DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

NANCE CAROL GOULDING,

Appellant,

v.

JASON ROSS GOULDING,

Appellee.

No. 2D22-3862

July 26, 2023

Appeal from the Circuit Court for Pinellas County; Elizabeth Jack, Judge.

Nance Carol Goulding, pro se.

Kathy C. George of Kathy C. George & Associates, Dunedin, for Appellee.

KHOUZAM, Judge.

Nance Carol Goulding, the Former Wife, timely appeals an order granting her Former Husband Jason Ross Goulding's motion for attorney's fees. We reverse because the order is legally deficient in several different respects.

BACKGROUND

I. The Underlying Proceedings and Prior Appeal

The parties divorced in 2009. In 2020, the Former Husband filed a

modification petition and moved for contempt against the Former Wife, alleging she had failed to repay a loan. She also moved for contempt against him. Ultimately, the court (1) denied the Former Husband's modification petition, (2) granted the Former Husband's contempt motion, and (3) denied the Former Wife's contempt motion.

The Former Wife, pro se, appealed that order to this court, and the Former Husband cross-appealed. This court issued a per curiam opinion affirming without comment the portions of the order denying the Former Wife's motion for contempt and granting the Former Husband's motion for contempt. *Goulding v. Goulding*, 341 So. 3d 476 (Fla. 2d DCA 2022). We also dismissed the Former Wife's appeal as from a nonfinal, nonappealable order to the extent it challenged the portion of the order awarding fees and costs as a sanction for contempt because no amount had yet been set. *Id.* We affirmed the Former Husband's cross-appeal. *Id.*

This court remanded the Former Husband's appellate fees motion to the trial court, expressly ruling that the respective positions of the parties in that appeal was not a factor to consider. The order struck the Former Husband's request for costs.

On remand from this court, the Former Husband pursued his claims for attorney's fees for contempt and for fees incurred in the appeal. The September 20, 2022, hearing thereon was not transcribed.

The parties agree that the court ruled orally at the hearing and directed the Former Husband's counsel to draft a proposed order. After he submitted a ten-page proposed order via email, the court entered it largely verbatim, with few substantive revisions.

II. The Order Now on Appeal

The order awards the Former Husband attorney's fees in two

categories: contempt of court and appellate fees from the prior appeal.

Fees for Contempt of Court

The order states that the court previously found entitlement to fees and costs for contempt, leaving open the issue of amount. It also states that the Former Wife "filed a Notice of Appeal on this issue of attorney's fees which was dismissed as being a non-final order."

With respect to ability to pay, the order states that the court can award attorney's fees in contempt proceedings regardless of ability to pay pursuant to "Florida Rules of Civil Procedure 12.615 (d)(2)." No such rule exists. It appears this was intended to be a reference to Florida Family Law Rule of Procedure 12.615(d)(2), which addresses sanctions for contempt of court. This legal assertion and citation are taken verbatim from the Former Husband's proposed order. The order does not address present ability to pay.

With respect to the amount, the order contains a miscalculation on its face. Whereas the order correctly multiplies one attorney's hourly rate by the hours asserted to have been expended, it incorrectly states that another attorney's $350 hourly rate at 0.8 hours yields $455. In fact, $350 multiplied by 0.8 is $280. The total amount awarded for contempt includes this inflated value. This portion of the order is also taken verbatim from the Former Husband's proposed order, which contains the identical mathematical error.

The court ordered payment due on the date the order issued.

Appellate Attorney's Fees for 2D21-3044

The order recounts that in prior trial court proceedings, (1) the Former Wife prevailed in obtaining a denial of the Former Husband's modification petition, (2) the Former Husband prevailed in obtaining a ruling of contempt against the Former Wife, and (3) the Former Husband

prevailed in defeating the Former Wife's request for contempt against him. The court states that the Former Wife filed two motions for rehearing of the order reflecting these rulings, which were denied.

The order states that the Former Wife then appealed this order. It states: "Incongruously, the Former Wife appealed the issue she issue she [sic] won in the lower court," thereby requiring the Former Husband to expend legal fees to defend the appeal. The order states that the Former Wife's initial brief asked this court to affirm the denial of the Former Husband's petition in its entirety. It then states: "This statement by the Former Wife reopened the litigation on a matter that had been previously litigated, and upon which she had prevailed." It recounts that the Former Wife has since testified that bringing the appeal was a "mistake."

The order states that this court affirmed the contempt rulings but dismissed the Former Wife's challenge to amount as premature. This section of the order does not acknowledge the Former Husband's cross-appeal of his modification petition or this court's affirmance without comment thereof. The only mention of the Former Husband's cross-appeal is an unexplained finding several pages later that the Former Wife's "actions required the Former Husband to respond and do a cross appeal based on something that the Former Wife prevailed in the trial court." That statement was taken verbatim from the Former Husband's proposed order.

The order also states that in the prior appeal, "[t]he Former Wife proceeded to request the Appellate Court to issue a written opinion; her request was denied." However, this court's docket reflects that we issued a written opinion disposing of the prior appeal on the briefing; there was no reason for anyone to request a second opinion, nor is there any record of such a motion being filed. This incorrect finding also appears in the

Former Husband's proposed order, using slightly different language.

The order finds that the Former Wife "acted in a vexatious manner" by seeking to hold the Former Husband in contempt, and further, that there was no legal basis for her prior appeal of the issue. The stated grounds for the ruling are that a prior judge had ruled against the Former Wife in orders that the later judge found "abundantly clear" and that the Former Wife never produced a court order ratifying the alleged oral agreement she claims the Former Husband violated. The order then recites the *Rosen*[1] factors, but it nowhere explains how they apply; it simply lists them and then says there was no valid basis for appeal.

The court recounted the Former Wife's financial documentation from 2019-2020. It found her 2020 financial affidavit "not credible." The order rejects her testimony of lack of ability to pay, saying "the Court found her reaction to be not credible and histrionic." It finds "based upon the records in evidence, the Former Wife has the ability to pay" in 2022 and orders her to pay in full by the same date the order was issued.

Nowhere does the order mention whether the Former Husband has a need for attorney's fees or otherwise address his finances.

The order states that the Former Wife testified she lives with "her paramour." This was one of the few findings that was not in the Former Husband's proposed order but was instead added by the court.

Like the contempt section of the order, this section contains a mathematical error on its face. It says 29.6 hours at $400 yields $11,820, whereas the correct value is $11,840. Once again, this language and mathematical error are taken verbatim from the Former Husband's proposed order.

Also taken verbatim is the finding that "the entire amount of fees

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[1] *See Rosen v. Rosen*, 696 So. 2d 697, 700 (Fla. 1997).

sought by the Former Husband concerning the appeal were [sic] necessary by the appeal filed by the Former Wife." That includes at least one charge for services performed in January 2021—nearly nine months before the appeal was initiated on the last day of September 2021.

The order acknowledges that both the Former Husband's fees motion and his amended fees motion in the prior appeal incorrectly stated that he was impecunious. But it excuses this error, and awards attorney's fees for the time spent making it, on the basis that "[t]he District Court of Appeals [sic] was aware at all times of the Former Husbands' [sic] income when it issued the Order remaining [sic] to the trial court the Former Husbands' [sic] request for appellate attorneys' fees." Once again, this paragraph is also taken verbatim from the Former Husband's proposed order.

III. Rehearing

After the ruling, the Former Wife moved for rehearing of both the contempt and appellate fees awards. She raised several arguments, including pointing out the faulty arithmetic, identifying that the Former Husband lost his cross-appeal, challenging the finding of her ability to pay, challenging the Former Husband's need for fees, and challenging the entry of the proposed order nearly verbatim despite several errors on its face. She also identified that the court found that she lived with a "paramour" without any evidence or even suggestion that this was true.

The court denied rehearing in full. It did not suggest that the Former Wife had failed to raise any of these issues contemporaneously; instead, it said she was present at the hearing, was permitted to ask questions about the ruling, and "repeatedly voiced her disagreements with the Court's findings, and the Court patiently and repeatedly explained its findings." Apparently acknowledging that the order

contains incorrect findings, the court nonetheless declined to grant any relief on the basis that "the facts with which she takes issue are not relevant to the Court's ultimate rulings." This appeal followed.

ANALYSIS

Family law litigation is often factually complex, emotionally taxing, and ultimately exhausting for all involved. Those difficulties are only heightened when parties exercise their rights to proceed pro se, often inexorably resulting in unorthodox or inefficient proceedings. But even in such cases, the law imposes certain minimum requirements designed to protect litigants and the judicial system itself from impropriety and oversight. Because several of them were not met here, we must reverse.

The order on review is legally deficient in many respects. Not only does it contain several errors on its face, but also, it bases its award of fees on statements of law and fact that are either incorrect or affirmatively contradicted by the record. In context, these concerns are heightened where the court adopted the Former Husband's ten-page proposed order nearly verbatim. Finally, despite tacitly acknowledging that a factual finding suggesting infidelity has no basis in fact, the court declined to revise it on the basis that it is "not relevant."

As a threshold matter, due to the prior appeal in case 2D21-3044, the contempt ruling itself is not before this court. In that case, this court (1) affirmed without comment the trial court's ruling finding the Former Wife in contempt of court but (2) dismissed the portion of the appeal ordering her to pay as nonfinal for lacking a determination of amount. Thus, although the contempt ruling itself is settled, the amount of contempt is properly at issue, as is the award of appellate attorney's fees.

Sufficiency of the Record

Generally, the absence of a transcript precludes appellants from

establishing reversible error. *See, e.g.*, *Esaw v. Esaw*, 965 So. 2d 1261, 1264 (Fla. 2d DCA 2007) (discussing difficulties involved in reviewing a judgment absent a transcript of the proceedings).

However, "it is not a rule absolute in an appellate proceeding that the appellant must present a transcript of the proceeding below. For example, an appellate court may . . . reverse a trial court order if there exists reversible error on the face of the order or judgment." *Ferguson v. Ferguson*, 54 So. 3d 553, 556 (Fla. 3d DCA 2011) (citing *Casella v. Casella*, 569 So. 2d 848, 849 (Fla. 4th DCA 1990)). This is true even where "[t]he record in [a] case is sparse." *Id.*

Consequently, "[a]n award of attorney's fees without adequate findings justifying the amount of the award is reversible even where the appellant has provided an inadequate record of the trial court proceedings." *Jacobs v. Jacques*, 310 So. 3d 1018, 1022 (Fla. 2d DCA 2020) (alteration in original) (quoting *Frezza v. Frezza*, 216 So. 3d 758, 760 (Fla. 2d DCA 2017)); *see also Esaw*, 965 So. 2d at 1265 (same).

With these principles in mind, we conclude that the lack of a transcript of the fee hearing does not preclude review here. Not only do several errors appear on the face of the order, but also, the briefing and record both support the conclusion that the arguments now raised by the Former Wife were addressed and properly preserved below.

Notably, in the Answer Brief, the Former Husband asserts unequivocally: "All issues addressed in this second appeal have already been litigated extensively." Although he presents this assertion as a basis for affirmance, it also operates as a concession that these issues were in fact raised and ruled upon below.

Further, the Former Wife's rehearing motions are in the record and raised many of the same challenges as she now does on appeal. Errors

appearing for the first time on the face of a final order are preserved if raised in a motion for rehearing. *E.g.*, *Spaulding v. Spaulding*, 326 So. 3d 186, 187 (Fla. 1st DCA 2021) (collecting cases). Moreover, the order denying rehearing does not suggest that any of the Former Wife's arguments for rehearing had not previously been raised; to the contrary, it affirmatively states that she asked questions about the ruling at the hearing and "repeatedly voiced her disagreement with the Court's findings, and the Court patiently and repeatedly explained its findings."

Accordingly, in the particular context of this case, the lack of a transcript of the final hearing does not preclude appellate review.

Standard of Review

The parties agree that the standard of review is abuse of discretion. *See Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980). Among other manifestations, "[a]n abuse of discretion occurs where the trial court's 'ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence.' " *Buzby v. Turtle Rock Cmty. Ass'n*, 333 So. 3d 250, 253 (Fla. 2d DCA 2022) (quoting *Rush v. Burdge*, 141 So. 3d 764, 766 (Fla. 2d DCA 2014)).

I. Omitted Necessary Findings

The Former Wife contends that reversal is necessary because the trial court failed to address both the Former Husband's need for attorney's fees and her ability to pay. We agree that both components of the award are missing necessary findings. Because the legal analysis for each component is different, we address them separately.

Attorney's Fees as a Sanction for Contempt

Florida Family Law Rule of Procedure 12.615(d) governs orders of contempt and sanctions flowing therefrom in support matters. Subsection (d)(2) provides that if a court grants a motion for contempt,

then it may impose sanctions, including attorney's fees, "provided the order includes a purge provision as set forth in" subsection (e).

In turn, subsection (e) provides that if the court orders such a sanction, then "the court shall set conditions for purge of the contempt, based on the contemnor's present ability to comply." Subsection (e) continues: "The court shall include in its order a separate affirmative finding that the contemnor has the present ability to comply with the purge and the factual basis for that finding."

Consequently, in support proceedings awarding attorney's fees as a sanction for contempt of court, among other requirements "[t]he trial court must base a purge amount on the contemnor's present ability to pay." *Finch v. Cribbs*, 46 Fla. L. Weekly D1467, D1467 (Fla. 1st DCA June 22, 2021) (first citing *Bowen v. Bowen*, 471 So. 2d 1274, 1280 (Fla. 1985); and then citing Fla. Fam. L. R. P. 12.615(e)).

As the Former Wife contends, the order on appeal does no such thing. It includes no affirmative finding of present ability to pay, much less any factual basis therefor. The only finding of ability to pay in the order addresses the separate award of appellate attorney's fees.

Indeed, the order flatly states that no such finding is necessary for contempt proceedings. But the applicable Family Law Rule and related judicial decisions provide squarely to the contrary.

Accordingly, under the plain language of the rule the court attempted to cite, the order is deficient on its face for failing to address whether the Former Wife has the present ability to pay the sanction.

Appellate Attorney's Fees

Section 61.16(1), Florida Statutes (2022), authorizes the trial court to order payment of attorney's fees "after considering the financial resources of both parties." Under this statute, "[i]t is not enough for a

party to demonstrate the adverse party's ability to pay; the party seeking payment of fees must also show a need." *Zahringer v. Zahringer*, 813 So. 2d 181, 182 (Fla. 4th DCA 2002). Thus, "a trial court cannot decide the issue of attorney's fees without findings as to one spouse's ability to pay fees and the other spouse's need to have fees paid." *Perrin v. Perrin*, 795 So. 2d 1023, 1024 (Fla. 2d DCA 2001) (citing *Schlafke v. Schlafke*, 755 So. 2d 706, 707 (Fla. 4th DCA 1999)).

Here, the Former Wife is correct that the order fails to address the Former Husband's need at all. Indeed, the word "need" appears nowhere in the order, nor did the court include any findings about the Former Husband's finances. Thus, the order is facially deficient in this regard as well. *See, e.g.*, *Perez v. Perez*, 100 So. 3d 769, 771-72 (Fla. 2d DCA 2012) (reversing attorney's fee award for insufficient factual findings regarding need and ability to pay).

Accordingly, the order lacks basic necessary findings to support both categories of fees awarded.

II. The Appellate Attorney's Fees Evidence

The Former Wife also raises several challenges to the Former Husband's attorney's fees evidence. She primarily raises factual issues, asserting the records are inaccurate, incomplete, and not credible. She also generally challenges the sufficiency of the evidence.

Unlike the legal issues raised in this appeal, the lack of a transcript largely precludes meaningful appellate review of these challenges. To the extent the Former Wife contends that the trial court suggested it had engaged in improper ex parte contact, the record shows otherwise.

Nonetheless, the Former Wife is correct that the appellate fees billing records include at least one charge for services rendered several months before the appeal was taken. The order does not identify how

this charge was incurred in the then-forthcoming appeal, instead simply awarding the Former Husband "the entire amount of fees sought . . . concerning the appeal."

In addition, the Former Wife is correct that the order awards the Former Husband fees for work this court struck for noncompliance with the Appellate Rules of Procedure, as well as fees for his counsel's time spent correcting the error. It further awards fees for both preparing and amending the Former Husband's appellate fees motions, which his counsel admitted falsely stated that the Former Husband was impecunious.

In making a blanket award of all of the Former Husband's requested fees, the order does not address how any of these charges were reasonable or necessary. That was also error. *See Perez*, 100 So. 3d at 771 (reversing fees order, explaining that "if the trial court determines that there is an entitlement to fees, the court must 'set forth findings regarding the factors that justify the specific amount awarded' " (quoting *Rogers v. Rogers*, 12 So. 3d 288, 292 (Fla. 2d DCA 2009))).

III. Finding of Appellate Litigation that Never Occurred

The Former Wife is also correct that the court erroneously found that she moved for a written opinion in the prior appeal. In the section describing her supposedly baseless litigation, both the Former Husband's proposed order and order on review contain identical language describing a motion for written opinion in this court that was never in fact filed.

Thus, the Former Wife correctly identifies another factual error in the order. To the extent the court based any part of its ruling on the nonexistent motion for written opinion, that was also error.

IV. The Court's Refusal to Correct an Undisputedly Erroneous Finding that the Former Wife Lives with a "Paramour"

The Former Wife also contends that the trial court incorrectly found that she lives with "her paramour" as opposed to her husband of several years. She contends there was no dispute below on this issue, nor was there any evidence to support the finding.

When the Former Wife raised this issue on rehearing below and again later in this appeal, neither the trial court nor the Former Husband disputed the facts as asserted by her, or the error in finding to the contrary. Instead, both the order denying rehearing and the Former Husband's brief in this court simply call the finding "not relevant."

Notably, this is one of the few revisions that the court made to the proposed order. And it is one of the only additions that includes an entirely new factual finding, as opposed to a revision to phrasing or a clarification. The record is silent on the evidentiary basis for this finding, and we are troubled that the court decided to add this unsupported, irrelevant finding of fact.

We are also unable to determine any proper reason why the court would not correct an apparently undisputed misstatement of fact, particularly where the court itself admits that fact is "not relevant" to its rulings. Once the trial court was made aware that this irrelevant finding had no evidentiary basis, it should have promptly stricken it.

V. Circumstances of the Entry of the Order

The Former Wife also challenges the procedure under which the trial court invited a proposed order and entered its final order. Specifically, she asserts that by inviting the Former Husband to draft and submit a proposed order, and then entering that order with very few changes, the trial court ran afoul of the prohibitions set forth in detail in

Perlow v. Berg-Perlow, 875 So. 2d 383 (Fla. 2004).

In *Perlow*, the trial court entered one party's twenty-five-page proposed judgment two hours after it was submitted, without making any changes, additions, or deletions to it. *Id.* at 386. Prior to its verbatim adoption of the proposed judgment, the court had not made any findings of fact or conclusions of law on the record, and had "actively discouraged" the losing party from filing a proposed judgment. *Id.* at 388-89.

The Florida Supreme Court held that the *Perlow* trial court had given the appearance of impropriety by the failure to make independent determinations. *Id.* at 389. The opinion emphasized the facts that (1) the trial court had not made any findings on the record before inviting the proposed judgment, (2) the court did not permit the losing party to submit his own proposed judgment or to object to the winning party's proposed judgment, and (3) the proposed judgment was lengthy but adopted verbatim within two hours of its submission. *Id.*

Although the cases have some factual overlap, the procedure here was sufficiently different such that this case is not governed by *Perlow*. In particular, the parties agree that before inviting the proposed order from the Former Husband, the court pronounced its findings of fact and conclusions of law orally to the parties. In the order denying rehearing, the court found that the proposed order captured its oral ruling "substantially verbatim," thereby undercutting the notion that the court had delegated its decisionmaking. Furthermore, unlike *Perlow*, the court here did revise the proposed order, even though few amendments were substantive. Finally, nothing in *Perlow* suggests that the court in that case addressed the challenged issues on rehearing, as the court here did.

Nonetheless, the procedure employed here does raise some of the

serious concerns identified in *Perlow*. Like in that case, the court here apparently invited the proposed order from the Former Husband and entered it without an express opportunity for the Former Wife to object to the order itself. And the order the court entered contains several legal and factual errors taken verbatim from the proposed one. Some of these deficiencies would be apparent during even a cursory review, such as faulty arithmetic, citing the wrong rules of procedure, and several omitted but legally necessary findings. The court did not add much to the proposed order; the most salient addition appears to be an incorrect finding of fact the court later called "not relevant" once it was challenged.

Although we conclude that *Perlow* does not require reversal on this basis, we are nonetheless troubled by the procedure employed below. We are mindful of the considerable difficulties judges face in resolving contentious family law cases, particularly those involving pro se litigants. But even so, the core duties of fairness and justice demand utmost concern. *See Ross v. Botha*, 867 So. 2d 567, 573 (Fla. 4th DCA 2004) ("Given the reality of current caseloads, it is unrealistic to advocate that judges should always author their own orders. However, particularly in cases involving pro se litigants such as this, the opportunity for both sides to have input as to the content of the order as well as careful scrutiny that the proposed order includes the necessary findings and language and reflects the independent conclusions of the court, are essential to perceptions of fairness and fundamental justice."), *abrogated on other grounds*, *C.N. v. I.G.C.*, 316 So. 3d 287, 289 (Fla. 2021).

VI. Other Concerns on the Face of the Record

In addition to the foregoing issues raised by the Former Wife, the order presents several other troubling concerns not clearly raised in her pro se briefing. We briefly discuss some of them here. *See Bresch v.*

Henderson, 761 So. 2d 449, 451 (Fla. 2d DCA 2000) ("Although not raised by Bresch, we write to express our concern regarding other blatant errors clear from the face of the record."); *see also Perez*, 100 So. 3d at 772 ("Because we are remanding for further proceedings, we take this opportunity to address certain other deficiencies in the fee order to provide guidance to the trial court on remand.").

Further, the court's findings on the appellate litigation the Former Wife purportedly caused are conflicting and difficult to reconcile. In particular, a foundational basis for the court's ruling is that the Former Wife mistakenly appealed an issue she won in the lower court, then asked this court to affirm in full. On that basis, the order says that the Former Husband had to respond to the unnecessary appeal.

But the order also says that the mistaken appeal asking for a full affirmance "required the Former Husband to respond and do a cross appeal based on something that the Former Wife prevailed in the trial court." (Emphasis added.) It does not explain how an appeal seeking an affirmance requires a cross-appeal. It also does not acknowledge that this court affirmed the Former Husband's cross-appeal without comment. "On remand, if the court again awards attorney's fees, it must make findings . . . that are not internally inconsistent." *Perez*, 100 So. 3d at 772.

Finally, we must note that this court's order authorizing the award of attorney's fees to the Former Husband in the prior appeal specifically states that, on remand, "[t]he merit of the respective positions of the parties in this appeal is not a factor that the trial court need consider." (Emphasis added.) The order cites *Rados v. Rados*, 791 So. 2d 1130 (Fla. 2d DCA 2001), which explains that this language means "the appellate record reflects a good faith basis for the appeal, and thus the issue of

entitlement should be determined solely based upon the relative financial needs of the parties." *Id.* at 1134. We are unsure why the trial court focused its analysis of the appellate fees award on the merits of the appeal despite this contrary language in the authorizing order.

CONCLUSION

In light of the multiple errors in the order, we reverse. Any proceedings on remand shall be consistent with this opinion.

Reversed and remanded.

CASANUEVA and SMITH, JJ., Concur.

Opinion subject to revision prior to official publication.