IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA21-467

Filed 3 October 2023

Mecklenburg County, No. 17 CVD 1839

TIFFANY MONIQUE STONER, Plaintiff,

v.

AJAMU HAMINDI STONER, Defendant.

On remand by order of the Supreme Court of North Carolina in *Stoner v. Stoner*, ___ N.C. ___, ___, S.E.2d ____ (2023), vacating and remanding a 7 July 2022 order of this Court dismissing Plaintiff's appeal. Originally appealed by Plaintiff from orders entered 16 December 2019 and 22 January 2021 by Judge Jena P. Culler in Mecklenburg County District Court. Originally heard in the Court of Appeals 23 March 2022.

Plumides, Romano, & Johnson, P.C., by Richard B. Johnson, for Plaintiff-Appellant.

No brief filed for Defendant-Appellee.

WOOD, Judge.

This case returns to us on remand from the North Carolina Supreme Court, which, upon granting Plaintiff's petition for *writ of certiorari*, vacated this Court's order dismissing Plaintiff's appeal and remanded this case for the limited purpose of

considering Plaintiff's challenges to the two orders in question on the merits pursuant to N.C. Gen. Stat. § 50-19.1. On remand, we affirm the trial court's orders.

I. Factual and Procedural Background

Tiffany ("Plaintiff") and Ajamu Stoner ("Defendant") were married on 11 July 1999. Three children were born from their union. On 1 February 2017, Plaintiff filed a complaint for divorce from bed and board, child custody, post-separation support, alimony, and attorney's fees.

The parties entered into a Memorandum of Judgment/Order on 4 December 2017. Therein, the parties agreed Defendant would leave the marital residence, pay the mortgage on the marital residence as a form of post-separation support, temporarily pay $500.00 per month in child support, and pay post-separation support until such time as the trial court ruled upon Plaintiff's alimony claims. Plaintiff agreed to pay all household bills and the cost of maintenance. The Memorandum of Judgment provided it was entered without prejudice to either party.

Under the Memorandum of Judgment, Plaintiff and Defendant were granted joint legal and physical custody of their children. The parties agreed the minor children would live with Plaintiff and Defendant on a two day, two day, five day, temporary schedule, wherein the children would live with Plaintiff on Monday and Tuesday and live with Defendant on Wednesday and Thursday. The children would live with either Plaintiff or Defendant on alternating weekends. This arrangement provided each parent equal time with the children. Approximately one month later,

on 5 January 2018, the trial court entered the formal Temporary Order pursuant to the terms of the Memorandum of Judgment entered into by the parties. After the entry of the Temporary Order, the parties filed multiple pleadings. On 1 March 2018, Defendant filed a notice of hearing for interim distribution and a motion in the cause for equitable distribution and interim allocation. On 23 April 2018, Plaintiff filed a motion for continuance of Defendant's interim allocation motion, which was granted on 2 May 2018. On 16 May 2018, Defendant filed a motion to deem request for admissions admitted and argued that because Plaintiff had not responded to the request in a reasonable amount of time, all requests for admissions should be deemed admitted as a matter of fact and law. The motion was calendared for 9 July 2018. Defendant also filed a motion to compel and a notice of hearing on 30 May 2018.

On 29 June 2018, Plaintiff filed a notice of substitution of counsel and also, filed responses to Defendant's motion to deem request for admissions admitted and Defendant's request for admissions on 2 July 2018. On 21 September 2018, the trial court entered an order compelling Plaintiff to fully respond to Defendant's request for production of documents. On 19 October 2018, Defendant filed a motion for interim distribution, a motion for contempt and for sanctions, and a notice of hearing. In his motion for contempt and for sanctions, Defendant alleged Plaintiff had not complied with the 2018 Temporary Order by not transferring all utility and household bills into her name and by not paying fifty percent of "various expenses involving the minor children." A show cause order was issued on 23 October 2018, requiring

Plaintiff to appear and show cause based on the contempt motion. On this same day, Plaintiff filed a motion for continuance of the contempt and sanctions action. On 7 November 2018, Defendant filed two notices of hearing for his motion for contempt and for sanctions and for his motion for interim distribution. On 15 November 2018, an order to show cause was entered, ordering Plaintiff to appear to show cause "as to why she should not be punished as for contempt of the orders" of the court. On 26 November 2018, the parties filed a Memorandum of Judgment agreeing to equally divide the proceeds from the sale of their marital residence.

Plaintiff filed a motion for contempt on 19 December 2018 alleging Defendant willfully failed to abide by the terms of the 2018 Temporary Order by not paying his portion of the children's uninsured medical expenses. Subsequently, Defendant filed a notice of hearing for his motion for contempt and sanctions on 21 December 2018. The trial court issued a show cause order on Defendant's motion on 2 January 2019 and issued a show cause order on Plaintiff's motion on 3 January 2019.

On 17 January 2019, Plaintiff filed a *pro se* motion for a temporary parenting arrangement requesting custody of the children in order to move to Kentucky with the children. On 10 April 2019, the trial court entered an order denying Defendant's and Plaintiff's motions for contempt and sanctions. The court found that both parties alleged in their motions that the opposing party did not make certain payments "pursuant to a prior support order" but the court could not find that "either party willfully violated the prior court order."

On 15 May 2019, Plaintiff filed a motion for continuance, requesting that the hearing on her motion for a temporary parenting arrangement be continued. An order entered on 23 May 2019 continued the matter to the "next available term." Plaintiff's attorney withdrew from representation the following month. Plaintiff's motion for a temporary parenting arrangement was never heard. On 27 August 2019, Defendant's attorney filed a consent order to withdraw from representation.

Thereafter, on 12 September 2019, this case came on for hearing upon the parties' claims for equitable distribution and Plaintiff's claims for alimony and attorney's fees. On this same day, the parties entered into a consent judgment settling the issue of equitable distribution, and the trial court conducted a hearing on the issues of alimony and attorney's fees.

An order directing action in the case was filed on 4 November 2019 because the trial court found that the issues of temporary child support and alimony were still open. The order found that both Plaintiff and Defendant "failed to take sufficient action to resolve the legal claims filed" and that issues pertaining to custody were "calendared on 1/9/19, 4/3/19, and 5/30/19 trial calendars."

On 23 December 2019, the trial court entered an order (the "Alimony Order") finding Plaintiff to be the dependent spouse, awarding Plaintiff $530.00 per month in alimony, and ordering Defendant to pay $1,500.00 towards Plaintiff's attorney's fees.

An order to appear and show cause was filed by Defendant on 9 January 2020. Subsequently, Plaintiff filed a motion for contempt on 30 January 2020, and

requested relief for alimony, child support, divorce, and equitable distribution. The next day, the trial court entered an order to appear and show cause against Defendant on Plaintiff's contempt motion. The court entered a contempt order on 10 February 2020, which found Plaintiff in civil contempt. The court also entered an order finding Defendant was not in civil contempt.

On 2 April 2020, the Mecklenburg County Child Support Enforcement Agency ("Agency") filed a motion to intervene and redirect requesting the trial court to permit the Agency to intervene as a Third-Party Plaintiff on behalf of Plaintiff in regard to the claim for child support. The motion was heard on 12 August 2020 and by an order to intervene and redirect, filed 14 September 2020, the trial court granted the Agency's motion.

On 20 January 2021, the issues of child support and custody came on for hearing pursuant to Plaintiff's request to family court to calendar the matter for permanent custody and permanent child support. Both parties appeared *pro se* and represented themselves at the hearing. On 22 January 2021, the trial court entered an order finding the December 2017 Memorandum of Judgment was a written, signed and filed order "that included 'temporary' custody and child support." The court also found the "parties have been abiding by the terms of the temporary custody order for over three years" and Plaintiff first sought to set permanent custody in December 2020. Further, the trial court held that the "temporary child custody and child support ordered entered via Memorandum of Judgment [on] December 4, 2017 (and

further formalized [on] January 5, 2018) is a permanent order due to the amount of time [it] has been in effect." Plaintiff filed a notice of appeal on 19 March 2021, appealing the 16 December 2019 Alimony Order and the 22 January 2021 Permanent Order.

By order entered 7 July 2022, this Court dismissed Plaintiff's appeal as untimely for failure to file her notice of appeal within thirty days of entry of the orders pursuant to N.C. R. App. P. 3(c)(1). On 28 July 2022, Plaintiff filed a petition for *writ of certiorari* with our Supreme Court. In her petition for *writ of certiorari*, Plaintiff alleged for the *first* time that she did not receive actual notice of the 22 January 2021 order until 25 February 2021. There was no certificate of service of the order contained in the file. On 13 December 2022, our Supreme Court granted Plaintiff's petition and remanded for this Court to address the merits of Plaintiff's appeal.

II. Analysis

On appeal, Plaintiff argues the trial court abused its discretion by (1) ordering Defendant to "only pay $530.00 per month for alimony" and (2) determining that the temporary custody order "became a permanent order by operation of law." We consider Plaintiff's contentions on the merits in accordance with N.C. Gen. Stat. § 50-19.1.

A. Alimony Amount

Plaintiff contends the trial court erred in calculating alimony by providing Defendant "both a credit for his monthly child support obligation and credit for his

monthly child related expenses." Plaintiff argues the methodology used by the trial court to calculate Plaintiff's needs for alimony and Defendant's ability to pay alimony does not separate the parties' individual expenses from their expenses for the children, resulting in an improper calculation of the alimony award. We disagree.

We have previously held the " 'overriding principle' in cases determining the correctness of alimony is 'fairness to all parties.' " *Harris v. Harris*, 188 N.C. App. 477, 481, 656 S.E.2d 316, 318 (2008) (quoting *Fink v. Fink*, 120 N.C. App. 412, 418, 462 S.E.2d 844, 850 (1995)). Decisions regarding the amount of alimony are left to the sound discretion of the trial judge and will be reviewed on appeal for abuse of discretion. *Robinson v. Robinson*, 210 N.C. App. 319, 326, 707 S.E.2d 785, 791 (2011). Thus, determining "what constitutes the reasonable needs and expenses of a party in an alimony action is within the discretion of the trial judge, and he is not required to accept at face value the assertion of living expenses offered by the litigants themselves." *Whedon v. Whedon*, 58 N.C. App. 524, 529, 294 S.E.2d 29, 32 (1982). An abuse of discretion occurs when the decision of the trial court is "manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Kelly v. Kelly*, 228 N.C. App. 600, 601, 747 S.E.2d 268, 272-73 (2013) (citation omitted). This court is bound by all findings of fact supported by competent evidence established by the trial court. *In re Trogdon*, 330 N.C. 143, 147, 409 S.E.2d 897, 900 (1991).

Alimony is determined by N.C. Gen. Stat. § 50-16.3A which governs the

determination of the amount, duration, and payment of alimony to a dependent spouse. There are sixteen relevant factors the court shall consider in making these determinations when evidence is offered for the factor to determine the amount and duration of the alimony award. N.C. Gen. Stat. § 50-16.3A(b)(1)-(16) (2021). During the determination of alimony, "the trial court must at least make a specific finding of fact on each of the above listed factors if evidence is offered on that factor." *Robinson*, 210 N.C. App. at 328, 707 S.E.2d at 793 (cleaned up). The trial court may rely on common sense and fairness between all parties when calculating reasonable expenses of the parties. *Id.* at 329, 707 S.E.2d at 793.

After awarding alimony, the trial court must state its reasons for the alimony amount, duration, and manner of payment pursuant to N.C. Gen. Stat. § 50-16.3A(c). *Hartsell v. Hartsell*, 189 N.C. App. 65, 75, 657 S.E.2d 724, 730 (2008). If the trial court leaves this reasoning out, this Court must remand for findings on those determinations. *Wise v. Wise*, 264 N.C. App. 735, 750, 826 S.E.2d 788, 799 (2019).

While the general rule is that alimony and child support must be kept separate when the court determines the appropriate awards as to each, our North Carolina Supreme Court has aptly noted that "the distinction between the two kinds of payments is easily blurred, particularly when the child for whom the support is needed resides primarily with the recipient of the alimony." *Robinson*, 210 N.C. App. at 331, 707 S.E.2d at 794 (citation omitted).

In fairness to both spouses, all of the circumstances of the parties should be

taken into consideration, including: the property, earnings, earning capacity, condition and accustomed standard of living, and childcare expenses. *Fink,* 120 N.C. App. at 418, 462 S.E.2d at 849. Relevant here, when minor children are involved, the trial court shall also consider as a factor "the earning power, expenses, or financial obligations" related to serving as a "custodian of a minor child" when setting the amount and duration of an alimony award. *See* N.C. Gen. Stat. § 50-16.3A(b)(7). Yet, while the trial court must "take into account the custodial spouse's financial and care-giving obligations in determining dependency, fairness unquestionably requires that the non-custodial spouse's contributions in this area also be considered." *Robinson*, 210 N.C. App. at 332, 707 S.E.2d at 794 (cleaned up).

In *Fink*, this Court held that when a prior child support order establishes the noncustodial spouse's "child support obligation under the Guidelines, the parties are collaterally estopped, absent a motion for modification, . . . from asserting amounts different from those set out in the previous order relating to the child[ren]'s needs and the parties' obligations arising therefrom." 120 N.C. App. at 423, 462 S.E.2d at 852 (citation omitted). This is based on the presumption that child "support set consistent with the guidelines is *conclusively presumed* to be in such amount as to meet the reasonable needs of the child for health, education and maintenance." *Id.* at 423, 462 S.E.2d at 853 (citation omitted). According to *Fink*, based on the principles of fairness, one spouse "may not receive the benefit of a finding of dependency based in part upon [his or] her *actual* child support expenditures where

[the other spouse] is credited only with his [or her] Guideline *proportionate share*." *Id.* at 424, 462 S.E.2d at 853.

In the present case, the parties' 2017 Memorandum of Judgment setting child support and determining custody was in effect at the time the alimony order was entered. In the alimony order, the trial court found Plaintiff and Defendant equally shared joint physical custody of the minor children and then calculated both parties' shared family expenses as well as their individual expenses for the minor children.

The alimony order also found that Plaintiff received $500.00 per month in child support from Defendant. The alimony order does not indicate that the trial court arrived at this figure based upon North Carolina's Child Support Guidelines. In fact, Plaintiff asserts that this amount was not calculated based upon those Guidelines at the hearing. Instead, the child support amount was agreed to by the parties in their December 2017 Memorandum of Judgment and the amount was never modified by the parties. Although it appears that the 2017 Memorandum was originally intended to be temporary, the parties would have been "collaterally estopped, absent a motion for modification, . . . from asserting amounts different from those set out in the previous order relating to the child[ren]'s needs and the parties' obligations arising therefrom." *Id.* at 423, 462 S.E.2d at 852.

However, the present case stands apart from *Fink*. Here, the trial court added the child support paid by Defendant to Plaintiff's total "Monthly Funds available" to pay her expenses and the children's expenses, and the court deducted this same

amount from Defendant's available income. Additionally, the trial court examined the financial affidavits submitted by both parties and reviewed and considered the actual expenditures for the children alleged by both parties. In determining the alimony amount, the trial court credited both parties their actual child support expenditures, so that both parties received this "benefit." In *Hames v. Hames*, we determined that the "trial court did not violate this Court's instruction in *Fink*" when it considered the child support paid by defendant in determining plaintiff's "total monies available" to pay her expenses and the children's expenses, deducted this same amount from defendant's available income, and "was willing to credit both parties with their actual child support expenditures." 190 N.C. App. 205, 661 S.E.2d 326, 2008 N.C. App. LEXIS 817, *8-9 (2008) (unpublished). Based upon similar circumstances, the trial court in the present case did not violate this Court's instruction in *Fink* as both parties, in fairness, received the same "credit." Thus, Plaintiff's argument is overruled.

B. Permanent Child Custody Order

Next, Plaintiff argues the trial court erred when it determined the 2017 Memorandum of Judgment "became a permanent order by the operation of law as the case did not sit dormant." In support of her contention, Plaintiff cites to the "numerous court filings and hearings and orders entered" including Plaintiff's 2019 motion for temporary parenting arrangement and the parties' child custody claims being "calendared at least three times in 2019." We do not find Plaintiff's argument

persuasive.

This court reviews *de novo* whether a custody order is temporary or permanent. *Marsh v. Marsh*, 259 N.C. App. 567, 569, 816 S.E.2d 529, 531 (2018). An order is temporary if it is either (1) "entered without prejudice to either party[;] (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues." *Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003) (citations omitted). If an order does not fall within these categories, it is a permanent order. *Id.* Temporary custody orders are characterized by the circumstances that existed at the time of the hearing. *Miller v. Miller*, 201 N.C. App. 577, 579, 686 S.E.2d 909, 912 (2009).

The time period under review begins when the temporary order is entered and ends when either party asks for the matter to be "set for hearing, not when the hearing is held." *Eddington v. Lamb*, 260 N.C. App. 526, 529, 818 S.E.2d 350, 353 (2018). While "the passage of time alone will not convert a temporary order into a permanent order[,]" *Dancy v. Dancy*, 247 N.C. App. 25, 31, 785 S.E.2d 126, 130 (2016), a temporary order may be converted to a permanent order by operation of time only when neither party requests the matter be set for a hearing within a reasonable period of time. *Eddington*, 260 N.C. App. at 529, 818 S.E.2d at 353. What is considered a reasonable period of time is reviewed on a case-by-case basis. *Id.* The reasonableness of a delay of a request for a hearing is viewed in light of whether the

matter was dormant before the request for a hearing was made. *Id.*

Pursuant to *Senner,* it is clear the 2017 Memorandum of Judgment was a temporary order as it states it was "entered without prejudice to either party" and emphasized that it was, in fact, a temporary order. 161 N.C. App. at 81, 587 S.E.2d at 677. However, it was proper for the trial court to determine that the 2017 Memorandum of Judgment converted into a permanent order by "operation of law."

Based upon the record before us, we note that neither party made a request to calendar the matter for a permanent custody hearing until December 2020. Although quite litigious during the course of their case over issues of equitable distribution, contempt, and alimony, the parties abided by the joint legal and physical custody division of their children and sought to enforce the terms of the December 2017 Memorandum of Judgment for several years. In fact, the record shows that both parties filed numerous contempt motions, requesting the court find the opposing party willfully failed to comply with the Memorandum of Judgment's terms addressing child support and order the other parent to "immediately comply" with the Memorandum's decrees.

It was not until December 2020 that either party asked to set the matter on for a hearing on permanent custody. Although Plaintiff filed a motion for a temporary parenting arrangement in January 2019, this motion was calendared once, continued, and never heard. Plaintiff's motion was filed over a year after the December 2017 Memorandum of Judgment was entered and was seeking additional temporary relief.

Furthermore, on 4 November 2019, the trial court entered an "order directing action in case" on the issue of child custody because neither party had taken "sufficient action to resolve the legal claims filed." Following that order, more than a year passed before either party requested to set the issue of permanent custody on for hearing. In short, the trial court did not err in determining that the December 2017 Memorandum of Judgment converted into a permanent order "due to the amount of time [it] has been in effect."

III. Conclusion

For the foregoing reasons, we affirm the trial court's 16 December 2019 order for alimony and 22 January 2021 order declaring the December 2017 Memorandum of Judgment to be a permanent child custody order.

AFFIRMED.

Judges ZACHARY and COLLINS concur.

Report per Rule 30(e).