NO. COA14-235
NORTH CAROLINA COURT OF APPEALS

Filed: 2 December 2014

TAMECIA D. KEY,

Plaintiff

v. Wake County
No. 08 CVD 9430

MARK A. KEY,

Defendant

Appeal by Defendant from an order entered 6 September 2013 by Judge Michael Denning in Wake County District Court. Heard in the Court of Appeals 27 August 2014.

Laura C. Brennan, PLLC, for Plaintiff-Appellee.

Mark A. Key, pro se, for Defendant-Appellant.

DILLON, Judge.

Mark A. Key ("Defendant") appeals from an order holding him in contempt of two orders entered in 2009 following the dissolution of his marriage with Tamecia D. Key ("Plaintiff").

I. Background

Defendant was married to Plaintiff from 1995 to 2008. They had two children together. On 6 January 2009, the district

court entered an order (the "Support Order") regarding child support and post-separation support, directing Defendant to pay monthly temporary child support and to pay half of the children's unreimbursed medical expenses.

On 21 September 2009, the district court entered an equitable distribution order (the "ED Order") with the parties' consent. In this order, the trial court awarded the marital residence to Defendant, but ordered him (1) to *either* refinance the residence with new mortgages in his name, paying out the existing mortgages that were in Plaintiff's name *or* to cooperate with Plaintiff to list the residence for sale, and (2) to maintain the residence in a marketable condition.

In early 2012, Plaintiff filed two motions alleging that Defendant was in contempt of both the Support Order and the ED Order. On 16 May 2013, a hearing was held on these motions.

On 6 September 2013, the district court entered an order (1) holding Defendant in contempt of the Support Order for failing to make certain child support payments on time; (2) ordering Defendant to reimburse Plaintiff for a portion of certain unreimbursed medical expenses incurred by their children; (3) holding Defendant in contempt of the ED Order for failing to perform his obligations concerning the marital

residence; and (4) ordering Defendant to pay Plaintiff's attorneys' fees.

Defendant appeals from the order, making four arguments. We address each argument in turn.

II. Analysis

A. Support Order--Child Support

In his first argument, Defendant contends that the district court erroneously found him in contempt of the Support Order for willfully failing to make child support payments when due. For the reasons stated below, we dismiss Defendant's appeal of this portion of the order.

The district court decreed as follows:

> Defendant is in civil contempt of the [Support Order] for failure to pay his ordered child support in full and on time as set forth above. Defendant is censured.

Defendant argues that the trial court actually found him to be in "criminal" contempt, notwithstanding its characterization of the contempt as being "civil" in nature. We agree.

"[T]he trial judge's characterization of the form of contempt is not conclusive[.]" *State v. Mauney*, 106 N.C. App. 26, 30, 415 S.E.2d 208, 210 (1992). Instead, whether contempt is civil or criminal depends ultimately on the "character of

[the] relief[.]" *Bishop v. Bishop*, 90 N.C. App. 499, 504, 369 S.E.2d 106, 108 (1988).

The difference between civil and criminal contempt is based on the purpose for which the court exercises its authority. *Blue Jeans Corp. v. Amalgamated Clothing Workers of Am.*, 275 N.C. 503, 507-08, 169 S.E.2d 867, 869 (1969). The nature of contempt is criminal where the court's purpose is to punish disobedience of court orders. *Id.* at 508, 169 S.E.2d at 869. By contrast, the nature of contempt is civil where the court's "purpose is to provide a remedy for an injured suitor and to coerce compliance with an order[.]" *Id.*

The willful refusal to pay child support can constitute grounds for either civil or criminal contempt. An adjudication of civil contempt is appropriate to coerce a parent to make a child support payment that is past due where the parent's delinquency is willful. *See McMiller v. McMiller*, 77 N.C. App. 808, 809, 336 S.E.2d 134, 135 (1985). A civil contempt order must prescribe the method by which the parent may purge themselves of the contempt, N.C. Gen. Stat. § 5A-22(a) (2013), or the order is fatally defective. *Bethea v. McDonald*, 70 N.C. App. 566, 570, 320 S.E.2d 690, 693 (1984). A court loses its authority to enter an order finding a parent in *civil* contempt

for failure to make required child support payments if the delinquent parent catches up on all payments prior to the order being entered, even if those payments were made after the motion for contempt was filed and the hearing on the matter was held. *See Ruth v. Ruth*, 158 N.C. App. 123, 126, 579 S.E.2d 909, 912 (2003).

An adjudication of criminal contempt is criminal in nature, *see Blue Jeans Corp.*, 275 N.C. at 508, 169 S.E.2d at 870, and is appropriate to punish a parent for refusing to obey the orders of the court by willfully making a child support payment after the date it was due. *See Bethea*, 70 N.C. App. at 570, 320 S.E.2d at 693.

In the present case, the district court found that Defendant had been delinquent in making support payments on a number of occasions and that, at the time of the hearing on 16 May 2013, Defendant was then currently past due on one payment. However, the trial court did not make any finding that Defendant was delinquent *at the time the order was entered* in September 2013; and, further, the trial court did not provide any conditions by which Defendant could purge himself of the contempt. Rather, the relief provided by the district court was to "censure" Defendant. Censure, however, is a punishment for

criminal contempt. N.C. Gen. Stat. § 5A-12 (2013). The district court's imposition of a criminal punishment and its exclusion of any finding that Defendant was delinquent at the time of the order's entry and of a purge provision lead us to conclude that the court mistakenly labeled the contempt "civil" rather than "criminal."

In light of our determination that the district court found Defendant in criminal rather than civil contempt, we must conclude that, pursuant to N.C. Gen. Stat. § 5A-17(a) (2013), we have no jurisdiction to review this aspect of Defendant's appeal. Rather, the superior court has exclusive jurisdiction to hear the appeal of an adjudication of criminal contempt by the district court. *Michael v. Michael*, 77 N.C. App. 841, 842-43, 336 S.E.2d 414, 415 (1985), *disc. review denied*, 316 N.C. 195, 341 S.E.2d 577 (1986). Accordingly, we dismiss this portion of Defendant's appeal.

B. Support Order--Medical Expenses

In his second argument, Defendant contends that the district court erroneously determined that, under the terms of the Support Order, he was required to reimburse Plaintiff

$1,604.75 for certain medical expenses incurred by their children. We disagree and affirm this portion of the order.[1]

In the Support Order, the district court decreed that Defendant pay one-half of his children's unreimbursed medical expenses after Plaintiff pays the first $250 each calendar year. The Support Order further provides:

> The party incurring the expense must submit documentation to the other party within fifteen (15) days of his or her receipt of the EOB (or if no insurance claim is filed within fourteen (14) days after incurring the expense); and the other party must reimburse the paying party within the fourteen (14) days of receiving the documentation of the expense being incurred.

The district court found that Plaintiff incurred a number of unreimbursed medical expenses of the children; that Defendant's share of these expenses under the Support Order, after deducting $250.00 each calendar year, totaled $1,604.75; and that Defendant had not reimbursed Plaintiff for these expenses. Accordingly, the district court ordered Defendant to pay Plaintiff $1,604.75 as reimbursement of these expenses. We disagree with Defendant's contention that he is not obligated to reimburse Plaintiff based on her alleged failure to provide him

[1] The district court did not hold Defendant in contempt for failing to reimburse Plaintiff for the children's medical expenses.

with documentation of these expenses within fourteen days from the date they were incurred. Specifically, we do not believe that the district court intended for Defendant's obligation as a father to provide for the medical care of his minor children to be dependent on whether the children's mother provided him with proof of the expenses within fourteen days of when the expenses were incurred. As our Supreme Court has held, it is "the public policy of this State that a father shall provide necessary support for his minor children, a duty he may not shirk, contract away, or transfer to another[.]" *Pace v. Pace*, 244 N.C. 698, 699, 94 S.E.2d 819, 821 (1956) (per curium) (internal marks omitted). Accordingly, this argument is overruled and the portion of the district court's order requiring Defendant to pay his share of his children's medical expenses is affirmed.

C. Former Marital Residence

In his third argument, Defendant contends that the district court erroneously held him in civil contempt of the provision in the ED Order concerning the marital residence and erroneously imposed certain purge conditions. For the reasons below, we affirm.

1. Adjudication of Contempt

The district court did not err in finding Defendant in civil contempt of the ED Order. The 2009 ED Order provides that if Defendant fails or is unable to pay off the existing mortgages in Plaintiff's name by September 2010, he and Plaintiff shall cooperate in choosing a real estate agent to list the residence.

In the contempt order, the district court found that Defendant failed to refinance the residence by September 2010 and that Defendant made no effort, thereafter, to place the residence on the market. We believe that the district court's finding that Defendant "made no effort to place the [residence] on the market" supports the court's determination that Defendant willfully violated the ED Order, specifically the provision requiring him to work with Plaintiff in listing the residence.

Defendant challenges the finding that he "made no effort to place the former marital residence on the market for sale" as required by the ED Order. He points to evidence in the record, including his testimony that he contacted real estate brokers in an attempt to list the residence but that the brokers would not list the residence because the liens on the residence were higher than its value. However, we note that Plaintiff testified that when she discussed listing the house with

Defendant, he told her that he was not interested in listing the residence. "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), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991). As the trier of fact, the district court determines the weight to be afforded conflicting evidence, which is binding on appeal. *Shamel v. Shamel*, 16 N.C. App. 65, 66, 190 S.E.2d 856, 857 (1972). Accordingly, since there is evidence to support the district court's finding that Defendant made no effort to place the residence on the market and since this finding supports the district court's determination that Defendant was in contempt of the ED Order, requiring him to cooperate with Plaintiff to list the residence, we hold that the district court did not err in finding Defendant in civil contempt of the ED Order.

2. Purge Provision

We find the purge provision in the district court's order free from error, with the sole exception of one minor, clerical error. Accordingly, we affirm the order, modifying it only to correct that clerical error.

In its written order, the district court decreed that Defendant could purge himself of the civil contempt by placing the residence on the market, after making whatever repairs the listing agent deemed to be necessary to place the residence on the market, all within "forty (45) days [sic]" of the entry of the contempt order. The written order provides that the parties must cooperate in selecting an agent and that if they cannot agree, Plaintiff must choose the agent.[2]

We note that the purge provision contains a clerical error where it provides that Defendant has "forty (45) days" to purge himself of the contempt. We have reviewed the transcript and find that the court intended that Defendant have forty-five days rather than forty days to purge himself. Therefore, we modify

[2] We note that the purge conditions contained in the written order *entered* on 6 September 2013 differ from the purge conditions *rendered* in open court at the conclusion of the 16 May 2013 hearing. For example, the entered order requires Defendant to spend an undetermined amount of money to bring the residence into a marketable condition as determined by the agent, whereas the order rendered in open court only required Defendant to make whatever repairs could be made using the proceeds from an insurance claim for storm damage in the amount of $9,000.00 and that the house was to be placed on the market in whatever condition it was in after said repairs were made, within forty-five days of the entry of the order. Defendant does not challenge this discrepancy, and we note that any challenge based on a variance between an order *rendered* and the final order *entered* "can be corrected by motion made in the action" with the trial court. *Daniels v. Montgomery*, 320 N.C. 669, 677, 360 S.E.2d 772, 777 (1987).

the order by correcting this clerical error. The order allows Defendant forty-five days to meet the conditions specified in the purge provision.

Defendant argues that the purge conditions are vague because he "is unaware of what is necessary to purge himself of the contempt." We disagree. The conditions specified in the purge provision serve to coerce Defendant to comply with his obligations under the ED Order. They relate to Defendant's obligations in the ED Order to cooperate with Plaintiff in selecting an agent to market the residence and in maintaining the residence in a marketable condition. They require Defendant to cooperate with Plaintiff in selecting an agent, to perform the repairs on the residence identified by the agent necessary to market the residence, and to complete these conditions within forty-five days.

Defendant argues that he might not have the ability to pay for all of the repairs that are identified by the agent. We note that the district court found that Defendant had the means to comply with the ED Order. While it might be shown at the end of forty-five days that Defendant does not have the present ability to purge himself of the contempt because he does not have the financial means to complete the repairs deemed

"necessary" by the agent *or* because Plaintiff failed to select an agent in time for him to complete the repairs, the district court has not yet fined or imprisoned Defendant for his civil contempt. Our civil contempt statutes "require that a person have the present ability to comply with the conditions for purging the contempt before that person may be imprisoned for civil contempt." *Tyll v. Berry*, ___ N.C. App. ___, ___, 758 S.E.2d 411, 421 (2014), *disc. review denied*, ___ N.C. ___, 762 S.E.2d 207 (2014); *see also Jolly v. Wright*, 300 N.C. 83, 92, 265 S.E.2d 135, 142 (1980) ("[D]efendant in a civil contempt action will be fined or incarcerated only after a determination is made that defendant is capable of complying with the order of the court"), *overruled on other grounds by McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993). Therefore, if Defendant has not met the conditions contained in the purge provision by the end of the forty-five day period, the district court can only fine or imprison him if it finds that he had enough time and money to complete the repairs within the specified timeframe.

Accordingly, we affirm the district court's adjudication of civil contempt for failing to comply with the ED Order.

D. Attorneys' Fees

In his final argument, Defendant contends that the district court abused its discretion in awarding Plaintiff $10,000.00 in attorneys' fees without making specific findings as to the reasonableness of the award. Based on our conclusion that the district court's adjudication of contempt for failure to pay child support was "criminal" in nature, we lack jurisdiction to consider *that portion* of the attorneys' fees award attributable to the criminal contempt. Accordingly, we dismiss Defendant's appeal of this issue to the extent that it touches on the attorneys' fees attributable to criminal contempt of the Support Order. Any appeal of the portion of the attorneys' fees award attributable to the criminal contempt matter must be appealed to superior court.

Regarding the portion of the attorneys' fees not attributable to the criminal contempt matter, we agree with Defendant that the district court failed to make certain required findings. Accordingly, we reverse and remand the district court's award of the portion of attorneys' fees not attributable to the criminal contempt matter. We instruct the court to determine which portion of the $10,000.00 award is not attributable to the criminal contempt matter and, further, to

make appropriate findings of fact and conclusions of law to support this portion of the award.

The general rule is that an award of attorneys' fees is only appropriate where specifically authorized by statute. *In re King*, 281 N.C. 533, 540, 189 S.E.2d 158, 162 (1972). To support an award in an action sounding in custody and support, the district court is required to make specific findings regarding the following:

> (1) the ability of the [Plaintiff] to defray the cost of the suit, *i.e.*, that the [Plaintiff] [is] unable to employ adequate counsel in order to proceed as a litigant to meet the other litigants in the suit;
>
> (2) the good faith of the [Plaintiff] in proceeding in this suit;
>
> (3) the lawyer's skill;
>
> (4) the lawyer's hourly rate; [and]
>
> (5) the nature and scope of the legal services rendered.

In re Scearce, 81 N.C. App. 662, 663-64, 345 S.E.2d 411, 413 (1986), *disc. review denied*, 318 N.C. 415, 349 S.E.2d 590 (1986). The findings related to the lawyer's skill, hourly rate, and the nature and scope of the services provided are necessary to determine whether the fees are *reasonable*, because the statute authorizes an award of only *reasonable* fees. *Cobb*

v. Cobb, 79 N.C. App. 592, 595-96, 339 S.E.2d 825, 828 (1986).

Although "[t]he amount of the award is within the discretion of the trial judge and will not be reversed in the absence of an abuse of discretion," *id.* at 596, 339 S.E.2d at 828, where the court fails to makes the findings necessary to a determination of whether the fees are reasonable, we are effectively precluded "from determining whether the trial court abused its discretion in setting the amount of the award." *Williamson v. Williamson*, 140 N.C. App. 362, 365, 536 S.E.2d 337, 339 (2000). In such a case, the court's "conclusions of law [] constitute nothing more than general statements . . . [un]related . . . to the findings of fact," and we will reverse the court's decision and remand for further findings. *Id.*

In the present case, the district court did not make all the requisite findings. Rather, the court found only that Plaintiff was an interested party acting in good faith with insufficient means to defray the costs of the action and incorporated by reference an Affidavit of Attorney Fees into a finding of fact. Accordingly, we reverse and remand with instructions to the district court to make the necessary findings to support an award of attorneys' fees, if any.

III. Conclusion

For the forgoing reasons, we dismiss Defendant's appeal of the district court's adjudication that he was in contempt of the Support Order for being delinquent on his monthly child support obligations and that portion of the award of attorneys' fees attributable to his criminal contempt of the Support Order based on his child support obligations. We affirm the portion of the district court's order decreeing that Defendant reimburse Plaintiff $1,604.75 for certain medical expenses of their children. We affirm the district court's adjudication that Defendant is in civil contempt of the ED Order. Finally, we reverse and remand for additional findings the portion of the attorneys' fees award *not* attributable to Defendant's criminal contempt of the Support Order.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART, AND DISMISSED IN PART.

Judge HUNTER, Robert C., and Judge DAVIS concur.

Report per Rule 30(e).