IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-543

No. COA20-639

Filed 5 October 2021

New Hanover County, No. 16 CVD 4146

ANN E. LEHN (now HEMING), Plaintiff,

v.

MARK D. LEHN, Defendant.

Appeal by plaintiff from orders entered 31 May 2019 and 31 December 2019 by Judge Jeffrey Evan Noecker in New Hanover County District Court. Heard in the Court of Appeals 8 September 2021.

The Lea/Schultz Law Firm, P.C., by James W. Lea, III, for plaintiff.

Noonan & Lieberman, Ltd., by James V. Noonan and Ruth B. Sosniak; and Brock and Scott, PLLC, by James P. Bonner, for defendant.

ARROWOOD, Judge.

¶ 1 Ann E. Lehn (now Heming) ("plaintiff") appeals from the trial court's order on her Rules 59 and 60 motion and the trial court's order on plaintiff's and Mark D. Lehn's ("defendant") motions to show cause. Plaintiff contends the trial court erred as a matter of law in several respects. For the following reasons, we affirm the trial

court's orders.

I. Background

¶ 2 The parties were married on 28 June 1986. The parties were divorced on 16 March 2006 in a proceeding filed in Will County Circuit Court, Illinois. The divorce judgment incorporated the parties' Marital Settlement Agreement ("Agreement"), which resolved issues of child custody, child support, maintenance, and property division. The parties have five children together: Kelsey, Nicholas, Christopher, Justin, and Haley. Plaintiff was awarded sole custody of the children, all of whom were minors at the time of the divorce judgment.

¶ 3 Per the Agreement, defendant was ordered to pay plaintiff forty-five percent of his monthly base net income per month for child support, a sum of $4,580.00 for defendant's net annual income at the time. In addition to the foregoing child support, defendant was ordered to pay fifty percent "of any and all day-care expenses, educational expenses including but not limited to the expenses incurred at SS. Peter & Paul school, and extra-curricular activity expenses that are incurred by and for the minor children." Defendant was also ordered to maintain an insurance policy covering the children's medical, dental, psychological, orthodontia, hospital, surgical, and optical care.

¶ 4 Defendant's maintenance obligations included monthly payments of $4,150.00 to plaintiff for a period of 120 months. Defendant's maintenance obligation could be

released upon the death of either party, the remarriage of plaintiff, or plaintiff's "cohabitation with another person on a resident continuing conjugal basis[.]" Defendant was also ordered to pay an additional thirty six percent of his net income in excess of his base net income, up to a maximum total of $5,280.00 per month.

¶ 5 Article X of the Agreement set out specific terms for the parties regarding the educational needs of their children. The Agreement required both plaintiff and defendant to contribute to the college and post-high school educational expenses of their children pursuant to Section 513 of the Illinois Marriage and Dissolution of Marriage Act. 750 Ill. Comp. Stat. § 5/513 (2019). In accordance with Section 513, college expenses were defined to include tuition, books, supplies, registration and other required fees, board, lodging, and round trip transportation between the college and home of the child if the college was out-of-town. The obligation to pay was conditioned upon several factors, including the desire of the children to attend a college or trade school, the financial resources available to each party, the financial resources available to each child, and the child's maintaining at least a "C" average at college. The contribution was limited to four years after high school graduation for each child, and was limited in amount by the published student budget for an Illinois resident full-time student living on campus at the University of Illinois at Champaign, Illinois.

¶ 6 Defendant began making regular child support and maintenance payments to

plaintiff, but began to fall behind on payments in 2007. Plaintiff moved for contempt in Will County Circuit Court, Illinois, and defendant responded with a petition to reduce support due to a major reduction in income after losing his job.

¶ 7 The Will County Circuit Court conducted a hearing on 9 April 2010 and entered an order on 14 October 2010 reciting the court's ruling. The court made findings with respect to defendant's payments for the years 2006 through 2009. The court did not find defendant in contempt of court for the years 2006 through 2008, finding that defendant overpaid his support obligation by $14,531.00 in 2006, underpaid by $26,407.00 in 2007, and underpaid by $60,228.00 in 2008. The court found defendant in contempt for failing to pay child support and maintenance for 2009, with a total of $83,540.00 in arrears for child support and maintenance and $11,057.00 for children's expenses, for a total amount due of $94,621.00. The court also made a contempt finding of $16,899.00 and awarded plaintiff interest at the rate of nine percent annum for 2006 through 2009 for a total of $14,121.71. The court ordered defendant to pay $6,000.00 in attorneys fees. Defendant's base child support commencing 1 February 2010 was set at $977.00 on a bi-weekly basis reflecting forty percent of defendant's net base annual income of $63,505.00. The order included modifications for the payment of child support and arrearages upon the emancipation of the parties' children.

¶ 8 On 22 November 2016, plaintiff filed a Petition to Register Foreign Orders and

Motion for Contempt in New Hanover County District Court, North Carolina. Plaintiff alleged that as of 10 October 2016, defendant was in arrears in the amount of $156,085.99 plus interest and additional sums for medical, educational, and extracurricular expenses for the children. On 20 April 2016, defendant filed a motion for contempt in the same action seeking enforcement of the 2006 judgment and a finding that plaintiff was responsible for contributing to the children's college expenses. In the motion, defendant stated that he had paid over $263,898.75 towards the children's college expenses pursuant to the Agreement, which included plaintiff's portion of the obligation because plaintiff had "not provided funds for the children towards college expenses nor has she reimbursed Defendant for her portion[.]" Defendant contended he was owed at least $120,000.00 plus interest.

¶ 9 The New Hanover County District Court conducted a hearing on 7 March 2019. The parties exchanged trial notebooks which included the Agreement and spreadsheets detailing the amounts at issue. The spreadsheets were admitted into evidence, and the trial court heard testimony from defendant, plaintiff, and plaintiff's new husband, Sean Heming ("Mr. Heming"). Plaintiff stipulated that by the time of trial, defendant had paid $288,000.00 in college expenses.

¶ 10 The trial court entered an order on 31 May 2019. The trial court found that all five children had attended colleges out-of-state and that defendant, "through loans, paid for a portion of Kelsey's tuition and paid for practically the entirety of college

expenses for Nicholas, Christopher, and Justin. As Defendant paid these college expenses he would apply half of the amount to his arrears balance, decreasing this amount each year from 2011 through 2016." The trial court noted a legal memorandum it issued in January 2019 "on the pertinent Illinois law regarding the intersection of child support and college expenses." Applying the factors set forth in Section 513, the trial court found that "[a]ll five children applied for and were granted various amounts of scholarships, grants, and financial aid which was applied towards their college tuition and expenses."

¶ 11 Further applying Illinois law, the trial court addressed the parties' responsibility for college expenses based upon the parties' respective financial resources during the time period while the children were in college. The trial court found that "[t]he financial resources of the two parents over the period from when Kelsey started college to the present, while Haley is still attending college, is about the same." The trial court added that in determining the financial resources of each party, it "viewed not just the income of the party but the full financial resources available to the parties, which included spouses and significant others." Accordingly, the trial court found that plaintiff had remarried, that Mr. Heming consistently earned over $250,000.00 per year, and that plaintiff earned approximately $55,000.00 per year as a social worker. The trial court found that defendant's employment income had reduced dramatically since 2013, and that defendant had applied for

loans from the Department of Education in 2010 and 2011 and received a loan of $350,000.00 from his significant other's family trust used for college expenses, child support payments, and other personal expenses.

¶ 12 Based on the relatively equal financial resources of the parties, the trial court found the parties equally responsible for college expenses. The trial court considered the bi-weekly $977.00 payments and fifty percent of the college expenses paid by defendant to be child support and arrearage payments credited at the time of the payments.

¶ 13 The trial court next set out the amounts paid for the relevant school year to clarify "each party's total financial obligation through May 2020." The trial court noted that it adopted "Defendant's exhibit #12 as presented at trial with certain changes which are listed below." The trial court credited defendant for his recurring child support and arrears payments each year, as well as college expenses relative to the in-state tuition cap. The trial court found that defendant overpaid by a total of $17,893.00 for school year 2013-2014 and that as of 30 June 2016, defendant no longer had arrears and had a credit balance of $22,090.91.

¶ 14 After summarizing the credits for defendant's college expenses against his arrearage amount for school years 2010-2016, the trial court found that in school year 2016-2017 "Haley was the only child of the parties in college. At the time of trial there was no evidence as to Haley's actual expenses for college." The trial court found

that it was "appropriate to set her expenses as $25,000 per year." The trial court then summarized defendant's obligations for the remainder of Haley's college education and found that "[t]hroughout the child support and arrears calculations and five children's college expenses, Defendant owes Plaintiff $14,492.42. This is the full limit of Defendant's exposure for all payments owed through June 30, 2019." The trial court dismissed both motions for contempt and ordered defendant to pay plaintiff $14,492.42 on or before 30 June 2019.

¶ 15 On 12 June 2019, plaintiff filed a Motion Pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure to seek a new trial. The trial court conducted a hearing on 6 November 2019 and denied plaintiff's motion by written order filed 31 December 2019. The order also amended the 31 May 2019 order to attach inadvertently omitted exhibits.

¶ 16 Plaintiff filed written notice of appeal of both orders on 29 January 2020, and amended her notice of appeal on 30 January 2020 to correct a clerical error.

II. Discussion

¶ 17 Plaintiff contends the trial court erred as a matter of law in several respects, including failure to account for the children's responsibility in their own college expenses, deviating from the "cap" of yearly costs required by Illinois law, accepting defendant's spreadsheet as evidence, considering plaintiff's new husband's income in determining the parties' financial resources, failure to account for defendant's

voluntary unemployment, crediting defendant for a federal loan, offsetting the "loan" amount put towards college expenses, and precluding plaintiff from introducing evidence of her college expenses on behalf of the children. We address each in turn.

A. Standard of Review

¶ 18 A provision for payment of college expenses is in the nature of child support obligation. *In re Marriage of Dieter*, 271 Ill.App.3d 181, 190, 648 N.E.2d 304, 311 (1995). "Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Ferguson v. Ferguson*, 238 N.C. App. 257, 260, 768 S.E.2d 30, 33 (2014) (quoting *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002)). "To support a reversal, 'an appellant must show that the trial court's actions were manifestly unsupported by reason.' " *Head v. Mosier*, 197 N.C. App. 328, 332, 677 S.E.2d 191, 195 (2009) (citation omitted). "The trial court must, however, 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) (citation omitted).

B. Children's Resources and College Expenses

¶ 19 Plaintiff argues this Court should reverse the trial court's decision and remand because the trial court "failed to consider in any applicable year the 'minor children's

responsibility' which would allot college expenses on a one-third basis to the child and the two parents[,]" and because "there were no further findings as to the exact amounts each child had the responsibility to cover." We disagree.

¶ 20 Section 513 requires a court to consider all relevant factors "that appear reasonable and necessary[,]" and how the court weighs those factors is within its discretion. *In re Support of Pearson*, 111 Ill.2d 545, 548, 490 N.E.2d 1274, 1275 (1986). The trial court is not required to make specific findings as to the amount each child is obligated to cover. *In re Marriage of Thomsen*, 371 Ill.App.2d 236, 243, 872 N.E.2d 1, 7 (2007).

¶ 21 The trial court received evidence for the amounts each child received in aid, scholarships, and student loans, which was included in defendant's testimony and supporting documents. Although the trial court did not specifically describe each child's obligations, plaintiff has failed to show that the trial court abused its discretion.

C. "Cap" Imposed by Section 513 and the Agreement

¶ 22 Plaintiff contends the trial court erred by deviating from the "cap" on yearly college expenses limited to the published student budget for an Illinois resident full-time student living on campus at the University of Illinois at Champaign, totaling $26,000.00. Plaintiff specifically argues the trial court deviated from this standard in Findings of Fact 48-51. Although plaintiff argues this guideline is set by statute,

plaintiff does not cite to any specific statutory section, only noting Article X of the Agreement.

¶ 23 In our review of applicable Illinois statutes, including Section 513, it does not appear that such a "cap" is imposed by statute. Furthermore, it is unclear how the challenged findings exercise any deviation from the terms set by the Agreement. Regardless, it was within the trial court's discretion to consider all relevant factors "that appear reasonable and necessary[,]" in determining the parties' obligations for college expenses, and plaintiff has failed to show that the trial court abused its discretion with respect to Findings of Fact 48-51.

D. Admission of Defendant's Spreadsheet

¶ 24 Plaintiff argues the trial court's admission and adoption of defendant's spreadsheet was a clear abuse of discretion because defendant's spreadsheet was incorrect in a number of ways and failed to account for defendant's additional child expense obligations. We disagree.

¶ 25 Although the trial court did adopt defendant's spreadsheet as an exhibit, it specifically noted "certain changes which are listed below." The trial court proceeded to make findings regarding college expense contributions, contributions to arrears, and related interest. Plaintiff's arguments regarding the effective date of child support payments and calculation of child expense obligations are immaterial and unsupported by the evidence. Plaintiff has failed to show that the trial court abused

its discretion by admitting and adopting portions of defendant's spreadsheet.

E. Mr. Heming's Income

¶ 26 Plaintiff contends the trial court erred in considering Mr. Heming's income in determining her financial resources. We disagree.

¶ 27 Under Illinois law, a new spouse's income is considered a part of their "financial resources" under Section 513. *In re Marriage of Drysch*, 314 Ill.App.3d 640, 644, 723 N.E.2d 125, 128-29 (2000). In *Drysch*, the court noted that the term "resources" was not defined under Section 513, and used the dictionary definition to find that the Illinois "legislature intended that the trial court consider all the money or property to which a parent has access." *Id.* at 644-45, 723 N.E.2d at 129. The court also determined that consideration of the new spouse's income was proper because they had pooled their income and money to pay for family expenses, and consideration of the new spouse's income was necessary to completely grasp her financial resources. *Id.* at 645, 723 N.E.2d at 129.

¶ 28 In this case, the trial court properly considered Mr. Heming's income in determining plaintiff's full financial resources. Although plaintiff fails to address it in her brief, the trial court also considered defendant's financial resources through loans and his significant other in addition to his reduced income. The trial court did not abuse its discretion or misapply Illinois law in considering Mr. Heming's income.

F. Defendant's Voluntary Unemployment

¶ 29 Plaintiff contends the trial court erred "in failing to take into account the defendant's voluntary unemployment in the absence of exhibits of mental health care providers and/or physicians' notes[.]" Plaintiff takes issue with the trial court's Findings of Fact 30 and 32 and generally asserts that defendant deliberately depressed his income and that the trial court should have made findings as to defendant's voluntary unemployment. We disagree.

¶ 30 The trial court considered evidence of defendant's employment during the entirety of the proceedings and determined that defendant's testimony was credible. The trial court also included the $350,000.00 loan in determining defendant's full financial resources. Plaintiff has failed to show that the trial court abused its discretion with respect to any findings regarding defendant's income, employment status, or financial resources.

G. Credit for Federal Loan

¶ 31 Plaintiff contends the trial court erred in Findings of Fact 41 and 42 crediting defendant's college assistance to Kelsey in the amount of $9,837.00, specifically arguing the doctrine of *res judicata* and collateral estoppel precluded the court from considering the credit. We disagree.

¶ 32 The Illinois proceedings concerned plaintiff's claims for back payments and defendant's counter-claims to reduce his support obligations and terminate alimony payments. Nothing in the record indicates that the specific issue of defendant's

college assistance to Kelsey was presented to the court and thus potentially subject to preclusion. The trial court did not abuse its discretion with respect to Findings of Fact 41 or 42.

H. Offsetting Loan Amount Towards College Expenses

¶ 33 Plaintiff argues the trial court should not have credited defendant by offsetting the "loan" amount put towards college expenses. Plaintiff cites no legal authority but claims that "[t]his was an established judgment and there is no basis in law or fact for reducing the amount of the judgment and accrued interest based on an alleged 'offset' for expenses paid after the judgment had been entered." We disagree.

¶ 34 Under Illinois law, although marital dissolution and collateral issues of support are statutory, "such proceedings partake so much of the nature of a chancery proceeding that the rules of equity are applicable[.]" *In re Marriage of Henry*, 156 Ill.2d 541, 549, 622 N.E.2d 803, 808 (1993). In this case, the trial court sought to clarify "each party's total financial obligation through May 2020[,]" and "to achieve equity in this matter," in applying defendant's payments of college expenses to different years. The trial court's findings were proper, and plaintiff's argument is overruled.

I. Precluding Plaintiff from Introducing Evidence

¶ 35 In her final argument, plaintiff asserts the trial court erred in Conclusion of Law 8, specifically claiming that she is foreclosed from addressing ongoing or future

college expenses. We disagree.

¶ 36 In a non-jury trial, the trial court has an obligation "to (1) find the facts on all issues joined in the pleadings; (2) declare the conclusions of law arising on the facts found; and (3) enter judgment accordingly." *Gilbert Eng'g Co. v. Asheville*, 74 N.C. App. 350, 364, 328 S.E.2d 849, 857 (1985) (citation omitted). Under Rule 60(b)(2), a trial court may set aside an order or judgment based on "[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." N.C. Gen. Stat. § 1A-1, Rule 60(b)(2) (2019). To be "newly discovered evidence" under Rule 60(b)(2), "it must have been in existence at the time of the trial, and not discoverable through due diligence." *In re L.H.*, 210 N.C. App. 355, 367, 708 S.E.2d 191, 199 (2011) (citation omitted).

¶ 37 At the time of each hearing, plaintiff had the opportunity to present evidence of her contributions to her children's college expenses. Mr. Heming testified that plaintiff had given Kelsey a total of $6,000.00, and "nominal amounts" "for some of the boys," but plaintiff did not present any evidence documenting her contributions to college expenses. Any evidence of plaintiff's contributions to her children's college expenses could have been discovered through due diligence by the time of trial, and plaintiff's failure to produce sufficient evidence precludes plaintiff's challenges under Rules 59 or 60.

III. Conclusion

¶ 38 For the foregoing reasons, we hold the trial court did not abuse its discretion or otherwise err. The trial court's orders are equitable, and plaintiff's arguments are overruled. We affirm the trial court's orders.

AFFIRMED.

Judges COLLINS and JACKSON concur.

Report per Rule 30(e).