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NO. COA09-1233

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

KELLY MULL,
Plaintiff,

v.

Buncombe County
04 CVD 5107

SCOTTY MULL,
Defendant.

Appeal by plaintiff from contempt order entered 27 February 2009, and the custody, visitation, and contempt order entered 16 March 2009 by Judge Rebecca B. Knight in Buncombe County District Court. Heard in the Court of Appeals 24 March 2010.

Michael E. Casterline, for plaintiff-appellant.

No brief was submitted for defendant-appellee.

STEELMAN, Judge.

Where the trial court failed to apply the "substantial change in circumstances" test in its 16 March 2009 order modifying the 15 December 2006 Child Support and Visitation Order we vacate and remand the 16 March 2009 order to the trial court for application of the proper legal standard. The trial court also did not make clear whether its finding of contempt was criminal or civil; therefore, we vacate and remand to the trial court for entry of findings of fact setting forth whether the contempt was criminal or civil and the purpose of any sanction or punishment imposed.

I. Factual and Procedural Background

Kelly Hendricks (plaintiff) and Scotty Mull (defendant) were married at one time and had one child, MBM. On 4 December 2004, plaintiff filed a complaint seeking an absolute divorce, custody, child support, equitable distribution, and attorney's fees. Apparently the trial court at some point in time awarded custody of MBM to plaintiff. The parties had difficulty managing and implementing defendant's visitation with MBM in a civilized manner.

On 22 March 2006, the trial court entered an order setting forth very specific times for defendant's visitation, the precise location where the child was to be exchanged at the commencement and termination of visitation, and directing that defendant appear and show cause why he should not be held in contempt for failure to comply with prior orders of the court for payment of child support. On 17 August 2006, the trial court entered another order setting specific times and places for visitation to take place and set the matter for further review on 29 August 2006. On 15 September 2006, the trial court entered an order requiring that a person other than plaintiff drop the child off for visitation. On 15 December 2006, the trial court entered an order reiterating that a third party bring the child to visitation, changing the exchange site, and directing that defendant meet once a month with Dr. Mumpower, a psychologist. The matter was set for further review on 19 February 2007. On that date, the trial court entered an order directing that the file be closed and pending open issues dismissed.

On 13 January 2009, plaintiff filed a motion in the cause asserting that defendant had physically abused the child and requesting that the trial court limit defendant's visitation with the minor child. On 30 January 2009, defendant filed a *pro se* motion for an order to show cause asserting that plaintiff's abuse charges were unfounded and that the criminal charges against him had either been dismissed or he was found not guilty, and that plaintiff had withheld visitation in violation of the previous orders of the trial court. On 27 February 2009, the trial court filed an order holding that plaintiff willfully violated the 15 December 2006 order by withholding visitation with the minor child. The trial court deferred entering an order on punishment for contempt until evaluation of plaintiff's motion to modify visitation. The order required that the child be exchanged at the magistrates's office, and that a third party be present with defendant at all times during visitation.

On 16 March 2009, the trial court entered a detailed order concerning custody and visitation. Plaintiff was found not to be a credible witness on issues involving defendant. The trial court found no credible evidence of physical abuse of the child by defendant. Defendant failed to attend sessions with Dr. Mumpower as ordered by the court. The incessant conflict between the parents was having an adverse effect on the child. Defendant was awarded visitation during the first three weekends of each month, and for the month of July during the summer, and for major holidays in alternate years. The parties were ordered to attend six months

of counseling with Dr. Mumpower. As punishment for contempt of court plaintiff was ordered to pay the court for defendant to attend three sessions of counseling. Plaintiff was directed to take the child to therapy sessions with Dr. Mumpower.

Plaintiff appeals the trial court's orders of 27 February 2009 and 16 March 2009.

II. Modified Custody and Visitation Order

In her first argument, plaintiff contends that the trial court erred in modifying the 15 December 2006 Child Support and Visitation Order on 16 March 2009 without making adequate findings of fact and concluding that there had occurred a substantial change in circumstances. We agree.

N.C. Gen. Stat. § 50-13.7(a) (2009) states that "custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances" Visitation is a "lesser degree of custody" such that "the word 'custody' as used in G.S. 50-13.7 was intended to encompass visitation rights as well as general custody." *Clark v. Clark*, 294 N.C. 554, 575-76, 243 S.E.2d 129, 142 (1978).

Trial courts apply different standards to temporary and final custody orders. *Simmons v. Arriola*, 160 N.C. App. 671, 674, 586 S.E.2d 809, 811 (2003). To modify a temporary custody order, the trial court only needs to apply the "best interest of the child" standard. *Id.* A permanent or final custody order may not be modified without a finding that there has been a substantial change in circumstances affecting the welfare of the child. *Id.* A

custody order is temporary if it "(1) states a 'clear and specific reconvening time' that is reasonably close in proximity to the date of the order; or (2) does not determine all the issues pertinent to the custody or visitation determination." *Id.* at 674-675, 586 S.E.2d at 811.

On 15 December 2006, the trial court entered an order setting forth a specific visitation schedule for defendant to visit with the minor child. The matter was set for review on 19 February 2007. On 19 February 2007, the trial court entered an order directing: "File shall be closed-all issues resolved and any pending open issues dismissed." Based upon the 19 February 2007 order, the 15 December 2006 order was a final order on visitation, and the appropriate standard of review for the trial court in its 16 March 2009 order was a substantial change in circumstances affecting the welfare of the child.

The order of 16 March 2009 applied the "best interests of the child" test rather than the "substantial change in circumstances" test. The order does contain detailed findings of fact which could possibly support the modification ordered by the trial court under a "substantial change in circumstances" theory. However, "[w]hen the order or judgment appealed from was entered under a misapprehension of the applicable law, the judgment, including the findings of fact and conclusions of law on which the judgment was based, will be vacated and the case remanded for further proceedings." *Concerned Citizens v. Holden Beach Enterprises*, 329 N.C. 37, 54-55, 404 S.E.2d 677, 688 (1991) (citing *Davis v. Davis*,

269 N.C. 120, 127, 152 S.E.2d 306, 312 (1967)). The portions of the order of 16 March 2009 making changes in visitation are vacated and remanded to the trial court for application of the correct legal standard.

III. Contempt

In her second argument, plaintiff contends that the trial court erred in holding that the plaintiff was in contempt of court and punishing her for contempt of court. We agree.

Contempt of court may be civil or criminal in nature, but the line of demarcation is "hazy at best." *O'Briant v. O'Briant*, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985) (citation omitted). Defendant's *pro se* motion did not specify whether he was seeking civil or criminal contempt. The orders entered by the trial court do not specify whether the contempt is civil or criminal. Portions of the 27 February 2009 order sound of civil contempt. However both orders talk of "punishment" for contempt, which is unique to criminal contempt proceedings. *Id.* at 434, 329 S.E.2d at 372. The purpose of civil contempt is to compel action rather than punish an action already committed. *Bishop v. Bishop*, 90 N.C. App. 499, 503, 369 S.E.2d 106, 108 (1988) (citations omitted). We are unable to determine whether the trial court intended to impose criminal or civil contempt. The "punishment" imposed was to compel plaintiff to pay for defendant's counseling sessions with Dr. Mumpower. It is not clear how this payment is related to coercing plaintiff to comply with the prior order of the court concerning visitation.

The order of 16 March 2009 as to contempt is vacated and remanded to the trial court for entry of findings of fact and conclusions of law clearly setting forth whether the contempt was civil or criminal, and setting forth the basis and purpose of any sanction or punishment imposed.

Because we have vacated the contempt order, we do not reach plaintiff's third argument. Remaining assignments of error listed in the record but not argued in defendant's brief are deemed abandoned. N.C.R. App. P. 28(b)(6) (2007).

REVERSED and REMANDED.

Judges BRYANT and BEASLEY concur.

Report per Rule 30(e).