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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-843

Filed: 21 March 2017

Transylvania County, No. 13 CVD 236

DAVID STAMEY, Plaintiff,

v.

HEATHER STAMEY, Defendant.

Appeal by Defendant from an order entered 29 April 2016 by Judge Emily Cowan in Transylvania County District Court. Heard in the Court of Appeals 7 February 2017.

No brief filed for Plaintiff-Appellee.

Donald H. Barton, P.C., by Donald H. Barton, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

Heather Stamey (“Defendant”) appeals an order holding her in contempt and modifying her children’s custody. On appeal, Defendant contends the trial court lacked jurisdiction to modify her court order. With regard to the contempt order, she contends the trial court made insufficient findings of fact and conclusions of law to hold her in criminal contempt and the language staying the contempt order is

impermissibly vague. We vacate and remand the custody order for further findings of fact, and we reverse the order holding Defendant in contempt.

I. Factual and Procedural History

This case arises from a custody dispute between David Stamey (“Plaintiff”) and Defendant, his wife. Plaintiff and Defendant married on 22 December 2007 and have three children together, D.S. (“Dorothy”), C.S. (“Connor”), and A.S. (“Alexandra”).¹ At the time of this dispute, the children live primarily with Defendant in Macon County.

On 29 May 2013, Plaintiff sought primary physical custody of the minor children or, in the alternative, shared custody. On 12 July 2013, Defendant filed an answer and counterclaim for child custody. Defendant alleged Plaintiff was physically and verbally abusive, abused alcohol and controlled substances, and exhibited “controlling behavior.” Further, Defendant alleged Plaintiff ceased paying home expenses, resulting in a loss of “utilities.” Defendant sought primary legal and physical custody of the children.

On 4 November 2013, the trial court entered an order granting Plaintiff custody of the children every other weekend from 7:00 p.m. on Friday to 4:00 p.m. on Sunday, and splitting time between Plaintiff and Defendant on the children’s birthdays and major holidays. Additionally, the order restricted Plaintiff and

¹ We use these pseudonyms to protect the minor children’s privacy and for ease of reading.

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Defendant from consuming alcohol or exhibiting “violent behavior” around the children.

On 1 February 2016, the trial court amended the visitation order. The trial court required Plaintiff to follow medical instructions for the children, including administering sunscreen and special allergy creams. Additionally, the trial court ordered both parents to ensure the children wear seat belts when riding in a vehicle and have reasonable telephone communications with the children while the children are with the other parent.

On 24 March 2016, Defendant filed a motion for change of custody. In her motion, Defendant alleged changed circumstances, as one of the children suffered severe sunburn while under the care of Plaintiff. Defendant sought suspension or modification of Plaintiff’s visitation rights. On the same day, Defendant filed a motion for contempt, alleging Plaintiff failed to abide by the 1 February 2016 order.

On 18 April 2016, Plaintiff filed his own motion for contempt. Plaintiff alleged Defendant failed to allow the children their visitation with him, as required by the court order. On 10 April 2016 and 22 April 2016, the trial court entered orders for Defendant to appear and show cause. The trial court held a hearing on 29 April 2016.

First, Defendant testified on her own behalf. On 13 March 2016, she arrived to pick up her children from their visitation with Plaintiff and noticed redness on the skin of her son, Connor. Connor was sunburned on his cheeks, forehead, ears, and

neck area. The next day, Defendant took Connor to the doctor and subsequently refused to allow any of her children visitation with Plaintiff. Defendant's refusal continued for several weeks and overlapped with Alexandra's birthday.

Next, Plaintiff testified. On the weekend of 11 March 2016, he took all three children to his mother's house to put together a trampoline, ride four-wheelers, and have a cookout. Plaintiff sought to ensure sunscreen was applied that day, but did not recall whether he applied it personally. None of the other children were sunburned, except Connor. Thereafter, Defendant refused to allow Plaintiff visitation with the children, including on Easter and Alexandra's birthday.

Also on 29 April 2016, the trial court entered a contempt and custody order. The trial court found Defendant's denial of visitation between Plaintiff and their children was without appropriate justification and in violation of the 1 February 2016 order. Consequently, the trial court modified the custody order to provide Plaintiff visitation with his children on the first three weekends of every month to make up for the visitations he missed. The trial court concluded Defendant was in direct criminal contempt, but stayed the three day jail sentence until a future violation. On 16 May 2016, Defendant filed a timely notice of appeal.

II. Standard of Review

"Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal." *Dixon v. Gordon*, 223 N.C. App. 365, 368,

734 S.E.2d 299, 302 (2012) (quotation marks and citation omitted). “[T]he extent to which the trial court exercised its discretion on the basis of an incorrect understanding of the applicable law raises an issue of law subject to *de novo* review on appeal.” *In re A.F.*, 231 N.C. App. 348, 352, 752 S.E.2d 245, 249 (2013) (citation omitted).

“[The] standard of review for contempt cases is whether there is competent evidence to support the trial court’s findings of fact and whether the findings support the conclusions of law and ensuing judgment.” *State v. Phair*, 193 N.C. App. 591, 593, 668 S.E.2d 110, 111 (2008) (quotation marks and citation omitted).

III. Analysis

We review Defendant’s contention in two parts: (1) the trial court’s modification of child custody and (2) the trial court’s order of contempt.

A. Modification of Child Custody

Defendant first argues the trial court inappropriately modified the 1 February 2016 child custody order, when the only issue before the court was contempt. Defendant specifically argues the trial court modified the custody order by providing Plaintiff with a permanent third weekend of visitation each month.

N.C. Gen. Stat. § 50-13.7 (a) governs modification of child custody orders. N.C. Gen. Stat. § 50-13.7 (a) (2016). First, there must be a “motion in the cause” to confer jurisdiction. N.C. Gen. Stat. § 50-13.7 (a); *see also Jackson v. Jackson*, 192 N.C. App.

455, 460, 665 S.E.2d 545, 549 (2008). “The trial court may not *sua sponte* enter an order modifying a previously entered custody decree.” *Id.* at 460, 665 S.E.2d at 549 (citation omitted). The purpose of the motion is to give “both parties an opportunity to submit evidence or present arguments regarding custody modification.” *Id.* at 463, 665 S.E.2d at 551.

Second, the “party seeking modification of custody must show a substantial change in circumstances” *Hatcher v. Matthews*, ___ N.C. App. ___, ___, 789 S.E.2d 499, 501 (2016). It is reversible error to modify child custody absent a finding of substantial change of circumstances affecting the welfare of the child. *Hibshman v. Hibshman*, 212 N.C. App. 113, 121, 710 S.E.2d 438, 443-44 (2011). “A determination of whether there has been a substantial change of circumstances is a legal conclusion, which must be supported by adequate findings of fact.” *Id.* at 121, 710 S.E.2d at 443-44 (citation omitted). However, this requirement is only necessary if the order is a permanent order. *Hatcher*, ___ N.C. App. at ___, 789 S.E.2d 501-02 (citation omitted). If the modification order is a temporary order, neither party is required to show a substantial change in circumstances, and the court determines custody using the best interest of the child test. *Id.* at ___, 789 S.E.2d at 501-02.

The trial court’s “designation of an order as ‘temporary’ or ‘permanent’ is not dispositive or binding on an appellate court.” *Id.* at ___, 789 S.E.2d at 502 (citation omitted). “Instead, . . . [it] is a question of law, reviewed on appeal *de novo*.” *File v.*

File, 195 N.C. App. 562, 567, 673 S.E.2d 405, 409 (2009) (citation omitted). “[A]n order is temporary if either (1) it is entered without prejudice to either party[;] (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues.” *Id.* at 568, 673 S.E.2d at 410 (citation omitted) (first alteration in original). In deciding whether the order determines all the issues, this Court has held an order was temporary when the order failed to address holidays or only ordered a limited number of visits. *Woodring v. Woodring*, 227 N.C. App. 638, 644-45, 745 S.E.2d 13, 18-19 (2013); *Sood v. Sood*, 222 N.C. App. 807, 809, 732 S.E.2d 603, 606 (2012).

First, we address N.C. Gen. Stat. § 50-13.7(a)’s requirement of a motion to change custody. Here, on 24 March 2016, Defendant filed a motion for change of custody. However, the trial court’s orders to appear and show cause state the reason for the 29 April 2016 hearing was to address Plaintiff’s motion to hold Defendant in contempt of court. At the hearing, the trial court specifically asked the parties what remedy they requested from the court, and the following colloquy occurred:

BY THE COURT: So the only -- yeah, okay. So I think I see where we’re going. The only real remedy for contempt is jail. But you all are asking rather, on both sides, there be a temporary non-prejudicial order entered out of this contempt proceeding; is that right?

[DEFENDANT’S COUNSEL]: Yes, ma’am. Yes, ma’am.

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[PLAINTIFF'S COUNSEL]: I'm not sure about temporary non-prejudicial, but we -- we're asking for an order basically directing compliance. We're just looking for a finding of contempt and a direction of compliance. At which point, if that's not followed, then perhaps we're looking at criminal contempt.

BY THE COURT: So you're looking at possibly a finding of contempt and then staying the execution of said sentence to allow compliance?

[PLAINTIFF'S COUNSEL]: Well, it's not -- that would be a criminal contempt. I think we're asking -- well, I guess -- suppose that is what it -- what we're kind of looking for, yes.

BY THE COURT: Okay, all right.

[DEFENDANT'S COUNSEL]: And, Judge, I was not going to do that based on his conversation, but because he's asking for finding, I'm going to have to, too. What I was --

BY THE COURT: That doesn't make a difference. I mean, if I find the contempt what the -- and I constantly, constantly go over this and review this, and go over this and review this, and the only result I can find is jail. There -- the idea that you can order something else is -- is sometimes used. I just don't know how ---

[PLAINTIFF'S COUNSEL]: It's under -- it's under Chapter 50 13 point something about compliance with the -- once the Court has jurisdiction over the children they're allowed to make -- to enforce and make modifications as they deem appropriate.

BY THE COURT: Right. That's what I'm saying. So -- right. So then the response would be that -- a temporary order. The response wouldn't be ---

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[PLAINTIFF'S COUNSEL]: Yeah. It's under 13.4(f) and 13.6.

BY THE COURT: But I could do a temporary order whether or not I find contempt.

[PLAINTIFF'S COUNSEL]: That's correct.

BY THE COURT: Right.

[DEFENDANT'S COUNSEL]: That is correct, Your Honor. And we would stipulate to that.

BY THE COURT: All right. I'm just making sure that we're all on the same page going in. Because sometimes if I know what results you all want, I can listen accordingly.

[PLAINTIFF'S COUNSEL]: Yeah. You asked what we wanted ---

BY THE COURT: Right.

[PLAINTIFF'S COUNSEL]: But yes, you're certainly -- that is certainly one of the options. That's not what we're asking. We're asking for a finding.

BY THE COURT: You're asking for a finding of contempt and enforcement of the current order, correct?

[PLAINTIFF'S COUNSEL]: Yes, Your Honor.

BY THE COURT: Correct, okay. And then you're asking for protection of the children pursuant to either a temporary order or a finding of contempt?

[DEFENDANT'S COUNSEL]: Yes, ma'am.

BY THE COURT: Got it.

[DEFENDANT'S COUNSEL]: But as I've said, I think from our position we just want something that protects the children.

We conclude, based on the pending motion for modification of child custody and counsels' statements at the hearing, the parties were adequately apprised of the pendency of an altered visitation schedule, which afforded them an opportunity to present evidence. Unlike in *Jackson*, the trial court did not *sua sponte* enter an order modifying a previously entered custody decree. *Jackson*, 192 N.C. App. at 460, 655 S.E.2d at 549. Thus, the first part of N.C. Gen. Stat. § 50-13.7 (a) has been met.

Next, we turn to whether the custody order was a permanent or temporary order. At the outset, we note the trial court titled the 29 April 2016 order as a "temporary" custody order. Additionally, at the hearing, the trial court stated the hearing was for a temporary order. However, this Court must apply the temporary versus permanent order test and not rely on the trial court's designation. *Hatcher*, ___ N.C. App. at ___, 789 S.E.2d at 502 (citation omitted).

We conclude the 29 April 2016 order was, in fact, a permanent modification order. First, the order was not entered into without prejudice to either party. Specifically, the modification order prejudiced Defendant by granting additional visitation with Plaintiff, and depriving Defendant of time with the parties' children. Second, the order does not state a *clear* and specific reconvening time. At the hearing, the trial court stated the additional visitation granted to Plaintiff would last "[f]rom

now until whenever it's heard again.” However, the trial court’s statement fails to state a *clear* and *specific* reconvening time. Moreover, the trial court’s ambiguous end date is not included in the order. Lastly, the order determined all of the legal issues. Our review of the record does not show any outstanding issues, such as a determination of visitation of holidays, which the order fails to address.

The trial court’s order, as a permanent order, fails to include findings of fact or conclusions of law regarding a substantial change in circumstances affecting the welfare of the minor children. *See Jackson*, 192 N.C. App. at 463, 665 S.E.2d at 551. The trial court failed to meet the standards of N.C. Gen. Stat. § 50-13.7(a). Accordingly, we vacate and remand the custody provisions of the 29 April 2016 order.

Lastly, as guidance for the court below on remand, we highlight the complicated relationship between modification of child custody and contempt.

When the court modifies custody or visitation because of violations of a visitation order, it must be careful not to confuse the purposes of modification and contempt. The court modifies custody or visitation because substantial changes in circumstances have made a different disposition in the best interest of the child. A custodian should not violate the visitation order, but if he or she does, then ordinarily the proper response is a finding of contempt, not modification.

Jackson, 192 N.C. App. at 463-64, 665 S.E.2d at 551 (citations omitted).

B. Contempt Order

Defendant next contends the trial court committed several errors in holding Defendant in contempt of court. Specifically, Defendant argues (1) the trial court failed to use appropriate language in the contempt order and (2) the trial court failed to include sufficient findings of fact and conclusions of law to find Defendant in direct criminal contempt. We agree with Defendant that the trial court failed to include sufficient findings of fact and conclusions of law in the contempt order.

There are two types of criminal contempt: direct and indirect.² Direct criminal contempt occurs when the act “(1) [i]s committed within the sight or hearing of a presiding judicial official; and (2) [i]s committed in, or in immediate proximity to, the room where proceedings are being held before the court; and (3) [i]s likely to interrupt or interfere with matters then before the court.” N.C. Gen. Stat. § 5A–13(a). “Any criminal contempt other than direct criminal contempt is indirect criminal contempt and is punishable only after proceedings in accordance with the procedure required by G.S. 5A–15.” N.C. Gen. Stat. § 5A–13(b).

² We note contempt of court may be civil or criminal in nature. *Watson v. Watson*, 187 N.C. App. 55, 61, 652 S.E.2d 310, 315 (2007) (citation omitted). “Criminal contempt is imposed in order to preserve the court’s authority and to punish disobedience of its orders.” *Id.* at 61, 652 S.E.2d at 315 (citation omitted). Civil contempt is used “when the court seeks to compel obedience with court orders” *Id.* at 61, 652 S.E.2d at 315 (citation omitted). In the order, the trial court conditioned the stay of the jail sentence upon if Defendant further violated the order by denying Plaintiff visitation. Because of the wording of the trial court’s order, it is unclear if the trial court imposed the contempt to compel obedience. However, as the trial court specifically concluded Defendant was in “direct criminal contempt”, we apply the direct criminal contempt rules to the trial court’s order. We further note if the trial court intended to enter a civil contempt order, our result would be no different. Under *Wellons v. White*, 229 N.C. App. 164, 748 S.E.2d 709 (2013), the trial court’s order fails to meet the requirements of civil contempt orders. *Id.* at 181-83, 748 S.E.2d at 722-23.

“N.C. Gen. Stat. § 5A-14 allows a judge to summarily impose measures in response to direct criminal contempt[.]” *In re Korfmann*, ___ N.C. App. ___, ___, 786 S.E.2d 768, 771 (2016) (alteration in original) (quotation marks and citation omitted). However, before holding a party in direct criminal contempt, “the judicial official must give the person charged with contempt summary notice of the charges and a summary opportunity to respond and must find facts supporting the summary imposition of measures in response to contempt.” *Id.* at ___, 786 S.E.2d at 771 (quoting N.C. Gen. Stat. § 5A-14(b)).

Under N.C. Gen. Stat. § 5A-14, in a proceeding for criminal contempt, the facts must be established beyond a reasonable doubt. N.C. Gen. Stat. § 5A-14 (b). “[A] trial court's failure to state the standard of proof for findings of fact in a criminal contempt order [is] a fatal deficiency.” *State v. Phillips*, 230 N.C. App. 382, 385, 750 S.E.2d 43, 44-45 (2013) (citation omitted).

We turn, first, to whether the alleged criminal contempt was direct or indirect. According to the order, the alleged contempt occurred when Defendant refused to comply with the custody order and would not let the children visit Plaintiff. This occurred over the course of several weeks, before the 29 April 2016 hearing, and outside of court, away from the presence of the trial court judge. Furthermore, there is no indication anywhere in the transcript Defendant acted in any way to interrupt or interfere with the court proceedings. In fact, the proceedings progressed very

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civilly and did not require any intervention or comment by the court regarding the behavior of either party. There are no findings to support the trial court's conclusion holding Defendant in direct criminal contempt.

Additionally, the trial court did not include the standard of proof in the order. The court's findings included only a statement that Defendant refused to comply with the custody order. Accordingly, we reverse the trial court's order of contempt.

In light of our holding on this issue, we need not address the additional arguments contained in Defendant's brief regarding the trial court's order of contempt. *See id.* at 387, 750 S.E.2d at 46.

IV. Conclusion

For the foregoing reasons, we vacate and remand the trial court's modification of the parties' custody order. We reverse the trial court's order of contempt.

VACATED AND REMANDED; REVERSED.

Judges BRYANT and DIETZ concur.

Report per Rule 30(e).