

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA09-1385

NORTH CAROLINA COURT OF APPEALS

Filed: 3 August 2010

LAURA H. RAIN TREE,
Plaintiff,

v.

Transylvania County
No. 02 CVD 396

DAVID BRADFORD,
Defendant.

Appeal by plaintiff from order entered 08 June 2009, *nunc pro tunc*, 1 May 2009 by Judge David K. Fox in Transylvania County District Court. Heard in the Court of Appeals 24 March 2010.

Donald H. Barton, for plaintiff-appellant.

Charles W. McKeller, for defendant-appellee.

STEELMAN, Judge.

The trial court did not err when the record contains ample evidence to support the trial court's findings of fact, which in turn support the conclusion that plaintiff was in contempt of court for her willful failure to abide by the terms of the prior orders of the trial court.

I. Factual and Procedural Background

Laura H. Rain Tree (plaintiff) and David Bradford (defendant) were formerly husband and wife, and are the parents of a minor child, born 10 July 2000. On 29 August 2002, plaintiff filed a

complaint seeking custody of the child. An order was entered on 20 October 2003.

On 29 December 2004, plaintiff filed a motion in the cause to modify visitation. On 26 August 2005, the parties entered into a Memorandum of Judgment/Order, resolving plaintiff's motion, which was entered by Judge Powell on 26 August 2005. Pursuant to this Memorandum of Judgment/Order, the previous custody order was amended to reflect plaintiff as the primary custodian of the minor child and defendant as secondary custodian. It also contained the following provisions:

1. The parties to this lawsuit have reached an agreement to settle certain matters as set forth specifically in this memorandum and agree to be legally and mutually bound by the following terms and conditions:

. . . .

2) Neither party shall cohabit with an unrelated party, either by blood or marriage, while the minor child is in their care.

3) Neither party shall have the minor child in a home, apartment, room, house, or occupied space with a person with whom the party has a [r]omantic [r]elationship overnight. "Overnight" is defined as the period of time after 10:00 pm and before 6:00 am the following day.

. . . .

3. The parties stipulate to the following:

(a) With the signing of this Memorandum by the presiding judge, this Memorandum shall become a judgment/order of the court and shall be deemed entered pursuant to Rule 58 of the North Carolina Rules of Civil Procedure on the date filed with the Clerk;

(b) the provisions of this Memorandum are fair and reasonable and each party has had ample opportunity to obtain legal advice concerning the legal effect and terms of this Memorandum;

(c) this Memorandum is enforceable by the contempt powers of the court should any party not comply with its terms[.]

On 2 March 2007, the parties entered into a second handwritten Memorandum of Judgment/Order, which was memorialized in a typewritten order filed on 6 July 2007. The 6 July 2007 Order provided that "[n]either party shall cohabit with an unrelated member of the opposite sex as cohabitation is defined by North Carolina case Laws and/or Statutes." The 6 July 2007 Order contained no provision or reference concerning overnight guests. However, it did contain a provision that "[e]xcept as [m]odified, all prior orders shall remain in full force and effect."

On 23 March 2009, defendant filed a motion that plaintiff be held in contempt for allowing a member of the opposite sex, to whom she was not married, to cohabit or stay overnight during her periods of custody with the minor child. On 9 April 2009, plaintiff filed a response, seeking dismissal of defendant's motion for contempt because the terms of the 6 July 2007 Order "only prohibit cohabitation and not overnights unless they amount to cohabitation."

The trial court entered a order on 8 June 2009, *nunc pro tunc*, 1 May 2009, holding plaintiff in contempt for allowing her boyfriend to stay overnight in the presence of the parties' minor child. The trial court found that the provision prohibiting

overnight guests in the 26 August 2005 Memorandum of Judgment/Order was not "obliterated" by the 6 July 2007 Order because it "requir[ed] those provisions not modified earlier to remain in full force and effect." The trial court concluded that plaintiff was in civil contempt of the prior orders of the court.

Plaintiff appeals.

II. Standard of Review

Our standard of review of orders in contempt proceedings is limited to whether competent evidence supports the findings of fact and whether those findings of fact support the conclusions of law. *Eakes v. Eakes*, 194 N.C. App. 303, 310, 669 S.E.2d 891, 896 (2008); *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997). "Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment." *Hartsell v. Hartsell*, 99 N.C. App. 380, 385, 393 S.E.2d 570, 573 (1990) (citing *Mauney v. Mauney*, 268 N.C. 254, 257, 150 S.E.2d 391, 394 (1966)), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991). "North Carolina's appellate courts are deferential to trial courts in reviewing their findings of fact." *Harrison v. Harrison*, 180 N.C. App. 452, 454, 637 S.E.2d 284, 286 (2006).

III. Contempt

In her only argument, plaintiff contends that the trial court erred by holding her to be in contempt. We disagree.

N.C. Gen. Stat. § 5A-21(a) states that failure to comply with a court order constitutes civil contempt so 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.

N.C. Gen. Stat. § 5A-21(a) (2009). "Willfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so." *Sowers v. Toliver*, 150 N.C. App. 114, 118, 562 S.E.2d 593, 596 (2002) (citing *Bennett v. Bennett*, 21 N.C. App. 390, 393, 204 S.E.2d 554, 556 (1974)).

A. Findings of Fact

Plaintiff first argues that the evidence did not support the trial court's findings of fact 6, 8, 9, 10, and 11.

Plaintiff assigned error to findings of fact 6, 8, and 9; however, her brief failed to argue that they are not supported by competent evidence. Therefore, these findings are binding on appeal. N.C. R. App. P. 28(b)(6) (2009); *Eakes*, 194 N.C. App. at 310, 669 S.E.2d at 896. As to findings of fact 10 and 11, plaintiff challenges them as unsupported by the evidence, and also contends that the findings fail to support the trial court's conclusion that she was in willful contempt. Findings of fact 10 and 11 read as follows:

10. That the failure to follow the prohibition on overnight guests of the opposite sex . . . is a willful and contemptuous act by the Plaintiff.

11. That the Plaintiff, at all times relevant to this proceeding, had the requisite means and ability to comply with the provisions of these orders herein and was without legal justification or excuse for her failure to comply.

There is competent evidence in the record to support each of these findings of fact. Paragraph seven (7) of the 6 July 2007 Order "requir[ing] those provisions not modified . . . to remain in full force and effect" preserved the prohibition against overnight guests of the opposite sex contained in the 26 August 2005 Memorandum of Judgment/Order. Plaintiff testified that her boyfriend was an overnight guest several nights per week in the presence of the parties' minor child. Plaintiff's failure to follow the provision against overnight guests of the opposite sex was a "willful and contemptuous act." The trial court further found that plaintiff had the ability to comply with the provisions of these orders and "was without legal justification or excuse for her failure to comply." Based on these findings, the trial court concluded that plaintiff was in willful civil contempt of the prior orders of the court.

The trial court's findings of fact were supported by competent evidence, which in turn support its conclusion that plaintiff was in willful contempt.

This argument is without merit.

B. Willfulness

Plaintiff next argues that the court erred in finding her in willful civil contempt. We disagree.

Plaintiff does not contest that her boyfriend was an overnight guest several nights per week in her home in the presence of the minor child. Rather, plaintiff argues that the trial court erred in holding her in willful civil contempt because the no overnight guest clause of the 26 August 2005 Memorandum of Judgment/Order was superceded by the 6 July 2007 Order, which only prohibited cohabitation. Plaintiff contended that she relied on this interpretation and believed her actions were in compliance with the 6 July 2007 Order.

Plaintiff's erroneous interpretation of the 6 July 2007 Order is not binding upon the trial court. *Potter v. Hilemn Labs., Inc.*, 150 N.C. App. 326, 333-34, 564 S.E.2d 259, 264 (2002). In *Potter*, this Court held that the mistaken belief that an action conforms with a prior consent order does not negate the willfulness of the violation. *Id.* (noting that evidence supported the trial court's conclusion that a competitor willfully violated a prior consent order, even though he mistakenly believed that use of the substance was allowed).

Citing this Court in *Campan v. Featherstone*, plaintiff argues that for disobedience of a court order to be willful, "[competent] evidence must show that the person was guilty of 'knowledge and stubborn resistance.'" 150 N.C. App. 692, 695, 564 S.E.2d 616, 618 (quoting *McKillop v. Onslow County*, 139 N.C. App. 53, 61-62, 532 S.E.2d 594, 600 (2000)), *appeal dismissed and disc. review denied*,

356 N.C. 297, 570 S.E.2d 504 (2002). In *Campen*, an order granting defendant visitation was subsequently modified in an *ex parte* order, that revoked those privileges. *Id.* at 693-94, 564 S.E.2d at 617. The trial court refused to hold plaintiff in contempt because her failure to comply was not willful given her reliance on the *ex parte* order terminating those privileges. *Id.* at 694, 564 S.E.2d at 617-18. On appeal, this Court held that plaintiff could not be held in contempt because she was "entitled to rely on the plain terms of a court order until such provisions are modified by the court." *Id.* at 696, 564 S.E.2d at 619 (quoting *Turman v. Boleman*, 235 Ga. App. 243, 245, 510 S.E.2d 532, 534 (1998)).

The instant case is distinguishable from *Campen*. The 6 July 2007 Order, by its explicit terms, did not modify the "overnight guests" clause. In *Campen*, the 1993 *ex parte* order explicitly stated that the "prior orders affording the defendant visitation . . . [are] hereby modified." *Campen*, 150 N.C. App. at 694, 564 S.E.2d at 617.

In its contempt order, the trial court found that the overnight guests provision in the 26 August 2005 Memorandum of Judgment/Order was not "obliterated" by the 6 July 2007 Order because "the later order contain[ed] a provision which specifically requir[ed] those provisions not modified earlier to remain in full force and effect." The 26 August 2005 Memorandum of Judgment became an order of the court once signed by the presiding judge and enforceable by contempt should either party fail to comply with its terms. *Henderson v. Henderson*, 307 N.C. 401, 406-07, 298 S.E.2d

345, 349-50 (1983). Because the 6 July 2007 Order did not strike or discuss the overnight guests clause, the prohibition of the parties entertaining overnight guests of the opposite sex while in the presence of the parties' minor child remained in effect.

The record contains competent evidence to support the trial court's findings of fact, which in turn support its conclusion that plaintiff was in willful civil contempt by failing to comply with the prohibition against overnight guests of the opposite sex.

This argument is without merit.

AFFIRMED.

Judges BRYANT and BEASLEY concur.

Report per Rule 30(e).