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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-632

Filed: 31 December 2020

Mecklenburg Count, No. 16-CVD-1134

SCOTT RICHARD HORNER, Plaintiff,

v.

ELLEN DENISE HORNER, Defendant.

Appeal by Defendant from an Order on Alimony entered 31 December 2018 by Judge Aretha V. Blake in District Court, Mecklenburg County. Heard in the Court of Appeals 18 February 2020.

*Hull & Chandler, by Andrew S. Brendle, for Plaintiff-Appellant.*

*Matthew R. Arnold for Defendant-Appellee.*

McGEE, Chief Judge.

Scott Richard Horner (“Plaintiff”) appeals from an Order on Alimony finding Ellen Denise Horner (“Defendant”) entitled to alimony in the gross amount of \$6,724.36 a month, effective 1 April 2016 and for a duration of one hundred and eighty (180) months from the date of filing of Plaintiff’s claim for alimony. Plaintiff contends that the trial court erred by concluding as a matter of law that it was barred from

considering wife's marital misconduct, failing to set forth its reasons for the amount and duration of the alimony award, and requiring plaintiff to pay "alimony arrears prior to the date of separation."

I. Factual and Procedural Background

Plaintiff and Defendant were married on 14 April 1995 and there was one child born of the marriage, who has since attained the age of majority. Their marriage of 21 years ended when they were divorced on 28 August 2017. Plaintiff and Defendant raised their child in their marital home located in Huntersville, North Carolina, that is approximately 4,800 square feet, and is located in a neighborhood where homes generally range from \$300,000 to \$650,000 in value. The parties also own a 64.4 acre tract of real property in Vale, North Carolina, which they purchased in 2013 for recreational purposes. In addition, at the time of separation, Plaintiff and Defendant owned multiple vehicles, including a 2011 F-150, a 2008 Honda Accord, a 2015 Honda Accord, an RV purchased in 2004, two ATVs and a trailer for transporting the ATVs.

Plaintiff was fifty-six (56) years old and employed at the time of trial by Fiber Composites, LLC, where he earned an average gross monthly income of \$15,833.33. Defendant was fifty-eight (58) years old and employed as an office manager at Pineville Healthcare, LLC earning an average gross monthly income of \$4,847.22. Throughout the marriage, both parties were employed and contributed to the marital

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estate; however, Plaintiff earned a significantly greater amount than Defendant's \$50,000 annually, with "Plaintiff [] consistently earn[ing] an annual income in the \$150,000.00 to \$220,000.00 range for the last five years[.]" The trial court determined that the couple's financial stability provided them "the luxury of doing anything they wanted, such as vacations and car purchases, as money was no object due to their stable financial status."

Plaintiff filed a complaint for temporary and permanent child custody, divorce from bed and board, declaratory judgment, injunctive relief, a restraining order and attorney fees on 20 January 2016. Defendant answered Plaintiff's complaint on 14 March 2016, moved to dismiss Plaintiff's claims for child custody and attorney fees, and verified counterclaims for permanent child custody, temporary and permanent child support, divorce from bed and board, postseparation support, alimony, and attorney fees. Plaintiff filed Affirmative Defenses and Reply to Defendant's Counterclaims on 8 April 2016. A Memorandum of Judgment/Order was entered on 10 June 2016, resolving the parties' crossclaims for divorce from bed and board, with Plaintiff moving out of the marital home on 17 June 2016.

The trial court entered an Order on Permanent Child Support and Attorney Fees on 24 April 2017, requiring Plaintiff to pay child support in the amount of \$1,392.86 per month, retroactive to 17 June 2016.

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Defendant's claim for alimony was heard by the trial court on 29 November 2017. In an Order on Alimony filed fourteen (14) months later, the trial court determined that Plaintiff was the supporting spouse pursuant to N.C. Gen. Stat. § 50-16.1A(5), and had a net monthly surplus of \$7,167.54 income over expenses. The court found Defendant to be a dependent spouse within the meaning of N.C. Gen. Stat. § 50-16.1A(2), with a net monthly shortfall of \$4,958.01. The trial court found the following pertinent facts regarding Defendant's need and Plaintiff's ability to pay:

16. As of the most current paystub for both parties produced with their respective Financial Affidavits, Wife has earned \$51,494.66 as of November 2017 and Husband has earned \$191,418.26 as of October 28, 2017. Again, Husband has earned just slightly under four times what Wife has earned to date.

24. During the years leading up to separation, the parties usually took two vacations a year. For example, in 2013 they traveled to Alaska and Universal Studios in Florida. In 2014, the parties went to Disney and Universal.

36. In the months and years before separation, the parties routinely dined out at restaurants such as Mickey and Mooch, Hawthorne's, 131 Main, and Outback. During their meals out they would have wine and/or drinks with the meal. These are nice restaurants. Husband liked to purchase wine at these meals[,] and he acted as if money was no object.

37. Since separation, Wife has been unable to enjoy this ability to dine outside the home without regard to budget.

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38. However, Husband testified that he has continued to enjoy dining at these types of restaurants and spends approximately \$300.00 on himself during these meals out on a monthly basis.

39. Since separation, Wife has been unable to take the vacations she enjoyed prior to separation and has had no access to the Vale property or the RV. Wife has also been unable to enjoy the ATVs as Husband possesses the only vehicle capable of towing the trailer.

40. Since separation, Husband has taken several vacations, including trips to Colorado, Florida and to visit his parents.

41. Since separation, Husband has been able to maintain a standard of living similar to that the parties enjoyed during their marriage.

...

46. In order to support herself and maintain something close to her accustomed standard of living and finance this litigation, Wife has been forced to incur substantial credit card debt and deplete her retirement savings and incur the penalties for early withdrawal. She had to do this because Husband did not pay her adequate support following separation. She should not have had to incur such debt or incur the taxes and penalties associated with depleting her retirement account[.]

The trial court also found that Plaintiff engaged in marital misconduct, based on detailed and explicit Facebook messages, a deleted Adult Friend Finder account, and hotel credit card charges:

76. The Court finds that Husband did in fact destroy evidence relevant to the litigation and that it was

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foreseeable that the litigation would occur at the time he destroyed the evidence.

77. The Court finds that Husband did in fact destroy this evidence because it was harmful to the case.

...

100. The Court finds that Husband had both the inclination and the opportunity to engage in illicit sexual behavior during the marriage of the parties and prior to separation.

101. The Court finds that husband did, in fact, engage in illicit sexual behavior during the marriage of the parties and prior to separation.

...

103. Wife was unaware of Husband's illicit sexual behavior and in no way condoned his extra marital affairs.

The trial court concluded that:

7. Once the Court has found that Husband, the supporting spouse, has committed illicit sexual behavior, the Court is barred from considering any marital misconduct by Wife in determining entitlement, amount, duration and manner of payment because the court is only given the discretion to consider the economic factors of N.C.G.S, § 50-16.3A(b) and not the marital misconduct of the dependent spouse.

Based on the findings of fact and conclusions of law of the trial court, the court issued the following order:

1. Wife has presented credible evidence to establish both an inclination and opportunity on the part of Husband to engage in illicit sexual behavior.

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2. Wife is entitled to Alimony due to the court finding that Husband had both the inclination and opportunity to engage in illicit sexual behavior and that he did, in fact, engage in illicit sexual behavior, during the marriage of the parties and prior to date of separation.

3. Husband engaged in spoliation of evidence by deliberately deleting his Adult Friend Finder account prior to initiating this litigation, when litigation was reasonably foreseeable. The court draws an adverse conclusion that evidence obtained from Adult Friend Finder would have supported and confirmed Husband's actual illicit sexual behavior, or further proved his inclination and opportunity to engage in illicit sexual behavior.

4. Wife is entitled to Alimony in the gross amount of \$6,724.36 for a duration of one hundred and eighty (180) months from the date of filing.

5. Wife's Alimony obligation dates back to the date of filing of Wife's claim for Alimony on March 14, 2016 and will be effective April 1, 2016.

6. The alimony set forth herein shall be payable by Husband to Wife on the first day of each month beginning April 1, 2016 and shall continue on the first of every month thereafter until the death of either party, remarriage or cohabitation of Wife, or the expiration of the one hundred and eighty (180) month term set forth above.

7. As of the date of trial, Husband owes alimony arrears to Wife in the amount of \$134,487.20.

8. Husband is entitled to a credit of \$25,790.11 towards the arrears owed to Wife for in-kind support he provided to Wife after separation.

9. After the credits provided to Husband, he owes a remaining arrears balance as of date of trial of \$108,697.09.

From this Order on Alimony, Plaintiff appeals.

II. Analysis

Plaintiff contends that the trial court erred by: (1) concluding as a matter of law that it was barred from considering Defendant's marital misconduct because Plaintiff had committed illicit sexual behavior; (2) failing to set forth its reasons for the amount and duration of the alimony award; and (3) requiring Plaintiff to pay alimony arrears prior to the date of separation. We affirm in part, and vacate and remand in part to the trial court.

A. *Standard of Review*

Alimony is granted upon the trial court finding that "one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors[.]" N.C. Gen. Stat. § 50-16.3A; *see also Barrett v. Barrett*, 140 N.C. App. 369, 371, 536 S.E.2d 642, 644 (2000) ("First is a determination of whether a spouse is *entitled* to alimony . . . . If one is entitled to alimony, the second determination is the *amount* of alimony to be awarded."). The first inquiry of entitlement is reviewed de novo, but the amount and duration of the alimony award are subject to the trial court's discretion. *Id.*; *see also Kelly v. Kelly*, 167 N.C. App. 437, 441, 606 S.E.2d 364, 368 (2004) ("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.” (citations omitted)).

“The well-established rule is that findings of fact by the trial court supported by competent evidence are binding on the appellate courts[.]” *In re Estate of Trogdon*, 330 N.C. 143, 147, 409 S.E.2d 897, 900 (1991)). “A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason.” *Clark v. Clark*, 301 N.C. 123, 128–29, 271 S.E.2d 58, 63-64 (1980) (citation omitted). Therefore, no grant of alimony based upon competent evidence and findings will be reversed on appeal absent an abuse of such discretion. *See Scott v. Scott*, 336 N.C. 284, 291, 442 S.E.2d 493, 497 (1994).

*B. Marital Misconduct*

Plaintiff first argues that the trial court erred when it concluded:

Once the Court has found that [Plaintiff], the supporting spouse, has committed illicit sexual behavior, the Court is barred from considering any marital misconduct by [Defendant] in determining *entitlement, amount, duration and manner of payment* because the court is only given the discretion to consider the economic factors of N.C.G.S. § 50-16.3A(b) and not the marital misconduct of the dependent spouse.

(Emphasis added). We agree.

Illicit sexual behavior is a form of marital misconduct that involves “acts of sexual or deviate sexual intercourse, deviate sexual acts, or sexual acts defined in G.S. § 14-27.20(4), voluntarily engaged in by a spouse with someone other than the

other spouse[.]” N.C. Gen. Stat. § 50-16.1A(3)(a). “If the court finds that the dependent spouse participated in an act of illicit sexual behavior during the marriage and prior to or on the date of separation, the court shall not award alimony.” N.C. Gen. Stat. § 50-16.3A(a). On the other hand, where “the court finds that the supporting spouse participated in an act of illicit sexual behavior . . . during the marriage and prior to or on the date of separation, then the court shall order that alimony be paid to a dependent spouse.” *Id.* However, “If the court finds that the dependent and the supporting spouse each participated in an act of illicit sexual behavior during the marriage and prior to or on the date of separation, then alimony shall be denied or awarded in the discretion of the court after consideration of all of the circumstances.” *Id.*

In this case, the trial court found that Plaintiff engaged in illicit sexual behavior during the marriage and prior to the date of separation and stated “[p]ursuant to N.C. [Gen. Stat.] § 50-16.3A(a), the court is without discretion and shall award alimony to [Defendant].” Absent a finding that Defendant also engaged in illicit sexual behavior during the marriage or prior to the date of separation, entitlement is non-discretionary. However, the trial court made no such finding regarding Defendant’s illicit sexual behavior, or lack thereof. N.C. Gen. Stat. § 50-16.3A(b) directs the trial court to “consider all relevant factors” when making the determination of alimony. Plaintiff presented evidence that Defendant threatened to

have an affair and claimed Defendant used a dating website to connect with other men. Because the evidence of alleged illicit sexual behavior by both parties is relevant and necessary to the alimony determination, the trial court was required to resolve this disputed issue and the trial court's findings should have included its determination of the credibility of Defendant's alleged illicit sexual behavior before concluding that Defendant's entitlement to alimony was non-discretionary.

The trial court erred in concluding that it was barred from considering a dependent spouse's illicit sexual behavior by virtue of a supporting spouse's illicit sexual behavior. We, therefore, remand to the trial court to make findings regarding Defendant's alleged illicit sexual behavior, or lack thereof, in making its determination whether Defendant's entitlement to alimony was non-discretionary.

Even in the event the trial court determines Defendant is entitled to alimony, Plaintiff contends entitlement does not control the amount, duration, and manner of payment in an alimony analysis. He argues marital misconduct, including but not limited to illicit sexual behavior, is one of sixteen enumerated factors a court must consider in determining the amount, duration, and manner of alimony. *See* N.C. Gen. Stat. §50-16.3A(b); *see also* N.C. Gen. Stat. § 50-16.1A(3).

Contrary to the trial court's Conclusion of Law 7, N.C. Gen. Stat. § 50-16.3A(b) does not restrict consideration of the marital misconduct of either party based on the misconduct of the other. N.C. Gen. Stat. § 50-16.3A(b) provides:

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The court shall exercise its discretion in determining the amount, duration, and manner of payment of alimony. The duration of the award may be for a specified or for an indefinite term. In determining the amount, duration, and manner of payment of alimony, the court shall consider all relevant factors[.]

N.C. Gen. Stat. § 50-16.3A(b). Furthermore, the statute mandates consideration of the marital misconduct of both spouses, stating “the court shall consider all relevant factors, including: (1) The marital misconduct of either of the spouses.” *See* N.C. Gen. Stat. § 50-16.3A(b). Although “marital misconduct” as defined by the alimony statute includes many forms of misconduct, it expressly includes “illicit sexual behavior” within its scope. N.C. Gen. Stat. § 50-16.1A(3) (2019).

The trial court made no findings addressing Plaintiff’s evidence of Defendant’s alleged misconduct presented at trial, including Plaintiff’s allegations of Defendant’s emotional abuse, reckless spending, and frivolous civil suits. Because the trial court’s legal conclusion is inconsistent with the plain language of the law, the trial court abused its discretion by not considering Defendant’s alleged marital misconduct.

“The trial court must at least make findings sufficiently specific to indicate that the trial judge properly considered each of the factors[.]” *Rhew v. Rhew*, 138 N.C. App. 467, 470, 531 S.E.2d 471, 473 (2000) (citations omitted). The trial court did not make specific findings of fact for factor one [marital misconduct] of the sixteen “ultimate facts at issue in the case[.]” *Id.* at 472, 531 S.E.2d at 474.; *see also* N.C. Gen. Stat. § 50-16. Without findings that the trial court properly considered each of

the relevant statutory factors upon which evidence was presented, this Court cannot appropriately determine whether the order is adequately supported by competent evidence. *See Friend-Novorska v. Novorska*, 143 N.C. App. 387, 395, 545 S.E.2d 788, 794, *aff'd*, 354 N.C. 564, 556 S.E.2d 294 (2001) (“the trial court must make findings of fact regarding any of the factors for which evidence is introduced at trial”).

Therefore, the order “must be vacated and the case remanded for necessary findings.” *Rhew*, 138 N.C. App. at 472, 531 S.E.2d at 474. Accordingly, this case is remanded to the trial court to make specific findings of fact regarding the alleged “illicit sexual behavior” of both parties in accordance with N.C. Gen. Stat. § 50-16.3A(a) and the alleged “marital misconduct” of both parties in accordance with N.C. Gen. Stat. § 50-16.3A(b).

*C. Alimony Amount, Duration and Arrears*

Plaintiff next argues that the trial court failed to expressly set forth its reasoning for the determination of the amount and duration of the alimony award. Specifically, Plaintiff contends that the trial court erred because “[t]here is no finding of fact that takes the time to explain why the trial court ruled the way it ruled[.]” We agree in part.

N.C. Gen. Stat. § 50-16.3A(c) states:

The court shall set forth the reasons for its award or denial of alimony and, if making an award, the reasons for its amount, duration, and manner of payment. Except where there is a motion before the court for summary judgment,

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judgment on the pleadings, or other motion for which the Rules of Civil Procedure do not require special findings of fact, the court shall make a specific finding of fact on each of the factors in subsection (b) of this section if evidence is offered on that factor.

N.C. Gen. Stat. § 50-16.3A(c). This Court has held “the findings of fact required to support the amount, duration, and manner of payment of an alimony award are sufficient if findings of fact have been made on the ultimate facts at issue in the case and the findings of fact show the trial court properly applied the law in the case.” *Friend-Novorska v. Novorska*, 143 N.C. App. 387, 395, 545 S.E.2d 788, 794 (2001) (noting that the “ultimate facts at issue in the case are facts relating to the factors set forth in section 50-16.A(b) for which evidence is presented at trial[]”).

“Under N.C. Gen. Stat. § 50-16.3A (c) (2001), the trial court is also required to set forth the reasons for the amount of the alimony award, its duration, and manner of payment.” *Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 421, 588 S.E.2d 517, 522 (2003). “The findings of fact need not set forth the weight given to the factors in section 50-16.3A(b) by the trial court when determining the appropriate amount, duration, and manner of payment, as the weight given the factors is within the sound discretion of the trial court.” *Friend-Novorska*, 143 N.C. App. at 395–96, 545 S.E.2d at 794. It is enough that the court “provide sufficient detail to satisfy a reviewing court that it has considered all relevant factors.” *Rhew*, 138 N.C. App. at 472, 531 S.E.2d at 474 (citations omitted). Where the facts set forth by the trial court leave a

reviewing court to speculate as to the reasoning behind an alimony amount and duration, the reviewing court must remand for further findings. *See Wise v. Wise*, 264 N.C. App. 735, 750, 826 S.E.2d 788, 799 (2019) (“This Court does not rely on speculation. The trial court must make sufficient findings to allow this Court to perform a meaningful review.”); *see also Cunningham v. Cunningham*, 171 N.C. App. 550, 564, 615 S.E.2d 675, 685 (2005) (remanding for findings of fact concerning the duration of the alimony award where the trial court only set forth reasons for the amount and manner of payment).

The trial court set forth sufficient facts to support the amount of alimony awarded to the dependent spouse. Specifically, the trial court made findings regarding the relative earnings and earning capacities of each spouse; both parties’ liquid and non-liquid assets; the parties’ standard of living pre- and post-separation; and the relative needs and expenses of both parties. The trial court further connected these findings to its allocation of \$6,724.36 in alimony payments each month in

Findings of Fact 140:

Wife has a net monthly shortfall of \$4,958.01. The Court finds credible the testimony of Victoria Coble regarding the tax implications of an alimony payment by Husband to Wife, including the calculation of the effective tax rate that will be applied to payments received by Wife. The Court finds that an effective tax rate of 26.268% is reasonable and that Wife needs alimony in the amount of \$6,724.36 to have the net cash flow necessary to meet her reasonable monthly expenses.

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The trial court also made sufficient findings of fact to support the amount of alimony arrears Plaintiff is required to pay. Based on the alimony amount determined, the trial court calculated the amount of arrears owed to Defendant as of the date of trial: \$134,487.20. The trial court then reasoned that “[Plaintiff’s] Alimony obligation date[d] back to the date of filing of [Defendant’s] claim for Alimony on March 14, 2016 and will be effective April 1, 2016.” The trial court credited \$25,790.11 to Plaintiff “for in-kind support he provided to [Defendant] after separation” and determined that Plaintiff “owes a remaining arrears balance as of date of trial of \$108,697.09.”

For these reasons, clearly set forth in the trial court’s findings of fact and conclusions of law, the trial court satisfied the requirement to “set forth the reasons for its award” under N.C. Gen. Stat. § 50-16.3A(c).

Though the trial court found ample facts to support Defendant’s entitlement to alimony, Plaintiff’s ability to pay, and the amount of alimony, the trial court made no findings to support its determination that Defendant is entitled to alimony “for a duration of one hundred and eighty (180) months from the date of filing.” When the trial court’s “findings do not set forth the reasons for the precise amount or duration of the trial court’s alimony award[,]” “we must remand for further findings.” *Wise*, 264 N.C. App. at 752, 826 S.E.2d at 799; *see also Cunningham*, 171 N.C. App. 550,



615 S.E.2d 675 (2005) (holding the trial court's failure to make the statutorily required findings concerning the duration of an alimony award warranted remand for further findings).

“[D]ecisions about the amount and duration of alimony are made in the trial court's discretion and the court is not required to make findings about the weight and credibility it assigned to the evidence before it.” *Hartsell v. Hartsell*, 189 N.C. App 65, 75 (2008). However, “[t]he requirement for detailed findings is thus not a mere formality or an empty ritual; it must be done.” *Rhew*, 138 N.C. App. at 467, 531 S.E.2d at 471 (citations omitted). Accordingly, we remand the alimony order for further findings of fact concerning the duration of the alimony award.

Plaintiff further contends that the trial court's assignment of alimony arrears effective prior to the date of legal separation was in error. Assuming, *arguendo*, that Plaintiff's argument is correct, the trial court is directed to modify the timing of the one hundred eighty (180) months' award of alimony to run from the date of separation of the parties.

### III. Conclusion

For the reasons stated above, we find the trial court erred by (1) concluding as a matter of law that it was barred from considering Defendant's marital misconduct and (2) failing to set forth its reasons for the duration of the alimony award. We vacate and remand to the trial court to make findings of fact regarding the alleged

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marital misconduct of Defendant and the duration of the alimony award in accordance with N.C. Gen. Stat. § 50-16.3A. We further direct the trial court to modify the timing of the one hundred eighty (180) months' award of alimony to run from the date of separation of the parties.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judges BRYANT and HAMPSON concur

Report per Rule 30(e).