NO. COA05-1644

NORTH CAROLINA COURT OF APPEALS

Filed: 20 March 2007

SELENA HAMMILL SHAW,
Plaintiff,

Wake County
No. 01 CVD 2231

v.

RONALD DWAIN SHAW,
Defendant.

Appeal by defendant from order entered 13 January 2005 by Judge Jennifer M. Green in Wake County District Court. Heard in the Court of Appeals 11 December 2006.

Rosen Law Firm, by Ketan P. Soni, for plaintiff-appellee.

Sandlin & Davidian, P.A., by Deborah Sandlin, for defendant-appellant.

LEVINSON, Judge.

Ronald Dwain Shaw (husband) and Selena Hammill Shaw (wife) were married in 1983 and divorced in 2003. Two children were born of the marriage. In an order entered 13 January 2005, the trial court (1) distributed the marital estate in an equitable distribution, (2) awarded alimony, (3) denied husband's motion to modify an earlier award of post-separation support, (4) refused to sanction wife "for discovery violations and perjury", (5) denied husband's motion alleging wife committed indirect contempt for failing to abide by a parenting agreement, and (6) denied husband's motion for attorney fees.

In husband's first argument on appeal, he contends the trial court erred by failing to conclude that wife had not engaged in cohabitation. He argues that, as a matter of law, the evidence compelled the court to conclude wife cohabited. We disagree.

N.C. Gen. Stat. § 50-16.9(b) (2005) provides:

> If a dependent spouse who is receiving postseparation support or alimony from a supporting spouse under a judgment or order of a court of this State remarries or engages in cohabitation, the postseparation support or alimony shall terminate. . . . [C]ohabitation means the act of two adults dwelling together continuously and habitually in a private heterosexual relationship, even if this relationship is not solemnized by marriage . . . . Cohabitation is evidenced by the voluntary mutual assumption of those marital rights, duties and obligations which are usually manifested by married people, and which include, but are not necessarily dependent on, sexual relations.

The trial court made the following relevant findings of fact:

> 77. Beginning in March 2001, Plaintiff began to date Robert Evans. By September 2001, she and Mr. Evans were involved in an exclusive monogamous sexual relationship. In May 2002, Defendant filed a motion to modify the post separation support payments and a subsequent motion to modify in January 2004 alleging cohabitation by the Plaintiff.
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> 78. Beginning in September or October 2001, Defendant began to notice that Plaintiff's car was parked in the driveway of the marital residence and not inside the garage. When Defendant called the marital residence to speak with the children, the phone was often answered by Mr. Evans. He began to learn that the minor children were traveling with Mr. Evans and Plaintiff on several trips. The children began to talk about visiting Mr. Evans's parents down east for the holidays in the winter of 2001. It was also apparent that Mr. Evans attended church with Plaintiff and children on almost every other weekend.
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> 79. In October 2003, Defendant hired a private investigator to confirm how much time Mr. Evans and Plaintiff were spending together. The Defendant presented evidence by Gary Richardson, private

investigator, related to his allegation that Plaintiff is cohabiting with Robert Evans.

80. The private investigator conducted surveillance of the Plaintiff and Mr. Evans for a period from October 14 - October 17, 2003 then from October 24 - 25, 2003. This surveillance was discontinued each night prior to midnight, except the last night of surveillance. On the final night of surveillance the private investigator observed Robert Evans leaving Plaintiff's residence at 12:20 a.m.

81. Mr. Evans spent the night with the Plaintiff at her residence for two (2) nights between October 14 and October 25. The Defendant alleged that on one of these nights the minor children were present; however, the children had gone to a neighbor's around 6:30 p.m. that evening, ate dinner with her family and spent the night with her.

82. Plaintiff and Mr. Evans went shopping together once during the surveillance period at Wal-Mart and Mr. Evans paid for the purchase. Mr. Evans, the Plaintiff, her children, another female person and several children went out to eat once during the surveillance and Mr. Evans paid for the meal.

83. The private investigator, during his surveillance, visited Mr. Evans' home located at 8801 Mansfield Drive in Raleigh, North Carolina. The home appeared to be "lived in" and the yard had been mowed.

84. Mr. Evans has a key to Plaintiff's home and a garage door opener and he is the only person other than Plaintiff to have those items. He sometimes helps the children with their homework, occasionally picks the children up from after school care at the YMCA, and takes trips with the children and the Plaintiff. Mr. Evans comes to Plaintiff's house to have meals with her and the children three or four times a week when he is in town, he sometimes purchases groceries for the meals, he pays for meals whenever she and the children go out to eat with him, and he pays for trips that they take together. Mr. Evans is on the list of approved persons to pick up the minor children from school and daycare, attends school and extracurricular activities of the children, attends church with Plaintiff and her children, has visited Plaintiff's parents on more than ten occasions, receives gifts from her family, and on at least one occasion, went on a family vacation with Plaintiff's extended family.

> 85. Plaintiff and the children had taken a trip to Disney World with Mr. Evans during the children's track-out time from October 4-11, 2003, and Mr. Evans paid for the trip. Plaintiff and Mr. Evans also went on a weekend trip to Atlanta the first weekend of October, 2003.
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> 86. Mr. Evans does not pay any of her household bills for Plaintiff and they have no financial accounts together. Mr. Evans receives no mail at Plaintiff's residence, keeps no clothing at her residence other than a swimsuit, and he does not keep any toiletries at her home.
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> 87. The Defendant has failed to offer sufficient evidence that Plaintiff and Mr. Evans are cohabitating within the meaning of N.C.G.S. 50-16.9.

Finding of fact 87 is actually a conclusion of law, and we therefore treat it is as such. *See Gainey v. N.C. Dept. of Justice*, 121 N.C. App. 253, 257 n.1, 465 S.E.2d 36, 40 n.1 (1996). Husband does not challenge any of the remaining findings of fact and they are, therefore, binding on appeal. *See Johnson v. Herbie's Place*, 157 N.C. App. 168, 579 S.E.2d 110, 118 (2003) (findings of fact not challenged on appeal are binding).

In making his argument that the evidence compelled a conclusion that wife cohabited with another, husband relies largely on two cases: *Long v. Long*, 160 N.C. App. 664, 588 S.E.2d 1 (2003), and *Oakley v. Oakley*, 165 N.C. App. 859, 599 S.E.2d 925 (2004). In *Long*, evidence was presented to suggest a "dating relationship" between the alimony obligee and another person. *Long*, 160 N.C. App. at 667, 588 S.E.2d at 3. This Court reversed the trial court's determination that cohabitation had occurred where its findings of fact were merely recitations of testimony. *Long* is therefore not authority in support of husband's argument in the

instant case. In *Oakley*, although there was "conflicting testimony" concerning the number of nights spent at wife's home, the parties did not disagree about the "essential facts" giving rise to the argument that wife had cohabited: an intimate relationship; overnight trips; dinners; and watching television. This Court, in affirming the trial court's conclusion that wife had not cohabited, observed that the evidence did not show "evidence of activities beyond [the] sexual relationship and their occasional trips and dates," *Oakley*, 165 N.C. App. at 863, 599 S.E.2d at 928, and concluded that the there was no assumption of any "'marital rights, duties, and obligations which are usually manifested by married people[.]'" *Long*, 160 N.C. App. at 667, 588 S.E.2d at 3 (quoting G.S. § 50-16.9(b)).

It is, of course, the trial court that sits as the finder of fact, evaluating what it chooses to believe or disbelieve, and determining the weight to be given to that which it believes. *See Scott v. Scott*, 336 N.C. 284, 291, 442 S.E.2d 493, 497 (1994). We are therefore guided not by husband's contentions in his brief about what the evidence and testimony suggested about all the facts and circumstances surrounding the nature and extent of wife's relationship with another man, but on what the trial court did find. The inquiry is whether the findings of the trial court support its conclusion of law that wife did not engage in cohabitation. *See Shear v. Stevens Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992).

Here, the findings primarily reveal that Robert Evans assisted

in some ways with the children, and further reveal a dating and sexual relationship; dinners together "when [Evans] was in town"; and time together shopping, attending church, and traveling. Evans maintained his own "lived in" residence and did not keep toiletries or clothing in wife's home; did not receive mail there; and did not pay household expenses. And wife and Evans did not maintain financial accounts together. We conclude that the findings do not compel a conclusion that there was a "mutual assumption of marital rights, duties, and obligations which are usually manifested by married people." *Long*, 160 N.C. App. at 667, 588 S.E.2d at 3. We therefore reject husband's contention that wife engaged in cohabitation as a matter of law, and overrule the relevant assignments of error.

Husband next argues that the trial court erred when it considered his motion to modify post-separation support (PSS), filed in June 2002, based upon changes in his employment and income. Specifically, husband contends the trial court erred by not reducing the obligation to $500.00 each month because the court found that wife's "needs were only $876.00 per month and that [husband] had the ability to pay only $500.00 per month." We disagree.

Husband's motion to reduce PSS was based on a change of employment and a corresponding reduction in income. *See* G.S. § 50-16.9. Husband argues that, "[i]t is illogical that [he] had the ability to pay $1,349 per month [in PSS] at a time when his annual income was only $60,000 if he only had the ability to pay $500 [for

alimony] when his salary is $27,000 more than the $60,000." In other words, he faults the trial court for awarding $500 each month in alimony at the time of trial, but denying his effort to reduce the $1349/month PSS obligation for a period of time when he was earning less income.

Husband suggests that he had an inability to pay the $1,349 each month in PSS at the time his motion to modify PSS was filed. He bases his argument on the trial court's finding of fact contained in paragraph 101 that he could pay $500.00 each month in alimony for five (5) years following the trial. However, the court's finding that he had the ability to pay $500 each month was expressly related to alimony. It did not refer to, or have any relationship with, the court's findings related to husband's motion to reduce PSS or his ability to pay PSS during a period that preceded the trial. Indeed, in finding of fact 89, the trial court found that husband could pay the higher award of PSS the court required of him leading up to the time of trial:

> 88. The [husband] ceased paying post-separation support to the [wife] in May 2002. As of June 2002, when [husband] filed a Motion to Terminate/Suspend Post-separation support, the [husband] was in arrears in the amount of $4,278.70. The [husband] is now currently in arrears for post-separation support owed to the [wife] pursuant to this Court's Order of May 17, 2001 in the amount of $34,668.90.
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> 89. During the period of time the [husband] has refused to pay post-separation support to the [wife], he maintained up to five (5) vehicles, three (3) rental units and his own town home unit, took vacations with his children, girlfriend and her child to the beach and mountains, took a recent vacation to Jamaica, purchased gifts for his girlfriend and her child, purchased antiques for his home, and maintained an antique booth at

> a flea market in Raleigh. Defendant had the ability to pay post-separation support as ordered.

Moreover, conclusion of law 14, which is assigned as error for reasons not argued on appeal, states that husband "had the ability to comply with [the order] regarding payment of post-separation support to [wife]." And husband overlooks a specific directive on the part of the trial court that, as a part of the order on appeal concerning sanctions, it concluded that, "[w]ith regard to the issue involving termination or reduction of post-separation support, it is equitable to prohibit the [husband] from presenting evidence as to his inability to pay." The relevant assignments of error are overruled.

In a related argument, husband contends that findings of fact 89, 91, and 101 conflict. This contention is without merit.

Findings of fact 89 and 101 are set forth above. Finding 91 states:

> 91. The Plaintiff's Financial Affidavit and testimony reflect non-prorated expenses of $2,886.19 and individual expenses of $558 per month. These amounts do not include amounts that [wife] testified she is currently unable to afford or has had to reduce, such as a car payment and insurance, clothing, vacations, and eating out. However, many of these expenses are paid for by [her gentleman friend] or are not supported by the documentary evidence provided, such as eating out and grocery costs. The [wife] is in need of $876 per month in order to meet her reasonable monthly expenses.

Husband's argument is premised, again, on the erroneous assumption that the court's findings concerning husband's ability to pay for the periods before and after the trial must be the same. On the contrary, finding of fact 89 is clearly in a portion of the

court order concerning PSS, while paragraphs 91 and 101 are in a portion of the order specifically concerning alimony. Findings 89, 91, and 101 are clearly not in conflict, and are clearly supported by the record.

Husband next argues that the trial court, in effecting an equitable distribution, erred by failing to consider the tax consequences of withdrawals he made from a Charles Schwab account held by the parties after the date of separation and before the hearing. Specifically, husband contends the trial court erred by finding that any tax consequences to him were speculative, and by failing to use the tax consequences as a distributional factor. We conclude that the trial court did "consider" the tax consequences associated with the husband's withdrawals within the meaning of the statute.

When reviewing an order on equitable distribution, this Court's duty is to determine whether the trial court abused its discretion. *White v. White*, 312 N.C. 770, 324 S.E.2d 829 (1985). "A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 777, 324 S.E.2d at 833. The trial court must make findings concerning those factors enumerated in N.C. Gen. Stat. § 50-20(c) (2005), where evidence has been presented concerning the same. *See Rosario v. Rosario*, 139 N.C. App. 258, 260-61, 533 S.E.2d 274, 275-76 (2000). Section 50-20(c)(11) requires the trial court to "consider tax consequences that will

result from the distribution of property that the court actually orders." *Weaver v. Weaver*, 72 N.C. App. 409, 416, 324 S.E.2d 915, 920 (1985), *rev'd on other grounds, Armstrong v. Armstrong*, 322 N.C. 396, 368 S.E.2d 595 (1988); *see also Wilkins v. Wilkins*, 111 N.C. App. 541, 432 S.E.2d 891 (1993).

Before its amendment in 2005, N.C. Gen. Stat. § 50-20(c)(11) (2003) required that the trial court consider "[t]he tax consequences to each party."

Here, the trial court made the following pertinent findings of fact:

> 51. The parties are also the owners of a Charles Schwab & Company, Inc. IRA, account number RH 8071- 2431 held in Defendant's name alone. On the date of separation, the balance in the account was $119,508.46. The account is an investment account that is both broker managed and stock holder managed. From the date of separation until the date of liquidation, both Defendant and Schwab managed the account. On the date of separation, the Schwab account contained the following stocks, America Online Latin America, Delias Corporation CL A, Global Games Corp., Leam2.com Inc., Optical Cable Corp., PSS World Medical, Inc., Skymall Inc. and Virtgame.com Corp.
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> 52. In 2001, Defendant removed $37,000 from the Schwab account. Defendant used these funds to pay attorneys' fees and to furnish his town home, as Plaintiff refused to give Defendant any furnishings for the town home from the marital residence. In 2002, Defendant removed $28,000 from the Schwab account. He used this money to pay bills and to live on after he lost his job with Diagnostic Imaging. In December 2002, an order was entered to restrain either party from removing additional funds from the account. Defendant did not find out about this order until March 2003 when his attorney at the time, Brett Hubbard, informed him of the restraining order. In January 2003, Defendant had removed an additional $3500 from the account. The total that Defendant received from the Schwab account is $68,500.00 and said distributions should be considered as an interim allocation to the Defendant.

53. Plaintiff tendered Mr. Lewis Crawley as an expert in stock valuation to testify with regards to this account. Mr. Crawley has no training or special license to value stock; therefore, he is not accepted as an expert in the area of stock valuation. However, he can give layman's testimony. Mr. Crawley analyzed the value of current value of the stock that resulted in the distributions to Defendant. His testimony was that the value of the stock that was sold, if it was held today would be $107,060 if the investments that were sold to make the distributions to Defendant remained in the account today.

54. On the other hand, the value of the portfolio would have decreased to approximately $6364 had the investments remained in the stock funds that were in existence on the date of separation. However, trades were made, prior to the withdrawals, although it is unclear whether those trades were made at the direction of Defendant or the broker and those investments do not remain in the portfolio.

55. There is no evidence before the Court as to whether additional trades would have been made of those investments after the distributions were made. Therefore, it is pure speculation, which the Court will not engage in, as to what the value of the account would be were it not for the distributions. The distributions were neither an effort by Defendant to preserve the marital estate nor a waste of a marital asset by the Defendant.

56. The current value of the Charles Schwab & Company, Inc. IRA account number RH 8071-2431 is $803.45. The difference between the $119,508.46 date of separation value less the $68,500 distribution to Defendant ($51,008.46) is passive and is a divisible loss to the parties.

57. Defendant retained the services of George Lambert, a partner with Williams, Overman, Pierce & Company to determine the tax consequences associated with the withdrawal of the funds from the Schwab account. Mr. Lambert was accepted by the Court as an expert in the field of certified public accounting.

58. Mr. Lambert prepared a chart which purported to show the tax consequences the Defendant will suffer as a result of his withdrawals from the Charles Schwab account. The chart reflected that for the tax year, 2001 Defendant incurred an early withdrawal penalty in the

> amount of $3,700 and federal and state taxes on the $37,00[0] withdrawal in 200[1], such that his net benefit of the distribution after taxes was $19,361. For the 2002 tax year, Defendant incurred an early withdrawal penalty in the amount of $2800 and federal and state taxes on the $28,000 withdrawal such that the net benefit from the distribution was $16,028 for the tax year 2002. For the tax year 2003, Defendant incurred an early withdrawal penalty of $350 and state and federal taxes such that his net benefit was $1969.
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> 59. The chart presented by Mr. Lambert was inaccurate in several respects: (a) the chart did not include rental income earned by the Defendant; (b) the chart did not include the tax loss currently available to Defendant to reduce his taxable income, related to Defendant's prior losses resulting from day trading; (c) the chart did not take into account any federal taxes withheld at the time of the withdrawals, and (d) the payments of post-separation support listed on the chart were not accurate.
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> 60. Furthermore, Defendant has not filed federal or state income tax returns for the years 2000, 2001, 2002, or 2003. Any tax consequences to Defendant are purely speculative and, if incurred, are the result of a unilateral decision by the Defendant. The tax consequences will not be considered as a distributive factor.
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> 75. The Court has considered the factors set forth in N.C.G.S. 50-20(c), including but not limited to, economic misconduct during the marriage alleged on the part of [husband] pursuant to [N.C.G.S.] 50-20(c)(11a) and (12) and the tax consequences alleged to be incurred by [husband] by reason of his withdrawal from his retirement account. Having considered all of the factors for an unequal distribution, the Court finds that an equal division of marital and divisible property is equitable.

Here, husband does not dispute that he unilaterally decided to withdraw the monies from the account, and does not dispute that the monies were used to pay for his attorney fees and living expenses. We evaluate husband's argument on the assumption, and without deciding, that husband's withdrawal from the Schwab account may

have tax consequences because of the trial court's distribution of the marital estate. *See Weaver,* 72 N.C. App. at 416, 324 S.E.2d at 920.

The plethora of findings related to the Schwab account and husband's assertion that it should have made a distributional factor in his favor make it abundantly clear that the trial court did, in fact, consider whether the alleged tax consequences should be considered in decreeing an unequal division of the estate. The trial court determined that, because the monies were withdrawn as a result of his unilateral decision, any tax consequences should not be used as a distributional factor in his favor. The findings reveal, too, that the trial court was skeptical of the expert witness' testimony concerning the tax consequences. Read *in toto*, the findings of the court reveal its unwillingness to utilize any tax consequences as a distributional factor. This holds true whether the court correctly concluded that the tax consequences were speculative. Put simply, husband's argument that the trial court did not consider the tax consequences of the withdrawals is belied by the court's findings.

Husband next argues that the trial court erred by failing to sanction wife while imposing sanctions on him.

Because husband failed, *inter alia*, to comply with the Tenth Judicial District rules, and because he failed to file his equitable distribution inventory affidavit, he was prohibited from presenting date of separation values for marital assets for purposes of equitable distribution. The trial court found that

wife failed "to answer questions [] truthfully" and "attempted to conceal from [husband]" and the court information about a Certificate of Deposit ("CD"). She "made attempts to evade and conceal the proceeds of the asset." The trial court found that "[b]oth parties have engaged in conduct that hindered the timely completion of discovery and exchange of information necessary to bring this matter to a prompt conclusion." The trial court also found that wife gave misleading and false testimony concerning, *inter alia*, her relationship with her gentleman friend and husband's efforts to retrieve some household items.

Given these findings of the trial court, husband argues the trial court was required under N.C. Gen. Stat. § 50-21(e) (2005) to sanction wife. Section 50-21(e) provides:

> Upon motion of either party or upon the court's own initiative, the court shall impose an appropriate sanction on a party when the court finds that:
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> (1) the party has willfully obstructed or unreasonably delayed, or has attempted to obstruct or unreasonably delay, discovery proceedings, including failure to make discovery pursuant to G.S. 1A-1, Rule 37, or has willfully obstructed or unreasonably delayed or attempted to obstruct or unreasonably delay any pending equitable distribution proceeding; and
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> (2) The willful obstruction or unreasonable delay of the proceedings is or would be prejudicial to the interests of the opposing party.

The trial court did not make all the findings that would be required for it to sanction wife pursuant to Section 50-21(e). Moreover, this Court has stated, "whether to impose sanctions and

which sanctions to impose under G.S. 50-21(e) are decisions vested in the trial court and reviewable on appeal for abuse of discretion." *Crutchfield v. Crutchfield*, 132 N.C. App. 193, 195, 511 S.E.2d 31, 34 (1999). We do not discern an abuse of discretion in the trial court's decision not to impose sanctions on wife, and we overrule the relevant assignments of error.

Husband next argues the trial court erred by failing to find wife in indirect civil contempt of the 18 June 2001 parenting agreement. In particular, husband argues wife violated the "no derogatory" comments provision and the "right of first refusal" provision. Husband contends, relying on the court's findings, that mother's conduct amounts to contempt as a matter of law. We disagree.

Husband cites N.C. Gen. Stat. § 5A-21 (2005), and argues wife is in civil contempt of the parenting agreement. We conclude that husband has failed to show error on the part of the trial court. Section 5A-21 provides:

> (a) Failure to comply with an order of a court is a continuing civil contempt as long as:
> (1) The order remains in force;
> (2) The purpose of the order may still be served by compliance with the order;
> (2a) The noncompliance by the person to whom the order is directed is willful; and
> (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

Here, the trial court found, in paragraphs 115 and 117, that:

> In the June 18, 2001 consent order, the parties agreed that neither party would make any statement in the presence or hearing of the minor children that tends to

> be derogatory to the other parent. While [wife's] diary/journal reveals that [wife] questions the minor children about visits with their father and has told the minor children that their father is dishonest and doesn't pay the money that he owes her, and there was evidence that [wife] calls [husband] while the minor children are with him for visitation and attempts to discuss various issues with [them], and that on one occasion, in the fall of 2003, [wife] mouthed a[------] at [husband] while the minor children were in the car with [husband], this evidence is insufficient to prove a violation of the this [sic] provision of the order on the part of either party.
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> . . . .
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> In the June 18, 2001 consent order, the parties agreed that the other party would have a right of first refusal to care for the children in the event the other parent is unable to do so. While the children participate in activities at the YMCA and [wife] sometimes allows [her gentleman friend] to care for the children for short periods of time while she runs errands or allows the children to spend the night with [a female friend], there is insufficient evidence to find that those acts are in willful violation of the Court's order.

In observing that the trial court was not compelled on this record to find her in contempt, wife points this Court to the decision in *Hancock v. Hancock*, 122 N.C. App. 518, 471 S.E.2d 415 (1996), where this Court summarized the law as follows:

> Willful has been defined as disobedience which imports knowledge and a stubborn resistence, and as something more than an intention to do a thing. It implies doing the act purposely and deliberately, indicating a purpose to do it, without authority – careless whether [the contemnor] has the right or not - in violation of law. . . . Willfulness involves more than deliberation or conscious choice; it also imports a bad faith disregard for authority and the law. Evidence which does not show a person to be guilty of purposeful and deliberate acts or guilty of knowledge and stubborn resistence is insufficient to support a finding of willfulness.

Id. at 523, 471 S.E.2d at 418 (internal quotation marks and

citations omitted).

We have reviewed the record and conclude that the trial court's findings are supported by competent evidence in the record, and that its conclusion that wife was not in willful violation of the Parenting Agreement is supported by its findings of fact. The relevant assignments of error are overruled.

We have considered husband's remaining arguments and conclude that they are without merit.

Affirmed.

Judges HUNTER and MCCULLOUGH concur.

Report per Rule 30(e).