IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-855

Filed 19 December 2023

Pitt County, No. 19CVD2825

HANNAH ELIZABETH SIMMONS, Plaintiff,

v.

ADRIAN CHARLES SIMMONS, Defendant.

Appeal by defendant from order entered 3 March 2022 by Judge Lee F. Teague in District Court, Pitt County. Heard in the Court of Appeals 11 April 2023.

The Graham Nuckolls Conner Law Firm, PLLC, by Jon G. Nuckolls, for defendant-appellant.

No brief filed for plaintiff-appellee.

STROUD, Chief Judge.

Defendant appeals the trial court's orders adjudicating him in civil contempt for failure to pay child support. Because the first contempt order does not include any findings of fact addressing defendant's present ability to pay the purge payments ordered, that order is reversed. The trial court also entered a second contempt order, purportedly *nunc pro tunc* to the date of the first contempt order, but the second contempt order is void as defendant's notice of appeal from the first contempt order

divested the trial court of jurisdiction to enter the second contempt order. We therefore reverse the first contempt order and vacate the second contempt order.

I. Background

Plaintiff-mother ("Mother") and defendant-father ("Father") were married in 2012, and they had three children. Mother and Father separated in 2018. On 8 September 2020, the trial court entered a "Consent Order Reached at Mediated Settlement Conference" ("Consent Order") resolving the parties' pending claims regarding child custody and child support. (Capitalization altered.) The Consent Order was based upon an agreement the parties reached at mediation and included an attached "Mediated Settlement Agreement[,]" (capitalization altered), and a "Parenting Agreement[.]" The provisions of the Parenting Agreement are not directly relevant to this appeal, but one part of the Consent Order addressed Father's income and employment situation at the time, noting that his "current employment requires that he be out of the country for roughly twelve weeks at a time and then he is home for roughly twelve weeks."

As to child support, the Consent Order decreed:

> 2. [Father] shall pay as permanent child support the sum of $3,500.00 per month to [Mother] commencing September 1, 2020 and a like sum on the first day of each month thereafter. This does not resolve any issues concerning child support claims about credits or amounts due prior to September 1, 2020, or any claims for attorneys fees. [Mother] shall pay the work related child care costs.

> 3. Father shall maintain health insurance for the minor children so long as reasonably available through his employment. Mother shall pay the first $250.00 of uninsured health care costs for the minor children per calendar year, then Father shall pay 60% and Mother shall pay 40% of the uninsured medical, dental, orthodontic, prescription and counseling expenses for the minor children.
>
> 4. Child Support shall cease or be subject to modification as provided by law.

On 21 October 2021, Mother filed a "Motion for Order to Show Cause and Order Holding Defendant in Contempt" ("Show Cause Motion").[1] (Capitalization altered.) Mother alleged Father had "failed and refused to comply with the" Consent Order by (1) paying no child support at all in March, April, and May 2021; (2) paying only a portion of the child support due under the Consent Order in June, July, August, and September 2021; and (3) paying no child support at all in October 2021. The Show Cause Motion also alleged Father was $23,700.00 in arrears and had not reimbursed Mother for $3,406.02 in uninsured medical expenses. Mother further alleged Father "has been at all times and continues to be capable of complying with" the Consent Order. Mother moved for entry of an order (1) "directing [Father] to appear and show cause . . . why [Father] should not be held in [c]ontempt[;]" (2) withholding Father's

[1] On 15 September 2021, the Pitt County Department of Social Services ("PCDSS") filed a motion to intervene as a party to the action "with regard to the issue of child support and medical only and modifying the case caption to read: Pitt County by and through the Pitt County Department of Social Services, Plaintiff, on behalf of: Hannah Elizabeth Siimons [sic], Caretaker, vs. Adrian Charles Simmons, Defendant." This motion was apparently never heard as on 16 December 2021, PCDSS voluntarily dismissed its 15 September 2021 motion to intervene.

income to meet his support obligation; (3) applying the withholding to Father's arrearages; and (4) requiring Father to pay Mother's attorney's fees.

On 10 February 2022, the trial court entered an "Order to Show Cause and Notice of Hearing" ("Show Cause Order"), (capitalization altered), directing "[Father] to appear and show cause, if any there be, why [Father] should not be held in contempt of the" Consent Order and allowing Mother's Show Cause Motion. The trial court ordered Father to appear in court the following Tuesday, 15 February 2022, to be advised on his right to counsel in the contempt matter, and to appear on 3 March 2022 to show cause why he should not be held in contempt. On 15 February 2022, the trial court entered an order finding Father failed to appear that morning and had waived his right to appointed counsel in the contempt proceeding.

The trial court heard Mother's Show Cause Motion on 3 March 2022.[2] At the show cause hearing, Father appeared *pro se* and Mother was represented by counsel. Both parties presented evidence. Mother presented one of Father's paystubs from January 2020 to show his income at the time of the entry of the Consent Order.

[2] Father's brief indicates that the transcript contains a typographical error. The transcript indicates Mother's Show Cause Motion was heard on Thursday, 3 February 2022. The Show Cause Order is dated 10 February 2022, after the hearing date. However, the Show Cause Order orders Father to appear before the trial court on 3 March 2022. In his brief, Father also refers to the date of the hearing as 3 March 2022, which we take judicial notice of as also a Thursday. *See Kinlaw v. Norfolk S. R.R. Co.*, 269 N.C. 110, 119, 152 S.E.2d 329, 336 (1967) (taking judicial notice that a certain date was a particular day of the week). Given that the trial court could not retroactively order Father to appear in court and show cause approximately a week prior to entry of the Show Cause Order, we assume the transcript contains a typographical error and the show cause hearing was actually held on 3 March 2022 as indicated by Father's brief and as ordered in the Show Cause Order.

Mother testified that sometime after entry of the Consent Order, around approximately January 2021, Father told her he was quitting his job because "it was unsustainable, and he was going to be spending more time with the children[.]" Mother further testified Father told her "[t]he job was dangerous. It was a hostile environment, and the travel and the time away from the children" was burdensome as Father was required to travel out of the country for his work. Mother estimated Father worked at this job for approximately one year.

Father then testified about his employment prior to the Consent Order and his employment at the time of the contempt hearing. Father's prior employment was "rotational[;]" he would work overseas for approximately three months at a time, then return to the United States until his next assignment; he was not paid during the time between assignments when he was in the United States. Father testified the work was dangerous, that "[e]very time [he] [went] to work could be the last time that [he] [went] to work[,]" and that he "was in Afghanistan shortly before it fell." Father testified since the entry of the Consent Order, he had obtained safer and more stable employment in North Carolina at Fleet Readiness Center, where he "overhaul[s] helicopters for the Air Force." Father provided his current "leave and earning statement" which he described as "a military version" of a W2 form. Father's income was about $1,100.00 "every two weeks," significantly less than he was making during the year preceding the Consent Order when he was working overseas. When questioned on why Father never filed a motion to modify the child support obligation,

Father testified he did not "know how to do that." Father also testified that he did not make a motion to modify the child support obligation through counsel because he could not afford another attorney after his previous counsel withdrew.

The trial court rendered some findings of fact after the close of the parties' evidence. The trial court found the Consent Order was still valid and in effect. The trial court further found at the time of the Consent Order, Father was earning approximately $16,000.00 to $18,000.00 per month, and that the parties negotiated Father's child support obligation to be $3,500.00 per month. The trial court stated that Father had quit his prior job and "obtained another job making less income[,]" and "made partial payments [of child support] and is in arrears approximately $36,200." The trial court also stated Father "has used bad faith. That his own individual actions have caused him to have less income" and "there are some monies available that we know of at this time[.]" The trial court then stated:

> [Father] is in willful, civil contempt, that he is to be placed in the custody of the sheriff of Pitt County until he purges himself, and that he may purge himself by paying $10,000 to [Mother] by way of liquidating his 401(k). That once he is released from custody after that payment, then he may -- he is ordered to pay the remaining balance of $26,200 within 60 days to [Mother]. If he does not, then he is to surrender himself to the Court to be held in custody until that payment is made.

After the hearing, the trial court entered a form order, on Form AOC-CV-110 (Rev. 8/17) entitled "Commitment Order for Civil Contempt" ("First Contempt Order"). (Capitalization altered.) The trial court did not include any findings of fact

in the blank portion of the form with the printed notation "(List additional findings, if applicable.)" Instead, there is a handwritten note stating "[t]his is a temporary order[.] [Mother's attorney] will prepare a formal order[.]" The trial court also marked the boxes on the form to direct that Father

> shall immediately be taken into custody by the sheriff of this county. The party shall remain in custody until he/she purges himself/herself of contempt by complying with the order entered on 9/8/2020 . . . or by complying with other release conditions listed below. When these conditions have been met, the party shall be released.

In the section of the form for "Other Release Conditions," there are handwritten conditions: "[Father] shall purge himself by paying $10,000.00 to [Mother]. Once released, [Father] shall pay $26,000.00 to [Mother] within 60 days of being released. If not paid within 60 days of release date, [Father] shall surrender himself to the court and be placed into custody." The blanks in the bottom portion of the form, for the date and time of a hearing to be held "if the ([Father]) is not sooner released" are blank. A receipt dated 4 March 2022 included in the record shows that the initial $10,000.00 purge payment was made to Mother. On 31 March 2022, Father filed notice of appeal from the First Contempt Order.

On 5 May 2022, the trial court entered an order entitled "Order Holding [Father] in Civil Contempt" ("Second Contempt Order") *nunc pro tunc* to 3 March 2022. The Second Contempt Order includes detailed findings of fact and conclusions of law.

The trial court ordered:

> 1. [Father] is in Civil Contempt for [Father's] violations of the September 8, 2020 Order.
>
> 2. [Father] shall be incarcerated at the Pitt County Detention Center until [Father] complies with this order.
>
> 3. [Father] may purge himself of this contempt by paying to [Mother] the full child support arrears of Thirty Six Thousand Two Hundred Dollars ($36,200.00) as follows:
>
> a. Paying $10,000.00 to [Mother], to be applied towards his child support arrears, at which time [Father] shall be released from the Pitt County Detention Center.
>
> b. Paying the remaining Twenty Six Thousand Two Hundred Dollars ($26,200.00) within sixty (60) days of being released from the Pitt County Detention Center.
>
> c. If [Father] fails to pay the full Thirty Six Thousand Two Hundred Dollars ($36,200.00) within sixty (60) days of being released from the Pitt County Detention Center, then [Father] shall surrender himself to the Pitt County Court and be held in custody at the Pitt County Detention Center until that payment is made.

Father did not file a notice of appeal from the Second Contempt Order.

II. Subject Matter Jurisdiction

We consider both the trial court's jurisdiction to enter the Second Contempt Order and this Court's appellate jurisdiction to review both Contempt Orders. "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed

de novo on appeal. An appellate court has the power to inquire into subject-matter jurisdiction in a case before it at any time, even *sua sponte*." *Henson v. Henson*, 261 N.C. App. 157, 160, 820 S.E.2d 101, 104 (2018) (citations, quotation marks, and brackets omitted).

A. First Contempt Order

The First Contempt Order was entered on 3 March 2022. *See Spears v. Spears*, 245 N.C. App. 260, 286, 784 S.E.2d 485, 502 (2016) ("An order is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." (citations and quotation marks omitted)). The First Contempt Order was immediately appealable on that date. *See Ross v. Ross*, 215 N.C. App. 546, 547, 715 S.E.2d 859, 861 (2011) ("[A] contempt order is immediately appealable." (citation omitted)). Despite being labeled "temporary," the First Contempt Order was not interlocutory since it resolved the only issue in this case: whether Father was in willful contempt for failure to pay child support. *See Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) ("A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court."); *Sood v. Sood*, 222 N.C. App. 807, 808, 732 S.E.2d 603, 606 ("An 'interlocutory order' does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy."); *appeal dismissed*, 366 N.C. 417, 735 S.E.2d 336 (2012).

Furthermore, even if the First Contempt Order was considered interlocutory

due to the temporary label, it is still a contempt order, and it is well-established that "[t]he appeal of any contempt order, however, affects a substantial right and is therefore immediately appealable." *Guerrier v. Guerrier*, 155 N.C. App. 154, 158, 574 S.E.2d 69, 71 (2002). A contempt order, even if interlocutory, is immediately appealable because of the serious and, as in this case, often immediate consequence of the contempt order: imprisonment. *See Hamilton v. Johnson*, 228 N.C. App. 372, 377, 747 S.E.2d 158, 162 (2013) ("Absent our review, defendant risks extradition, imprisonment, or may otherwise be required to comply with the temporary child support order that he believes was erroneously entered. Thus we hold . . . that this matter is properly before us for review." (citing *Willis v. Duke Power Co.*, 291 N.C. 19, 30, 229 S.E.2d 191, 198 (1976)).

Father timely filed his notice of appeal from the First Contempt Order on 31 March 2022, and this Court has jurisdiction to consider his appeal under North Carolina General Statute Section 7A-27(b)(2).[3] *See* N.C. Gen. Stat. § 7A-27(b)(2) (2021) ("(b) Except as provided in subsection (a) of this section, appeal lies of right directly to the Court of Appeals in any of the following cases: . . . . (2) From any final judgment of a district court in a civil action.").

B. Second Contempt Order

[3] North Carolina General Statute Section 7A-27 was amended by the General Assembly in 2023 to add a provision under North Carolina General Statute Section 7A-27(b)(3); the amendment does not alter North Carolina General Statute Section 7A-27(b)(2).

Although Father filed a notice of appeal from the First Contempt Order, he did not file a notice of appeal from the Second Contempt Order, though his arguments on appeal address both orders. Since Father did not file a notice of appeal from the Second Contempt Order, we *sua sponte* invoke Rule 2 of the North Carolina Rules of Appellate Procedure as to that Order "[t]o prevent manifest injustice to a party[;]" specifically, the injustice being Father's wrongful imprisonment under an order the trial court did not have jurisdiction to enter. N.C. R. App. P. 2 ("To prevent manifest injustice to a party . . . either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it . . . upon its own initiative, and may order proceedings in accordance with its directions."); *see* N.C. Const. art. I, § 19. ("No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land.").

Father filed his notice of appeal from the First Contempt Order on 31 March 2022, and thereafter the Second Contempt Order was filed 5 May 2022 stating it was "*nunc pro tunc*" to 3 March 2022. "*Nunc pro tunc* means 'now for then[.]'" *Rockingham Cnty. DSS ex rel. Walker v. Tate*, 202 N.C. App. 747, 751, 689 S.E.2d 913, 916 (2010) (quoting *Nunc pro tunc*, Black's Law Dictionary (9th ed. 2009)).

> The power of a court to open, modify, or vacate the judgment rendered by it must be distinguished from the power of a court to amend records of its judgments by

> correcting mistakes or supplying omissions in it, and to apply such amendment retroactively by an entry nunc pro tunc. Nunc pro tunc is merely descriptive of the inherent power of the court to make its records speak the truth, to record that which was actually done, but omitted to be recorded. A nunc pro tunc order is a correcting order. The function of an entry nunc pro tunc is to correct the record to reflect a prior ruling made in fact but *defectively recorded*. A nunc pro tunc order merely recites court actions previously taken, but *not properly or adequately recorded*. A court may rightfully exercise its power merely to amend or correct the record of the judgment, so as to make the court[']s record speak the truth or to show that which actually occurred, under circumstances which would not at all justify it in exercising its power to vacate the judgment. *However, a nunc pro tunc entry may not be used to accomplish something which ought to have been done but was not done.*

Id. at 751-52, 689 S.E.2d at 917 (emphasis added) (citation omitted). "*Nunc pro tunc* orders are allowed only when a judgment has been actually rendered, or decree signed, *but not entered on the record, in consequence of accident or mistake or the neglect of the clerk*[.]" *Long v. Long*, 102 N.C. App. 18, 21-22, 401 S.E.2d 401, 403 (1991) (emphasis added) (citation and quotation marks omitted).

The trial court's use of *nunc pro tunc* was not appropriate in these circumstances because the Second Contempt Order was not an "amendment" or made for the purpose of "correcting mistakes or supplying omissions" to "speak the truth." *See Tate*, 202 N.C. App. at 751-52, 689 S.E.2d at 916. The words "*nunc pro tunc*" have no effect where the trial court had already been divested of jurisdiction by the notice of appeal filed prior to entry of the 5 May 2022 order, the Second Contempt Order.

See Whitworth v. Whitworth, 222 N.C. App. 771, 780, 731 S.E.2d 707, 713 (2012) ("[A] court retains jurisdiction of a case until final disposition, but jurisdiction ceases with rendition of a final judgment or decree except as to certain matters." (citation omitted)). Since the trial court had been divested of jurisdiction to enter the Second Contempt Order by Father's notice of appeal, nothing the trial court included in that Order – including the words "*nunc pro tunc*" – could create jurisdiction anew.

"The longstanding, general rule in North Carolina is that when a party gives notice of appeal, the trial court is divested of jurisdiction until the appellate court returns a mandate in the case." *SED Holdings, LLC v. 3 Star Properties, LLC*, 250 N.C. App. 215, 219, 791 S.E.2d 914, 918 (2016) (citation omitted). "To that end, our General Assembly has provided that an appeal from a trial court order or judgment automatically 'stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein[.]'" *Id.* (quoting N.C. Gen. Stat. § 1-294 (2015)). "Pending the appeal, the trial judge is generally *functus officio*, . . . Latin for 'having performed his or her office,' which is defined as being 'without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.'" *Id.* (citations omitted). The trial court was divested of jurisdiction by Father's 31 March 2022 notice of appeal and was therefore without jurisdiction to enter the Second Contempt Order. *See id.*

> According to well-established North Carolina law, once an appeal is perfected, the lower court is divested of jurisdiction. An appeal is not perfected until it is docketed

> in the appellate court, but when it is docketed, the perfection relates back to the time of notice of appeal, so any proceedings in the trial court after the notice of appeal are void for lack of jurisdiction.

Ponder v. Ponder, 247 N.C. App. 301, 305, 786 S.E.2d 44, 47 (2016).

While we are aware the trial court intended to enter another order, including detailed findings of fact, when it signed the First Contempt Order, this intent does not change the legal effect of the First Contempt Order or Father's notice of appeal. *See id.* In *Ponder*, the trial court also planned to enter a more detailed order later, but this Court held the notice of appeal divested the trial court of jurisdiction to do so:

> Here, the trial court signed and entered the DVPO Renewal Order on 12 February 2015. The order was complete, and the trial judge intended for it to be operative, at that time. The trial judge remarked at the hearing that he would fill out the AOC form on the date of the hearing, and Plaintiff could "walk away" with that form. Defendant then filed an appeal from the DVPO Renewal Order on 13 March 2015, which divested the court of jurisdiction.
>
> We are cognizant that the trial court contemplated, at the 12 February 2015 hearing, that a supplemental order containing findings of fact supporting its decision to renew the DVPO would be filed. However, the trial court made no oral findings of fact at the hearing, the DVPO Renewal Order itself contained no written findings of fact. The contemplated Supplemental Order, which did contain the findings of fact, was not entered until months after Defendant had perfected an appeal to this Court.
>
> It is fundamental that a court cannot create jurisdiction where none exists. While the trial court was technically not divested of jurisdiction until the appeal was

> perfected in this Court, which happened after the Supplemental Order was entered . . . the appeal, and thus the divestment of the trial court's jurisdiction, relates back to the date of the notice of the appeal, in this case 13 March 2015. The findings of fact and conclusions of law contained in the Supplemental Order are not ancillary to the appeal, and the trial court did not have jurisdiction to enter them following Defendant's 13 March 2015 notice of appeal. The Supplemental Order, which was a proceeding[ ] in the trial court after the notice of appeal is void for lack of jurisdiction.

Id. at 305-06, 786 S.E.2d at 47-48 (citations and quotation marks omitted).

In both this case and *Ponder*, "The order was complete, and the trial judge intended for it to be operative, at that time." *Id.* at 305, 786 S.E.2d at 47-48. Father was immediately in custody of the Pitt County Sheriff and was required to pay a purge payment of $10,000.00 to be released.

As the First Contempt Order was rendered in open court on 3 March 2022 and officially entered on the same date by means of a signed, filed form order without findings of fact, the failure to enter the full order on 3 March 2022 was not "in consequence of accident or mistake or the neglect of the clerk[.]" *Long*, 102 N.C. App. at 21-22, 401 S.E.2d at 403 (citation and quotation marks omitted).

In addition, even if the Second Contempt Order had been entered at a later date due to mistake or neglect of the clerk, it would not be effective as a *nunc pro tunc* order because the late entry would create prejudice to "intervening rights." *See Whitworth*, 222 N.C. App. at 778-79, 731 S.E.2d at 712. Although the First Contempt Order entered on 3 March 2022 included a note that it was a "temporary order" and

that a formal order would be prepared, the First Contempt Order also directed that Father be immediately taken into custody by the Pitt County Sheriff's Office. Further, the First Contempt Order required Father to pay a $10,000.00 purge payment to be released and "another payment of $26,000.00 within 60 days of being released." If Father did not pay the $26,000.00 within 60 days of his release – a date unknown at the time of rendition of the order – he would be required to "surrender himself to the court and be placed into custody" apparently without any further hearing, as no additional court date was set in the First Contempt Order.

Calling the First Contempt Order "temporary" does not render it immune from the effect of a notice of appeal under North Carolina General Statute Section 1-294 or from appellate review. *See* N.C. Gen. Stat. § 1-294 (2021). Had Father not retained counsel and filed a timely notice of appeal from the First Contempt Order, he could have been incarcerated indefinitely under the terms of that order, since it did not set any date for review; the portion of the "Commitment Order for Civil Contempt" for a court date for review was left blank. Father was immediately taken into custody of the Pitt County Sheriff's Office as of 3 March 2022 and paid the $10,000.00 purge payment the next day. Father was subject to the requirement to pay an additional $26,000.00 in 60 days based on the terms of the First Contempt Order or to again be incarcerated indefinitely, with no provision for a hearing to determine if he had the ability to pay a $26,000.00 purge payment at that time and no provision for any review hearing. We therefore must treat the Second Contempt Order as an order

entered on 5 May 2022, the date of its entry, and on this date, the trial court did not have jurisdiction to enter the order.

Therefore, as in *Ponder*, Father's notice of appeal divested the trial court of jurisdiction to enter the 5 May 2022 order, including an order that improperly used the language of *nunc pro tunc*. *See Ponder* at 305-06, 786 S.E.2d at 47-48; *see also Long*, 102 N.C. App. at 21-22, 401 S.E.2d at 403. Accordingly, the Second Contempt Order is vacated. *See generally In re T.R.P.*, 360 N.C. 588, 636 S.E.2d 787 (2006) (vacating for lack of subject matter jurisdiction).

III. Civil Contempt

Father presents four issues on appeal as to the First Contempt Order. Because the Second Contempt Order is void based on Father's notice of appeal prior to its entry, we only address Father's arguments as they are applicable to the First Contempt Order.

A. 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. When the trial court fails to make sufficient findings of fact and conclusions of law in its contempt order, reversal is proper.

Thompson v. Thompson, 223 N.C. App. 515, 518, 735 S.E.2d 214, 216 (2012) (citations and quotation marks omitted). In a civil contempt order, the trial court must make the findings of fact required by North Carolina General Statute Sections 5A-21 and

5A-23. *See id.* at 518-19, 735 S.E.2d at 217.

B. Findings of Fact

"The purpose of civil contempt is not to punish but to coerce the defendant to comply with a court order." *Spears*, 245 N.C. App. at 274, 784 S.E.2d at 494 (citation and quotation marks omitted). Father was adjudicated in civil contempt of the Consent Order based upon North Carolina General Statute Sections 5A-21 and 5A-23. Sections 5A-21 and -23 address the required findings of fact to hold a person in civil contempt. North Carolina General Statute Section 5A-21 provides:

> (a) 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 (2021).

North Carolina General Statute Section 5A-23 provides that the trial court is required to make findings of fact addressing each element of Section 5A-21(a) and stating specifically the action required to purge the contempt:

> (e) At the conclusion of the hearing, the judicial official must enter a finding for or against the alleged contemnor on each of the elements set out in G.S. 5A-21(a). If civil contempt is found, the judicial official must enter an order finding the facts constituting contempt and

> specifying the action which the contemnor must take to purge himself or herself of the contempt.

N.C. Gen. Stat. § 5A-23(e) (2021). The First Contempt Order failed to fulfill the statutory requirements. *See generally* N.C. Gen. Stat. §§ 5A-21, -23.

A contempt order must specifically set out how the contemnor may purge the contempt and must include findings demonstrating the contemnor has the present ability to comply with the contempt order. *Spears*, 245 N.C. App. at 286, 784 S.E.2d at 502 (citations omitted). "For civil contempt to be applicable, the defendant . . . must have the present ability to comply, or the present ability to take reasonable measures that would enable him to comply, with the order." *Id.* at 274, 784 S.E.2d at 494 (citation and quotation marks omitted). Furthermore,

> [t]o justify conditioning defendant's release from jail for civil contempt upon payment of a large lump sum of arrearages, the district court must find as fact that defendant has the present ability to pay those arrearages. The majority of cases have held that to satisfy the "present ability" test defendant must possess some amount of cash, or asset readily converted to cash.

Tigani v. Tigani, 256 N.C. App. 154, 160, 805 S.E.2d 546, 551 (2017) (citations omitted).

A trial court need not find the contemnor has the ability to pay the full amount of his obligations under a court order, but the contemnor must have the ability to pay any purge amounts set by the trial court:

> Plaintiff responds that the trial court need not find that defendant has the ability to pay the entire amount of

> the obligations to hold him in contempt, but it is sufficient that the trial court find that he had the ability to pay at least a portion of the sums owed and that he willfully failed to pay as much as he could have. We agree with plaintiff that an interpretation of the cases which would always require a finding of full ability to pay would "encourage parties to completely shirk their court-ordered obligations if they lack the ability to fully comply with them." Yet the cases do not go quite so far as plaintiff suggests. An obligor may be held in contempt for failure to pay less than he could have paid, even if not the entire obligation, *but the trial court must find that he has the ability to fully comply with any purge conditions imposed upon him*.

Spears, 245 N.C. App. at 278, 784 S.E.2d at 497 (emphasis added).

The findings of fact in the First Contempt Order were limited to the pre-printed language on the Commitment Order for Civil Contempt, Form AOC-CV-110. The trial court checked the appropriate boxes on the First Contempt Order to make the following findings: (1) "[Father] . . . has willfully failed and refused to comply with the order entered on 9/8/2020[,]" and (2) Father "has sufficient means and ability to comply or take reasonable measures to comply." The trial court made one additional finding that "[t]his is a temporary order . . . [Mother's attorney] will prepare a formal order[.]" Based on these findings, the trial court concluded Father was in civil contempt, and ordered Father to pay $10,000.00 immediately and the remaining arrearage of $26,200.00 within 60 days to purge his contempt or surrender himself to the Pitt County Sheriff's Office again.

Even if we consider the pre-printed findings on the form as sufficient to satisfy the requirements of North Carolina General Statute Sections 5A-21(1),(2), and (2a),

and we assume for purposes of argument there was sufficient evidence to support them, the trial court did not make a specific finding addressing North Carolina General Statute Section 5A-21(3), that Father "is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order[,]" as it is not sufficient to simply state, "Father "has sufficient means and ability to comply or take reasonable measures to comply." *See Thompson*, 223 N.C. App. at 517, 735 S.E.2d at 215-16.

In *Thompson*, this Court also found the trial court's findings were inadequate to support a contempt order where the trial court's findings stated "1. The Defendant has had the ability and means to pay the Post Separation Support previously ordered, or at least a substantial portion of that amount. 2. The Defendant has willfully refused to pay the Post Separation Support previously ordered." *Id.* at 517, 735 S.E.2d at 215-16. While the *Thompson* case was a contempt hearing regarding postseparation support, it nonetheless addresses a contempt order. *See id.* In *Thompson*, this Court distinguished between a defendant having previously had the ability to pay from currently having the ability to pay arrearages as a purge, stating:

> A factual finding that the defendant has had the ability to pay as ordered supports the legal conclusion that violation of the order was willful; however, standing alone, this finding of fact does not support the conclusion of law that defendant has the present ability to purge himself of the contempt by paying the arrearages.

Id. at 519, 735 S.E.2d at 217 (citation and quotation marks omitted).

Indeed while

> [t]he trial court need not find detailed evidentiary facts but an order must have sufficient findings to support its conclusions of law and decretal. There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts. While a trial court need not make findings as to all of the evidence, it must make the required ultimate findings, and there must be evidence to support such findings.

Cnty. of Durham by & through Durham DSS v. Burnette, 262 N.C. App. 17, 25-26, 821 S.E.2d 840, 848 (2018), *aff'd*, 372 N.C. 64, 824 S.E.2d 397 (2019).

Here, there was no specific finding addressing Father's present ability to pay the purge payments totaling $36,200.00 or his ability to take reasonable measures to pay. Nor was there any evidence indicating he would have the ability to pay purge payments of $36,200.00 within approximately 60 days of the date of entry of the First Contempt Order or that he may be able to take reasonable measures to obtain funds sufficient to pay the full $36,200.00 as a purge payment. *See McMiller v. McMiller*, 77 N.C. App. 808, 809-10, 336 S.E.2d 134, 135-36 (1985).

In *McMiller*, this Court explained what the trial court must find to satisfy the part of North Carolina General Statute Section 5A-21(3) regarding the ability to pay, stating

> [t]o justify conditioning defendant's release from jail for civil contempt upon payment of a large lump sum of arrearages, the district court must find as fact that defendant has the present ability to pay those arrearages.

> The majority of cases have held that to satisfy the "present ability" test defendant must possess some amount of cash, or asset readily converted to cash. For example, in *Teachey*, *supra*, defendant could pay $4825 in arrearages either by selling or mortgaging mountain property in Virginia. Accord *Jones v. Jones*, 62 N.C.App. 748, 803 S.E.2d 583 (1983) (defendant could not pay $6540 in arrearages because land he owned was already heavily mortgaged).
>
> In the case at bar, there was no finding relating to defendant's ability to come up with $4320.50 in readily available cash. The only finding by the trial court related to defendant's past ability to pay the child support payments. No finding was made as to appellant's present ability to pay the arrearages necessary to purge himself from contempt.

Id.; *see also Bishop v. Bishop*, 90 N.C. App. 499, 506, 369 S.E.2d 106, 110 (1988) ("As the court made no findings of defendant's ability in June 1987 to pay the entire $2,230 arrearage, we must conclude there were inadequate findings to support the adjudication of civil contempt. Accordingly, we reverse the trial court's adjudication of defendant's civil contempt." (citations omitted)).

The First Contempt Order should, therefore, be reversed due to the absence of any finding as to Father's ability to pay the purge payments as ordered. Further, we need not remand for additional findings of fact as there was no evidence presented to support such a finding of fact. Even considering all the evidence, at most it demonstrated Father had a single asset that he could liquidate to pay his child support arrears, his 401K. Even assuming Father could withdraw the entire balance of the 401K account without deduction of any taxes or payment of any penalties for

early withdrawal, the evidence indicated Father had only $13,000.00 available to pay toward purge of his contempt. But the trial court ordered Father to pay purge payments totaling $36,200.00; he was ordered to pay $10,000.00 immediately and to "pay $26,200.00 within 60 days of being released [from jail]." Although the 401K account would be sufficient to cover the initial $10,000.00 purge payment, there was no evidence of assets or savings available to pay $36,200.00 within 60 days.

We also note that although the trial court may consider imputation of income for purposes of establishing a child support obligation, this was a civil contempt hearing. *See Cash v. Cash*, 286 N.C. App. 196, 201, 880 S.E.2d 718, 724 (2022) ("[T]herefore the trial court could impute income to Father when calculating child support."). To hold Father in civil contempt and set a purge payment, the trial court must be able to find that the contemnor actually "owns some property or has some income [and] the actual value of that property or the amount of income must be sufficient to satisfy the purge conditions." *Burnette*, 262 N.C. App. at 38, 821 S.E.2d at 855 (citation omitted). There was no evidence that Father had "the present ability to take reasonable measures that would enable him to comply" with the First Contempt Order requiring him to pay purge payments of $36,200.00 within 60 days. *Spears,* 245 N.C. App. at 274, 784 S.E.2d at 494 (citation and quotation marks omitted).

This Court has indicated the disposition of a civil contempt order where the trial court made inadequate findings regarding the party's ability to pay their entire

arrearage is to reverse the adjudication of civil contempt. *See, e.g.*, *Bishop*, 90 N.C. App. at 506, 369 S.E.2d at 110. Therefore, we reverse the First Contempt Order.

IV. Conclusion

We conclude the trial court's findings of fact in the First Contempt Order were insufficient and reverse the First Contempt Order. We further conclude the trial court did not have jurisdiction to enter the Second Contempt Order and therefore vacate that order.

REVERSED IN PART; VACATED IN PART.

Judges COLLINS and FLOOD concur.

Report per Rule 30(e).