NO. COA05-664

NORTH CAROLINA COURT OF APPEALS

Filed: 6 June 2006

JAY B. SABLE,
Plaintiff,

v.

Wake County
No. 01 CVD 5464

D. STELLA SABLE (now Knight),
Defendant.

Appeal by Plaintiff from orders entered 15 June 2001, 16 March 2004, and 19 July 2004 by Judge Anne B. Salisbury in Wake County, District Court. Heard in the Court of Appeals 20 February 2006.

Jay B. Sable, pro se, for plaintiff-appellant.

Lynne M. Kay for defendant-appellee.

WYNN, Judge.

In this appeal, Jay B. Sable brings multiple issues arising from his dispute with his former wife, Stella (now remarried with the surname of "Knight"), regarding relocation of the couple's minor child and other issues. Upon thoroughly reviewing the record on appeal in light of the law of North Carolina, we reject Mr. Sable's issues as being without merit.

The parties married in 1988; had one child in 1996; and separated in 1997. Under their separation agreement, (1) the parties agreed to "joint custody" with Mrs. Knight's residence as the child's primary residence; (2) Mr. Sable would pay $1,000.00

per month in child support; and (3) Mr. Sable would make Mrs. Knight the beneficiary trustee of his $200,000 life insurance (with the minor child as irrevocable beneficiary) until the minor child reached the age of twenty-five. A "Sable Family Budget" was also included in the separation agreement. The parties divorced on 4 December 1998.

During 1997 through 2001, Mr. Sable had physical custody of the minor child on alternate weekends, shared or alternate holidays, and for approximately three hours every Tuesday and Thursday. But upon Mrs. Knight informing Mr. Sable of her intent to remarry and relocate with the minor child from Raleigh, North Carolina to Hertford, North Carolina, Mr. Sable brought an action on 7 May 2001 seeking joint physical and legal custody of the minor child. Thereafter, he filed a "Motion for Preliminary Injunctive Relief," seeking to maintain the minor child's place of residence in Wake County until permanent custody could be determined. District Court Judge Anne B. Salisbury denied that motion and entered a "Memorandum of Judgment/Order" on 15 June 2001, allowing the child's relocation and specifying a visitation schedule with Mr. Sable.

Mr. Sable appeals from the 15 June 2001 relocation order; 30 October 2003 Temporary Custody and Support Order; 16 March 2004 order denying Mr. Sable's Motion to Compel; and 19 July 2004 Final Order on Custody and Support. We, however, do not address the 30 October 2003 order because the trial court entered a final order on 19 July 2004. *See Hunter v. Hunter*, 126 N.C. App. 705, 708, 486

S.E.2d 244, 246 (1997) (If an interim order does not affect a substantial right, the appealing party's rights will be adequately protected by an appeal timely taken from a final order.).

I.

Mr. Sable first contends that the trial court erred in using the Memorandum of Judgment/Order form, which is used for consent judgments, because he did not consent to the relocation of the minor child. We disagree.

"The power of the court to sign a consent judgment depends upon the unqualified consent of the parties thereto, and the judgment is void if such consent does not exist at the time the court sanctions or approves the agreement . . . and promulgates it as a judgment." *Ledford v. Ledford*, 229 N.C. 373, 376, 49 S.E.2d 794, 796 (1948); *see also Buckingham v. Buckingham*, 134 N.C. App. 82, 87, 516 S.E.2d 869, 873-74 (1999) (consent decree relating to child custody valid where parties signed written agreement and appeared in open court to acknowledge their consent). There is no requirement with consent judgments, including consent judgments relating to property, support and custody rights of married persons, that the parties, at the time of the entry of the judgment, actually appear in court and acknowledge to the court their continuing consent to the entry of the consent judgment. *Wachovia Bank & Trust Co. v. Bounous*, 53 N.C. App. 700, 706, 281 S.E.2d 712, 715 (1981) (where parties do not appear in court, trial court may sign and enter judgment if it contains the signatures of

all the parties); N.C. Gen. Stat. § 52-10(c) (2005) (consent judgments do not have to be acknowledged).

In this case, upon learning of Mrs. Knight's intent to relocate, Mr. Sable sought a preliminary injunction to prohibit moving the minor child pending the permanent custody hearing. Counsel for both parties met in chambers without either party present, and after the trial court denied the motion for injunctive relief, Mr. Sable's counsel requested that the trial court enter an order specifying visitation for Mr. Sable. The trial court used the Memorandum of Judgment/Order form allowing Mrs. Knight to relocate to Hertford with the child and providing a detailed visitation schedule for Mr. Sable. Counsel for both parties signed the memorandum.

It is apparent that the trial judge used the Memorandum of Judgment/Order form to specify visitation for Mr. Sable - not as a consent judgment regarding relocating the child as Mr. Sable argues. Mr. Sable's own testimony establishes that his attorney told him that the trial judge denied his motion for preliminary injunction and entered an order specifying his visitation rights:

> Q: Okay. And you are aware, aren't you, that Judge Salisbury at that time issued a verbal ruling that your motion for injunction was denied, aren't you?
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> A. No. This is the very first time I'm hearing that.
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> Q: You are aware, aren't you, that —
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> A: (interposing). Well, no. . . .I can't give you a simple yes or no on that one, because my former attorney called me up and her exact

> words were "Jay" -- quote, "Jay, I'm sorry, we didn't get it," unquote.
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> Q: You are aware, aren't you, that it is your own attorney at that time in Judge Salisbury's chambers who wanted that memorandum to be entered to secure your visitation by court order, aren't you?
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> A: I believe I was aware of that.

The record reveals that the trial judge entered the memorandum *after* denying Mr. Sable's motion for a preliminary injunction and in an effort to comply with Mr. Sable's request for an order regarding visitation. While the better practice would have been for the parties' counsel to omit all references in the memorandum indicating that the trial court's judgment on visitation was a consent order, we are satisfied that under the circumstances of this case, the parties understood the order was directed towards the issue of visitation. Accordingly, Mr. Sable's assignment of error is rejected.

II.

Mr. Sable next contends the trial court erred in awarding primary custody to Mrs. Knight. We disagree.

Section 50-13.2 of the North Carolina General Statutes requires a trial court's order to include terms for visitation and contain findings sufficient to support the ruling. N.C. Gen. Stat. § 50-13.2 (2005). "[T]he trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary." *Surles v. Surles*, 113 N.C. App. 32, 42, 437 S.E.2d 661, 666 (1993)

(citation omitted). Here, the trial court made the following pertinent findings of fact regarding custody:

> 15. The evidence presented by all witness [sic] show that both Plaintiff and Defendant are good parents. Plaintiff is a good father and has been actively involved in the child's upbringing since the separation. While he has never been the primary custodian, he continued to see the child and bond with her after the separation of the parties. On two occasions, early in the separation, Plaintiff left the child unattended in two potentially harmful situations. On one occasion, he left the minor child aged approximately 18 months, alone and asleep in his apartment while he walked the dog around the block. On another occasion, he left the child alone, aged approximately 2 years, on the apartment playground to go to his apartment to retrieve something. Plaintiff acknowledged the potential for harm and his lack of good judgment on these occasions; there is no evidence that anything like the above incidents has occurred since and the Plaintiff has been quite attentive since then.
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> 16. Both parties love the minor child and by all accounts she is healthy, happy and loves both her parents. . . .
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> 17. The minor child enjoys a good relationship with both her stepparents. Both engage in age-appropriate activities with her such as reading, being outside, and playing with the dog. Plaintiff's wife, Paula, especially spends quality time with the child engaging in whatever activities the child elects to do. Defendant's husband works long hours and tends to spend less time with her but engages in quiet time activities such as watching television together or walking the dog or hiking on acreage that he owns. He respects Plaintiff's status as the child's father. An example of this is that on approximately two occasions he has overheard the minor child be rude to her father on the telephone and hang up on him. He made the child call Plaintiff back and speak politely to her father.
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19. The custody evaluation was performed by the Forensic Psychiatry Service at the University of North Carolina at Chapel Hill School of Medicine. By stipulation of the parties, the written report of the custody evaluation was admitted into evidence. In addition, Dr. David Bartholomew was admitted as an expert witness in the field of child psychology and in the area of custody evaluations and testified. The evaluation team and UNC did psychological testing, analysis, interviews with the parties, the minor child and various references provided by the parties. . . .

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21. Various witnesses confirmed and the Court finds that the minor child . . . is an intelligent child who, as an only child, is often in the company of other adults with her parents. Although she gets long well with her peers at school, she needs more age appropriate relationships with her peers. When she is with her parents, she tends to be bossy and overly demanding of their time. This was evidenced by the fact that when she is visiting with the Plaintiff and his wife, they play with her and do whatever she wants to do to "the point of exhaustion". She also tries to overly demand attention while with Defendant, though not with as much success as at her father's. Defendant and her husband are better at setting boundaries and not giving in to the child's every whim than are Plaintiff and his wife.

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23. Both parties have adequate and appropriate physical facilities in which to house the minor child. Both parents love her and can provide her with a family environment, good education and can provide for her physical and emotional needs.

24. However, because of the continuing conflict and constant court hearings and the inability of the parties to communicate effectively with each other, joint custody is not practical or workable.

> 25. Defendant has been the primary caregiver to the minor child since the child's birth. She has provided continuously for the child's physical and emotional needs. She has been a source of stability for the child. Plaintiff has provided for the child's physical and emotional needs when the child has been with him and has provided for her financial support except as noted herein.

Mr. Sable contends the trial court's custody order does not contain sufficient findings comparing each aspect of the parties and their relative abilities to advance the minor child's best interest. "However, the trial court need not make a finding as to every fact which arises from the evidence; rather, the court need only find those facts which are material to the resolution of the dispute." *Witherow v. Witherow*, 99 N.C. App. 61, 63, 392 S.E.2d 627, 629 (1990), *aff'd per curiam*, 328 N.C. 324, 401 S.E.2d 362 (1991). After careful review of the record, we conclude there is competent evidence to support the trial court's findings, and we conclude the trial court made sufficient findings of fact to support its decision to award sole legal custody and primary physical custody to Mrs. Knight. Thus, Mr. Sable's assignment of error is rejected.

III.

Mr. Sable next contends the trial court erred in setting his visitation schedule with the minor child. We disagree.

"Visitation rights orders, along with other matters related to child custody are governed by the standard of promot[ing] the interest and welfare of the child." *Pass v. Beck*, 156 N.C. App. 597, 600, 577 S.E.2d 180, 182 (2003) (internal quotation and

citation omitted). "A trial court is given broad discretion in determining the custodial setting that will advance the welfare and best interest of minor children." *Cox v. Cox*, 133 N.C. App. 221, 228, 515 S.E.2d 61, 67 (1999) (citation omitted).

In this case, the trial court ordered, in part, for Mr. Sable to have four weeks summer visitation with the minor child. Mr. Sable argues that he should have physical custody of the minor child during all three-day weekends associated with the school calendar and for six weeks during her summer vacation based on the trial court's Finding of Fact No. 20 which stated:

> 20. The evaluation team prepared an extensive report on its findings regarding the needs of the minor child, the relative strengths and weaknesses of the Plaintiff and Defendant and the roles of the stepparents in the family dynamics. This report was admitted into evidence and is incorporated into these Findings of Fact as if set out fully herein.

This finding references the evaluation team's report recommending that Mr. Sable have six weeks summer visitation. The trial court's order as to the amount of summer visitation ultimately granted to Mr. Sable was based on its many findings, and was not a recitation of the evaluation team's recommendation. Therefore, it was not inconsistent for the trial court to incorporate the evaluation team's report into its findings and yet not order all of the report's recommendations. As we can discern no abuse of discretion by the trial court in setting visitation with the child, we reject this assignment of error.

IV.

Mr. Sable next contends the trial court erred by not identifying a verifiable source of funds from which Mrs. Knight will provide her share of the minor child's financial support. This argument is without merit.

The trial court made the following findings of fact regarding Mrs. Knight's share of child support:

> 28. When Defendant remarried and moved to Perquimans County, she closed her part-time law practice. She currently does not work regularly and is supported by her husband who contributes to her living expenses and to those of the minor child. Defendant devotes her time to child-rearing (including driving the child to and from Elizabeth City, NC for school and to her extra curricular activities), helping in her husband's business and volunteer work. She does keep her law license current by attending Continuing Legal Education seminars and performing some indigent work *pro bono*. She is healthy and capable of working full-time. She made the decision not to work regularly when she remarried and moved to Perquimans County. She has chosen not to work and is voluntarily unemployed with full knowledge of her duty to support her minor child because her husband has voluntarily chosen to assume this responsibility and support she has provided from her separate estate. In addition, she has continuously provided support to the minor child from her separate estate. Previously, and upon her move to Hertford, the Defendant sold her residence and received approximately $145,000.00 representing the equity therein. She has used this amount to provide support for the minor child and a large portion of it to employ counsel to defend the numerous motions filed by Plaintiff in this case. This sum is now almost depleted.
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> 29. The evidence before the Court as to past or potential income of the Defendant was the submission of the parties' 1997 joint tax returns wherein the Defendant had earnings from her part-time practice of Elder law after

> adding back depreciation of $29,053.00. In 1998, Defendant had gross income from her law practice after adding back depreciation of $29,074.00. In 1999, Defendant had gross income from her law practice, after adding back depreciation, of $31,118.00. In 2000, Defendant's gross income from her law practice, after adding back depreciation was $25,464.00. In 2001, Defendant's gross income from her law practice was $19,920.00. . . .
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> ***
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> 36. The present Guideline amount of $1,189.00 does not meet or exceed the reasonable needs of the child, which are as set forth above. The Plaintiff has the ability to pay the amount of child support ordered herein. Plaintiff's $1,000.00 child support payment provided by the Separation Agreement plus Defendant's share of the support obligation does not exceed the reasonable needs of the child as set forth above. The amount of child support payable by the Plaintiff pursuant to the Separation Agreement, coupled with the support provided by Defendant for the balance (either by herself or through her husband) adequately meets the needs of the child as set forth . . . above.

After careful review of the record, we conclude there is ample evidence to show that the child's needs in excess of the $1,000 ordered child support are being met. Moreover, Mr. Sable testified at trial that the minor child is not lacking for anything and, in fact, she has too many toys and "too much stuff." He further admitted that he does not know what is being spent on the child in excess of the amount of child support he pays. Because there is no evidence in the record to show that Mrs. Knight is not meeting her portion of child support, we reject this assignment of error.

V.

Mr. Sable next argues that Mrs. Knight is acting in bad faith in remaining voluntarily unemployed. However, a party is not deemed to be acting in bad faith only because he or she is unemployed by choice. *Pataky v. Pataky*, 160 N.C. App. 289, 307, 585 S.E.2d 404, 416 (2003). In *Pataky*, this Court held that the non-custodial parent was not acting in bad faith even though he decided to return to school only after the child support agreement was executed and before he was aware that the custodial parent would seek a child support order from the court. *Id.* at 307-08, 585 S.E.2d at 416.

Similarly, in this case, there is no evidence in the record to show that Mrs. Knight is acting in bad faith in remaining voluntarily unemployed. Mrs. Knight became voluntarily unemployed in June 2001 to become a full-time housewife and mother. Mr. Sable did not file a Motion for Child Support until 27 September 2002. Thus, it is highly unlikely that Mrs. Knight became unemployed in anticipation that Mr. Sable would be filing a motion for the court to set child support and in an effort to "shirk" her child support obligations. Accordingly, we reject this assignment of error.

VI.

Mr. Sable next contends the trial court erred in setting his child support obligation because the "reasonable monthly expenses" for the minor child are "excessive."

The trial court has considerable discretion in determining the appropriate amount of prospective child support. "Absent a clear abuse of discretion, a judge's determination of what is a proper

amount of support will not be disturbed on appeal." *Plott v. Plott*, 313 N.C. 63, 69, 326 S.E.2d 863, 868 (1985) (citation omitted). A "judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Id.*

Contrary to Mr. Sable's assertion, he is not solely responsible for the minor child simply because the permanent support guideline does not impute income to Mrs. Knight. In fact, the guideline worksheet reveals that Mr. Sable should be paying $1,189.00, and the Court only ordered him to pay $1,000. Thus, any deviation in the Guidelines was to Mr. Sable's benefit. As we can discern no abuse of the trial court's discretion in determining the amount of child support, we reject this assignment of error.

VII.

In his next assignment of error, Mr. Sable argues the trial court erred by refusing to compel the production of Mrs. Knight's 2002 tax returns. We disagree.

General provisions governing discovery are set forth in Rule 26 of the North Carolina Rules of Civil Procedure. *See* N.C. Gen. Stat. § 1A-1, Rule 26 (2005). Discovery methods include, *inter alia*, depositions, interrogatories, and production of or permission to inspect documents. N.C. Gen. Stat. § 1A-1, Rule 26(a). Regarding the scope and limits of discovery, our Legislature has provided, in pertinent part, as follows:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . .

> The frequency or extent of use of the discovery methods set forth in section (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or . . . (iii) the discovery is unduly burdensome or expensive . . .

N.C. Gen. Stat. § 1A-1, Rule 26(b)(1). "Whether or not the party's motion to compel discovery should be granted or denied is within the trial court's sound discretion and will not be reversed absent an abuse of discretion." *Wagoner v. Elkin City Schools' Bd. of Educ.*, 113 N.C. App. 579, 585, 440 S.E.2d 119, 123, *disc. review denied*, 336 N.C. 615, 447 S.E.2d 414 (1994). We find the trial court did not abuse its discretion in denying Mr. Sable's motion to compel the production of Mrs. Knight's 2002 tax returns. Accordingly, we reject this assignment of error.

VIII.

We next address Mr. Sable's argument that Mrs. Knight should not have been awarded attorney's fees. Section 50-13.6 of the North Carolina General Statutes provides:

> In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; provided however, should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may

> order payment of reasonable attorney's fees to an interested party as deemed appropriate under the circumstances.

N.C. Gen. Stat. § 50-13.6 (2005). Whether the statutory requirements of section 50-13.6 have been met is a question of law and is reviewable on appeal. *Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 724 (1980).

The trial court made the following findings of fact as it relates to awarding Mrs. Knight attorney's fees under section 50-13.6:

> 43. The Defendant has retained the services of Lynne M. Garnett, attorney at law, to represent her in defense of Plaintiff's Complaint for custody and child support and Plaintiff's request that the Court deviate downward from the North Carolina Child Support Guidelines and the Plaintiff's subpoenas and Discovery filed herein.
>
> 44. Defendant's attorney's practice is almost totally devoted to domestic litigation, including, but not limited to the various issues which comprise this action. She has practiced family law since 1993. Her hourly rate is $175.00 per hour which is comparable to other family law attorneys practicing in Wake County. She charged $150.00 per hour for her services through December 2, 2003. She was assisted by her paralegal at a rate of $60.00 per hour.
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> 45. Defendant's attorney expended a minimum of 18 hours through December 4, 2003 defending against Plaintiff's motions to establish and deviate downward from the North Carolina Child Support Guidelines and attempting to collect child support arrearages not paid by Plaintiff. For purposes of the permanent hearing, Defendant's attorney expended no less than 14 hours.
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> 46. Defendant defended Plaintiff's child support action in good faith and is without the independent means to defend this action

> without depleting her separate estate. Defendant is entitled to recover her reasonable attorney's fees under statutory authority set forth in N.C.G.S. 50-13.4 *et seq.*

Based on these findings of fact, the trial court made the following conclusion of law:

> 13. Defendant is not entitled to recover her attorney's fees for breach of the Separation Agreement but is entitled to recover her reasonable attorney's fees for Plaintiff's failure to pay adequate child support pursuant to N.C.G.S. 50-13.4 [sic] and for her defense of this action where it is clear that Plaintiff failed to pay adequate support.

Mr. Sable contends Mrs. Knight is not acting in "good faith" with regard to child support and is thus ineligible for an award of attorney fees under section 50-13.6. As we have already rejected Mr. Sable's argument that Mrs. Knight was not acting in good faith with regard to child support, we likewise reject this argument.

IX.

Mr. Sable further argues the trial court erred in finding that Mrs. Knight lacked "independent means" to pay her attorney because the test for an award of attorney fees under section 50-13.6 is "insufficient means." This argument is without merit.

Our Supreme Court has held that the "insufficient means" test has been satisfied if the party is "unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit." *Hudson*, 299 N.C. at 474, 263 S.E.2d at 725. Our review of the record reveals that Mrs. Knight does not work regularly and is supported by her husband who contributes to her living expenses and to those of the minor child. Further, the

record reveals that Mrs. Knight sold her residence and received approximately $145,000 from the sale. Mrs. Knight testified that she used this money to provide for the minor child and to employ counsel and that the sum is almost depleted. However, she is not required to deplete her separate estate to pay her attorney's fees. *Cobb v. Cobb*, 79 N.C. App. 592, 596-97, 339 S.E.2d 825, 828 (1986) (holding it would be contrary to the intent of the legislature to require one seeking an award of attorneys' fees to meet the expenses of litigation through the unreasonable depletion of her separate estate, where her separate estate is smaller than that of the other party).

We hold there is sufficient evidence in the record to support the trial court's findings of fact to show that Mrs. Knight was unable to employ counsel to defend the lawsuits brought by Mr. Sable without depleting her separate estate. *See id.* We, therefore, reject this assignment of error.

X.

Mr. Sable next contends the trial court erred by holding him in contempt of its temporary child support order. We disagree.

To find a party in contempt, the trial court must find that (1) the party failed to comply with the order, and (2) that the party presently possesses the means to comply. *Wolf v. Wolf,* 151 N.C. App. 523, 529, 566 S.E.2d 516, 520 (2002) (citing *Gorrell v. Gorrell*, 264 N.C. 403, 141 S.E.2d 794 (1965)). To find that a party acted willfully, "the court must find not only failure to comply but that the defendant presently possesses *the means* to

comply." *Teachey v. Teachey*, 46 N.C. App. 332, 334, 264 S.E.2d 786, 787 (1980) (quoting *Mauney v. Mauney*, 268 N.C. 254, 257-58, 150 S.E.2d 391, 393-94 (1966)) (emphasis in original).

This Court affords great deference to a trial court's findings of fact. *McAulliffe v. Wilson*, 41 N.C. App. 117, 120-21, 254 S.E.2d 547, 550 (1979). The standard of review in a contempt proceeding is "limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997); *see also Sloan v. Sloan*, 151 N.C. App. 399, 408, 566 S.E.2d 97, 103 (2002) ("In reviewing a trial court's contempt order, the appellate court is limited to determining whether there is competent evidence to support the trial court's findings of fact and whether the findings of fact support the conclusions of law."); *Nix v. Nix*, 80 N.C. App. 110, 112, 341 S.E.2d 116, 118 (1986) ("[W]hen an appellant contends that the findings of fact are not supported by the evidence, we look to see whether the findings are supported by *any* competent evidence in the record." (emphasis in original)). Furthermore, findings of fact to which a party does not except are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

Mr. Sable challenges the following findings of fact:

> 39. During the pendency of the litigation, the North Carolina Child Support Guidelines were changed (effective October 1, 2002) and Plaintiff's income changed, as well as the *Pataky* decision by the North Carolina Court of Appeals rendered in September, 2003 just after the temporary hearing. At the temporary hearing stage, Plaintiff was ordered to pay

the sum of $1,000.00 (representing $864.36 under the Guidelines and $135.64 under the Separation Agreement as child support for the months of August and September, 2002. He did, in fact, pay $1,000.00 for each of those months and is not in arrears for those months. Fort the period October 1, 2002 until May 1, 2003, Plaintiff was ordered to pay the sum of $1,000.00 per month (representing $832.17 under the new Guidelines and $167.83 under the Separation Agreement. Plaintiff paid $1,000.00 per month to Defendant from October 1, 2002 until February 1, 2003 and is not in arrears for those months. From February 1, 2003 until May 1, 2003, Plaintiff only paid $500.00 per month. He has total arrears for that period of $996.51 under the Guidelines and the balance of $503.49 under the Separation Agreement for a total arrears for those months of $1,500.00.

40. In May, 2003, the Guideline amount changed again because of Plaintiff's increase in salary. At the temporary hearing, Plaintiff was ordered to pay the sum of $1,000.00 per month child support effective May 1, 2003 (representing $845.77 under the Guidelines and $154.23 under the Separation Agreement). Plaintiff paid the Guideline amount but continues to refuse to pay the Separation Agreement amount. Amounts due to Defendant under the Separation Agreement for the period from May 1, 2003 through July, 2003 are $462.69. From August 1, 2003 through the date of the permanent hearing, the Plaintiff owes $1,388.07 representing the difference between what Plaintiff has paid and the $1,000.00 per month. Plaintiff has paid the Guideline amount but has consistently refused to pay the balance due under the Separation Agreement because he disagrees with the Court's Order. He also claimed that he cannot afford the $154.23 per month because he has what he termed "discretionary expenses."

41. The Plaintiff paid inadequate support to the Defendant for May and June of 2002 and from February 2003 to the present according to the reasonable needs of the child, the North Carolina Child Support guidelines and in breach of the parties Separation Agreement. This was at a time when th Plaintiff had gross

> income of at least $90,000.00 per year and had the ability to pay said support.

A review of the record reveals the evidence supports the trial court's determination that Mr. Sable's non-compliance with the separation agreement was willful. Mr. Sable admitted that he did not pay the $154.23 per month because the trial court erred in entering an order of specific performance, and that his non-performance was "based on principled opposition[.]" Although at times Mr. Sable has argued that he could not afford to pay the $154.23 per month, he admitted at trial that he could pay the $154.23, but that he should not have to pay the money because it was improper for the trial court to order him to pay. Based on the evidence in the record on appeal, we conclude the evidence fully supports the trial court's findings of fact and the trial court's conclusion of law that Mr. Sable was in willful contempt of the separation agreement and that he had the ability pay the $154.23 per month.

We also reject Mr. Sable's argument that the trial court's underlying order of specific performance is improper and invalid. "In North Carolina, the law is clear that 'if a [spouse] does not perform his[/her] part of a valid separation agreement, which has not been incorporated into a court order, the [opposing spouse] may obtain from the court a decree of specific performance of the separation agreement which is enforceable through contempt proceedings.'" *General Motors Acceptance Corp. v. Wright*, 154 N.C. App. 672, 676, 573 S.E.2d 226, 228 (2002) (alteration in original)

(citation omitted). As this was a valid unincorporated separation agreement, and Mr. Sable admittedly did not perform his part of the separation agreement, the trial court properly entered an order of contempt against Mr. Sable. We therefore reject Mr. Sable's assignment of error.

Likewise, we reject Mr. Sable's argument the trial court abused its discretion in ordering him to specifically perform the portion of the separation agreement requiring him to make Mrs. Knight the beneficiary trustee of the minor child's $200,000 life insurance benefit because she was not able to provide an accounting of the expenditure of funds from her $145,000 estate. Under the terms of the separation agreement, Mr. Sable is required to maintain a life insurance policy with a value of $200,000, and name the minor child the irrevocable beneficiary with Mrs. Knight as trustee until the minor child is twenty-five years old. There is no requirement in the separation agreement that she must show an accounting of the expenditure of funds from her estate prior to being named beneficiary trustee of the life insurance benefit. Mr. Sable's failure to maintain this life insurance policy is a breach of the separation agreement and the trial court did not abuse its discretion in its order of specific performance of the life insurance provision of the separation agreement. This assignment of error is rejected.

XI.

Mr. Sable next contends that Mrs. Knight's relocation with the minor child to Hertford constitutes a material breach of the

separation agreement's provision as to both the physical and legal custody components of joint custody and that he is entitled to recission of the agreement. A review of the separation agreement reveals that the agreement specifically provides that either party is free to live wherever he or she chooses. Thus, Mrs. Knight's decision to remarry and relocate with her husband is not grounds for recission of the separation agreement. We, therefore, reject this assignment of error.

XII.

In his final argument on appeal, Mr. Sable contends the trial court erred by awarding Mrs. Knight a child-support related monetary judgment. Specifically, he contends Mrs. Knight should be estopped from collecting the disputed amount on grounds that her ratification of his partial performance of the separation agreement constituted a bar to the action. We disagree.

A non-breaching party to a separation agreement may waive enforcement of a provision of that agreement by ratification of the breaching party's partial performance of the contract. *Altman v. Munns*, 82 N.C. App. 102, 106, 345 S.E.2d 419, 422 (1986). However, there is no evidence in record to show that Mrs. Knight waived performance of the additional child support owed. Thus, we uphold the trial court judgment.

Affirmed.

Chief Judge MARTIN and Judge STEPHENS concur.

Report per Rule 30(e).