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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 15-357

Filed: 16 February 2016

Wake County, No. 11 CVD 1280, 11 CVD 9780

CHRISTINA D'ALESSANDRO, Plaintiff,

v.

ADAM D'ALESSANDRO, Defendant.

Appeal by Defendant from order entered 3 November 2014 by Judge Lori Christian in Wake County District Court. Heard in the Court of Appeals 24 September 2015.

The Williams Law Group, by T. Miles Williams and Teresa Y. Davis, for Plaintiff-Appellee.

Staples Hughes, Appellate Defender, by Assistant Appellate Defender Joyce L. Terres, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

Adam D'Alessandro ("Adam") appeals from a trial court order holding him in civil contempt. Adam challenges the contempt holding, the purge condition, and attorney fees. We affirm the trial court's order.

I. Factual and Procedural Background

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On 12 June 2014, Christina D'Alessandro ("Christina") filed two motions for order to show cause asking the trial court to hold Adam in contempt for failure to pay child support and attorney fees. Christina alleged Adam failed to pay \$5,000 in attorney fees from an order for custody entered 26 April 2012 as well as \$2,500 in attorney fees from an order of civil contempt filed 31 January 2014. Christina also alleged Adam did not pay the ordered \$607 per month for child support plus \$13 per month toward arrears in the amount of \$3,035 from a child support order entered 2 December 2011. At the resulting hearing on 17 September 2014, Adam represented himself *pro se*. Adam argued all previous child support obligations and attorney fee awards were void. Adam testified, explaining he did not have the ability to pay because he could barely afford food. Adam also argued \$10,000 and \$5,000 bonds from previous contempt purges covered the amounts owed. He did not make any of the \$607 monthly child support payments because he thought the \$15,000 in bond payments covered everything owed.

The court explained the total amount Adam owed exceeded \$15,000. The court agreed to subtract \$15,000 from the total amount owed to reflect the bonds. Still, Adam owed child support and attorney fee payments totaling more than \$14,000. Christina stipulated to two \$13 payments and one \$600 payment. Accounting for these payments, the court calculated Adam owed \$13,752.

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On cross-examination, Adam testified he worked at Advanced Irrigation Repair earning \$2,400 per month. Adam pays \$850 per month to rent a house. Adam is now married to Liz Estes (“Estes”). Christina introduced a Facebook post by Estes into evidence. The post said, “Today my sweet man drove almost four hours to spend less than 20 minutes with me while I was on a layover in Charlotte. While there, dressed in his tux, he proposed to me.” Adam testified he drove to Charlotte, but did not pay for the gas. Christina also introduced, among other things, pictures from a vacation to a ski resort and the beach. Adam said Estes paid for the ski vacation. The beach trip was required for work.

The court found Adam in contempt for failure to pay child support. Adam filed a Notice of Appeal 29 October 2014. On 3 November 2014, the trial court filed an order of civil contempt. The court concluded Adam “willfully failed to comply” with prior court orders and “willfully failed to pay both prospective child support and awarded attorney fees as ordered.” Adam failed to show cause why he should not be held in civil contempt. The court ordered Adam remain in custody until he purges his contempt by paying \$13,700. The \$13,700 consisted of \$5,000 in attorney fees under the 26 April 2012 Custody Order, \$2,500 in attorney fees under the 30 January 2014 Civil Contempt Order, \$1,930 for attorney fees for the recent hearing, and \$4,270 toward child support arrearages. The \$13,700 purge condition gave Adam credit for \$15,000 from previous purge payments as well as the stipulated amount of

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\$626 paid to Christina. Adam appealed the order and appellate entries were entered 6 November 2014.

On 10 November 2014, the Appellate Defender's office appointed Adam counsel for the appeal. On 9 December 2014, the trial court stayed the order of civil contempt pending appeal.

II. Jurisdiction

This Court has jurisdiction as of right pursuant to N.C. Gen. Stat. § 7A-27(b) from a final order of a district court.

III. Standard of Review

“The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law.” *Young v. Young*, 224 N.C. App. 388, 395, 736 S.E.2d 538, 544 (2012). Findings of fact not challenged on appeal are presumed to be supported by competent evidence and are therefore binding on appeal. *Tucker v. Tucker*, 197 N.C. App. 592, 594, 679 S.E.2d 141, 143 (2009). Conclusions of law are reviewed *de novo*. *Id.*

Trial courts have considerable discretion in allowing attorney fees in child support cases. *Leary v. Leary*, 152 N.C. App. 438, 443, 567 S.E.2d 834, 837 (2002). We review the award of attorney fees for abuse of discretion. *Id.*

IV. Analysis

A. Civil Contempt

North Carolina's statutes set out the elements of civil contempt:

Failure to comply with an order of a court is a continuing civil contempt as 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) (2013). Under subsection 2a, willfulness constitutes an ability to comply with the order and a deliberate and intentional failure to comply. *See Watson v. Watson*, 187 N.C. App. 55, 66, 652 S.E.2d 310, 318 (2007).

Civil contempt proceedings can be initiated in three ways: by order of a judicial official, by notice of a judicial official, or by motion of an aggrieved party. *Moss v. Moss*, 222 N.C. App. 75, 77, 730 S.E.2d 203, 204–205 (2012). Pursuant to the first two methods, the burden of proof is on the alleged contemnor to show cause why he should not be held in contempt. *Id.* Upon motion of an aggrieved party, the burden of proof is on the aggrieved party “because there has not been a judicial finding of probable cause.” *Id.*

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Here, in response to a motion by Christina, the court entered an order finding probable cause to believe Adam was in contempt. Therefore, the burden of proof was on Adam to show why he should not be held in civil contempt. Adam challenges numerous findings of fact as not supported by competent evidence. The unchallenged findings of fact are binding on this Court, even were we to find the unchallenged findings unsupported by competent evidence.

The *unchallenged* findings establish:

11. Defendant continues to argue that all court orders over three (3) years old are void. Defendant has not presented any evidence that supports his legal argument.

12. In 2014 the Defendant has engaged in the following:

- a. a ski trip with his current wife and three children;
- b. a beach trip with his current wife and three children;
- c. drove to Charlotte in a tuxedo and proposed to his current wife; and
- d. gave his current wife an engagement ring.

13. Since July of 2011 the Defendant has made the following payments toward his child support obligations: \$600 payment, two \$13 payments, civil purge payment of \$10,000, a second civil purge payment of \$5,000. Thus, Defendant's total payments towards his child support obligation equal \$15,626.00.

...

18. Based on the Child Support Order the Defendant should have paid a total of \$23,673.00 as follows:

- a. July 2011 through June 2012 \$7,284
- b. July 2012 through June 2013 \$7,284
- c. July 2013 through June 2014 \$7,284

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19. Defendant's total arrears based upon the difference in what he has paid toward his child support obligation and what he should have paid is \$8,047.00.¹

20. Defendant has paid nothing toward his ordered attorney's fee payments under either order.

...

26. Defendant has been given ample time to argue his case and used $\frac{3}{4}$ of the time allotted for the hearing. The Defendant introduced evidence relating to why he believes the previous orders of the court are void which the court finds is not relevant to this hearing.

On appeal, Adam again argues his noncompliance was not willful. Adam explains he did not have a willful disregard of the law, but instead a lack of knowledge regarding the orders. He also argues he is unable to comply with the order because of insufficient income or other assets. Adam challenges findings of fact 17 and 25 on appeal. Findings of fact 17 and 25 provide:

17. Defendant has shown a blatant disrespect for the court and only pays his court ordered obligations when brought into court on a hearing for contempt. This is the third time he has appeared before this judge for failure to pay his child support obligation.

25. Defendant has willfully failed to comply with the terms of the prior orders of this court or to take reasonable steps that would allow him to do so.

Findings of fact 17 and 25 are clearly supported by the evidence based on the unchallenged findings. Adam reargues the trial court contentions that he lacked

¹ This figure comes from subtracting the total in finding 13 from the total in finding 18.

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understanding of the law and lacked the ability to pay. This contention is unfounded since he cannot point to findings of fact or conclusions of law not based on competent evidence. We must affirm.

B. Purge Condition

Pursuant to N.C. Gen. Stat. §5A-23, if civil contempt is found a trial court must specify the actions which the contemnor must take to purge himself of the contempt. N.C. Gen. Stat. § 5A-23(e) (2013). “The court’s conditions under which defendant can purge herself of contempt cannot be vague such that it is impossible for defendant to purge herself of contempt, and a contemnor cannot be required to pay compensatory damages.” *Watson v. Watson*, 187 N.C. App. 55, 65, 652 S.E.2d 310, 317 (2007). The purpose behind the contempt is to make defendant comply with the court order, not to punish the defendant. *Cox v. Cox*, 133 N.C. App. 221, 226, 515 S.E.2d 61, 65 (1999). To condition release from imprisonment on the payment of a large lump sum, the court must find that defendant has a present ability to pay. *Tucker v. Tucker*, 197 N.C. App. 592, 595, 679 S.E.2d 141, 143 (2009).

In *Tucker v. Tucker*, the Court considered evidence of defendant’s vacations and personal property in determining whether defendant had a present ability to pay. *Id.* at 596–597, 679 S.E.2d at 143–144. The Court also considered that defendant provided evidence of assets without documentation of accounting for bills to show an inability to pay. *Id.* at 597, 679 S.E.2d at 144.

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Here, as in *Tucker*, Adam failed to document an inability to pay at trial. He provided testimony about his monthly income, but no documentation showing he had no ability to pay child support from that income. Additionally, evidence showed Adam had enough disposable income to go on two vacations and buy an engagement ring. As a result, we hold the trial court's order is supported by competent evidence to find Adam had the present ability to pay.

C. Attorney Fees

For a trial court to award attorney fees in a child support contempt matter, the trial court must make specific findings on:

- (1) the ability of the intervenors to defray the cost of the suit, i.e., that the intervenors are 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 intervenors in proceeding in this suit;
- (3) the lawyer's skill;
- (4) the lawyer's hourly rate;
- (5) the nature and scope of the legal services rendered.

Shippen v. Shippen, 204 N.C. App. 188, 192, 693 S.E.2d 240, 244–245 (2010) (quoting *In re Baby Searce*, 81 N.C. App. 662, 663–664, 345 S.E.2d 411, 413 (1986)).

Adam challenges the award of attorney fees for each of the five requirements. He argues the trial court did not make a specific finding of good faith. For the other finding requirements, Adam challenges findings of fact 27 and 28, which support the other required findings for attorney fees. We are not persuaded.

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First, a specific finding of good faith is not required. Although it is better practice for trial courts to make express findings of good faith, lack of a specific finding on good faith will not defeat an award of attorney fees. *Lawrence v. Tise*, 107 N.C. App. 140, 153, 419 S.E.2d 176, 184 (1992).

The findings of fact on the other attorney fee finding requirements challenged by Adam are stated below:

27. The Plaintiff has had to employ the services of an attorney to assist in getting the Defendant to comply with the previous orders of the court. Plaintiff does not have the means to pay attorney's fees incurred in this action.

28. The Plaintiff's attorney through an affidavit has shown reasonable fees in the amount of \$1,930 for filing and litigating this action. The Defendant should be responsible for paying these fees.

We hold the totality of the record and transcript support that Christina does not have the means to pay for attorney fees. The past child support and custody orders reviewed by the trial court establish that Christina was a homemaker and nursing student. Child support worksheets show Christina earned less than Adam. Additionally, Adam's failure to pay thousands of dollars in arrearages and attorney fees has further financially burdened Christina. Adam's contention that the attorney did not submit an attorney fee affidavit is without merit. The affidavit was filed as a supplement to the record and supports finding of fact 28 as written by the trial court. We therefore affirm the award of attorney fees.

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V. Conclusion

For the foregoing reasons, we affirm the order of the trial court.

AFFIRM.

Judges Dillon and Dietz concur.

Report per Rule 30(e).