An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA03-1508

NORTH CAROLINA COURT OF APPEALS

Filed: 16 November 2004

IN THE MATTER OF

C.K.M.
S.M.

Orange County
No. 03 J 45-46

Appeal by respondent from order entered 01 May 2003 by Judge M. Patricia DeVine in Orange County District Court. Heard in the Court of Appeals 11 October 2004.

James M. Bell, for respondent-appellant.

No brief for petitioner-appellee.

MARTIN, Chief Judge.

Respondent mother, Mary Smith, appeals from a custody order entered 1 May 2003 placing the custody of her minor children with the Orange County Department of Social Services and finding her in willful contempt of court. Initially, we note that petitioner, Orange County Department of Social Services, has filed no appellee's brief, despite obtaining an extension of time in which to do so.

On 25 April 2003, the district court, believing the children were in imminent danger, entered a handwritten order directing DSS and the Orange County Sheriff's Department to take C.K.M. and S.M. into temporary non-secure custody. When DSS and law enforcement

arrived at respondent's residence, neither respondent nor the children were at home.

On 1 May 2003, at the non-secure custody hearing, the district court was advised that the children were in Virginia with their father on a previously scheduled visit. When asked where the children were, respondent replied that they were in Virginia although she did not "know exactly where." At the urging of DSS, the court held respondent in contempt of the non-secure custody order until she revealed the children's location. The court directed counsel for DSS to "draw up an order stating the facts on which the Department is basing its strong belief that [respondent] knows where her children are. And that she also colluded in removing them from the jurisdiction of the court."

The order, with findings of fact and conclusions of law, placed the children in the custody of Orange County DSS. In addition, the court placed respondent in custody for contempt of the 25 April 2003 non-secure custody order, and provided for respondent's release upon condition she deliver custody of the children to petitioner.

I.

Respondent argues the trial court erred in finding her in contempt of the 25 April 2003 court order which was neither directed to her nor served upon her. Although the court did not indicate whether the contempt order was criminal or civil in nature, it is apparent the order found respondent in civil contempt

since its purpose was to compel respondent to disclose the location of the children. *See O'Briant v. O'Briant*, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985).

To find a person in civil contempt, G.S. § 5A-21(a) requires "[f]ailure to comply with an order of a court," N.C. Gen. Stat. § 5A-21(a) (2004), which is "*directed at* the alleged contemnor." *Atassi v. Atassi*, 122 N.C. App. 356, 359, 470 S.E.2d 59, 61 (1996). The 25 April 2003 handwritten order, as well as the printed orders, was directed to the Orange County Department of Social Services (DSS) and the Orange County Sheriff's Department. Since the order was not directed at her, respondent could not have failed to comply with it. In addition, according to the record and testimony at the hearing, respondent was never served with the non-secure custody order as required by G.S. § 7B-504.

Respondent also argues the trial court did not follow proper procedure for a contempt proceeding. According to N.C. Gen. Stat. § 5A-23(a) (2004), a civil contempt proceeding may be made

> by the order of a judicial official . . . or by the notice of a judicial official that the alleged contemnor will be held in contempt unless he appears at a specified reasonable time and show cause why he should not be held in contempt. The order or notice must be given at least five days in advance of the hearing unless good cause is shown. The order or notice may be issued on the motion and sworn statement or affidavit of one with an interest in enforcing the order, including a judge, and a finding by the judicial official of probable cause to believe there is civil contempt.

The trial court initiated the finding of contempt without the required statutory notice. Moreover, the order was not accompanied by either a sworn statement or affidavit or a finding of probable

cause to hold respondent in contempt. N.C. Gen. Stat. § 5A-23(a) (2004). Because the trial court failed to follow the required procedure, we vacate the trial court's finding of civil contempt.

II.

Next, respondent contends the trial court committed reversible error in making findings of fact and conclusions of law which were not supported by testimony or other evidence presented at the hearing. N.C. Gen. Stat. § 7B-506 (2004) provides in pertinent part:

> (b) At a hearing to determine the need for continued custody, the court shall receive testimony and shall allow the guardian ad litem, or juvenile, and the juvenile's parent, guardian, custodian, or caretaker an opportunity to introduce evidence, to be heard in the person's own behalf, and to examine witnesses. The State shall bear the burden at every stage of the proceedings to provide clear and convincing evidence that the juvenile's placement in custody is necessary. The court shall not be bound by the usual rules of evidence at such hearings.
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> . . .
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> (d) If the court determines that the juvenile . . . should continue in custody, the court shall issue an order to that effect. The order shall be in writing with appropriate findings of fact and signed and entered within 30 days of the completion of the hearing. The findings of fact shall include the evidence relied upon in reaching the decision and purposes which continued custody is to achieve.

When a trial court is required to make findings of fact, it "may not simply 'recite allegations,' but must through 'processes of logical reasoning from the evidentiary facts' find the ultimate facts essential to support the conclusions of law." *In re Harton*,

156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003) (citations omitted).

The 1 May 2003 non-secure custody hearing was an informal conversation between the court, counsel for respondent, counsel for DSS and respondent regarding the location of the children. The court did not offer an opportunity to provide witnesses or evidence and no evidence or testimony was introduced by either party.

At the conclusion of the hearing, the trial court asked petitioner to "draw up an order stating the facts on which the Department is basing its strong belief that she knows where her children are." None of the information in findings of fact numbered 3 through 12 and 14 through 16 was discussed in the hearing. Instead, it appears the information was taken from the attachments to the juvenile petitions for neglect. The court's factual findings and conclusions of law were not based upon evidence. Accordingly, we reverse the district court's order.

Reversed.

Judges TIMMONS-GOODSON and HUDSON concur.

Report per Rule 30(e).