IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-306

Filed: 21 January 2020

Mecklenburg County, No. 13-CVD-11484

MICHAEL M. BERENS, Plaintiff-Husband,

v.

MELISSA C. BERENS, Defendant-Wife.

Appeal by Defendant and cross-appeal by Plaintiff from an order entered 20 July 2018 by Judge Aretha V. Blake in Mecklenburg County District Court. Heard in the Court of Appeals 31 October 2019.

James, McElroy & Diehl, P.A., by Christopher T. Hood, Gena G. Morris, and Caroline T. Mitchell, for Plaintiff-Appellee/Cross-Appellant.

Fox Rothschild LLP, by Michelle D. Connell, for Defendant-Appellant/Cross-Appellee.

DILLON, Judge.

Defendant Melissa C. Berens ("Wife") and Plaintiff Michael M. Berens ("Husband") each appeal from an Order for Child Support, Retroactive Child Support, Postseparation Support, Alimony and Attorney's Fees (the "Permanent Support Order").

I. Background

In 1989, Husband and Wife were married. In July 2012, Husband and Wife separated. At the time of Husband and Wife's separation, five of their six children were minors. The minor children resided with Wife following the parties' separation.

About a year later, in June 2013, Husband filed the underlying action for child custody and equitable distribution. Wife counterclaimed for child custody, child support, post-separation support, alimony, equitable distribution, and interim distribution.

Four years of discovery, cross-motions, litigation, and temporary orders ensued. During the pendency of the underlying action, Husband and Wife were divorced in December 2014.[1]

In July 2018, the trial court entered the Permanent Support Order. Wife appealed, and Husband cross-appealed.

II. Analysis

On appeal, each party takes issue with various aspects of the Permanent Support Order. Each separately argues that the trial court erred in its award of alimony and its award of child support, and Husband alone contends that the trial court erred in awarding attorney's fees to Wife. We address each argument in turn.

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[1] The trial court previously entered an order for equitable distribution, which was the subject of a prior appeal to our Court. *See Berens v. Berens*, 818 S.E.2d 155, 2018 N.C. App. LEXIS 784 (N.C. Ct. App. Aug. 7, 2018).

A. Award of Alimony

Husband and Wife each argue that the trial court erred in its award of alimony, but for different reasons. While Wife contends that the trial court erred by imputing income to her, Husband contends that the trial court erroneously calculated the parties' gross monthly income. We review the trial court's award of alimony for an abuse of discretion. *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982).

"Alimony is ordinarily determined by a party's actual income, from all sources, at the time of the order. To base an alimony obligation on earning capacity rather than actual income, the trial court must first find that the party has depressed her income in bad faith." *Kowalick v. Kowalick*, 129 N.C. App 781, 787, 501 S.E.2d 671, 675 (1998) (internal citations omitted). A party is acting in bad faith when she "is not living up to [her] income potential in order to avoid or frustrate the support obligation." *Works v. Works*, 217 N.C. App. 345, 347, 719 S.E.2d 218, 219 (2011) (internal citations omitted).

In the present case, the trial court made multiple findings that Wife "has disregarded her parental obligations by refusing to seek employment and acting in bad faith" and "has made minimal effort to reduce her living expenses while also refusing to seek retraining or employment." Thus, the trial court "found that income [in the amount of $29,120 per year or $2,426.67 per month] should be imputed to [Wife]."

In arguing that the trial court erroneously imputed income to her, Wife cites to our Court's decisions in *Works* and *Kowalick*. However, in these cases the trial court erred by merely failing to make any findings as to whether the parent had "depressed her income in bad faith." *Kowalick*, 129 N.C. App. at 787, 501 S.E.2d at 675 ("Absent [a finding concerning the mother's depression of her income in bad faith], the trial court could not base its determination of [mother's] alimony obligation on [her] earning capacity."); *see Works*, 217 N.C. App at 348, 719 S.E.2d at 219-20 (concluding "that the trial court's findings were not sufficient to support its imputation of a monthly income . . . to wife" because it "did not find that wife had depressed her income in bad faith") (internal citations omitted). No such error was made in the underlying case.

The facts in evidence establish as follows: Wife has not worked outside of the home since 1994, but has been a stay-at-home mother to the couple's six children, three of whom were still minors. Wife was the sole caretaker of the three minor children. Wife would likely require retraining in order to obtain gainful employment. Wife is well-educated and capable of working, having graduated college with an engineering degree. The three minor children are school age and participate in activities, which would provide Wife with the time and opportunity to work. Wife alleged in her Financial Affidavits that she pays monthly for a maid and other house maintenance.

Thus, the trial court's finding that "[Wife] has acted in bad faith . . . by refusing to seek employment and acting in deliberate disregard of her support obligations" is supported by competent evidence. Moreover, the income imputed to Wife only amounts to a job paying approximately $29,000 per year, or about $14 an hour. This is not an unreasonable or unobtainable amount. Thus, we conclude that the trial court did not abuse its discretion in imputing income to Wife.

Husband also takes issue with the amount of alimony awarded, arguing that the trial court miscalculated the parties' gross income. In so arguing, Husband contends that the trial court "improperly excluded sources of recurring income reflected on [Wife's] . . . tax returns" and it wrongfully declined to "replicate [and adopt] [Husband's] calculation of his gross monthly income[.]"

We disagree with Husband that the trial court erred by excluding Wife's tax refunds when calculating Wife's income. More specifically, while there was evidence that Wife "received an individual tax [refund] every year from 2013 through 2016," our Court has held that "[t]ax refunds and bonuses are not to be included in the calculation of regular income." *Williamson v. Williamson*, 217 N.C. App. 388, 391, 719 S.E.2d 625, 627 (2011); *but see Burger v. Burger*, 249 N.C. App. 1, 7, 790 S.E.2d 683, 688 (2016) (concluding that "the trial court acted within its discretion in including [wife's bonus] in her average gross monthly income" when she, herself, listed her gross monthly income inclusive of her annual bonus).

However, we agree with Husband that the trial court should have included the dividends received and reinvested by Wife when calculating her income. Indeed, our Court has held it proper to "include[ ] . . . investment income in its calculation of both parties' income[.]" *Bryant v. Bryant*, 139 N.C. App. 615, 618, 534 S.E.2d 230, 232 (2000). Just as "[a] supporting spouse may not insulate himself from payment of alimony by choosing to reinvest income each year rather than actually receive it[,]" a dependent spouse may not elect to reinvest monies to create a need for more alimony to cover living expenses. *Friend-Novorska v. Novorska*, 131 N.C. App. 867, 870, 509 S.E.2d 460, 462 (1998) ("[A] dependent spouse [may not] choose to invest his surplus income in a new house and car when no necessity is shown for the expenditures and the effect is to deprive the dependent spouse of funds necessary for living expenses."). While Wife alleges that she only has one fund from which she may receive dividends and plans to deplete this account to pay off debt, such debt has not yet been paid off; and it is conceivable that Wife could make different arrangements to pay off the debt in order to continue receiving dividends.

In sum, we hold that the trial court abused its discretion by not including certain sources of income, namely received and reinvested dividends, when calculating Wife's income. Thus, we remand this portion of the Permanent Support Order to the trial court to recalculate Wife's gross income, and Husband's alimony obligation.

B. Child Support Award

Husband and Wife each argue that the trial court erred in its award of child support. Wife contends that the trial court erred by imputing income to her, in basing the child support award on Husband's net income, and in, effectively, requiring her to deplete her personal estate to support herself and her children. And Husband argues that the trial court committed an error of law by calculating child support based on three minor children, rather than two.

We review child support awards for "a clear abuse of discretion." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). We only overturn such awards "upon a showing that [the award] was so arbitrary that it could not have been the result of a reasoned decision." *Id.*

As reasoned and explained above, the trial court did not abuse its discretion in imputing income to Wife.

Likewise, we conclude that the trial court did not err in basing the child support award on Husband's net income. More specifically, Wife alleges that the trial court's findings of fact are inconsistent and "totally at odds with one another." This is simply not the case. The findings of fact at issue read as follows:

> 99. [Husband], after subtracting his shared family expenses, individual monthly expenses and debt, has remaining monthly income in the amount of $13,732.14.
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> . . .

> 119. That the total needs of [Wife] and the minor children are $14,322.58 per month.
>
> 120. That [Husband] has the means and ability to support the necessary needs and expenses of [Wife] and the minor children *as ordered herein*.
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> 121. The Court finds that [Husband] has $13,712.14 remaining each month.
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> 122. [Husband] does not have the means and ability to pay the combined total needs of [Wife] and the minor children in the full amount of $14,322.58.

(Emphasis added).

Indeed, while findings of fact 99 and 121 may be different by twenty dollars ($20.00), the ultimate findings do not differ – Husband cannot afford to pay the full amount of $14,322.58 per month needed by Wife and the children, but he *can* afford to pay what the court ordered, which is $5,404.63 per month for child support and $4,195.00 per month for alimony. Thus, the findings are not lacking, and the trial court did not commit error in calculating the child support award based on Husband's net income.

Wife further argues that the trial court should not have ordered her to effectively deplete her personal estate to support herself and the minor children. Specifically, she argues that she will need to deplete her assets at the pace of about $4,500.00 per month to cover living expenses. It may be that in some circumstances it would be an abuse of discretion for a trial court to enter an order which required

one spouse to deplete her assets, thus reducing her to poverty. But here, in its order, the trial court imputed almost $2,500.00 monthly to Wife for income she could earn to defray her expenses. Further, the trial court found as fact that Wife has made minimal efforts to reduce her living expenses. Accordingly, we cannot say that the trial court abused its discretion in this regard.

Husband takes issue with the child support award in that it awarded child support based on three minor children, when only two children were minors at the time of the Permanent Support Order. We disagree.

Section 50-13.4(c) of our General Statutes provides that child support "shall terminate when the child reaches the age of 18 [or graduates from secondary school.]" N.C. Gen. Stat. § 50-13.4(c) (2017). However, our Court has held

> when one of two or more minor children for whom support is ordered reaches age eighteen, and when the support ordered to be paid is not allocated as to each individual child, the supporting parent has no authority to unilaterally modify the amount of the child support payment . . . [he] must apply to the trial court for modification.

Craig v. Craig, 103 N.C. App. 615, 618, 406 S.E.2d 656, 658 (1991).

In the present case, when any minor child reaches the age of eighteen (18) or graduates from high school, it is Husband's duty to move for modification of child support. *See id.* Husband argues that the trial court should not have ordered child support for three minor children as one of the parties' children turned eighteen (18)

in March 2018 and graduated from high school in May 2018. He filed a motion to modify child support in May 2018, and the Permanent Support Order was entered in July 2018. However, the facts in evidence before the trial court in entering its Permanent Support Order were from a hearing conducted in May 2017. Thus, the findings of fact provide that "*at the time of the trial of this matter*, three (3) of the parties' six (6) children were minors[.]" The court does take notice of this child's birth date and, in turn, her turning eighteen (18) on 23 March 2018, but there was no evidence before the trial court concerning when she may graduate from high school. Based on these facts, the trial court correctly based its child support award on three minor children. While we find that the trial court did not err in calculating child support for three children, Husband may now file a motion to modify support in light of another child reaching the age of majority. *See Craig*, 103 N.C. App at 618, 406 S.E.2d at 658.

C. Attorney's Fees

Lastly, Husband argues that the trial court erred in awarding attorney's fees to Wife. We disagree. We review such an argument for an abuse of discretion. *Clark v. Clark*, 301 N.C. 123, 136, 271 S.E.2d 58, 67 (1980).

Section 50-13.6 of our General Statutes permits a party "acting in good faith who has insufficient means to defray the expense of the [action for custody and support of minor children]" to request reasonable attorney's fees. N.C. Gen. Stat. §

50-13.6 (2017). "[T]he element of good faith is seldom in issue . . . a party satisfies it by demonstrating that he or she seeks custody in a genuine dispute with the other party." *Setzler v. Setzler*, 244 N.C. App. 465, 467, 781 S.E.2d 64, 66 (2015).

Here, Wife sought child support, child custody, alimony, and a number of other remedies in the underlying case. Husband contends that Wife acted in bad faith by dismissing a previous suit and in responding to his action for custody. However, we conclude this prior suit, and her seeking custody of the children amounts to a "genuine dispute" that shows good faith in the underlying action. *See id.* Moreover, Husband argues that the trial court's findings regarding Wife's bad faith and disregard of her parental obligations bar Wife from acting in good faith in requesting attorney's fees. We believe these findings stand alone – Wife can fail to mitigate her costs or standard of living and, in turn, be imputed income, but also pursue the underlying action in good faith and be unable to defray the costs of litigation. Thus, Wife is not enjoined from seeking and receiving attorney's fees. And we conclude that the trial court did not abuse its discretion in awarding attorney's fees to Wife.

III. Conclusion

The trial court erred in not including Wife's received and reinvested dividends, when calculating her income for the purposes of determining alimony. Thus, we remand this portion of the Permanent Support Order to the trial court to recalculate Wife's gross income and, in turn, Husband's alimony obligation.

The trial court properly exercised its discretion in all other portions of the Permanent Support Order.

AFFIRMED IN PART; REMANDED IN PART.

Judges DIETZ and YOUNG concur.

Report per Rule 30(e).