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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-359

Filed: 6 February 2018

Wake County, No. 10 CVD 8072

JOHN COOK, Plaintiff,

v.

DIANA COOK, Defendant.

Appeal by plaintiff from orders entered 3 March 2016 and 17 November 2016 by Judge Michael Denning in Wake County District Court. Heard in the Court of Appeals 2 November 2017.

Gailor Hunt Jenkins Davis & Taylor, PLLC, by Jonathan S. Melton and Carrie B. Tortora, for plaintiff-appellant.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson and Jessica B. Heffner, for defendant-appellee.

DAVIS, Judge.

John Cook ("Mr. Cook") appeals from the trial court's orders awarding attorneys' fees to Diana Cook ("Ms. Cook") and denying his motion to set aside the fee award. After a thorough review of the record and applicable law, we vacate the trial court's order and remand for further proceedings.

Factual and Procedural Background

The parties were married on 14 September 2002 and divorced on 1 April 2008 in Tennessee. One child ("Catherine")[1] was born of the marriage on 5 August 2003. On 15 December 2008, the parties entered into a consent custody order in a Tennessee court. On 9 January 2009, the Tennessee court entered a second custody order. These custody orders provided for joint legal custody and a custody schedule that "was roughly a week on, week off visitation schedule."

In 2009, Ms. Cook moved to North Carolina with Catherine. Mr. Cook was subsequently transferred to North Carolina by his employer. The parties currently live three miles away from one another in Wake County, North Carolina.

On 19 December 2010, the parties entered into a consent order (the "19 December Order") in Wake County District Court. In the 19 December Order, the parties retained joint legal custody of their daughter, and Mr. Cook was given "visitation every other weekend . . . ." Additionally, the 19 December Order required "[t]he parties . . . to participate in all major medical decisions and have access to all health, education, and medical records."

In 2014, Ms. Cook sought the assistance of Wake County Child Support Enforcement ("CSE") to recalculate Mr. Cook's monthly payments of child support, and CSE filed a motion to intervene in the action. Upon learning that Ms. Cook was

[1] A pseudonym is used throughout this opinion to protect the identity of the minor child.

seeking to increase child support payments, Mr. Cook filed a motion to modify custody and child support on 23 May 2014. In his motion, he alleged that Ms. Cook had taken Catherine to an orthodontist and had braces put on her without first consulting him. On 5 June 2014, Mr. Cook filed a calendar request and notice of hearing as to his motion.

On 10 June 2014, CSE's motion to intervene was granted, and a Child Support Transmittal Order was entered on 7 August 2014. As a result, the issue of child support was "severed from all other issues involved in [the present case]." On 10 November 2014, Ms. Cook filed a motion to dismiss as to Mr. Cook's motion to modify child support and a motion for attorneys' fees. In the motion to dismiss, Ms. Cook asserted that the trial court lacked subject matter jurisdiction to modify the child support order because of CSE's intervention.

Mr. Cook filed a motion for a show cause order and a motion for contempt on 27 February 2015, asserting that Ms. Cook should be held in contempt for her failure to comply with the 19 December Order. Mr. Cook asserted that Ms. Cook had taken Catherine to several health care providers "for consultation, treatment, and/or diagnosis without [his] knowledge or consent[.]"

On 28 and 30 April 2015, a hearing was held before the Honorable Michael Denning on Mr. Cook's motion to modify child custody and support, Ms. Cook's motion to dismiss, Ms. Cook's motion for attorneys' fees, Mr. Cook's motion for a show cause

order, and Mr. Cook's motion for contempt. During the hearing, Ms. Cook's attorney ("Ms. Bloom") stated that she had not been informed by Mr. Cook's attorney ("Ms. Hunt") as to whether Mr. Cook would be proceeding on the child support modification motion until five days before the 28 April hearing. She further stated that she had spent time preparing to defend this motion because Mr. Cook had calendared it for hearing. In response, Ms. Hunt stated that Mr. Cook would not be proceeding on the modification of child support claim because "[i]t's been transferred from this court over to Child Support Enforcement. We don't have any intention of moving forward with that." The trial court also acknowledged that it had no jurisdiction over the matter because of CSE's intervention.

On 2 March 2016, the trial court entered an order (the "2 March Order") in which the court (1) determined that it lacked jurisdiction to modify child support; (2) modified the parties' child custody arrangement; and (3) held Ms. Cook in criminal contempt for "her knowing and willful violation" of the 19 December Order.

On 3 March 2016, the trial court entered the order from which this appeal arises (the "Attorneys' Fees Order") in which it found that Ms. Cook had "act[ed] in good faith as to all claims in this litigation" and had insufficient means to defray the cost of litigation. The court awarded Ms. Cook attorneys' fees in the amount of $46,109.20.

On 14 March 2016, Mr. Cook filed a motion for relief pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure requesting that the Attorneys' Fees Order be set aside. The trial court issued an order on 17 November 2016 denying Mr. Cook's motion. On 22 November 2016, Mr. Cook filed a notice of appeal as to the Attorneys' Fees Order as well as the trial court's 17 November 2016 order denying his motions under Rules 59 and 60.

Analysis

The sole issue raised by Mr. Cook on appeal concerns the validity of the trial court's award of attorneys' fees to Ms. Cook. N.C. Gen. Stat. § 50-13.6 governs the recoverability of attorneys' fees in child custody and support actions and states as follows:

> In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; provided however, should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable attorney's fees to an interested party as deemed appropriate under the circumstances.

N.C. Gen. Stat. § 50-13.6 (2017). Thus, N.C. Gen. Stat. § 50-13.6 authorizes the award of attorneys' fees in connection with both child support and child custody proceedings.

"[T]he facts required by the statute [are] that the party seeking the award is (1) an interested party acting in good faith, and (2) has insufficient means to defray the expense of the suit [and] must be both alleged and proved." *Taylor v. Taylor*, 343 N.C. 50, 54, 468 S.E.2d 33, 35 (citation and quotation marks omitted), *reh'g denied*, 343 N.C. 517, 472 S.E.2d 25 (1996). This Court has stated that "[i]n a custody and support action, once the statutory requirements of Section 50-13.6 have been met, whether to award attorney's fees and in what amounts is within the sound discretion of the trial judge and is only reviewable based on an abuse of discretion." *Savani v. Savani*, 102 N.C. App. 496, 505, 403 S.E.2d 900, 905-06 (1991) (citation omitted). "Under the abuse-of-discretion standard, we review to determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Brewer v. Hunter*, 236 N.C. App. 1, 8, 762 S.E.2d 654, 658 (citation and quotation marks omitted), *disc. review denied*, 367 N.C. 800, 766 S.E.2d 678 (2014).

Mr. Cook first challenges the trial court's award of fees to Ms. Cook for her defense of the motion to modify custody on the ground that there was an insufficient showing that she had acted in good faith. The trial court made the following pertinent

findings of fact in its Attorneys' Fees Order as to whether Ms. Cook had satisfied the requirements of N.C. Gen. Stat. § 50-13.6.

> 16. Defendant, as the minor child's mother, is an interested party. Plaintiff instigated the litigation and as such, Defendant had no choice but to participate and defend and she acted in good faith in doing so.
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> 17. Defendant is employed by SAS Institute, Inc. and earns approximately $3,765 per month in gross income. Defendant's earned income was $41,927 in 2014. In addition, in 2014, she liquidated retirement benefits in the amount of $24,247 a portion of which she had to use in able [sic] to pay attorneys' fees.
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> 18. Defendant has credit card and other loan debt in excess of $30,000. As of April 15, 2015, Defendant had $2,782.96 in her checking account and $82.94 in her savings account. She has no other liquid cash assets. Defendant does not own a home, rather she rents. As of April 23, 2015, Defendant had $29,982.26 in her Fidelity 401(k) retirement account that also included a small loan balance against the account as a result of the attorneys' fees she incurred in the 2010 litigation.
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> 19. Plaintiff is employed by North Carolina Electric Membership Corporation as an engineer. In 2013, Plaintiff's gross (and adjusted gross) income was $125,120. In 2014, Plaintiff's income increased, with Plaintiff earning $139,485.57 through November 30, 2014. As of November 28, 2014, Plaintiff has $245,500.69 between two (2) Merrill Lynch IRAs in his name and he owns a home that he purchased for approximately $300,000 in 2014.
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> 20. The Court received and considered a sworn Amended Attorney's Fee Affidavit dated May 21, 2015 and prepared by Defendant's counsel. That affidavit reflected attorneys' fees and costs incurred by Defendant from June 11th, 2014 (when Defendant first consulted with Ms.

Bloom) through April 30th, 2014 (the last day of trial of this case). The Court finds Defendant incurred attorney's fees and costs related to this litigation in the amount of $41,493.50 through April 30, 2015. This amount is after write-offs and courtesy discounts of approximately $6,000.

21. The Court received and considered a sworn Second Amended Attorney's Fee Affidavit dated January 21, 2016 and prepared by Defendant's counsel. The affidavit reflected attorney's fees and costs related to this litigation incurred by Defendant from June 11, 2014 through January 15, 2016, including but not limited to, fees associated with the drafting of Orders following the ruling in this matter. The Court finds Defendant incurred attorney's fees and costs related to this litigation in the amount of $46,109.20 from June 11, 2014 through January 15, 2016.

22. Defendant is an interested party to this litigation and acting in good faith with respect to all claims. This Court has considered Defendant's income, assets, and estate. Defendant is without sufficient means to defray the cost of litigation or to meet Plaintiff on equal footing during the course of this litigation, without borrowing funds. Defendant has been forced to borrow significant funds to pay her attorney's fees, including from friends, credit cards and her limited retirement and as of the date of trial, had a significant balance due owing to her attorneys as a result of her inability to pay.

23. Defendant's attorney, Heidi C. Bloom, is a board certified family law specialist who limits her practice to family law matters. Ms. Bloom has been certified as a family law specialist by the North Carolina State Bar since 2004. Ms. Bloom has been practicing law since 1996 and has limited her practice to family law since 1999. Ms. Bloom's hourly rate was $300 per hour in 2015, and is $315 per hour in 2016. This rate is reasonable given Ms. Bloom's expertise and experience. Based on this Court's experience and observation in Family Court, Ms. Bloom's rate is

> reasonable and comparable, if not below, the rates charged by lawyers similarly situated considering the skills required and services rendered with respect to this case. Ms. Bloom's associate, Jessica B. Heffner also provided services to Defendant on occasion. Ms. Heffner limits her practice to family law issues and bills at the hourly rate of $185 (2015) and $195 (2016). Ms. Heffner's rate is reasonable and comparable both with respect to her knowledge and experience as well as in comparison to similarly situated attorneys in Wake County considering the skills required and services rendered in this case.
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> 24. Defendant is entitled to an award of attorney's fees incurred by her with respect to Plaintiff's Motion to Modify Child Custody and Child Support in the amount of $46,109.20. The Court finds these fees to be reasonable (By contrast, Plaintiff contends that his fees for this matter have exceeded $90,000.00).

The trial court then made the following pertinent conclusions of law:

> 2. Defendant is an interested party acting in good faith as to all claims in this litigation. Defendant does not have sufficient means to defray the cost of litigation, and is unable to meet Plaintiff on equal footing to defend against Plaintiff's child custody and child support claim without borrowing funds.
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> 3. The attorney's fees incurred by Defendant in this action are reasonable based upon counsel for Defendant's skill, experience and expertise as well as given the nature and scope of the services rendered in this case.

Mr. Cook contends that the trial court could not have properly found that Ms. Cook had acted in good faith for purposes of N.C. Gen. Stat. § 50-13.6 based on its prior order holding her in criminal contempt for violating the 19 December Order. We disagree.

The trial court's decision to hold Ms. Cook in contempt was based on her actions in taking Catherine to an orthodontist, deciding that Catherine needed braces, and having "braces put on the minor child . . . without the input of [Mr. Cook]." Mr. Cook has failed to direct our attention to any North Carolina case holding as a matter of law that a previous finding of contempt against a party precludes the trial court from nevertheless determining that the party acted in good faith in defending a motion to modify custody. Here, the above-quoted findings reflect the trial court's determination that Ms. Cook did, in fact, act in good faith in defending Mr. Cook's motion to modify custody — a motion in which she was the prevailing party. Thus, we cannot say that the trial court abused its discretion in concluding that she acted in good faith.

However, Mr. Cook also argues — and we agree — that he could not lawfully have been required to pay the portion of Ms. Cook's attorneys' fees incurred in unsuccessfully defending his motion for criminal contempt. *See Daniels v. Hatcher*, 46 N.C. App. 481, 486, 265 S.E.2d 429, 433 (1980) (". . . [T]he trial court cannot order the defendant to pay plaintiff's attorney for the time spent in representing her on the contempt citation stemming from her violation of the defendant's court-ordered visitation rights."), *overruled on other grounds in Pulliam v. Smith*, 348 N.C. 616, 620 n.1, 501 S.E.2d 898, 900 n.1 (1998). Because it appears that a portion of the attorneys' fees awarded to Ms. Cook may have included attorney time incurred for this purpose,

we must vacate the Attorneys' Fees Order and remand for the trial court to enter a new order that excludes from the award of fees any time entries by Ms. Cook's counsel that were devoted to defense of Mr. Cook's criminal contempt motion.

Finally, Mr. Cook contends that attorneys' fees were also improperly awarded to Ms. Cook in connection with the motion to modify child support. We agree.

As an initial matter, we note that Ms. Cook's motion for attorneys' fees sought an award of fees solely in connection with the motion to modify custody. Furthermore, the trial court never actually reached the child support issue given its determination that it lacked jurisdiction due to CSE's intervention. Therefore, the award of fees to Ms. Cook for the time spent by her attorney in connection with the motion to modify child support constituted error. On remand, we direct the trial court to exclude from its new fee award any amounts incurred for this purpose.

Conclusion

For the reasons stated above, we vacate the trial court's 3 March 2016 and 17 November 2016 orders and remand for proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Judges ZACHARY and BERGER concur.

Report per Rule 30(e).