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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-467

Filed: 21 January 2020

Onslow County, No. 14 CvD 420

GREGORY WRUBLUSKI, Plaintiff,

v.

HEATHER WRUBLUSKI, Defendant.

Appeal by Plaintiff from order entered 15 November 2018 by Judge Henry L. Stevens IV, in Onslow County District Court. Heard in the Court of Appeals 14 November 2019.

J. Albert Clyburn for Plaintiff-Appellant.

No brief filed for Defendant-Appellee.

DILLON, Judge.

Plaintiff Gregory Wrubluski (“Husband”) appeals from an order modifying his child support and post-separation support obligations to Defendant Heather Wrubluski (“Wife”) and awarding attorney’s fees to Wife.

I. Background

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Husband and Wife were married in 1997. Four children were born during the marriage. In 2014, Husband and Wife separated; and in 2015, the parties were divorced.

During their separation, Husband and Wife entered into a Parenting Agreement and a Memorandum of Judgment/Order, under which Husband was ordered to pay Wife \$2,500.00 per month for family support (the “Family Support Order”).

In April 2016, Husband moved to modify the Family Support Order, as two of the minor children were now residing with him and he had “medically retired from the United States Marine Corps . . . [and] had a substantial reduction to his monthly income.” In May 2016, Wife filed a motion for show cause, alleging that Husband had failed to pay her as ordered in the Family Support Order and should be held in contempt for such failure.

A hearing was held on Husband’s motion to modify, and the trial court allowed his motion. In allowing Husband’s motion to modify support, the trial court ordered Husband to pay Wife \$400.00 per month in child support and \$350.00 per month as post-separation support.

Some months later, Husband moved to terminate his post-separation support obligation, alleging Wife was cohabitating with her male partner. Husband also moved to dismiss Wife’s claim for alimony on the same grounds. A hearing was held

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on these motions, and others, and the trial court entered an order, in pertinent part, dismissing Wife's alimony claim and awarding Wife a portion of Husband's military retirement pension, but reserving all other issues, such as child support, post-separation support, and contempt, for a later hearing.

On 27 April 2018, a hearing was held concerning "the issues of child support, post separation support, military pensions, sanctions and contempt." An order was entered on these issues and Husband timely appealed.

II. Analysis

On appeal, Husband argues that the trial court unlawfully modified his post-separation support obligation, failed to follow the guidelines of N.C. Gen. Stat. § 50-13.10 in calculating Husband's child support arrearages, and erroneously awarded attorney's fees to Wife. Husband also takes issues with a number of findings of fact, alleging that they are not supported by the evidence.

A. Post-Separation Support

Husband first argues that the trial court unlawfully modified his post-separation support obligation because he did not receive notice and an opportunity to be heard. We disagree.

A party is entitled to "[n]otice and an opportunity to be heard prior to [being] depriv[ed] . . . of his property." *McDonald's Corp. v. Dwyer*, 338 N.C. 445, 448, 450 S.E.2d 888, 891 (1994). However, the record shows that a motion regarding

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Husband's support obligations was before the trial court. And it appears from the transcript of the hearing that Husband's attorney did not object to the matter being heard. Accordingly, we conclude that the trial court did not err in considering the matter.

B. Child Support

Husband also argues that the trial court failed to follow the parameters of Section 50-13.10 of our General Statutes and miscalculated his child support arrearages. For the reasons stated below, we conclude that the trial court did not abuse its discretion in this regard. *See White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (stating that we review for abuse of discretion).

Section 50-13.10 provides that "a child support payment or the relevant portion thereof, is not past due, and no arrearage accrues . . . [d]uring any period when the child is living with the supporting party pursuant to a valid court order or to an express or implied written or oral agreement transferring primary custody to the supporting party[.]" N.C. Gen. Stat. § 50-13.10(d)(3) (2017). Notwithstanding, our Court has held that "even if an oral agreement [to reduce the child support obligation] existed, it would not justify noncompliance with [Section 50-13.10]." *Van Nynatten v. Van Nynatten*, 113 N.C. App. 142, 146, 438 S.E.2d 417, 418 (1993). Rather, "[t]he supporting parent must apply to the trial court for modification [of his child support obligation]." *Craig v. Craig*, 103 N.C. App. 615, 618, 406 S.E.2d 656, 658 (1991).

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In the present case, it is undisputed that two of the minor children began to live with Husband in June 2015. However, at the time of the custody change, Husband had a lump sum obligation of \$2,500.00 per month. Thus, Husband had to “apply to the trial court for modification” of his obligation. *See id.* Husband could not unilaterally modify the amount of his family support payment. *See id.* (“[W]hen 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.”). Thus, Husband still had an obligation to pay \$2,500.00 per month to Wife and, in turn, accrued arrearages by paying only \$1,250.00 per month. As such, the trial court did not abuse its discretion in calculating Husband’s arrearages from the period of August 2014 through June 2016.

Husband also argues that the trial court miscalculated the amount of arrearages accrued from July 2016 to April 2018.¹ While arguing that the trial court miscalculated his arrearages from July 2016 to April 2018, Husband does not argue that the trial court erred in correcting his child support obligation – in fact, Husband adopts the monthly obligation of \$834.38, rather than the originally imposed obligation of \$400.00, when performing his own calculations of arrearages.

A review of the record, including the order and the supporting payment charts, reveals that Husband should have paid a total of \$15,531.75 from July 2016 to April

¹ In so arguing, Husband challenges findings of fact 59-61.

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2018. The charts also provide that Husband paid \$14,012.61 during this time period. As Wife was ineligible to receive post-separation support beginning in October 2016 and began directly receiving Husband's military pension in May 2017,² all payments made from Husband to Wife should have been attributed to child support. Indeed, the charts include a column entitled "[o]verpayments per order," which from November 2016 to April 2018 continually has a positive balance. Therefore, we conclude that the trial court abused its discretion in its calculation of Husband's arrearages for the period from July 2016 to April 2018. We remand this portion of the order to the trial court with instructions to recalculate the amount of arrearages owed to Wife.

C. Findings of Fact

Husband next challenges findings of fact numbers 15, 24, and 65. We review these findings for whether they are supported by competent evidence, and if so, the "findings of fact are conclusive on appeal[.]" *Olivetti Corp. v. Ames Bus. Sys., Inc.*, 319 N.C. 534, 541, 356 S.E.2d 578, 582 (1987).

Finding of fact number 15 states that "[Husband's] reduction [of his family support obligation] was without conscience, heart, or foresight[.]" Husband argues that this is not supported by the evidence. We disagree.

² See findings of fact 36 and 45.

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Husband, himself, testified that he unilaterally adjusted his child support obligation; and, while he testified that he used the North Carolina Child Support Obligations to so calculate, as discussed above, this is unlawful. Therefore, we cannot say that the trial court, as factfinder, erred in making its determination that “[Husband’s] reduction was without conscience, heart, or foresight[.]”

Finding of fact number 24 states that “[Husband] failed to disclose a May 2, 2016 VA disability letter that established his VA benefits of \$3,532.39 at the time the Court entered the Child Support/PSS Order in June 2016 resulting in an inaccurate amount of support being Ordered in May 2016.” This finding is also supported by the evidence: the June 2016 order modifying support found that “[o]n March 31, 2016, [Husband] was medically retired from his active duty service in the United States Marine Corps. As a result, . . . [Husband] had a substantial and involuntary reduction in his monthly income; (reduction from \$7,889.00 per month prior to retirement to \$3,934.00 per month after retirement).” Based upon competent evidence, this finding establishes that, at the time it entered its May 2016 order, the court was unaware of Husband’s VA benefits due to his failure to disclose. Therefore, finding of fact number 24 is sufficiently supported by the evidence.

Finding of fact number 65 provides that “[Husband] should have been paying \$389.37 per month as [Wife’s] marital share of [Husband’s] military pension[, and] . . . [Husband] did not pay from April 2016 until DFAS started withholding the

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amount in May 2017.” And, contrary to Husband’s arguments, there is competent evidence to support this finding. More specifically, a prior order was entered concerning Husband’s military pension: such order concluded that Wife was “entitled to receive [39.45% of Husband’s] retirement pension . . . effective as of the date of [Husband’s] military retirement” and reserved “the issue of arrears on any pension payments due since [Husband’s] retirement . . . for later hearings of the Court.” Therefore, finding of fact number 65 is based on the trial court’s prior conclusion to address arrearages at a later date.

We find no reversible error in the trial court calculating and ordering Husband to pay arrearages to Wife her unpaid share of Husband’s military pension.

D. Attorney’s Fees

Lastly, Husband argues that the trial court failed to make sufficient findings to justify an award of attorney’s fees to Wife. We agree.

Section 50-13.6 of our General Statutes permit a party to seek counsel fees “in actions for custody and support of minor children[.]” N.C. Gen. Stat. § 50-13.6. When sought, “the court may in its discretion order payment of reasonable attorney’s fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit.” *Id.*

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If attorney's fees are ordered, the trial court *must* make findings of fact to support its order. *Warner v. Latimer*, 68 N.C. App. 170, 176, 314 S.E.2d 789, 793 (1984). More specifically:

Before awarding attorney's fees, the trial court must make specific findings of fact concerning: (1) the ability of the intervenors to defray the cost of the suit, *i.e.*, that the intervenors are unable to employ adequate counsel in order to proceed as a litigant to meet the other litigants in the suit; (2) the good faith of the intervenors in proceeding in this suit; (3) the lawyer's skill; (4) the lawyer's hourly rate; [and] (5) the nature and scope of the legal services rendered.

In re Baby Boy Scarce, 81 N.C. App. 662, 663-64, 345 S.E.2d 411, 413 (1986).

In the present case, the trial court did not make findings of fact sufficient to sustain its award of attorney's fees to Wife. While the trial court did find that Wife was "without sufficient funds to pay the mortgage on the marital home" and that she "incurred additional legal fees in the amount of \$1,500[.]" there is no mention of Wife's ability to pay for the underlying action, the attorney's skill or hourly rate. *See id.* Thus, we reverse this portion of the order and remand to the trial court with instructions to make findings regarding Wife's request for attorney's fees.

III. Conclusion

The trial court did not abuse its discretion in modifying Husband's post-separation support, calculating Husband's child support arrearages from the period of August 2014 through June 2016, or in making findings of fact. However, the trial

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court did err in calculating Husband's child support arrearages from July 2016 to April 2018 and in awarding attorney's fees to Wife. We remand these portions of the order to the trial court with instructions to recalculate the amount of arrearages owed to Wife and to make sufficient findings regarding attorney's fees.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Judges DIETZ and ARROWOOD concur.

Report per Rule 30(e).