

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

IN RE THE MARRIAGE OF

GEORGIA CHAPMAN,
Appellee,

and

HERBERT H. CHAPMAN,
Appellant.

No. 2 CA-CV 2020-0049-FC
Filed March 23, 2021

Appeal from the Superior Court in Santa Cruz County
No. DR20090121
The Honorable Sheila L. Dagucon, Judge Pro Tempore

APPEAL DISMISSED

COUNSEL

Pahl & Associates, Tucson
By Danette R. Pahl
Counsel for Appellee

Roberto Montiel Law Office PLLC, Nogales
By Roberto Montiel
Counsel for Appellant

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OPINION

Presiding Judge Espinosa authored the opinion of the Court, in which Vice Chief Judge Staring and Judge Eckerstrom concurred.

ESPINOSA, Presiding Judge:

¶1 Herbert Chapman appeals from the trial court's order entering judgment for Georgia Chapman as a result of Herbert's failure to comply with a court order. Because we lack jurisdiction, his appeal must be dismissed.

Factual and Procedural Background

¶2 After Georgia filed a petition for dissolution of marriage in 2009, the trial court in 2012 issued a consent decree that ordered, inter alia:

The residence and real property located [in] Tumacacori, Arizona, . . . is awarded to [Georgia] and [Herbert] as tenants in common. Until sold, [Herbert] shall have the exclusive possession thereof, and be responsible for making the mortgage payment and tax payments due thereon. The property will be sold at a price mutually agreeable to the parties. Upon the sale of the residence, the proceeds shall be equally divided between the parties. If no mutual agreement can be reached by the parties, parties are free to seek court intervention (Partition).

¶3 In 2013, Herbert sold the property for \$200,000 with Herbert carrying a mortgage on the property for four years, and a balloon payment due at the end of the third year. In violation of the decree, however, Herbert had failed to inform Georgia he was putting the property on the market and did not consult with her regarding the terms of the sale. After learning of the sale, Georgia contacted Herbert, who apprised her of the terms and told her that he would pay her one-half of the payments he received, but she did not approve of the terms of sale. The buyers eventually failed to pay the

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mortgage obligation and defaulted on the loan, and Herbert regained possession of the property.

¶4 In March 2018, Herbert sold the property for \$140,000. He, again, did not consult with Georgia about the terms of sale. Herbert received over \$120,000 from the sale, but testified he did not pay any of the proceeds to Georgia because he had paid her the first time he sold the property and did not believe he was required to pay her a portion from the second sale. Georgia apparently received \$29,500 from the first, unsuccessful sale, but the trial court stated that because Herbert had failed to provide “exhibits, contracts, or disclosures regarding the sale,” it was unclear whether she received the full amount due her as required by the consent decree.

¶5 In June 2019, Georgia filed a verified motion for enforcement of post decree/judgment, which detailed Herbert’s violations of the consent decree and requested the trial court to “1. Enter a judgment against [Herbert] for failure to comply with a court order. 2. Find [him] in contempt of court for intentionally refusing to follow the court order [and] 3. Enter a judgment against [him] for all attorney’s fees and court costs.” Herbert filed a motion for judgment on the pleadings, seeking dismissal and arguing “the remedy of contempt is not available to enforce a portion of a decree of dissolution that provides for the payment of monies due to an opposing party.” In October 2019, the trial court issued an order denying Herbert’s motion, and finding the provisions in the consent decree to be enforceable court orders “under Rules 91 and 92 of the Arizona Rules of Family Law Procedure.”

¶6 The trial court subsequently held an evidentiary hearing on Georgia’s enforcement motion and directed the parties to brief the issue of whether certain statutes of limitation applied to the facts of the case. After full briefing, in January 2020, the court issued an under advisement ruling finding that Herbert had not consulted with Georgia for the first sale as required by the consent decree, and ordered him to “provide a complete accounting of the sale of the property . . . to determine the total amount due to [Georgia]” and to pay her that amount. Regarding the second sale, the court found that Herbert had “once again failed to comply with the Consent Decree order to consult with [Georgia] to arrive at a mutually agreeable price for the sale of the property” and that Georgia “is due one-half of \$120,782.79 paid to [Herbert] for the sale.” The court expressly found no criminal contempt, but did find Herbert “in civil contempt for violating the court’s order contained in the Consent Decree regarding the sale of the

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property,” and ordered him to pay Georgia’s attorney fees and costs incurred for prosecuting the action.

¶7 Herbert filed a notice of appeal in February 2020 and a special action petition challenging the same order in April 2020. In his petition for special action, he argued that this court had only special action jurisdiction to hear the matter because he was challenging an order of contempt. We declined to accept jurisdiction of the special action, and because Herbert’s notice of appeal was from a contempt order, we directed him to file a memorandum addressing our jurisdiction to consider his appeal. Herbert complied, and Georgia filed a responsive memorandum. We now address the issue. *See Camasura v. Camasura*, 238 Ariz. 179, ¶ 5 (App. 2015) (appellate court has “independent duty to examine whether we have jurisdiction over matters on appeal”).

Discussion

¶8 In his memorandum, Herbert contends we have jurisdiction over his direct appeal from the under advisement ruling “because it is a final appealable judgment pursuant to Rule 78(c), is signed by the court, and is for a liquidated amount.” Georgia disagrees, arguing we lack jurisdiction because the “contempt orders are based on previous orders from claims that were decided on their merits and that [Herbert] had the opportunity to appeal, but did not.” She points to the well-established rule in Arizona that civil contempt adjudications are not appealable. *See Ex parte Wright*, 36 Ariz. 8, 16 (1929); *Berry v. Superior Court*, 163 Ariz. 507, 508 (App. 1989); *Pace v. Pace*, 128 Ariz. 455, 456-57 (App. 1981); *Haggard v. Superior Court*, 26 Ariz. App. 162, 162-63 (1976); *Van Baalen v. Superior Court*, 19 Ariz. App. 512, 513 (1973); *In re Anonymous*, 4 Ariz. App. 170, 171 (1966); *Herzog v. Reinhardt*, 2 Ariz. App. 103, 104-05 (1965).

¶9 Herbert relies on *Natale v. Natale* to support his contention that appellate jurisdiction is authorized because the trial court included Rule 78 language in its ruling. 234 Ariz. 507 (App. 2014). In *Natale*, the wife filed a petition for contempt and for enforcement of court orders, asserting the husband had failed to complete steps necessary to divide marital assets. *Id.* ¶ 3. She also sought attorney fee awards for all post-trial proceedings, including her petition. *Id.* After a hearing, the trial court issued a minute entry that resolved several issues regarding the division of the marital property and accounts but did not include a Rule 78 certification of finality for appeal. *Id.* ¶ 4. The court issued two subsequent judgments addressing the wife’s attorney fee requests. *Id.* Following those rulings, the husband appealed, challenging all three rulings, and the wife moved to dismiss,

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arguing the appeal was untimely because, although the minute entry did not include Rule 78 language, it was nevertheless a final and appealable ruling. *Id.* ¶¶ 5, 7. We denied the motion, holding that because the minute entry did not include Rule 78 language and did not resolve all issues in the case, it was not a final, appealable order. *Id.* ¶¶ 9, 11.

¶10 Georgia argues, and we agree, that *Natale* is “inapposite to the present matter because it did not deal with or resolve the jurisdictional issue that is before this Court.” In *Natale*, we did not address whether we had jurisdiction to review a contempt adjudication. *See id.* ¶¶ 6-19. While the wife’s underlying petition in the trial court had sought a contempt order, there is no indication the trial court held the husband in contempt or that any of its rulings were based on contempt orders.¹ *Id.* There is no mention of this issue in *Natale*, and, as recognized above, the well-settled rule is that we lack jurisdiction to review contempt adjudications. *See Berry*, 163 Ariz. at 508; *Wright*, 36 Ariz. at 16; *Pace*, 128 Ariz. at 456-57; *Anonymous*, 4 Ariz. App. at 171; *Herzog*, 2 Ariz. App. at 104-05; *Haggard*, 26 Ariz. App. at 162-63; *Van Baalen*, 19 Ariz. App. at 513. Further, the inclusion of Rule 78 language alone does not make a judgment final and appealable; “the certification also must be substantively warranted.” *Sw. Gas Corp. v. Irwin ex rel. Cnty. of Cochise*, 229 Ariz. 198, ¶ 12 (App. 2012).²

¶11 Herbert also cites *Green v. Lisa Frank*, wherein the plaintiff sought to remove a defendant as the director of a defendant-corporation, enforce a stock buy-sell agreement, and assert a claim for breach of fiduciary duty. 221 Ariz. 138, ¶ 2 (App. 2009). The defendant-director filed a counterclaim against the plaintiff and a cross-claim against the defendant-corporation. *Id.* The defendant-corporation then counterclaimed against the defendant-director, seeking damages for breach of fiduciary duty, conversion, computer fraud, and copyright violations. *Id.* The trial court found Green had violated several court orders throughout the litigation, and entered a sanctions order dismissing Green’s cross-claim, striking his

¹*See also Natale v. Natale*, No. 1 CA-CV 12-0765, 2014 WL 1758308 (Ariz. App. Apr. 16, 2014) (mem. decision) (filed contemporaneously with the opinion addressing merits of the husband’s appeal; similarly no mention of contempt order).

²Arizona Rule of Family Law Procedure 78 is virtually identical to Arizona Rule of Civil Procedure 54, and therefore we may apply interpretations of Rule 54 to Rule 78. *See In re Marriage of Kassa*, 231 Ariz. 592, n.1 (App. 2013).

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reply to the defendant-corporation's counterclaim, and granting judgment to the defendant-corporation. *Id.* ¶¶ 8-9. This court found it had jurisdiction to uphold the trial court's civil contempt sanctions on appeal. *Id.* ¶¶ 10-23.

¶12 *Green*, however, is distinguishable on several grounds. First, the trial court's contempt orders here are based on claims that were previously resolved and that Herbert had an opportunity to appeal, but did not. Unlike the plaintiff in *Green*, Herbert has already had the opportunity to litigate whether he should be required to consult with Georgia in regard to a sales price for the property, whether he should be required to split the proceeds of a sale with her, and whether the trial court's eventual decision that he was required to do both was correct. *See id.* ¶¶ 15-16.

¶13 Second, the trial court's January ruling in this case did not go beyond a finding of contempt. In *Green*, a variety of claims and counterclaims were directly at issue, and we explained that the "reason behind the rule disallowing appeals from pure contempt orders" is "that parties have already been given the chance to appeal from the order that forms the basis for contempt," and that "it must be [reviewed by] special action petition." *Id.* at ¶¶ 15, 17 (quoting *Elia v. Pifer*, 194 Ariz. 74, ¶ 30 (App. 1998)). Such circumstances do not exist here. The contempt order in this case does not dispose of all of Herbert's claims or award Georgia's requests for relief without a trial. In fact, the parties' claims were disposed of in 2012 by a consent decree they entered after being provided the opportunity to litigate their claims. The entirety of the post-decree litigation relates to Georgia's request to hold Herbert in contempt, and all remedies in her favor stem directly from the finding of contempt.³ Accordingly, we lack jurisdiction to hear Herbert's appeal.

Attorney Fees and Costs on Appeal

¶14 Georgia requests her attorney fees on appeal pursuant to A.R.S. § 25-324 and Rule 21, Ariz. R. Civ. App. P., on the ground Herbert "repeatedly advanced unreasonable positions that are not supported in fact

³Herbert also asserts "the Order serves as a judgment for a liquidated sum representing [Georgia's] share of the community property held during the marriage. In substance, it was never a valid order of contempt, and [Herbert] should have a right to appeal from it as any other liquidated money judgment." But this contention essentially challenges the trial court's ruling and goes to the merits of this dismissed appeal, which we necessarily do not reach.

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or law.” Having considered Herbert’s tenuous position on the law regarding our appellate jurisdiction and his directly contrary position in his petition for special action, in the exercise of our discretion we grant Georgia her reasonable attorney fees upon her compliance with Rule 21. *See Clark v. Clark*, 239 Ariz. 281, ¶ 14 (App. 2016) (attorney fees pursuant to A.R.S. § 25-324 subject to appellate court’s discretion). And, pursuant to A.R.S. § 12-341, Georgia is entitled to her costs on appeal.

Disposition

¶15 For the foregoing reasons, this appeal is dismissed.