NO. COA01-1174
NO. COA01-1426

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

ELONA HUANG (TOMBRELLO),
Plaintiff

v. Wake County
No. 95 CVD 1078

JIM JAY HUANG,
Defendant

Appeals by defendant from order entered 5 June 2001 (COA01-1174) and from a separate but related order entered 23 August 2001 (COA01-1426) by Judge Monica M. Bousman in Wake County District Court. Heard in the Court of Appeals 6 June 2002.

Brett A. Hubbard, for plaintiff-appellee.

Jim Jay Huang, pro se, defendant-appellant.

CAMPBELL, Judge.

Defendant filed two interrelated appeals from orders awarding plaintiff primary custody of the parties' two minor children and child support. Upon defendant's motion, the appeals were consolidated for oral argument on 27 December 2001. The appeals remain consolidated for decision in this opinion. For the reasons stated herein, we affirm the trial court's orders.

Plaintiff and defendant married on or about 13 August 1977. Four children were born of this marriage; one of whom died prior to

the commencement of this action, one of whom is no longer a minor, and two of whom, Cheryl and Rachel, are still minors and are the subject of this appeal. The parties separated in 1995, and defendant was temporarily awarded primary custody of the minor children. The parties subsequently divorced in December of 1996. By an order entered on 20 December 1996 (the "1996 custody order"), defendant was awarded primary custody of the minor children with plaintiff receiving visitation rights.

During the years following the 1996 custody order, the parties filed several motions regarding custody modification and/or visitation. In June of 1998, the Wake County District Court heard a motion by plaintiff for modification of custody and a motion and show cause order by defendant. A new custody order was issued on 12 June 1998 (the "1998 custody order") that restricted plaintiff's visitation and awarded legal custody of the minor children to the Wake County Social Services with defendant retaining physical custody. Legal custody of the children was returned to defendant on 25 August 1998. In August of 1999, plaintiff attempted to have the 1998 custody order modified; however, plaintiff's motion was denied because the court did not find a substantial change of circumstances.

On 24 August 2000, defendant filed a motion for order to show cause alleging that plaintiff had violated the 1998 custody order by not returning Rachel to his home at the end of Rachel's summer visitation with plaintiff. Thereafter, plaintiff filed a new motion to modify custody in January of 2001. Both motions were

heard by the Wake County District Court on 2 April 2001, Judge Monica M. Bousman presiding ("Judge Bousman"). During the hearing, Judge Bousman received testimony and other evidence from the parties, as well as privately talked with the two minor children in chambers as allowed by the parties. Thereafter, the court issued an order on 5 June 2001 that included the following pertinent findings of fact:

> 6. The Court finds that the following have occurred since the last hearing on modification in 1999:
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> A. Both children continue to desire to live with their mother and (sic) have become increasingly defiant in insisting that they spend more time with the Plaintiff. The children repeatedly ask the Plaintiff to come get them at times not provided for by the existing custody order and the Defendant has repeatedly allowed them to go.
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> . . . .
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> K. The Defendant admitted in testimony that he remains so bitter toward the Plaintiff that he does not want to be involved in the children's activities if both parties have to be involved, even if the involvement is simply one party dropping the children off and the other party picking them up. He has shown extreme anger toward the children and the Plaintiff in such circumstances.
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> . . . .
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> N. The Defendant admits that the children do not want to live with him and that they do not have a good relationship with him. . . .
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> . . . .
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> 10. The Defendant was asked if he thought the Court should require Cheryl to remain with him until she is 18, to which he replied in the negative. He said she should at least be

> required to remain with him the remainder of the school year to help her with her chemistry, but the Court does not find that Defendant's help with Cheryl's chemistry studies and other school work is better than the Plaintiff's assistance.

Based upon these findings of fact and the additional findings listed in the order, the court concluded that (1) plaintiff was not in wilful contempt of the 1998 custody order with respect to visitation and (2) there was a substantial change in circumstances affecting the welfare of the children. Thus, custody was modified with plaintiff being awarded primary custody of the children and defendant receiving visitation rights. Defendant timely filed notice of appeal with respect to the modified custody order ("COA01-1174").

On 22 June 2001 (prior to this Court's decision on COA01-1174), plaintiff filed a motion in the cause with the trial court arguing that the prior orders requiring her to pay child support should be modified because of the change in custody. Defendant filed a reply and a motion to dismiss plaintiff's claim arguing that the trial court did not have jurisdiction to rule on plaintiff's motion while his appeal of the modified custody order was still pending. On 2 August 2001, Judge Bousman heard the motions of both parties. The court denied defendant's motion and entered a child support order in favor of plaintiff on 23 August 2001. This order included an offset based on the arrearages owed by plaintiff during the months of January, 2001 through April, 2001 for her failure to pay child support to defendant prior to the

child custody modification. Defendant appealed the child support order as well ("COA01-1426").

In this consolidated decision we review the appeals by defendant in the order in which they appeared before this Court.

I. COA01-1174

In the first case, defendant brings forth five assignments of error relevant to the trial court's modified custody order. For the reasons stated below, we find no error.

In one of defendant's assignments of error, he argues that the trial court erred in failing to take judicial notice of adjudicative facts that were against plaintiff. We disagree.

Rule 201 of the North Carolina Rules of Evidence permits the trial court to take judicial notice of adjudicative facts. *See* N.C. Gen. Stat. § 8C-1, Rule 201 (2001). "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." § 8C-1, Rule 201(b). "The trial court is required to take judicial notice of certain facts only when a party requests it and supplies the necessary information pursuant to Rule 201(d); otherwise, it is discretionary with the trial court pursuant to Rule 201(c)." *Hinkle v. Hartsell*, 131 N.C. App. 833, 835, 509 S.E.2d 445, 457 (1998) (citing §§ 8C-1, Rules 201(c) and (d)).

In the present case, the record indicates that the trial court was supplied with information regarding plaintiff's various violations of prior court orders regarding child custody and support. However, the record fails to indicate that defendant requested the court take judicial notice of this information. Therefore, absent evidence of such a request from defendant, we must assume that the trial court exercised its discretionary authority in not taking judicial notice of the adjudicative facts against plaintiff.

With respect to defendant's remaining assignments of error relating to the modified child custody order, he takes issue with several of the findings of fact made by the trial court. However, in doing so, defendant presents no record of objections to the admission of evidence on which these findings were based. More importantly, defendant has failed to provide this Court with a verbatim transcript of the proceedings at the trial level or a record reciting the evidence presented. *See* N.C. R. App. P. Rule 9(c)(1)-(3). It is well established that "[f]indings of fact by the trial court are upheld on appeal as long as they are supported by competent evidence." *Gum v. Gum*, 107 N.C. App. 734, 738, 421 S.E.2d 788, 791 (1992). As the appellant, the defendant in this case has the burden of showing that the trial court erred in making its findings. *Id.* Since defendant failed to meet this burden by not providing the materials needed by this Court to fully consider his arguments, we must assume that the trial court's findings of fact were supported by competent evidence. Therefore, we cannot

consider the remainder of defendant's assignments of error relevant to the modified custody order. *See Baker v. Baker*, 115 N.C. App. 337, 339, 444 S.E.2d 478, 480 (1994).

II. COA01-1426

In the second case, the issue defendant presents to this Court is whether the trial court erred in entering a child support order, pursuant to Section 1-294 of the General Statutes of North Carolina, in favor of plaintiff while the modified child custody order was pending on appeal. In considering this issue we note that Section 1-294 provides:

> When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but *the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from*.

N.C. Gen. Stat. § 1-294 (2001) (emphasis added). Defendant contends that the child support order violates Section 1-294 because it directly affects the child custody order currently under appellate review. We disagree.

This Court has previously held in *Appert v. Appert*, 80 N.C. App. 27, 40, 341 S.E.2d 342, 349 (1986), that the withholding of child support payments are harmful to the children because they are necessary to provide for their needs. Since these payments are for the maintenance of the children's welfare, they are not to be used as "a lever upon which divorced adults can be made to resolve their differences over visitation." *Id.* at 41, 341 S.E.2d at 350

(citation omitted). Thus, "the duty of a parent to support his or her children is not dependent upon the granting of visitation rights, nor is it dependent upon the parent's opportunity to exercise visitation rights." *Id.* Although, *Appert* dealt with the relationship between child custody and visitation, we find its holding to be directly applicable to the child custody and support issue currently before this Court.

As stated earlier, the only issue in the instant case is whether the trial court can enter an order for child support while a modified child custody order is pending on appeal. Despite the obvious relationship between child custody and child support, one does not directly affect the other under these facts. Here, the parties' children were to remain in the primary care and physical custody of plaintiff until such time as the issue of custody was resolved on appeal. While those circumstances existed, defendant was not relieved of his duty to support his children because "[u]nder North Carolina law, a parent's obligation to support his child continues throughout the child's minority." *Lenoir County ex rel. Cogdell v. Johnson*, 46 N.C. App. 182, 185, 264 S.E.2d 816, 819 (1980). Regardless of the final outcome of defendant's appeal of the custody order, the minor children continued to need financial support for their maintenance and should not be deprived of that support while the parties attempt to resolve their differences over custody. As the parent awarded custody under the modified custody order, plaintiff was entitled to institute an action for child support. *See* N.C. Gen. Stat. § 50-13.4(a) (2001). The issue of

child support is left to the lower courts to make such an award and not with this Court, which is only in the position to *review* a child support award to determine whether there was a clear abuse of discretion. *See White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Thus, the trial court did not err in awarding plaintiff child support because the children need support from defendant until such time as there is a change in custody.

In conclusion, we find that the trial court's findings of fact in COA01-1174 regarding the modified child custody order were supported by competent evidence and that it was at the court's discretion not to take judicial notice of adjudicative facts against plaintiff. We also find that the trial court in COA01-1426 did not err in its decision to award plaintiff child support. Thus, the orders of the trial court in these two cases are affirmed.

In No. COA01-1174, affirmed.

In No. COA01-1426, affirmed.

Judges MARTIN and TIMMONS-GOODSON concur.

Report per Rule 30(e).