NO. COA13-611
NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2013

CAROL S. MACMILLAN,
Plaintiff,

v. Forsyth County
No. 85 CVD 351

BRYAN THOMPSON, Public Administrator of the Estate of Jerrold MacMillan, and MARY MACMILLAN,
Defendants.

Appeal by defendant Mary MacMillan from order entered 4 February 2013 by Judge Camille Banks-Payne in Forsyth County District Court. Heard in the Court of Appeals 21 October 2013.

Craige Brawley Liipfert & Walker LLP, by William W. Walker, for plaintiff-appellee.

Jones Law PLLC, by Brian E. Jones, for defendant-appellant Mary MacMillan.

Surratt & Thompson, PLLC, by Bryan C. Thompson, for defendant-appellee Bryan Thompson, Public Administrator of the Estate of Jerrold MacMillan.

MARTIN, Chief Judge.

Defendant Mary MacMillan ("Mary") appeals from the trial court's order granting plaintiff Carol S. MacMillan's ("Carol")

motion, which requested that the court impose a constructive trust on funds received by Mary as a result of the death of Mary's husband——and Carol's ex-husband——Jerrold MacMillan. For the reasons stated herein, we vacate the trial court's order.

Jerrold MacMillan ("Jerrold") and Carol were married in 1955, entered into a separation agreement in 1974, and were divorced in 1985, all in the Commonwealth of Massachusetts. In March 1985, while Jerrold was living in Winston-Salem, North Carolina, Carol registered the parties' 1974 Massachusetts separation agreement——which awarded alimony, child support, and other support to Carol——as a foreign support order in Forsyth County. Then, in September 1985, after the parties "reached a settlement agreement on all disputed issues," presumably arising out of the 1974 separation agreement that had been registered as a foreign support order earlier that year, the district court in Forsyth County entered a consent judgment that both incorporated and modified the terms of the parties' separation agreement. Among the terms modified and brought forward into the consent judgment was one providing that Jerrold would "provide in his last will and testament, through insurance, or, if [Jerrold] dies intestate and without insurance, by hereby recognizing that [Carol] has a valid claim against [Jerrold's] estate for the payment of $18,000.00 to [Carol] upon [Jerrold's] death." The

consent judgment further provided that "[t]his obligation . . . is intended, if necessary, to apply to any and all of [Jerrold's] property, however held," and that, "[u]pon reasonable request by [Carol], [Jerrold] will from time to time furnish [Carol] proof that he is in compliance with this obligation." In accordance with this consent judgment, Jerrold's will devised $18,000.00 to Carol "pursuant to that certain Consent Order of September 4, 1985 in the District Court of Forsyth County, North Carolina."

When Jerrold died in May 2010, he was survived by his second wife, Mary. At the time of his death, the only asset in Jerrold's estate was one-half of a bank account he jointly owned with Mary, which was valued at $7,551.74. Upon Mary's application, those funds were distributed to Mary as a portion of the $20,000.00 year's allowance to which she was entitled as Jerrold's surviving spouse pursuant to N.C.G.S. § 30-15; the remaining $12,448.26 of the year's allowance to which Mary was entitled was entered as a deficiency judgment against the estate. Mary also received $35,000.00 from four separate life insurance policies belonging to Jerrold at the time of his death, for which Mary was the beneficiary.

On 1 February 2011——almost twenty-six years since both the registration of Jerrold and Carol's 1974 separation agreement as

a foreign support order in Forsyth County and the entry of the trial court's 1985 consent judgment——Carol filed a "Motion to Substitute Party; Motion in the Cause; and Motion for Joinder of Party" ("Motion in the Cause"). In this Motion in the Cause, Carol sought to substitute Bryan C. Thompson ("Mr. Thompson"), Public Administrator of the Estate of Jerrold MacMillan, for Jerrold as a party defendant in the action that gave rise to both the separation agreement and the consent judgment, sought to join Mary as a defendant in the same action, and requested that the court impose a constructive trust upon Mary and order her to pay $18,000.00[1] to Carol from the proceeds of Jerrold's life insurance policies and other assets in accordance with the provisions directing Jerrold to do the same in the consent judgment and in Jerrold's will.

In May 2011, the trial court entered an order that substituted Mr. Thompson for Jerrold as a defendant "in this action," concluded that the court had personal jurisdiction over

[1] In her Motion in the Cause, Carol originally requested that the trial court impose a constructive trust upon Mary in the amount of $38,000.00 based on (1) the specific gift of $18,000.00 to Carol in Jerrold's will, which was also a term of the parties' 1985 consent judgment, and (2) an additional gift of $20,000.00, which was among the terms of Jerrold and Carol's original 1974 separation agreement. Because the record before us indicates that Carol conceded at a subsequent hearing that the consent judgment modified the terms of the 1974 separation agreement and that she is only entitled to the $18,000.00 referenced in both the consent judgment and in Jerrold's will, we limit our recitation of the facts to account for this amount only.

Mary and overruled Mary's motion challenging the same, and joined Mary as a defendant "in this action" and ordered that Carol should serve Mary with "a copy of the Notice of Registration of Foreign Support Order, the Massachusetts Divorce Judgment and the incorporated Separation Agreement, a copy of the 1985 Consent Judgment, and [Carol's Motion in the Cause.]" Mary then moved to dismiss Carol's Motion in the Cause on grounds enumerated in N.C.G.S. § 1A-1, Rules 12(b)(1), (b)(2), (b)(4), (b)(5), and (b)(6). In July 2011, the court allowed Mary's motion to dismiss Carol's Motion in the Cause with prejudice on the grounds that such motion failed to state a claim upon which relief could be granted. Carol gave notice of appeal to this Court from the trial court's July 2011 order.

In *MacMillan v. MacMillan* (*MacMillan I*), __ N.C. App. __, 723 S.E.2d 173 (2012) (unpublished), this Court considered whether the trial court erred by dismissing Carol's Motion in the Cause on the grounds that such motion failed to state a claim upon which relief could be granted. *MacMillan I*, __ N.C. App. __, 723 S.E.2d 173, slip op. at 4. After analyzing the purpose of a constructive trust, this Court stated the following:

> Here, [Carol's] pleading alleges 1) that pursuant to two court orders Jerrold was to provide the sum of $38,000.00 to [Carol] through his last will and testament, 2) that

> according to those court orders any of Jerrold's assets, including insurance policies, could be used to pay the sum owed, 3) that at the time of his death, Jerrold's probate estate possessed insufficient funds to pay [Carol], 4) that also at the time of his death Jerrold owned three life insurance policies totaling $25,000.00, and an accidental death policy of unknown value, 5) that the proceeds of those policies were paid to Jerrold's widow, [Mary], and 6) that Jerrold willfully and intentionally violated two court orders by failing to designate his existing assets to [Carol] at the time of his death.

Id. at 5. This Court continued that it was "clear from her pleading" that Carol adequately alleged that the property at issue entered Mary's possession "because Jerrold breached his duty under the terms of the separation agreement and consent judgment," and, thus, "adequately state[d] a claim for unjust enrichment and the imposition of a constructive trust." *Id.* at 6. Accordingly, this Court reversed the trial court's dismissal of Carol's Motion in the Cause. *Id.*

The parties then both moved for summary judgment, which motions were denied on 10 December 2012. On 4 February 2013, the trial court entered an order granting Carol's Motion in the Cause. In its order, the trial court concluded that it had jurisdiction over the subject matter, as well as over the persons of Carol, Mary, and Mr. Thompson. The court also concluded that "Mary was aware of Jerrold's obligations" to

Carol in the consent judgment, that Jerrold "willfully and intentionally violated" the consent judgment "by failing to designate $18,000.00 of his existing assets to Carol at the time of his death," and that Mary was "unjustly enriched" by Jerrold's failure to comply with the consent judgment. The court then imposed a constructive trust on the funds received by Mary as a result of Jerrold's death. Mary appealed.

Mary first contends the trial court erred by denying her motion for summary judgment, which order was entered two months prior to the court's final order granting Carol's Motion in the Cause. However, we cannot consider Mary's arguments with respect to the order denying her motion for summary judgment, because the notice of appeal in the record before us only designates that Mary seeks to appeal from the court's 4 February 2013 order granting Carol's Motion in the Cause, and does not include any reference to the court's 10 December 2012 order denying the parties' motions for summary judgment. Since Rule 3 of the North Carolina Rules of Appellate Procedure provides that the notice of appeal "shall designate the judgment or order from which appeal is taken," N.C.R. App. P. 3(d), and since "[w]ithout proper notice of appeal [in accordance with Appellate Rule 3], this Court acquires no jurisdiction," *Von Ramm v. Von*

Ramm, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990) (internal quotation marks omitted), we are without jurisdiction to review the trial court's denial of Mary's motion for summary judgment.

Moreover, even if Mary had properly identified the court's interlocutory order denying the parties' motions for summary judgment in the notice of appeal in the record before us, we would still decline to review such an order, since "[i]mproper denial of a motion for summary judgment is not reversible error when the case has proceeded to trial and has been determined on the merits by the trier of the facts, either judge or jury," *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985), as is true of the record in the present case. *See id.* ("The purpose of summary judgment is to bring litigation to an early decision on the merits without the delay and expense of a trial when no material facts are at issue. After there has been a trial, this purpose cannot be served. . . . [Thus,] the denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits." (citations omitted)). Accordingly, we decline to address this issue on appeal further.

Mary next contends the trial court erred when it concluded that it had subject matter jurisdiction over this action. After

careful review, we agree.

"A universal principle as old as the law is that the proceedings of a court without jurisdiction of the subject matter are a nullity." *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964). "If a court finds at any stage of the proceedings it is without jurisdiction, it is its duty to take notice of the defect and stay, quash or dismiss the suit." *Id.*

"[O]ur Supreme Court [has] fashioned a 'one-size fits all' rule applicable to incorporated settlement agreements in the area of domestic law," *Fucito v. Francis*, 175 N.C. App. 144, 148, 622 S.E.2d 660, 663 (2005), which provides that "[a]ll separation agreements approved by the court as judgments of the court [after 11 January 1983] will be treated . . . as court ordered judgments." *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983). As such, "[t]hese court ordered separation agreements, as consent judgments, are modifiable, and enforceable by the contempt powers of the court, in the same manner as any other judgment in a domestic relations case," *id.*, and the parties to such judgments "do *not* have an election to enforce such judgment by contempt or to proceed in an independent action in contract." *Doub v. Doub*, 313 N.C. 169, 171, 326 S.E.2d 259, 260–61 (1985) (per curiam).

"Civil contempt is based upon acts or neglect constituting a *willful* violation of a lawful order of the court." *Henderson v. Henderson*, 307 N.C. 401, 408, 298 S.E.2d 345, 350 (1983). "The purpose of civil contempt is . . . to use the court's power to impose fines or imprisonment as a method of coercing the defendant to comply with an order of the court." *Jolly v. Wright*, 300 N.C. 83, 92, 265 S.E.2d 135, 142 (1980), *overruled on other grounds by McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993); *see id.* ("[C]ivil contempt is not a form of punishment; rather, it is a civil remedy to be utilized exclusively to enforce compliance with court orders."). In order to hold a defendant in civil contempt, the trial court must find facts in accordance with the elements identified in N.C.G.S. § 5A-21(a), including that "[t]he noncompliance by the person to whom the order is directed is willful," and that "[t]he 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) (2011). In other words, "'the court must find not only failure to comply but [must also find] 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, 258, 150 S.E.2d 391, 394

(1966)); *see Adkins v. Adkins*, 82 N.C. App. 289, 293, 346 S.E.2d 220, 222 (1986) ("[Because t]he purpose of civil contempt is to coerce compliance with a court order[,] . . . present ability or means to satisfy that order is essential."). Additionally, "[c]ivil contempt proceedings are initiated by a party interested in enforcing the order by filing a motion in the cause." *Plott v. Plott*, 74 N.C. App. 82, 85, 327 S.E.2d 273, 275 (1985).

In the present case, Carol asserts in her brief that, in order "[t]o obtain relief, [she] was required to file a show cause/contempt motion in the District Court in this action," and that a "violation of a consent order must be addressed under the contempt powers of the trial court in the original action." Accordingly, Carol asserts that she properly sought to enforce the terms of the 1985 consent judgment entered by the court, which incorporated and modified the parties' 1974 separation agreement, in her February 2011 Motion in the Cause. Then, in her Motion in the Cause, Carol alleged the following: Jerrold "had the ability to cause [Carol] to be paid at his death, but willfully failed to do so"; Jerrold "willfully failed to abide by the terms of the Court's [consent judgment]" by "failing to ensure that sufficient funds existed in his estate to pay the judicially ordered bequest of $18,000" and "by failing to

provide for other means of payment to [Carol] of assets" for the same; and Jerrold's "gross estate has sufficient assets to enable it to comply with the [consent judgment]" and "assets belonging to [Jerrold] in whatever form, manner or title, could have been used to pay [Carol] in fulfillment of [Jerrold's] legal obligations." Thus, in her Motion in the Cause, Carol alleged facts that would be necessary to support a claim of civil contempt against Jerrold and, based on the record before us, it appears that Carol intended for her Motion in the Cause to initiate a civil contempt action against Jerrold; an action that was first commenced only after Jerrold's death.

It has been long recognized that "[t]he strictly coercive nature of civil contempt is often illustrated by invoking the image of the imprisoned defendant, who by virtue of his ability to comply with the court order, carries the keys of [his] prison in [his] own pocket," *Jolly*, 300 N.C. at 92, 265 S.E.2d at 142 (alterations in original) (internal quotation marks omitted), and that civil contempt is a civil remedy intended to be used to coerce compliance in one who has a "*present* ability or means to satisfy" the judgment at issue. *See Adkins*, 82 N.C. App. at 293, 346 S.E.2d at 222 (emphasis added). Perhaps because one who is deceased has no present ability or means to satisfy a consent judgment and cannot be coerced to do the same, we can

find no authority indicating that a party may bring a civil contempt action through a motion in the cause to enforce a consent judgment entered upon a separation agreement in a domestic relations case where the person against whom the contempt action is brought is deceased at the time that the contempt action is first filed. Consequently, we find no authority that would permit the trial court to consider Carol's action for civil contempt against Jerrold, when such action was first brought after Jerrold was deceased and when he could no longer be coerced to comply with the court's 1985 consent judgment. Therefore, we hold that the trial court erred when it concluded that it had jurisdiction over the subject matter of Carol's motion and, thus, we vacate the trial court's order granting Carol's Motion in the Cause.

Finally, we note that, as we recognized above, we are aware of the rule from *Walters* directing that a party must enforce a consent judgment entered upon a separation agreement in a domestic relations case only by a civil contempt action and not by an independent action. *See Walters*, 307 N.C. at 386, 298 S.E.2d at 342. However, Mary was not a party to Jerrold and Carol's divorce action in the foreign jurisdiction, was not a party to the 1974 separation agreement arising from Jerrold and Carol's divorce action, and was not the person against whom the

1985 consent judgment at issue was directed. Thus, while it appears that the rule from *Walters* would be inapplicable to any action that Carol could properly bring against Mary, we decline to further address whether Carol could have brought a separate, independent action against Mary that alleged the claim for unjust enrichment and requested the imposition of the constructive trust against Mary that was discussed and approved of by this Court in *MacMillan I*.

Our disposition on this issue renders it unnecessary to address Mary's remaining issues on appeal and we decline to do so.

Vacated.

Judges STEELMAN and DILLON concur.

Report per Rule 30(e).