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NO. COA 13-109  
NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2013

COUNTY OF DURHAM, by and  
through, DURHAM DSS, ex rel:  
AUGUST M. CLARK WOOD,  
Plaintiff,

v.

Durham County  
No. 92 CVD 5241

EDGAR ARTHUR ORR, JR.,  
Defendant.

Appeal by defendant from order entered 4 September 2012 by Judge Doretta L. Walker in Durham County District Court. Heard in the Court of Appeals 4 June 2013.

*No brief was submitted for plaintiff-appellee.*

*Mary McCullers Reece for defendant-appellant.*

HUNTER, JR., Robert N., Judge.

Edgar Arthur Orr, Jr. ("Defendant") appeals from an order holding him in contempt for failure to pay child support. On appeal, Defendant argues the trial court erred in holding him in contempt because he lacks the present ability to comply with the child support order. Upon review, we reverse.

### **I. Facts & Procedural History**

Defendant has two children: Anna and Barbara.<sup>1</sup> At the time of the instant contempt hearing, Anna was thirteen and Barbara was twenty-one. On 8 December 1992, Defendant entered into a voluntary child support agreement (the "Child Support Agreement") with Barbara's mother in Durham County District Court. Under the terms of the Child Support Agreement, starting 1 January 1993 Defendant would pay Barbara's mother \$125.00 each month until Barbara turned eighteen. Defendant failed to meet his child support obligations. However, he has tried to pay \$10.00 per month toward child support. As of 2 July 2012, his arrears totaled \$13,872.33.

Defendant currently lives with his fiancé and Anna. He has not worked for the past seven years due to ruptured discs in his back and a cyst on his spine. Starting in 2011, Defendant began receiving \$430 per month in supplemental security income ("SSI"). He has no other income and spends his entire monthly SSI payments on rent. Defendant's fiancé has no income and receives food stamps. She uses her food stamps to purchase food for Defendant and Anna.

In March 2011, Defendant received a lump SSI back payment of approximately \$2,900. Defendant used the \$2,900 to pay personal debts.

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<sup>1</sup> "Anna" and "Barbara" are pseudonyms used to protect privacy.

On 2 July 2012, Durham County filed a show cause motion against Defendant in Durham County District Court. In the motion, it alleged Defendant willfully failed to pay child support to Barbara's mother. That same day, the district court issued an order for Defendant to show cause as to why he was not in contempt for violating the Child Support Agreement.

On 4 September 2012, Defendant attended a contempt hearing in Durham County District Court. Based on Defendant's testimony, the district court determined he had the present ability to pay child support. The district court reasoned that Defendant "got a big old check and he couldn't give the baby \$10 then." It further explained that Defendant "has an ability to pay because he receives a paycheck that's enough to house three people, but yet when he get's [sic] some money, he doesn't pay anything towards the money he owes for this child."<sup>2</sup> As a result, the district court held Defendant in contempt for failing to abide by the Child Support Agreement.

In its 4 September 2012 contempt order, the district court ordered Defendant imprisoned for 90 days, but suspended the term based on several conditions. Specifically, the district court required Defendant to: (i) pay \$30.00 per month in child support for the next three months; (ii) pay \$70.00 per month for the

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<sup>2</sup> Barbara is the "baby" and "child" referenced by the district court. At the time of the hearing, Barbara was twenty-one years old.

four months following that; and then (iii) pay \$125.00 per month until all arrears are satisfied.

Defendant paid \$10.75 toward his child support arrears immediately following the contempt hearing. Defendant filed timely notice of appeal on 26 September 2012.

## II. Jurisdiction and Standard of Review

This Court has jurisdiction to hear the instant case pursuant to N.C. Gen. Stat. § 7A-27(c) (2011).

In contempt proceedings, the standard of review

is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. 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.

*Watson v. Watson*, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007) (quotation marks and citations omitted).

"Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011); see also *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) ("Conclusions of law drawn by the trial court from its findings of fact are reviewable de novo on appeal."). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal."

*State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

### III. Analysis

On appeal, Defendant argues the trial court erred by holding him in contempt when he lacks the present ability to pay child support. We agree.

In North Carolina, courts may hold parties in civil contempt if: (i) an order remains in force; (ii) the order's purpose may still be served through the party's compliance; (iii) the party's non-compliance with the order is willful; and (iv) the party has the present ability to comply with the order. N.C. Gen. Stat. § 5A-21 (2011). As to the last requirement, this Court has clarified that:

[c]ivil contempt is designed to coerce compliance with a court order, and a party's ability to satisfy that order is essential. Because civil contempt is based on a willful violation of a lawful court order, a person does not act willfully if compliance is out of his or her power. Willfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so. Ability to comply has been interpreted as not only the present means to comply, but also the ability to take reasonable measures to comply. A general finding of present ability to comply is sufficient when there is evidence in the record regarding defendant's assets.

*Watson*, 187 N.C. App. at 66, 652 S.E.2d at 318 (quotation marks and citations omitted).

When analyzing parties' present ability to make payments, trial courts must examine the parties' "assets and liabilities and [their] ability to pay and work." *Vaughan v. Vaughan*, 213 N.C. 189, 193, 195 S.E. 351, 353 (1938). For instance, trial courts may look at income, housing expenses, and outstanding debts. *Graham v. Graham*, 77 N.C. App. 422, 424-25, 335 S.E.2d 210, 212 (1985). Trial courts should also consider expenses incurred from raising minor children. *Fuchs v. Fuchs*, 260 N.C. 635, 640, 133 S.E.2d 487, 492 (1963). Additionally, trial courts may examine whether the party could have taken reasonable measures to comply with the order, such as seeking employment or liquidating existing assets. *Watson*, 187 N.C. App. at 66, 652 S.E.2d at 318.

The framework for initially calculating child support obligations gives us non-binding guidance in determining parties' present ability to pay child support. First, when trial courts calculate child support, N.C. Gen. Stat. § 50-13.4(c1) requires them to give "due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case." N.C. Gen. Stat. § 50-13.4(c1) (2011). Furthermore, the North Carolina

Child Support Guidelines explicitly address SSI payments: "Specifically excluded from income are benefits received from means-tested public assistance programs, including but not limited to . . . Supplemental Security Income (SSI)." Conference of Chief District Judges, *North Carolina Child Support Guidelines* 3 (2011), available at <http://www.nccourts.org/forms/documents/1226.pdf>. Because trial courts do not consider SSI payments for initial child support calculations, we decline to consider SSI payments in related contempt proceedings.

In the present case, Defendant argues the trial court erred by holding him in contempt when he lacks the present ability to pay. We agree.

In its factual findings, the district court noted that Defendant is unemployed. See *In re J.M.W.*, 179 N.C. App. 788, 792, 635 S.E.2d 916, 919 (2006) ("If unchallenged on appeal, findings of fact are deemed supported by competent evidence and are binding upon this Court." (quotation marks and citation omitted)). The only current income the district court listed in its factual findings was Defendant's \$430 monthly SSI payment. See *id.* Later, in its factual finding about Defendant's present ability to pay, the district court summarily stated, "Defendant is contributing to current household expenses and received [a] SSI lump sum."

Based on these factual findings, the district court concluded as a matter of law that Defendant "should be held in civil contempt" because he has "the present ability to comply with the order or to take reasonable measures to comply with the Order." At the hearing, the district court judge explained her rationale: "[H]e tells me he got a big old check and he couldn't give the baby \$10.00 then. . . . [H]e has an ability to pay because he receives a paycheck that's enough to house three people, but yet when he get's [sic] some money, he doesn't pay anything towards the money he owes for this child."

Upon *de novo* review, we determine the district court erred in its legal conclusion that Defendant had the present ability to pay. First, the district court did not appropriately consider Defendant's existing assets or income. See *Vaughan*, 213 N.C. at 193, 195 S.E. at 353; *Graham*, 77 N.C. App. at 424-25, 335 S.E.2d at 212. For instance, although Defendant received a \$2,900 lump SSI back payment in March 2011, he testified he spent the entire sum on pre-existing debts. The district court did not list any other assets to support its contempt determination. Additionally, the only income the district court listed was Defendant's \$430 monthly SSI payment. However, when trial courts exclude SSI payments from initial child support calculations, we believe the district court erred



by holding Defendant in contempt when his current income consists entirely of monthly SSI payments.

Furthermore, the trial court did not appropriately consider Defendant's expenses, including rent and the costs of raising his minor daughter Anna. *See Fuchs*, 260 N.C. at 640, 133 S.E.2d at 492. Specifically, the district court acknowledged that Defendant uses his entire monthly SSI payment to "contribut[e] to current household expenses," but still held him in contempt. When a defendant uses his entire monthly SSI payments on apartment rent for himself and his minor daughter, we hold that he is in fact contributing to the costs of raising the child and he lacks the present ability to pay as required by law.

Lastly, since the district court did not find Defendant has any other assets or the ability to seek employment, he could not have taken reasonable measures to comply with the Child Support Agreement. *See Watson*, 187 N.C. App. at 66, 652 S.E.2d at 318; *Vaughan*, 213 N.C. at 193, 195 S.E. at 353. Consequently, we conclude the trial court erred by holding Defendant in contempt because he lacks the present ability to comply with the Child Support Agreement.

#### **IV. Conclusion**

For the foregoing reasons, the district court's contempt order is

REVERSED.

Chief Judge MARTIN and Judge ELMORE concur.

Report per Rule 30(e).