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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-26

Filed 01 August 2023

Caldwell County, No. 11-CVD-1624

JEANNIE ROBERTS ICENHOUR, Plaintiff,

v.

JEFFREY DAVID ICENHOUR, Defendant.

Appeal by Plaintiff and cross-appeal by Defendant from orders entered 6 June 2022 by Judge Richard Holloway in Caldwell County District Court. Heard in the Court of Appeals 9 May 2023.

Wesley E. Starnes for Plaintiff-Appellant/Cross-Appellee.

Wilson, Lackey, Rohr & Hall, P.C., by Destin C. Hall, for Defendant-Appellee/Cross-Appellant.

RIGGS, Judge.

Plaintiff Jeannie Roberts Icenhour and Defendant Jeffrey David Icenhour both appeal from orders modifying Defendant's alimony obligation and holding him in contempt for failing to pay said obligation. Both parties assert that the order modifying alimony lacks adequate findings of fact and conclusions of law and that the contempt order based on that erroneous order must therefore be set aside. After

careful review, we agree with both parties, set aside the orders on appeal, and remand the matter to the trial court for further proceedings.

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiff and Defendant were married in 1987 and separated in 2011. The parties entered into a consent judgment on 10 January 2012, with Defendant agreeing to pay $1,800 per month in alimony based on a conceded annual income of $100,000. Defendant moved to modify alimony in 2014, but that motion was denied, as the parties' financial circumstances, per the evidence available to the trial court, had not changed.

Defendant, then working as a transportation driver for Richard Petty Racing, filed another motion to modify alimony on 15 February 2018. In that motion, Defendant alleged that his income was reduced to $72,800 per annum and that his expenses were increased due to rising rent, housing, and vehicle costs. Plaintiff, for her part, sought and received a show cause order on 10 April 2019 based on Defendant's alleged failure to fully pay his monthly alimony obligations beginning in January 2019.

Defendant filed a financial affidavit ahead of hearings on the parties' motions. After the parties executed a memorandum of judgment, Plaintiff agreed to dismiss her motion for contempt and the trial court entered a formal order amending alimony to reduce Defendant's monthly alimony obligation by $100 on 17 January 2020.

By mid-2020, Defendant had again ceased fully paying his alimony obligations, and Plaintiff sought and received a new show cause order. Defendant subsequently filed another motion to modify alimony on 29 December 2020, asserting that: (1) he was furloughed for part of 2020; (2) he was subsequently terminated from his job and was now unemployed; and (3) he had incurred a major unforeseen expense and was borrowing against his retirement account to cover his living expenses. Both parties filed new financial affidavits ahead of the resolution of their respective motions. Per Defendant's affidavit, he was now earning $67,600.08 per annum, incurring annual living expenses of $48,641.52, and owed existing outstanding debts of $53,537.26.

The trial court held a hearing on the parties' motions on 29 March 2022. At the hearing, Defendant testified that he was furloughed from his job at Richard Petty Racing in November 2020; when he returned to the job, his compensation was cut by 7.5%. He was subsequently fired without cause, and he found new employment with Special Event Transportation in February 2021. He took a new position with Big Machine Racing three weeks later, as the job offered higher pay. When questions arose around Big Machine's ability to participate in the upcoming race season, Defendant decided to leave the team in November 2021 for a position at Big Wheels Racing. Defendant remained employed at Big Wheels at the time of the hearing and was earning a gross annual salary of approximately $59,539.02. As for his expenses, Defendant testified consistent with those listed in his financial affidavit, and further explained that he had emptied his 401(k) retirement account to pay his debts and

costs following his reduction in income. The trial court also received into evidence numerous documents concerning Defendant's finances, including tax documents, bank statements, and 401(k) account balance sheets.

After testimony from additional witnesses, including Plaintiff, the trial court took the matter under advisement. Written orders dispensing with the motions were entered on 6 June 2022 (the "Alimony Order" and "Contempt Order," respectively). In the Alimony Order, after recapping the proceedings, the trial court made the following limited findings of fact:

> 3. The Defendant was furloughed from his employment due to the COVID-19 pandemic for a portion of 2020.
>
> 4. Thereafter, the Defendant was terminated from his job due to no fault of his own.
>
> 5. The Defendant is currently employed as a truck driver for a NASCAR racing team.
>
> 6. The Defendant is earning approximately $70,000.00 annually before taxes and any other deductions.

On these four factual findings, the trial court concluded that there was a substantial change in circumstances warranting a reduction of Defendant's monthly alimony obligation to $600.00. As for the Contempt Order, the trial court found facts establishing Defendant's arrearage at $19,700 and ordering him to pay an additional $100.00 per month until that amount was satisfied. The trial court similarly awarded Plaintiff $1,000 in attorney's fees, to be paid in monthly installments of $50.00. The parties entered notices of appeal from both orders.

II. ANALYSIS

Each party advances meritorious arguments for setting aside both the Alimony and Contempt Orders. The barebone facts found in the Alimony Order are inadequate to justify a finding of substantial change in circumstances, the finding as to Defendant's current income is unsupported by the evidence, the remaining findings are insufficient to show an appropriate exercise of discretion in adjusting the alimony amount, and the subsequent Contempt Order based thereon is likewise infirm. We therefore set aside the appealed orders and remand the matter to the trial court for further proceedings not inconsistent with this opinion.

A. Standard of Review

As with any civil bench trial, a trial court resolving a motion to modify alimony must "find the facts specially and state separately its conclusions of law thereon." N.C. R. Civ. P. 52(a)(1) (2021). The court must find "specific ultimate facts . . . sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence." *Montgomery v. Montgomery*, 32 N.C. App. 154, 156-57, 231 S.E.2d 26, 28 (1977). On appellate review of both alimony modification and contempt orders, "the standard . . . is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Kelly v. Kelly*, 228 N.C. App. 600, 601, 747 S.E.2d 268, 273 (2013)*; see also Spears v. Spears*, 245 N.C. App. 260, 273, 784 S.E.2d 485, 494 (2016) (applying this standard of review to a contempt order for failure to

pay alimony). Whether the facts, as found, support the legal conclusion of a substantial change in circumstances is reviewed *de novo*. *Peeler v. Joseph*, 263 N.C. App. 198, 201, 823 S.E.2d 155, 158 (2018). The amount of alimony, if supported by adequate findings and conclusions, is reviewed for abuse of discretion. *Dodson v. Dodson*, 190 N.C. App. 412, 415, 660 S.E.2d 93, 96 (2008).

B. The Alimony Order

Though both parties present slightly different arguments on appeal, both agree that the Alimony Order lacks adequate findings to support its legal conclusions. For example, Plaintiff asserts that the trial court's lone finding concerning Defendant's change in income is inadequate to support a legal conclusion of substantially changed circumstances, while Defendant points out the lack of necessary findings concerning his ability to pay. The parties' contentions are well-founded and, consistent with our caselaw, we vacate the Alimony order and remand for further findings adequate to resolve the motion to modify. *See, e.g., Kowalick v. Kowalick*, 129 N.C. App. 781, 787, 501 S.E.2d 671, 675 (1998) (remanding an order modifying alimony for findings sufficient to determine the existence or absence of a substantial change of circumstances); *Cunningham v. Cunningham*, 345 N.C. 430, 440, 480 S.E.2d 403, 409 (1997) (setting aside an alimony modification order based solely on a party's decreased income and "remand[ing] the change of circumstances issue for consideration by the trial court" where the findings were insufficient to support that determination).

A substantial change in circumstances sufficient to modify alimony "must relate to the financial needs of the dependent spouse or the supporting spouse's ability to pay." *Rowe v. Rowe*, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982). The same factors used to establish alimony are to be considered in determining the existence of such a substantial change. *Id.* Specifically, the issue "requires consideration of the estates, earnings, earning capacity, condition, accustomed standard of living of the parties and other facts of the particular case." *Id.* These factors are weighed towards "the overriding principle . . . [of] fairness to all parties." *Marks v. Marks*, 316 N.C. 447, 460, 342 S.E.2d 859, 867 (1986). The specific statutory factors are set forth in N.C. Gen. Stat. § 50-16.3A(c) (2021), under which "the trial court is 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, 420-21, 588 S.E.2d 517, 522 (2003). Not every factor must be found in all cases, "but the court must provide sufficient detail to satisfy a reviewing court that it has considered 'all relevant factors'" *Rhew v. Rhew*, 138 N.C. App. 467, 472, 531 S.E.2d 471, 474 (2000). Such findings are necessary for this Court "to determine that the judgment is adequately supported by competent evidence." *Pierce v. Pierce*, 188 N.C. App. 488, 490, 655 S.E.2d 863, 864 (2008) (citation and quotation marks omitted). In short, the resulting modification order must find "the ultimate facts which were raised by the defendant's motion to modify." *Kelly*, 228 N.C. App. at 608, 747 S.E.2d at 276. *See*

also Medlin v. Medlin, 64 N.C. App. 600, 603, 307 S.E.2d 591, 593 (1983) (noting the trial court must make "sufficient material facts to support the judgment.").

A straightforward rule may be derived from our caselaw on alimony modification: "A conclusion of a substantial change in circumstances based solely on a change in income is inadequate and erroneous." *Medlin*, 64 N.C. App. at 602, 307 S.E.2d at 592 (citation omitted). Instead, "[t]he extant overall circumstances of the parties must be compared with those at the time of the award to determine whether a substantial change has occurred." *Id.* at 602-03, 307 S.E.2d at 593. This is no less true when the initial alimony amount is established by consent judgment. *Id.* Again, while "[t]he court is not required to find all facts supported by the evidence," it must still find "sufficient material facts to support the judgment." *Id.* at 603, 307 S.E.2d at 593.

In the present case, the trial court made only four factual findings pertinent to its substantial change determination: (1) Defendant was furloughed during the COVID-19 pandemic; (2) he was subsequently terminated without fault; (3) he is now employed by a NASCAR racing team; and (4) he is earning a gross annual income of approximately $70,000. These findings are plainly inadequate to support a conclusion of substantially changed circumstances; not only do they fail to discern what the overall circumstances of the parties were at the time of prior alimony order, but they omit findings as to Defendant's ability to pay and the required "consideration of the [current] estates, earnings, earning capacity, condition, [and] accustomed

standard of living of the parties." *Rowe*, 305 N.C. at 187, 287 S.E.2d at 846. A single finding[1] as to Defendant's current income falls well short of the findings necessary to conclude a substantial change in circumstances exists, particularly when the parties' testimony and the documentary evidence in the record are sufficient, as here, to make findings as to these required facts.

The trial court's failure to make sufficient findings in support of its legal conclusions requires us to vacate the Alimony Order and remand the matter for further findings even where, as here, there may be sufficient record evidence to fully resolve the controversy. We are a reviewing—and not fact-finding—court and are precluded from making those factual determinations in the first instance. That duty falls solely to the trial court, as it alone is able to consider the credibility of witnesses, weigh the evidence, and resolve conflicts therein. *See, e.g., Rhew,* 138 N.C. App. at 472, 531 S.E.2d at 475 ("It is not enough that there is evidence in the record from which such findings could have been made because it is for the trial court, and not the Court of Appeals, to determine what facts are established by the evidence." (cleaned up) (citation and quotation marks omitted)).

C. Contempt Order

[1] We note that this finding that Defendant earns an annual salary of $70,000 is unsupported by the evidence. The record shows Defendant's current gross annual salary is approximately $59,539.02. While Plaintiff argues that the $70,000 estimate may be derived based on an average of Defendant's prior 13 months of earnings across several jobs, such evidence is relevant only to Defendant's prior earnings and/or earning capacity. It is not sufficient evidence of the annual salary currently (and expected to be) earned from Defendant's present employment with Big Wheels Racing.

As with their other arguments, both parties agree that the Contempt Order must rise or fall with the Alimony Order. Because we vacate the Alimony Order, we likewise vacate the Contempt Order based thereon. *See Collins v. Collins*, 243 N.C. App. 696, 710, 778 S.E.2d 854, 862 (2015) ("Upon reversal of the underlying alimony order for errors, the order setting the arrearage must also be reversed.").

III. **CONCLUSION**

For the foregoing reasons, the Alimony and Contempt Orders are vacated. The matter is remanded to the trial court for further findings adequate to determine whether a substantial change in circumstances has occurred and otherwise resolve Defendant's motion to modify. After entry of its order on Defendant's motion to modify, the trial court shall consider and resolve Plaintiff's motion for contempt. On remand, the trial court may rely on the existing record or take additional evidence within its sound discretion. *Rhew*, 138 N.C. App. at 472, 531 S.E.2d at 475.

VACATED AND REMANDED.

Judges TYSON and ARROWOOD concur.

Report per Rule 30(e).