IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1011

Filed: 1 October 2019

Mecklenburg County, No. 14 CVD 13699

RICHARD OWEN SHIREY, Plaintiff,

v.

STACIE B. SHIREY, Defendant.

Appeal by plaintiff from order entered 14 March 2018 by Judge Tracy H. Hewitt in Mecklenburg County District Court. Heard in the Court of Appeals 8 August 2019.

Thomas Godley & Grimes, PLLC, by Maren Tallent Werts and Seth A. Glazer, for plaintiff-appellant.

No brief for defendant-appellee.

TYSON, Judge.

Richard Owen Shirey ("Husband") appeals from the trial court's 6 March 2018 order on Stacie B. Shirey's ("Wife") motions: (1) for contempt; (2) to enforce/attach; (3) to modify alimony and child support; (4) for suspension of custody/visitation; and, (5) for attorney's fees, and on Husband's motions: (1) for contempt; and, (2) to modify. We affirm in part, reverse in part, vacate in part, and remand.

I. Background

The Shireys were married on 12 October 2002, separated on 1 February 2014, and were divorced on 13 May 2016. They are the natural parents of two children, one deceased minor son and one minor daughter with special needs ("T.S."), who is also a subject of this litigation.

While represented by counsel, the Shireys voluntarily bargained for and agreed upon a settlement on all issues of alimony, child custody and support, and equitable distribution, which was reduced to writing, signed by all parties and was jointly presented to the court and entered as a Consent Order in the Mecklenburg County Clerk of Superior Court on 24 May 2016.

Husband agreed to: (1). pay $2,800 per month for T.S.'s child support until terminated pursuant to North Carolina Law; (2). pay T.S.'s health insurance premium and 50% of T.S.'s uninsured medical expenses; (3). maintain a life insurance policy securing his life with a net death benefit of $1,000,000.00 to T.S. as named beneficiary; (4). pay Wife a total of sixty (60) payments of $1,500.00 per month in alimony; (5). pay Wife's health insurance premium for the same five years duration; and, (6). maintain a life insurance policy on his life with a net benefit of $1,500,000.00 with Wife as named beneficiary.

The Consent Order also required the Shireys to list the former marital residence located at 17301 Huntersville Concord Road, Huntersville, N.C. ("Huntersville Property") for sale and to split the net sale proceeds; list a marital Condominium property located at 18829 Vineyard Point Lane, Cornelius, N.C.

("Cornelius Property") for sale and split the net sale proceeds; and for Husband to pay debt owed by the Shireys to the Internal Revenue Service ("IRS") in the amount of $159,163.83. The Consent Order also addressed the disposition and sale of a resort property located in Big Pine Key, Florida, which was owned by the Shireys with two other couples.

After their separation and divorce, the Shireys remained amicable and were staying at a hotel in Indian River County, Florida with T.S. for her to attend and participate in an equestrian event on 27 January 2017. An altercation arose between them. Wife threw a soft drink in Husband's face, and then Husband threw a soft drink in Wife's face, then purportedly hit her. Husband called police officers, who observed injuries to Wife and arrested Husband. Wife then obtained a Domestic Violence Order of Protection ("DVPO").

This DVPO restricted Husband from contacting Wife directly. Husband attempted to send the alimony and child support payments to Wife's counsel. Wife refused to accept these payments and filed motions for contempt, to enforce/attach, to modify alimony and child support, for suspension of custody/visitation, and for attorney's fees. Husband later filed motions for contempt and to modify alimony and child support on 27 April 2017.

Wife's motion to modify the Consent Order's alimony and child support provisions alleges a substantial change in circumstances based upon the following facts: (1) Husband selling the business interests distributed to him as separate

property in the Consent Order; (2) Husband allegedly having acquired additional employment and income post-divorce; (3) Husband having voluntarily provided additional funds beyond his agreed-upon obligations for the benefit of T.S. and Wife after entry of the Consent Order; (4) the Shireys not selling and agreeing to maintain ownership of the property in Big Pine Key under a limited liability company, and to operate it as a rental property; and, (5) the Shireys' alleged diversion of rental income from the Big Pine Key property.

While legally separated and divorce was contemplated and after the Consent Order had been entered, Husband and Wife purchased a residence as listed tenants by the entirety located at 25 Park Avenue, Vero Beach, Florida ("Vero Beach Property"). The parties stipulated Husband contributed $300,000.00 to pay for his one-half interest, and also contributed an additional $202,000.00 towards the purchase price of Wife's share.

Wife contributed $98,000.00 toward her one-half interest in the Vero Beach Property. Wife testified she had agreed to the Husband's request for the Vero Beach Property to be purchased to provide T.S. "a nice place to live."

Wife further testified that no portion of the purchase price contributed by Husband for her share of the Vero Beach Property was to compensate for amounts Husband owed pursuant to the Consent Order. Wife asserted Husband wished to reconcile with her at the Vero Beach Property and wanted them to raise his minor son, who was born from an extramarital affair.

Husband testified and denied Wife's assertions. Husband testified the additional $202,000.00 he paid to purchase Wife's share of the Vero Beach Property was to satisfy amounts owed and payable to Wife under the equitable distribution terms of the Consent Order. Husband also testified to an agreement providing Husband would advance Wife a portion of her share of the net proceeds from the sale of the Cornelius Property, and reimburse her for money garnished from her account by the IRS by bringing those cash amounts to closing for the parties' purchase of the Vero Beach Property.

The trial court concluded Husband remained obligated to Wife for $58,700.70 from the sale proceeds of the Cornelius Property and to pay $129,873.10 to reimburse her for the IRS garnishment. The trial court denied Wife's Motion for Contempt, but found "Husband has failed to comply with the terms of the Permanent Order. However, he has either purged the contempt[s] or found not to be willful."

The trial court also allowed Wife's Motion for Modification of Child Support and Alimony. The court found a "substantial change in circumstances impacting the welfare of the minor child that justifies an indefinite suspension of the child custody provisions in the permanent order" had occurred since entry of the Consent Judgment. Sometimes referring to the Consent Order or Judgment as a "Permanent Order," the court also concluded the best interests of the child required the custodial terms of the Consent Order that placed T.S. in the primary physical custody with

Wife were to remain intact, but amended the agreed-upon terms to allow the minor child to dictate the terms of any visitation with Husband.

Husband was also ordered to pay $58,700.70, representing Wife's remaining share of the net proceeds from the sale of the Cornelius Property, $155,632.68 representing Wife's share of the proceeds from the sale of the Huntersville Property, $129,873.10 as reimbursement for money garnished from Wife's account by the IRS, and pay the debt on the 2014 Ford F-250 pick-up truck in full and to transfer and deliver title to the vehicle to Wife.

The trial court also found: "Wife is an interested party acting in good faith with insufficient means to defray costs and expenses of suit and is entitled to an award of attorney's fees." The trial court granted Wife's Motion for Attorney's Fees, holding "Wife had no choice but to initiate legal action to force Husband's compliance with the Permanent Order." Husband was ordered to pay Wife's attorney's fees of $69,962.90. Husband timely appealed.

II. Jurisdiction

This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b) (2017).

III. Issues

Husband argues the trial court erred by: (1) finding a substantial change in circumstances had occurred to warrant a modification of child support and alimony; (2) concluding both that there had been a substantial change in circumstances warranting an indefinite suspension of the child visitation provisions in the

Permanent Order and that it is in the best interests that the custodial terms in the consent order remain intact, yet denying Wife's motion to suspend child custody; (3) ordering Husband to pay Wife $58,700.70 from the net proceeds of the Cornelius Property; (4) requiring Husband to pay Wife $129,873.10 to reimburse Wife for the IRS garnishment; (5) finding the parties did not deviate from the terms of the Consent Order without the written consent of both parties; (6) ordering Husband to pay off the debt on the F-250 Ford pick-up; and, (7) awarding Wife attorney's fees. Wife filed no brief or arguments on appeal with this Court, after seeking and being granted two extensions to do so.

IV. Modification of Child Support and Alimony

Husband asserts the trial court erred when it found a substantial change in circumstances had occurred, warranting a modification of the parties' agreed-upon terms for child support and alimony in the Consent Order.

A. Standard of Review

Generally, the trial court's decision regarding alimony and child support is:

> left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion. When the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.

Williamson v. Williamson, 217 N.C. App. 388, 390, 719 S.E.2d 625, 626

(2011) (citations and quotation marks omitted).

A trial court abuses its discretion when it renders a decision that is "manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998) (citations omitted). The trial court's conclusions of law are reviewed *de novo*. *Lee v. Lee*, 167 N.C. App. 250, 253, 60 S.E.2d 222, 224 (2004).

B. Analysis

The Order states, in relevant parts:

> 63. Since the entry of the Permanent Order there has been a substantial change in circumstances affecting both the welfare of the minor child and her mother which justifies the modification of child support and alimony in order to maintain their accustomed standard of living. Specifically the court finds as follows:
>
> a) Husband sold his interests in the businesses he previously owed with his brother for more than $4 million which is paid over a 10-year period in monthly installments of $30,000 [twice monthly payments of $15,000.00] as well as an additional $100,000.00 lump sum payment made annually= $460,000.00/year. This does not include the initial buyout payment of $275,000.00 made to Husband in April, 2016.
>
> b) Husband is receiving rental income from one or more properties in Florida.
>
> c) Husband is enjoying income from the new businesses he formed after the Permanent Order was signed. In fact, he generates additional earnings anywhere from $5,000 to $30,000 more per month than what he receives from the sale of his business interests.

> d) Husband voluntarily provided thousands per month (every month until the month Husband was arrested for domestic violence) to Wife in excess of the base child support and alimony amounts to cover reasonable and necessary expenses for the minor child including her equestrian activities[6] (including ownership of a horse and all that it entails) and her attendance at Sun Grove Montessori School, a private school which is well suited to help ameliorate [T.S]'s longstanding and documented special needs and learning disabilities. After the entry of the DVPO, Husband stopped paying the tuition and expenses related thereto thereby severely affecting the welfare of the minor child.
>
> e)Husband convinced Wife to buy an expensive home in Vero Beach with him and then defaulted on the remaining indebtedness which sent the home into foreclosure.
>
> ---
>
> [6]After Wife and the minor child moved to Florida, Husband continued paying for the minor child to participate in equestrian related activity. The minor child has been riding since she was four [4] years old and is now an equestrian competition rider. All her life she has been encouraged in this endeavor by both parents, as she is talented in it and it is beneficial to the minor child because of her special needs. It was only on Husband's guarantee that he would maintain the costs associated with the care, boarding, and other expenses of the horse, as well as the costs associated with the minor child's continued participation in the sport that the minor child would be able to continue riding.

Defendant argues the trial court committed an error of law by concluding a substantial change in circumstances had occurred to warrant a modification of child support and alimony. "When the parties have entered into a consent order providing for the custody and support of their children, any modification of that order must be

based upon a showing of a *substantial change in circumstances affecting the welfare of the child*." *Woncik v. Woncik*, 82 N.C. App 244, 247, 346 S.E.2d 277, 279 (1986) (emphasis supplied) (citing *Harris v. Harris*, 56 N.C. App. 122, 286 S.E.2d 859 (1982)).

A trial court may modify alimony and post-separation support only upon a "showing of changed circumstances." N.C. Gen. Stat. § 50-16.9(a) (2017). This Court has held "[i]t is well established that an increase in child support is improper if based solely upon the ground that the support payor's income has *increased*." *Thomas v. Thomas*, 134 N.C. App. 591, 594, 518 S.E.2d 513, 525 (1999) (emphasis in original).

In *Britt v. Britt*, this Court held a trial court's conclusion of a substantial change in circumstances related to alimony, that was based solely on a supporting spouse's increase in income, was erroneous as a matter of law. *Britt v. Britt*, 49 N.C. App. 463, 470, 271 S.E.2d 921, 926 (1980). To properly consider a change in income by a supporting spouse, the Court is limited to review and determine how that change in income affects the supporting spouse's ability to pay. *Rowe v. Rowe*, 52 N.C. App. 646, 655, 280 S.E.2d 182, 187 (1981), *rev'd on other grounds*, 305 N.C. 177, 287 S.E.2d 840 (1982).

1. Sale of Business Assets

As enumerated and detailed in the Consent Order, Husband held interests in the following related landscaping companies: 1) Southeast Spreading Company, LLC; 2) Southeast Spreading Asset Management, LLC; 3) Southeast Spreading Logistics,

LLC; 4) Southeast Spreading Properties, LLC; 5) Southeast Spreading Transport, LLC; and 6) Southeast Pinestraw, LLC. In the Consent Order, Wife expressly agreed she "hereby and forever releases, waives, and relinquishes any right title and interest she may have in and to these businesses."

Following the divorce and entry of the Consent Order, the court found Husband had:

> sold his interests in the businesses he previously owned with his brother for more than $4 million which is paid over a 10-year period in monthly installments of $30,000.00 [twice monthly payments of $15,000.00] as well as an additional $100,000.00 lump sum payment made annually = $460,000.00. This does not include the initial buyout payment of $275,000.00 made to Husband in April, 2016.

The classification of proceeds from the sale of business assets as income is a conclusion of law, reviewable *de novo* by this Court. *Lee*, 167 N.C. App at 253, 60 S.E.2d at 224. The separate assets Husband sold had been released, awarded, and distributed solely to him by agreement in the Consent Order. Wife had expressly "relinquish[ed] any right title and interest she may have in and to these businesses."

Under the holdings in *Greer* and *Britt*, an increase of income alone cannot be the sole basis to support a conclusion of a substantial change in circumstances. *Britt*, 49 N.C. App. at 470, 271 S.E.2d at 926. In the absence of fraud or non-disclosure, modification of the Consent Order regarding alimony or child support cannot be based upon the change in form of separate assets from tangible to liquid, after they were released by Wife and distributed solely to Husband.

This Court, in *McKyer v. McKyer*, examined a similar issue in the context of non-recurring payments, the sale of a marital residence distributed solely to a spouse with an order that it be sold. *McKyer v. McKyer*, 179 N.C. App. 132, 143, 662 S.E.2d 828, 834-35 (2006). When wife sold the residence, the conversion of the asset into cash did not render the cash proceeds received from the sale as income. *Id.*

While the analysis in *McKyer* is pertinent and persuasive, in this case we must address whether the installment payments from a purchase-money financing sale of an asset previously released and distributed solely as separate property is considered as income to the supporting spouse for modification of previously agreed upon alimony and child support.

When this Court reviews an issue of first impression, it is appropriate to look to decisions from other jurisdictions for persuasive guidance. *See Skinner v. Preferred Credit*, 172 N.C. App. 407, 413, 616 S.E.2d 676, 680 (2005) ("Because this case presents an issue of first impression in our courts, we look to other jurisdictions to review persuasive authority that coincides with North Carolina's law"), *aff'd*, 361 N.C. 114, 638 S.E.2d 203 (2006).

The Appellate Court of Connecticut reviewed an analogous issue in *Denley v. Denley*, 661 A.2d 628 (Conn. App. Ct. 1995). In *Denley*, the husband was solely awarded stock options in a dissolution decree. *Id.* at 630. The Connecticut court found the gain husband had received from the redemption of these stock options could not be considered income to evaluate whether a change in circumstances had occurred.

The court held "[t]he mere exchange of an asset awarded as property in a dissolution decree, for cash, the liquid form of the asset, does not transform the property into income." *Id.* at 631 (citing *Simms v. Simms*, 593 A.2d 161 (Conn. App. Ct. 1991)).

Two other jurisdictions agree with the Connecticut court's holding. *See Rimpf v. Campbell*, 853 So. 2d 957, 961 (Ala. Civ. App. 2002) ("the change in the character of an asset . . . awarded in a divorce judgment does not transform the asset into income"); *Geiger v. Geiger* 645 N.E.2d 818, 822 (Ohio Ct. App. 1994) ("The mere exchange of an asset awarded as property in a dissolution decree, for cash, the liquid form of the asset, does not transform the property into income.").

The reasoning of these decisions and this Court's holding in *McKyer* regarding a similar issue of sale of an asset into liquid proceeds is instructive. The fact that the purchase price was paid to Husband, either as a lump sum or in an installment sale, does not convert the payment and receipt of proceeds from sale of a distributed sole asset into income. In *McKyer*, the wife sold the former marital residence for more than the value listed in the equitable distribution order. *McKyer*, 179 N.C. App. at 143, 662 S.E.2d at 834-35. This Court did not address whether this additional money was income as apparently neither party raised the issue. *Id.* However, in this case, and unlike *McKyer*, the trial court did not assign values to assets being distributed according to an equitable distribution order. The record does not show whether Husband realized profit or whether he received full payment in installments from the purchase money sale. Additionally, as in *McKyer*, the only arguments before this

Court assert the installment payments were not income and do not address any profit realized from the sale of the businesses. *See id.* at 144, 632 S.E.2d at 835. *Cf.* N.C. Child Support Guidelines at p. 3; N.C.R. Annot. at 53 (2019) (defining "Income" as "a parent's actual gross income from any source, including but not limited to income from employment or self-employment . . . , ownership or operation of a business, partnership or corporation, . . . capital gains").

The trial court here erred by including proceeds from the mere sale of Husband's released and separate business assets as increased income and a purported substantial change of circumstances to support a modification to agreed-upon alimony and child support without any evidence and finding the sale of the business assets resulted in actual income to Defendant. Also, an increase of income alone cannot be the sole basis to support a substantial change in circumstances. *Britt*, 49 N.C. App. at 470, 271 S.E.2d at 926.

The incorrect attribution of the installment proceeds from the sale as income and Husband's purported increase in income permeates the trial court's entire analysis to modify child support and alimony. Moreover, one spouse's cessation of voluntary payments in excess of support amounts established by a court order should not be classified as a substantial change of circumstances, absent a showing of a change in the reasonable needs of the child or dependent spouse. *See, e.g.*, *Gibson v. Gibson*, 24 N.C. App. 520, 523, 211 S.E.2d 522, 524 (1975) (holding that an increase

in support was properly justified by a showing of increased support costs and substantially increased spendable income of the payor).

Here, no finding by the trial court supports any change in the costs of child support since the parties' agreed upon amounts of child support in the Consent Order. The trial court's findings and conclusions are unsupported as a matter of law. This portion of the trial court's order is reversed.

V. Child Custody Provisions

Husband argues the trial court erred when it found a substantial change in circumstances had occurred warranting an indefinite suspension of his child custody and visitation provisions in the Consent Order, while keeping the custody provisions intact, after denying Wife's motion to suspend Husband's child custody. Husband asserts the trial court's Conclusions of Law 12 and 13 directly contradict one another.

A. Standard of Review

"When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (citing *Pulliam v. Smith*, 348 N.C. 616, 625, 501 S.E.2d 898, 903 (1998)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citing *State v. Smith*, 300 N.C. 71, 78-79,

265 S.E.2d 164, 169 (1980)). The trial court's conclusions of law are reviewed *de novo*. *Lee*, 167 N.C. App at 253, 60 S.E.2d at 224.

B. Analysis

The trial court's Conclusions of Law 12 and 13 state:

> 12. Pursuant to N.C. Gen. Stat. §50-13.7, [t]here has been a substantial change of circumstances impacting the welfare of the minor child that justifies an indefinite suspension of the child custody provisions in the Permanent Order.
>
> 13. It is in the best interests of the minor child that the custodial terms provided in the Permanent Order remain intact with [T.S.] dictating visitation.

Contrary to Husband's argument, these conclusions of law are not in conflict. Rather, these conclusions of law reflect the trial court's two-part analysis in determining whether to modify the custody provisions of the parties' earlier Consent Order. *Shipman* 357 N.C. at 474, 586 S.E.2d at 253 ("If . . . the trial court determines that there has been a substantial change in circumstances and that the change affected the welfare of the child, the court must then examine whether a change in custody is in the child's best interests."). Here, while the trial court incorrectly determined there was a substantial change of circumstances affecting the welfare of the child, the trial court then determined it was nevertheless *not* in the best interests of the minor child to modify the Consent Order. Thus, the trial court purported to decline to modify the prior Consent Order.

However, in so doing, the trial court erred in its interpretation of the Consent Order. In Finding of Fact 79, the trial court "notes that paragraph 2 of the decretal [in the Consent Order] sets out visitation 'as the minor child desires.'" In addition, the trial court ordered: "Defendant/Wife's Motion to Modify Custody/Suspend Visitation is **DENIED**. However, as a result of the custodial provisions as provided in the [Consent Order], visitation is to be as the minor child desires."

This conclusion in the order constitutes an erroneous modification of the prior Consent Order. The Consent Order does not vest decisions regarding Husband's visitation solely within the discretion of the minor child. Rather, the Consent Order incorporates the parties' then-existing arrangement and actually provides: "the minor child *will* visit upon reasonable advance request to Defendant /Mother, as the parties agree, and/or as the minor child desires." (emphasis supplied).

This provision of the parties' Consent Order is stated disjunctively and does not provide the minor child with automatic consent or veto power over Husband's visitation; rather, it provides the minor child with the ability to request additional visitation with her father if she desires in addition to and above the "will visit" provision. By re-casting this provision as one providing the minor child with sole discretion over visitation, the trial court erroneously modified child custody. We vacate this provision of the trial court's order and remand for entry of an order simply denying Defendant's Motion to Modify Custody/Suspend Visitation.

VI. <u>$202,000.00 Payment</u>

A. Standard of Review

When interpreting consent orders, it is appropriate to consider normal rules of interpreting or construing *contracts*." *Fucito v. Francis*, 175 N.C. App. 144, 150, 622 S.E.2d 660, 664 (2005) (emphasis in original). What constitutes a "modification" by "written consent of both parties" is an interpretation of a contract and is a conclusion of law, reviewable *de novo* by this Court. *See Id.*

B. Argument

Husband argues the trial court erred by concluding his cash payments of $202,000.00 to purchase Wife's share of the Vero Beach Property were not in satisfaction of amounts he owed under the equitable distribution of the Consent Order. The trial court's order did not find or classify the basis for these payments to ex-Wife, but simply denied Husband any credit for these payments toward his obligations under the Consent Order.

The trial court based this conclusion on a provision in the parties' agreement, entered as a Consent Order, that states "this consent order, is not subject to modification absent the written consent of both parties." The trial court disallowed modification of the express provisions in the Consent Order by finding and concluding no "deal was possible without the written consent of both parties." (emphasis in original). The trial court found no evidence the parties had agreed in writing that the additional $202,000.00 payment towards the Vero Beach property modified Husband's obligations under the Consent Order as it related to (1) repayment of IRS

tax debt Husband was obligated to pay and (2) the proceeds from the parties' Cornelius property.

1. IRS Lien

The Consent Order was entered on 24 March 2016, before the divorce decree was finalized and entered on 13 May 2016. Husband and Wife purchased the Vero Beach property as tenants by the entirety on 6 May 2016, after the Consent Order and a week before the divorce decree was entered. As such, the Vero Beach property is not addressed in the Consent Order. Husband contributed his share to purchase a one-half interest of $300,000.00, and an additional $202,000.00 towards Wife's share of the purchase price. Wife contributed $98,000.00.

The Shireys purchased the Vero Beach Property as purported tenants by the entirety on 6 May 2016. Less than a week later on 13 May 2016, the tenancy by the entirety was terminated by entry of the divorce decree in North Carolina. The Shireys became tenants in common in the Vero Beach Property, and their equal ownership percentages in the property remained the same.

Husband testified the additional $202,000.00 he paid for Wife's share was to advance and satisfy amounts he owed under the equitable distribution provisions of the Consent Order. Specifically, after the parties had entered into their Consent Order, the IRS garnished $129,873.10 from Wife's funds. The Consent Order provided this IRS debt was to be Husband's obligation. The Consent Order states: "Plaintiff/Husband agrees to be solely and separately responsible for this

indebtedness and shall indemnify and hold Defendant/Wife harmless from any liability she may have thereon (including any attorneys' fees spent to enforce this indemnification provision)." Wife's own testimony in this case, agreeing that she "had to put in less money to purchase the Vero house because of the IRS withdrawal," shows that as a result of this garnishment and other expenses, Wife lacked the funds to pay her portion of the Vero Beach Property purchase price. Instead, Husband paid an additional $202,000.00 on her behalf in order to make up in part for the garnishment.

The trial court found that in the absence of a written modification to the Consent Order agreement that Husband's additional $202,000.00 payment toward the Vero Beach property did not absolve him of having to reimburse Wife an additional $129,873.10. Contrary to the trial court's characterization, Husband's additional payment towards the Vero Beach house was not a modification of the parties' Consent Order, but rather was the effectuation of the terms of the Consent Order. We reverse the provisions of the trial court's Order requiring Husband to make an additional $129,873.10 payment to Wife as reimbursement for the amounts garnished from her to satisfy the IRS tax debt.

2. Cornelius Property

Husband further contends he should be entitled to a credit from the proceeds from the sale of the Cornelius property resulting from his additional $202,000.00 payment towards Wife's interest in the Vero Beach property. As noted, the Shireys

closed the purchase of the Vero Beach property on 6 May 2016. The Cornelius Property was under contract and closed on 18 August 2016. In the Consent Order, Husband and Wife had agreed to sell and divide the net sale proceeds from the Cornelius Property. The net proceeds from the sale of the Cornelius Property were $157,401.39, with Husband's and Wife's one-half share each representing $78,700.70. A copy of the closing statement signed by both parties is included in the record on appeal. It is also undisputed Wife received $20,000.00 cash from the sale of the Cornelius Property after closing.

The trial court disallowed modification of the express provisions in the Consent Order again by finding no "deal was possible without the written consent of both parties." (emphasis original). In light of our decision that Husband's $202,000.00 payment was, at least in part, reimbursement to Wife for the IRS tax debt under the Consent Order, we also find it necessary to vacate the provisions of the trial court's Order requiring Husband to pay Wife $58,700.00 from the proceeds of the Cornelius property sale. We remand the matter for the trial court to determine whether Husband is entitled to any credit toward the additional $58,700.70 he owes (after the $20,000 actually paid to Wife) resulting from the additional $202,000 he paid toward Wife's interest in the Vero Beach Property.

VII. Big Pine Key Property

Husband argues the trial court erred in finding that the parties agreed to modify the Consent Order by co-owning the Big Pine Key property, while

simultaneously finding that no agreement to deviate from the order was possible without written consent of both parties.

A. Analysis

In light of our holding that Wife's signed agreements to sell the Cornelius and Huntersville properties serve as a modification of the Consent Order with the written consent of both parties, we address the status of the Big Pine Key property as it also relates to the modification of the Consent Order. The Consent Order provides:

> 4) Big Pine Key Property. The parties are the part owners of real property located in the Florida Keys, more specifically: 225 West Cahill Court, Big Pine Key, Florida [hereinafter the "Big Pine Key Property"]. This property is owned with 2 other couples. Neither party resides in the Big Pine Key Property and it is currently listed for sale at the listing price of Four Hundred Seventy-Five Thousand Dollars ($475,000). Until the sale of the property, Plaintiff/Husband shall be responsible for maintaining payments for the taxes, insurance and any other expenses related to the parties' ownership share in the Big Pine Key Property.
>
> After the Big Pine Key Property has been sold and the expenses of sale are paid, which shall include the mortgage (principal and interest), appraisals, inspections, sales commissions, prorated and *ad valorem* taxes, revenue stamps, and other routine closing costs Plaintiff/Husband shall pay Defendant/Wife a one-time cash distribution of Fifty Thousand Dollars ($50,000) for her share of this property, within thirty (30) days of closing.
>
> However, notwithstanding the foregoing, in the event that the debt payments to be paid by Plaintiff/Husband as part of equitable distribution and pursuant to this Consent Order have not been satisfied in full, the parties agree that Plaintiff/Husband's share of the net proceeds shall be used

> to pay down any and all outstanding debts which have not been timely paid pursuant to the express terms of this Consent Order.

The trial court's Finding of Fact 10 provides:

> 10. In May 2016, Husband decided to take the house he owned with Wife and four other family members in Big Pine Key (i.e. 255 Cahill Court W. Big Pine Key, Florida)("Big Pine Key House") off the market. He asked Wife to remain as co-owner of the home and to operate it with him as a rental property. She agreed. Husband secured transfers of ownership from his other family members and now Husband and Wife are the only two persons remaining on the deed.

After the parties reached agreement on equitable distribution and the Consent Order was entered, the parties mutually agreed in writing to modify its terms, formed a Florida Limited Liability Company ("LLC") on 16 April 2016, bought out the other couples' ownership and transferred ownership of the property into the LLC.

The trial court received into evidence the Operating Agreement for the LLC and bank information concerning the management and operation of the property. At the time of the hearing, the Shireys owned and operated this property under a Florida LLC, Shirey Properties, LLC. In addition, their acts of forming of the LLC, transfer of ownership, and co-owning and operating the Big Pine Key House in an LLC, that is owned by both parties was not in dispute.

The Consent Order states the property was listed for sale and was owned by the Shireys and two other couples. It is clear the parties had mutually agreed in writing to modify the terms of the Consent Order requiring sale of this property, and

implemented that modification. The trial court acknowledged the post-divorce change of ownership of the Big Pine Key Property from the terms of equitable distribution in the Consent Order was not a part of this action.

The Big Pine Key Property provisions of the Consent Order were modified and satisfied and are no longer subject to the sale or distribution provisions of that order or to North Carolina's jurisdiction. Husband's and Wife's ownership, rights and liabilities to the property now owned by the Shirey Properties, LLC, are subject to Florida laws and jurisdiction. Any claims concerning use of funds purportedly belonging to this entity by either party are also subject to Florida law. As we have held the parties modified the terms of the Consent Order by written agreement on other assets, this provision of the Consent Order is satisfied. Husband's arguments on this issue are moot and dismissed.

VIII. Ford F-250 Pick-Up Truck

Husband argues the trial court erred in concluding he had failed to pay off the debt on the Ford pick-up, after wife failed to provide the required payoff information to the closing attorney.

The Consent Order provides:

> 1) 2014 Ford F250 Super Duty Truck. Defendant/Wife currently drives a 2014 Ford F250 Super Duty Truck which is titled in Plaintiff/Husband's name [hereinafter "Ford F250"]. The Ford F250 is encumbered by a loan in favor of Ford Motor Company. Plaintiff/Husband agrees to pay off the current indebtedness securing the 2014 Ford F250 Super Duty Truck in full and, until said payoff occurs,

> Defendant/Husband shall be responsible for making the monthly loan payments. Defendant/Wife shall be responsible for all expenses of ownership of said, including vehicle, insurance, taxes, registration, maintenance, repairs and the like, and shall indemnify and hold Plaintiff/Husband harmless from any liability he may have thereon. If the loan is not paid in full and any of the real properties provided in Paragraph 16 (a)(1)-(4) above sell, then Plaintiff/Husband will pay off this loan in full using his share of the net proceeds from said sale. Defendant/Wife shall provide the payoff information to the closing attorney who shall cause the loan to be paid off directly from Plaintiff/Husband's closing proceeds.
>
> Once the loan has been paid in full Plaintiff/Husband shall sign the title over into Defendant/Wife's sole name. The Ford F250 shall thereafter be the sole and separate property of Defendant/Wife, free of all claims of Plaintiff/Husband, marital or otherwise. Defendant/Wife shall be solely responsible for all expenses of ownership of said vehicle, including liens, insurance, taxes, registration, maintenance, repairs and the like, and shall indemnify and hold Defendant/Husband harmless from any liability he may have thereon.

It is undisputed that Wife failed to provide the payoff information to the closing attorney when the Huntersville and Cornelius properties were sold as she had agreed and was ordered by the Consent Order. Her failure to comply was considered by the trial court when it found Husband was not in willful violation of the Consent Order. Wife's failure did not absolve or release Husband from his agreed-upon obligations to pay off this debt in the Consent Order. Husband has not provided any argument or authority to relieve him from this obligation. In the absence of any authority, he

remains bound by the terms of the Consent Order. *See* N.C. R. App. P. 28. Husband's argument is dismissed.

IX. Proceeds from Huntersville Property

The parties agreed in the Consent Order:

> 1) 17301 Huntersville Concord Road, Huntersville, NC 28078. The parties are the owners of real property located at 17301 Huntersville Concord Road, Huntersville, NC 28078 which is the former marital residence [hereinafter the "Residence"]. Neither party currently resides in the Residence and it is currently listed for sale at the listing price of One Million Eight Hundred Thousand Dollars ($1,800,000.00). Plaintiff/Husband shall bring all mortgage payments secured by the Residence current within thirty (30) days of the entry of this Consent Order. Neither party shall cause any further indebtedness to be secured by the property.
>
> The Residence shall remain on the market to be sold until such time as it is sold. Plaintiff/Husband shall be solely and separately responsible for maintaining the mortgage payments, *ad valorem* taxes, homeowner's insurance and all other expenses related to the property. He will not allow these expenses to go in arrears thereby resulting in a reduction in net sales proceeds (as defined below) upon sale. In addition, Plaintiff/Husband agrees to assume the cost of an ensure the repairs and upgrades that have been started on the property are completed in a timely manner so as not to hinder any potential sale of the property and he shall pay all of the cost to complete any such projects.
>
> The parties agree to cooperate in all respects to sell the Residence including lowering the price in reasonable increments and making sure the Residence in saleable condition at all showings (sic). The parties shall be obligated to take any offer within 10% of the initial listing price. In the event that the Residence is not sold in ninety (90) days from the entry of this Order, the initial listing

> price shall be reduced by the amount suggested by the realtor.
>
> At closing on the sale of the Residence and the expenses of sale are paid, which shall include the mortgage (principal and interest), appraisals, inspections, sales commissions, prorated and *ad valorem* taxes, revenue stamps, and other routine closing costs the net balance, constituting the "net sales proceeds," shall be divided equally between the parties.
>
> There are some large items of furniture located in the residence in which the parties hope to sell with the Residence. In the event that a potential buyer does not wish to purchase this furniture, the parties agree to divide the remainder between them.

The trial court found:

> That the real property located at 17301 Huntersville Concord Road, Huntersville, NC 28078 be sold. Pending the sale of this property, Husband is required to pay ALL (1) mortgage payments; (2) ad valorem taxes (sic); (3) homeowner's insurance and (4) all other expenses related to the property, [including maintenance and repairs related to the listing for sale. Husband was forbidden from allowing the house mortgage to fall into arrears or to allow the house to fall into disrepair. Per the Order, upon the sale of the property, the proceeds were to be divided equally between the parties. However, notwithstanding the foregoing, in the event that debt payments to be paid by Husband pursuant to this Order have not been satisfied in full, Husband's share of the net proceeds will be used to pay same.

The net sale proceeds of the Huntersville Property totaled $295,321.68. To this amount, the trial court found and added: Husband had retained the buyer's deposit of $500.00, should have paid the July 2016 mortgage of $7,809.27, and the *ad valorem*

taxes of $7,634.41 to equal $311,265.36. Husband does not challenge these calculations and adjustments to his obligations under the Consent Order.

From these adjusted net proceeds of $311,265.36, Wife is due $155,632.38. Husband is due the balance of the net sale proceeds, $139,689.30. It is undisputed the parties signed the settlement and closing statement for this property to be sold. The net sale proceeds, if still held in trust by the closing attorney from the sale of the Huntersville property, are to be distributed to both Husband and Wife, consistently with the Consent Order with the amounts as adjusted above by the trial court and unchallenged by the parties.

X. Award of Attorney's Fees

Husband asserts the trial court abused its discretion when it awarded Wife attorney's fees related to contempt, while not finding Husband in contempt. In light of this Court's holdings to reverse and remand for further proceedings, the trial court's award of attorney's fees is vacated and remanded.

XI. Conclusion

We affirm the trial court's conclusion ordering Husband to pay off the Ford pick-up. The trial court's refusal to address the Big Pine Key Property's change of ownership and any disputes over the funds belonging to that ownership entity is moot.

We reverse the trial court's finding a substantial change in circumstances had occurred to warrant a modification of child support and alimony by calculating income

derived from the sale of Husband's separate property in the Consent Order and increased income earned post-divorce. We also reverse the trial court's modification of the child custody provisions in the Consent Order leaving Wife's custodial terms in the Consent Order intact, while only allowing Husband's parental visitation as his minor daughter "desires." On remand, the trial court shall deny Wife's Motion to Modify Custody.

We vacate the trial court's order for Husband to further pay Wife $58,700.70 from the proceeds of the Cornelius property and remand for further consideration. We reverse the trial court's requirement Husband pay $129,873.10 to reimburse Wife for the IRS garnishment. We also vacate the award of Wife's attorney's fees.

These portions of the trial court's order are reversed or vacated as noted and remanded for entry of order consistent herewith. The net sale proceeds from the sale of the Huntersville Property, as adjusted by the trial court's 6 March 2018 order and unchallenged by Husband, are to be distributed by the closing attorney to Husband and Wife per the terms of the Consent Order. *It is so ordered.*

AFFIRMED IN PART; REVERSED IN PART; VACATED IN PART; AND REMANDED.

Judges INMAN and HAMPSON concur