequently paid invoices for legal fees from this checking account.

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On 16 February 2016, Defendant filed a verified answer wherein she moved the trial court to dismiss the action, strike certain portions of Plaintiff's complaint, and sanction Plaintiff under Rule 11. Defendant also counterclaimed for temporary and permanent child custody, child support, and attorney's fees.

On 11 April 2016, before a hearing was held on the parties' motions, the parties entered into a consent order wherein they agreed that they would share temporary joint legal custody, Plaintiff would have temporary primary physical custody, and Defendant would have temporary visitation rights every other weekend. Child support was not addressed in the consent order.

On 1 September 2016, Plaintiff filed a second motion for a temporary parenting arrangement seeking sole custody and control of the minor children and permission to relocate them to New York, as Plaintiff had been offered employment by Citibank in New Jersey. Defendant filed a response with motions. Plaintiff moved to New Jersey in September 2016 and began working for Citibank.

On 14 October 2016, the parties entered into a consent order amending the previous consent order and giving primary physical custody of the minor children to Defendant and visitation every other weekend to Plaintiff. On 28 December 2016, Plaintiff paid retroactive child support in the amount of \$5,400. The parties filed a memorandum of judgment/order on 13 February 2017, wherein they agreed to the following: (1) Plaintiff would pay Defendant temporary child support in the amount

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of \$2,770 per month plus 13% of any bonuses received, including \$9,750 from Plaintiff's January 2017 bonus to be paid by 23 February 2017; (2) Plaintiff would pay Defendant temporary postseparation support in the amount of \$900 per month plus 15% of any bonuses received, including \$10,000 from Plaintiff's January 2017 bonus to be paid by 23 February 2017; and (3) Plaintiff would maintain health insurance and pay 100% of any uninsured medical expenses for the two minor children.

On 15 September 2017, Diehl notified the trial court that Hatcher Law Group, P.C. ("HLG"), would substitute as counsel for Defendant. HLG had begun working on Defendant's child support case on 12 September 2017.

On 28 November 2017, the trial court entered a formal consent order for temporary child support and postseparation support, reflecting the terms the parties had previously agreed upon in the 13 February 2017 memorandum of judgment/order, and ordering Plaintiff to make all monthly support payments no later than the first day of each month. On 3 December 2018, the trial court entered a consent permanent child custody order, giving Defendant primary physical custody and Plaintiff visitation every other weekend.

The trial court conducted a hearing on 15 and 16 January 2019¹ on Defendant's claims for permanent child support and attorney's fees. On 30 April 2019, the trial

¹ The transcript and Plaintiff both indicate that the hearing was held on 15 and 16 January 2019. The Order appears to erroneously state that the matter came on for hearing on 12 March 2019.

court entered an order (“Order”) finding and concluding that Defendant “is an interested party, acting in good faith who has insufficient means to defray the expense of her claim for permanent child support from” Plaintiff and awarding Defendant \$19,104.25 in attorney’s fees, pursuant to N.C. Gen. Stat. § 50-13.6. In the Order, the trial court found the following facts relevant to the issues on appeal:

6. [Plaintiff] refused to pay [Defendant] an amount of child support for the minor children that was, and is, reasonable under the circumstances.

7. [Plaintiff’s] refusal to pay a reasonable amount of child support to [Defendant] necessitated [Defendant’s] prosecution, through this litigation, of her child support claim.

8. [Defendant] is an interested party acting in good faith who has insufficient means to defray the expense of her claim for permanent child support.

9. Although [Defendant] was able to secure a monetary distribution from the parties’ estate, she has been forced to spend a majority of the distribution on attorney’s fees related to the litigation of the parties’ claim before this Court. She has also spent the distribution on the children’s expenses that [Plaintiff] refused to pay, such as private school tuition.

10. [Defendant’s] use of the distribution to pay for her attorney’s fees related to her permanent child support claim against [Plaintiff] is an unreasonable depletion of her estate that she should not have had to endure.

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26. [Plaintiff] has significant resources and liquidity of assets from which to reimburse [Defendant] for her attorney’s fees incurred as a result of her claim for permanent child support from [Plaintiff].

II. Discussion

A. Jurisdiction

Plaintiff appeals from an interlocutory order awarding attorney's fees to Defendant. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citation omitted). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). In the family law context, N.C. Gen. Stat. § 50-19.1 "creates a kind of intermediate class of 'quasi-interlocutory' orders that would be final if considered in isolation, but would technically not otherwise be 'final' under Rule 54(b) because another related claim (or 'issue') is still pending in the larger action." *Beasley v. Beasley*, 259 N.C. App. 735, 739, 816 S.E.2d 866, 871 (2018). N.C. Gen. Stat. § 50-19.1 provides in pertinent part:

Notwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment adjudicating a claim for absolute divorce, divorce from bed and board, the validity of a premarital agreement as defined by [N.C. Gen. Stat. §] 52B-2(1), child custody, child support, alimony, or equitable distribution if the order or judgment would otherwise be a final order or judgment within the meaning of [N.C. Gen. Stat. §] 1A-1, Rule 54(b), but for the other pending claims in the same action.

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N.C. Gen. Stat. § 50-19.1 (2019). This statute, however, “restricts interlocutory family law appeals to those claims listed in that section,” *Beasley*, 259 N.C. App. at 742, 816 S.E.2d at 873, and a “claim” for attorney’s fees is not listed in that section.

Immediate appellate review of an interlocutory order may nevertheless be permissible if “(i) the trial court certifies the case for immediate appeal pursuant to [N.C. Gen. Stat.] § 1A-1, Rule 54(b), or (ii) the order ‘affects a substantial right of the appellant that would be lost without immediate review.’” *Musick v. Musick*, 203 N.C. App. 368, 370, 691 S.E.2d 61, 63 (2010) (citation omitted); *see also* N.C. Gen. Stat. § 7A-27(b)(3)(a) (2019) (“[A]ppel lies of right directly to the Court of Appeals . . . [f]rom any interlocutory order or judgment of a superior court or district court in a civil action or proceeding that . . . [a]ffects a substantial right.”). The “substantial right” exception applies to interlocutory orders entered in a family law case—such as the one here for attorney’s fees—but that are not listed in N.C. Gen. Stat. § 50-19.1. *Beasley*, 259 N.C. App. at 742, 816 S.E.2d at 873.

In the instant case, the trial court did not certify the Order pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b). Thus, Plaintiff’s right to an immediate appeal necessarily depends on whether the Order affects a substantial right. Child support and attorney’s fees related to that child support claim have been litigated, although a child support order has yet to be entered. The Order for attorney’s fees completely disposes of the attorney’s fees issue and orders Plaintiff to pay \$19,104.25, not an

insignificant amount. *See id.* at 742, 816 S.E.2d at 872-73. The Order thus affects a substantial right, and we have jurisdiction to hear the appeal. *See id.* Moreover, as the Order for attorney's fees lacks sufficient findings of fact, judicial economy favors addressing those deficiencies in the instant case.

B. Attorney's Fees

Plaintiff argues that the trial court erred by awarding attorney's fees to Defendant pursuant to N.C. Gen. Stat. § 50-13.6, which provides in pertinent part:

In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding

N.C. Gen. Stat. § 50-13.6 (2019). Thus, to award attorney's fees pursuant to this statute, the trial court must make specific findings that (1) the interested party acted in good faith; (2) the interested party had insufficient means to defray the expenses of the action; and (3) the party ordered to furnish support refused to provide adequate support under the circumstances existing at the commencement of the action or proceeding. *Leak v. Leak*, 129 N.C. App. 142, 151, 497 S.E.2d 702, 707 (1998). The

trial court's findings of fact must be supported by competent evidence. *Conklin v. Conklin*, 825 S.E.2d 678, 680 (N.C. Ct. App. 2019).

Whether a trial court has met these statutory requirements for awarding attorney's fees in a child support case is a question of law, which we review de novo on appeal. *Hennessey v. Duckworth*, 231 N.C. App. 17, 23, 752 S.E.2d 194, 199 (2013). "Only when these requirements have been met does the standard of review change to abuse of discretion for an examination of the amount of attorney's fees awarded." *Conklin*, 825 S.E.2d at 680 (internal quotation marks and citation omitted).

1. Good faith

Plaintiff first argues that the trial court erred by finding that Defendant had acted in good faith in seeking to obtain child support. Plaintiff asserts the trial court failed to make additional findings as to Plaintiff's good faith and failed to consider the evidence Plaintiff offered to rebut the record evidence of good faith.

"[O]ur Supreme Court has previously adopted the definition of good faith as 'honesty of intention, and freedom from knowledge of circumstances which ought to put one upon inquiry' for Rule 11 sanctions." *Id.* (citation omitted). A party satisfies the element of good faith by demonstrating that he or she seeks child support in a genuine dispute with the other party. *See id.* (trial court's finding of mother's good faith was supported where record showed parties had genuinely disputed custody of children, despite father's argument that parties' ultimate agreement on custody

arrangement suggested mother did not act in good faith when defending against father's custody claim and pursuing her own).

In this case, the record reflects that Defendant sought child custody and child support in a genuine dispute with Plaintiff. Plaintiff filed a complaint on 22 December 2015, seeking temporary and permanent child custody. On 16 February 2016, Defendant filed an answer and counterclaimed for temporary and permanent child custody, child support, and attorney's fees. In his response to Defendant's motion for attorney's fees, Plaintiff "admitted that it is appropriate for the Court to enter an order providing for the support of the minor children[;]" and the trial court ultimately held a hearing on 15 and 16 January 2019 to determine permanent child support. *See, i.e., Setzler v. Setzler*, 244 N.C. App. 465, 468, 781 S.E.2d 64, 66 (2015) ("Here, it is undisputed that defendant was in a genuine dispute with plaintiff—plaintiff initiated a claim for custody and defendant brought a counterclaim for custody.").

Nonetheless, Plaintiff argues that the trial court failed to make a finding of fact regarding whether Plaintiff acted in good faith in that dispute. However, the inquiry under N.C. Gen. Stat. § 50-13.6 is solely whether the party moving for attorney's fees—Defendant in this case—sought child support in a genuine dispute with the other party. Thus, the trial court did not err by failing to make a finding of fact as to whether Plaintiff acted good faith.

Plaintiff also contends that the trial court failed to consider evidence rebutting the record evidence of good faith.² However, “[t]he trial court was in the best position to evaluate the merits and sincerity of the claims of both parties and to determine whether [Defendant] was acting in good faith.” *Conklin*, 825 S.E.2d at 682-83 (citation omitted). As the challenged finding and conclusion regarding Defendant’s good faith are based on competent evidence, the trial court did not err by finding and concluding that Defendant acted in good faith.

2. Insufficient means

Plaintiff next argues that the trial court erred in finding and concluding that Defendant had insufficient means to defray the expense of her child support claim.

For purposes of awarding attorney’s fees, a party has insufficient means to defray the expense of the lawsuit when that party is “unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit.” *Leary v. Leary*, 152 N.C. App. 438, 443, 567 S.E.2d 834, 838 (2002) (internal quotation marks and citation omitted). In making this determination, a court should generally focus on the disposable income and estate of the movant, although a comparison of the two spouses’ estates may sometimes be appropriate. *Van Every v. McGuire*, 348

² Citing *Mason v. Erwin*, 157 N.C. App. 284, 579 S.E.2d 120 (2003), Plaintiff argues, “The trial court made no additional findings as to Plaintiff-Appellant’s ‘good faith’ and failed to consider the evidence that Plaintiff-Appellant offered to rebut the presumption that Defendant-Appellee was acting in good faith in filing her claim for child support.” However, we note that *Mason* does not address a “presumption” of good faith but rather addresses the lack of evidence offered by defendant to rebut plaintiff’s proffered evidence of good faith.

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N.C. 58, 62, 497 S.E.2d 689, 691 (1998). The court should start by examining the movant's income and expenses. *See Hinshaw v. Kuntz*, 234 N.C. App. 502, 509-10, 760 S.E.2d 296, 302 (2014) (movant's monthly surplus of \$4,405.78 was enough to show she was able to pay attorney's fees). If the income and expense figures show that the movant cannot pay attorney's fees, the court must also look to whether the movant has a separate estate or other assets that could be used to cover them. *See, e.g., Respess v. Respess*, 232 N.C. App. 611, 636-37, 754 S.E.2d 691, 707 (2014) (the trial court erred by not considering movant's estate and assets); *Bookholt v. Bookholt*, 136 N.C. App. 247, 252, 523 S.E.2d 729, 732-33 (1999) (the trial court erred by not considering movant's separate \$88,000 estate). If there is indeed a separate estate, the question for the court is whether "the use of [the movant's] separate estate to pay [] litigation expenses would amount to an unreasonable depletion of that estate" by paying the fees. *Bookholt*, 136 N.C. App. at 252, 523 S.E.2d at 733.

It is not enough for the trial court's order to merely make a conclusory statement reflecting the statutory language. *Dixon v. Gordon*, 223 N.C. App. 365, 373, 734 S.E.2d 299, 305 (2012). In *Dixon*, this Court reversed and remanded a trial court's order awarding father's attorney's fees because

the only findings of fact were that father does not have sufficient funds with which to employ and pay legal counsel . . . to meet Mother on an equal basis. Although information regarding father's gross income and employment was present in the record in father's

testimony, there are no findings in the trial court's order which detail this information.

Id. (internal quotation marks, ellipsis, brackets, and footnote omitted). This Court concluded "that because the findings in this case contain little more than the bare statutory language, the order is insufficient to support an award of attorney's fees." *Id.* See also *Cameron v. Cameron*, 94 N.C. App. 168, 172, 380 S.E.2d 121, 124 (1989) (trial court's finding that "plaintiff did not have the ability to defray the costs and expenses" was little more than a "bald statement" of the law and was insufficient to support an award of attorney's fees).

Likewise, in *Cox v. Cox*, 133 N.C. App. 221, 228, 515 S.E.2d 61, 66 (1999), this Court reversed and remanded a trial court's order awarding plaintiff attorney's fees because the trial court failed to make sufficient findings of fact concerning whether plaintiff had insufficient means to defray the expense of the litigation. "[T]he trial court concluded that plaintiff did not have sufficient assets with which to pay his attorneys' fees and that defendant did have the means to pay plaintiff's attorneys' fees. However, there were no findings about plaintiff's monthly income or expenses." *Id.* (citation omitted).

On the other hand, in *Barrett v. Barrett*, 140 N.C. App. 369, 536 S.E.2d 642 (2000), this Court specifically considered whether plaintiff had sufficient funds to defray the costs of litigation and concluded that the "findings suggest that plaintiff

was in fact forced to deplete her equitable distribution award to pay off her debts and expenses.” *Id.* at 375, 536 S.E.2d at 646. This Court explained:

[T]he trial court’s findings reflect plaintiff has negative disposable income and a separate savings account of only \$600. This fact alone demonstrates that plaintiff had insufficient funds to defray the costs of litigation. Defendant nonetheless points to the \$5000 cash [plaintiff] received pursuant to equitable distribution out of which her litigation costs could be paid. However, defendant has made no showing (either at trial or on appeal) that plaintiff even still has this money from which she could defray her litigation expenses, as opposed to being forced to spend it to pay off her monthly expenses. After all, the trial court found that plaintiff’s only source of savings was her \$600 credit union account. Furthermore, the court noted that plaintiff’s credit card obligation is currently \$20,000, most of which was incurred after the date of separation in order to meet her monthly expenses. These findings suggest that plaintiff was in fact forced to deplete her equitable distribution award to pay off her debts and expenses. We therefore conclude plaintiff was without sufficient funds to defray the costs of litigation and was therefore entitled to attorney’s fees.

Id. at 374-75, 536 S.E.2d at 646.

In this case, the trial court’s sole findings concerning whether Defendant had insufficient means to defray the expense of the lawsuit are as follows:

9. Although [Defendant] was able to secure a monetary distribution from the parties’ estate, she has been forced to spend a majority of the distribution on attorney’s fees related to the litigation of the parties’ claim before this Court. She has also spent the distribution on the children’s expenses that [Plaintiff] refused to pay, such as private school tuition.

10. [Defendant's] use of the distribution to pay for her attorney's fees related to her permanent child support claim against [Plaintiff] is an unreasonable depletion of her estate that she should not have had to endure.

Unlike in *Barrett*, the trial court made no findings of fact regarding Defendant's disposable income, savings, debt, monthly income, or monthly expenses. Moreover, the trial court made no findings of fact to determine: (1) the amount of the monetary distribution Defendant had removed from the joint account and estate; (2) the amount of the distribution that Defendant used to pay the children's expenses that Plaintiff refused to pay; or (3) the reasonableness of those expenses and fees.

Although the trial court asserted Defendant's use of her separate estate to pay her own litigation expenses would amount to an unreasonable depletion of her estate, the trial court failed to make detailed findings of fact, similar to the trial courts in *Cox* and *Dixon*, to support its ultimate finding and conclusion that Defendant had insufficient means to defray the expense of the litigation.

3. Refusal to pay reasonable child support

Plaintiff finally argues that the trial court erred in finding and concluding that he had refused to pay reasonable child support to Defendant.

To award attorney's fees in a child support case, the trial court must find that "the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding." *Hudson v. Hudson*, 299 N.C. 465, 472-73, 263 S.E.2d 719, 724 (1980)

(citing N.C. Gen. Stat. § 50-13.6). This ultimate finding of fact necessarily requires the trial court to determine what amount of support was “adequate under the circumstances existing at the time of the institution of the action.” N.C. Gen. Stat. § 50-13.6; *see Boyd v. Boyd*, 81 N.C. App. 71, 81, 343 S.E.2d 581, 587 (1986) (quoting N.C. Gen. Stat. § 50-13.6) (vacating an order for attorney’s fees and remanding for consideration anew, as “[t]he court’s determination of [the amount which defendant should be reasonably required to pay for the support of his children], upon remand, will necessarily have a direct bearing upon the issue of whether defendant, by paying \$500.00 per month, has ‘refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding. . . .’”).

In this case, the trial court failed to make any findings of fact regarding the circumstances existing at the time of the action, the amount of support which was adequate at the time the action was instituted, or the amounts agreed to by the parties and paid by Plaintiff.

III. Conclusion

Because the trial court failed to make adequate findings of fact, the Order for attorney’s fees is vacated, and this cause is remanded to the District Court of Mecklenburg County for further findings of fact, conclusions of law, and a determination on Defendant’s motion for attorney’s fees consistent with those findings of fact and this opinion. *See Cameron*, 94 N.C. App. at 172, 380 S.E.2d at

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124 (vacating order awarding attorney's fees and remanding case for further findings of fact).

VACATED AND REMANDED

Judges TYSON and BERGER concur.

Report per Rule 30(e).