IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 17-241

Filed: 6 March 2018

Durham County, No. 06-CVD-2127

PATRICK MALONE, Plaintiff,

v.

LEIGH HUTCHISON-MALONE, Defendant.

Appeal by defendant from order entered 13 October 2016 by Judge Doretta L. Walker in Durham County District Court. Heard in the Court of Appeals 10 August 2017.

No brief filed for plaintiff-appellee.

Leigh A. Hutchison-Malone, pro se, defendant-appellant.

BERGER, Judge.

Leigh A. Hutchison-Malone ("Defendant") appeals from a child support order entered on October 13, 2016 upon remand from this Court, which granted Patrick S. Malone's ("Plaintiff") motion to terminate child support, and denied Defendant's motions for contempt and attorney's fees. Defendant argues the trial court abused

its discretion by terminating Plaintiff's child support obligations prior to Doug's[1] high school graduation pursuant to N.C. Gen. Stat. § 50-13.4(c)(2), failed to make appropriate findings of fact that were supported by competent evidence regarding Doug's progression and completion of education, and failed to make proper conclusions of law that terminated child support prior to Doug's graduation in its order. We disagree.

Factual and Procedural Background

The order Defendant has herein appealed was entered on October 13, 2016 by the trial court, after it was given instructions from this Court to correct certain findings of fact based on applicable law to establish termination of child support, contempt, and attorney's fees. *Malone v. Hutchinson-Malone* [sic] *(Malone I)*, ___ N.C. App. ___, 784 S.E.2d 206 (2016). Because only procedural elements of this case have changed since *Malone I*, we adopt that opinion's recitation of the facts:

> The parties were married on 6 June 1993, separated on or about 15 November 1999, and divorced on 22 December 2006. One child, Doug, was born to the parties during the course of their marriage on 15 July 1994. On 22 March 2013, plaintiff filed a motion seeking to terminate his obligation to pay child support, which was established by the parties' separation agreement as incorporated into their divorce judgment. The separation agreement acknowledged "that Doug has been diagnosed as having an autism spectrum disorder and is thus a child with special needs who requires particular care." The separation agreement then provided for specific child support

[1] A pseudonym is used to protect the identity of the parties' son.

> payments until such time as . . . Doug becomes emancipated under North Carolina law or turns age eighteen, unless he is still a full-time secondary school student in which case it will continue until he is no longer a full-time secondary school student or turns age twenty, whichever first occurs.
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> In plaintiff's motion to terminate child support, plaintiff alleged that Doug was no longer in a home school program or in a secondary school, that Doug turned eighteen in July 2012, and that "the only way for Doug to obtain a North Carolina Diploma is [his] enrollment in a GED or Community College High School Program." [Doug started and enrolled in a home school program supervised by Defendant and assisted by Doug's therapist in the Spring of 2013.]
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> On 14 May 2013, defendant responded to plaintiff's motion to terminate child support alleging that, contrary to plaintiff's allegations, Doug was "still making progress towards a NC high school diploma, not a GED, and was expected to finish the requirements for his diploma by the summer of 2013." [Doug received his high school diploma in August 2013.] On 14 May 2013, defendant filed a motion for contempt and attorney's fees, in which she alleged that plaintiff failed to pay his child support obligations from February 2013 and that such failure was "willful and without legal justification or excuse."
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> On 26 June 2014, the trial court entered an order in which it made numerous findings of fact and concluded that Doug "did not attend school full time after December 2012." Based upon its findings and conclusions, the trial court granted plaintiff's motion to terminate his child support obligation and denied defendant's motion for contempt and attorney's fees.

Id. at ___, 784 S.E.2d at 207-08 (footnote and brackets omitted).

On April 5, 2016, this Court filed *Malone I*, which remanded the case to the trial court for entry of a new order. *Malone I* instructed the trial court to make additional findings of fact regarding Plaintiff's child support obligation, and further instructed the trial court that it could consider terminating child support prior to the minor's high school graduation pursuant to N.C. Gen. Stat. § 50-13.4(c)(2) if the additional findings merited termination. *Id.* at ___, 784 S.E.2d at 210. On September 1 and October 12, 2016, the trial court held sessions of Family Court in the Durham County District Court on this matter and issued an order on October 13, 2016 that included additional findings of fact and conclusions of law as instructed by *Malone I*. The trial court granted Plaintiff's motion to terminate child support as of March 2013, and ordered him to pay child support arrears in the amount of $1,200.00 and $180.00 for the child's internet service. The trial court denied Defendant's motion for contempt and attorney's fees. It is from this order that Defendant timely appeals.

Analysis

Defendant contends the trial court erred in granting Plaintiff's motion to terminate child support alleging that the trial court's findings of fact and conclusions of law are unsupported by competent evidence. We disagree, and address each argument in turn.

I. Noncompliance with Appellate Rules

As a preliminary matter, we address Defendant's various violations of our

North Carolina Rules of Appellate Procedure. The appeal before this Court is the second appeal filed by Defendant on the same issues presented. Defendant's brief was filed in violation of several rules, and does not comport to the standards set forth in content or organization. Defendant's brief does not properly contain a complete table of authorities, *see* N.C.R. App. P. 28(b)(1) (2017), and has innumerable spacing, citation, and organization violations, *see* N.C.R. App. P. 26(g)(1)-(2) (2017).[2] Defendant's brief is 16,228 words[3] which fails to comply with the limit of 8,750 words pursuant to N.C.R. App. P. 28(j) (2017). Defendant also violated the Appellate Rules by failing to file a certificate of compliance with her brief. *See* N.C.R. App. P. 28(j)(2) (2017).

"[T]he Rules of Appellate Procedure[] are mandatory and [the] failure to follow these rules will subject an appeal to dismissal." *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999) (citations omitted). This Court has recognized that these rules apply to everyone, regardless of whether the appellant is acting *pro se* or represented by counsel. *See Bledsoe v. County of Wilkes*, 135 N.C. App. 124, 125, 519 S.E.2d 316, 317 (1999). "[R]ules of procedure are necessary in order to enable the

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[2] "All documents presented to either appellate court other than records on appeal, which in this respect are governed by Rule 9, shall, unless they are less than ten pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of authorities, i.e., cases (*alphabetically arranged*), constitutional provisions, statutes, and textbooks cited, with *references to the pages where they are cited*." N.C.R. App. P. 26(g)(2) (2017) (emphasis added).

[3] This word-count is consistent with portions of the brief subject to the word-count allowed by N.C.R. App. P. 28(j)(1) (2017). However, appendixes have been included in the word-count because Defendant continues to argue and present information within the appendixes and does not comply with the parameters outlined in N.C.R. App. P. 28(d)(1), (2), and (4) (2017).

courts properly to discharge their duty of resolving disputes." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 193, 657 S.E.2d 361, 362 (2008) (citation, quotation marks, brackets, and ellipses omitted). However, "rules of practice and procedure are devised to promote the ends of justice, not to defeat them." *Id.* at 194, 657 S.E.2d at 363 (citations, quotation marks, and brackets omitted).

"[N]oncompliance with the appellate rules does not, ipso facto, mandate dismissal of an appeal." *Id.* A "principal category of default involves a party's failure to comply with one or more of the nonjurisdictional requisites prescribed by the appellate rules[, and] . . . [n]oncompliance with rules of this nature . . . does not ordinarily give rise to the harms associated with review of unpreserved issues or lack of jurisdiction." *Id.* at 198, 657 S.E.2d at 365.

> [W]hen a party fails to comply with one or more nonjurisdictional appellate rules, the court should first determine whether the noncompliance is substantial or gross under Rules 25 and 34. If it so concludes, it should then determine which, if any, sanction under Rule 34(b) should be imposed. Finally, if the court concludes that dismissal is the appropriate sanction, it may then consider whether the circumstances of the case justify invoking Rule 2 to reach the merits of the appeal.

Id. at 201, 657 S.E.2d at 367 (2008). Appellate Rule 25(b) states the following:

> A court of the appellate division may, on its own initiative or motion of a party, impose a sanction against a party or attorney or both when the court determines that such party or attorney or both substantially failed to comply with these rules, including failure to pay any filing or printing fees or costs when due. The court may impose sanctions of

> the type and in the manner prescribed by Rule 34 for frivolous appeals.

N.C.R. App. P. 25(b) (2017). Here, Defendant's noncompliance with Appellate Rules 26 and 28 is substantial. Despite these substantial violations, we will consider Defendant's argument raised regarding the trial court's granting of Plaintiff's motion to terminate child support, as most of the argument is contained within the word limit and the record on appeal is complete and allows for an accurate review on its merits. As a sanction for failure to follow Appellate Rule 28(j), pursuant to N.C.R. App. P. 34(b)(3) (2017), we decline to consider the third issue presented regarding contempt and attorney's fees due to the issue not being raised until well past the word limit allowed. *See D'Aquisto v. Mission St. Joseph's Health Sys.*, 171 N.C. App. 216, 225 n.3, 614 S.E.2d 583, 589 n.3 (2005) (refusing to consider the portion of the brief that exceeded the allowable brief length), *rev'd in part on other grounds,* 360 N.C. 567, 633 S.E.2d 89 (2006).

II. Standard of Review

Defendant argues that the trial court did not make proper findings of fact that were supported by competent evidence, and did not make sufficient findings that supported the conclusions of law in its October 13, 2016 Child Support Order. This Court reviews the aforementioned issues on appeal under the following standard of review:

> [W]hen 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. While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable *de novo*.

Romulus v. Romulus, 215 N.C. App. 495, 498, 715 S.E.2d 308, 311 (2011) (citations and quotation marks omitted).

III. Findings of Fact

The trial court, upon remand from this Court in *Malone I*, entered a new order with additional findings of facts, several of which Defendant directly challenges on appeal regarding Doug's progression in a home school program under Defendant's supervision. "Where petitioner fails to challenge any of the trial court's findings of fact on appeal, they are binding on the appellate court . . . ." *Powers v. Tatum*, 196 N.C. App. 639, 640, 676 S.E.2d 89, 91, *disc. review denied*, *writ denied*, 363 N.C. 583, 681 S.E.2d 784 (2009). Accordingly, our review of the trial court's findings is limited to Findings of Fact 10, 18, 26, 29-32, and 34-36, and we accept the remainder of findings as binding upon appeal. Therefore, we will address each challenged finding in turn.

"The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on

appeal." *Byrd v. Byrd*, 62 N.C. App. 438, 441, 303 S.E.2d 205, 208 (1983) (citation and quotation marks omitted).

"A recitation of all evidentiary facts presented at the hearing is not required; those facts required to be found are those facts which are determinative of the rights and obligations of the parties and essential to support the court's conclusions of law." *Boyd v. Boyd*, 81 N.C. App. 71, 78, 343 S.E.2d 581, 586 (1986) (citing *Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982)). "While Rule 52(a) does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts, it does require *specific findings* of the ultimate facts . . . ." *Moore v. Moore*, 160 N.C. App. 569, 571, 587 S.E.2d 74, 75 (2003) (citation omitted); *see also* N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2017).

The trial court made the following specific findings of fact pertaining to Doug's progression through the home school program that Defendant was supervising and its associated classes, schedule, and costs:

> 26. That the Keystone Student Handbook states that home schooled students have one calendar year from original date of enrollment to complete their courses, that the students should spend one hour per day per course or five hours per course every week and these recommendations were not followed by the Defendant.
>
> 27. That the documentation provided as samples of school work were not indicative of the hours supposedly spent working per Defendant's exhibit M (the home school calendar of work done each day).

. . . .

29. That the documentation of his work shows that he was doing work for English III at the same time as he was doing work for English IV, up until May of 2013, he had not yet completed English III, and would intersperse between days course work for different courses. And that on the actual transcript it says that he completed English III during the 2011/12 school year and earned a credit and made a grade of 85 even while he was still supposedly doing course work as late as May 2013. These discrepancies in addition to the other findings of facts lead the court to doubt the veracity of the course work presented and the legitimacy of the actual transcript presented.

30. That the transcript also indicates that he completed Physical Science during his 2011/12 school year but was spending hours of course work through April 25, 2013. A review of the evidence shows that [Doug] received half credit for this course while attending Middle College High School at Durham Technical Community College and did [the] other half credit during his final year in school.

31. . . . Furthermore, the court has serious concerns regarding his home schooling during 2013 up until his graduation. The evidence presented to this court showed that the minor child was on vacation for the majority of the month of January 2013.

32. That the date of termination is March 2013. That Plaintiff filed his motion in March of 2013. That the evidence presented to this court was that the last payment paid by Plaintiff was the January 2013 payment. This court notes that the opinion from the Court of Appeals indicates that in Defendant's brief that she concedes that plaintiff paid child support until late February of 2013,[4] this court was not presented with this evidence during the hearing in which this court accepted additional evidence

[4] *Malone I*, __ N.C. App. at __, 784 S.E.2d at 208.

> and arguments. That Plaintiff owes the February 2013 payment for child support.
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> . . . .
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> 35. That there were other incidentals that the court was asked to consider and did consider during the original hearings and during the hearings after the remand. The Court finds that pursuant to the evidence considered that [the] only incidental pursuant to the agreement that had not been paid was the internet bill . . . . However, that Plaintiff did agree to pay the internet bill and failed to do so as required by the terms of the agreement, and owed $180.00 per the separation agreement based on all evidence presented.

The trial court made several detailed findings of fact based on evidence presented that Doug had not made sufficient progress towards graduation in August 2013. The trial court considered the content of the coursework, and suggested homeschool learning plans and the timing of progress in relation to specific classes. Defendant's appeal requests this Court to re-weigh the evidence presented to the trial court, which is not the role of an appellate court reviewing a cold record on appeal. The record shows evidence to support the trial court's findings of fact, and even if there is some evidence that may sustain a finding to the contrary, absent abuse of discretion, they will not be overturned on appeal. *See Raynor v. Odom*, 124 N.C. App. 724, 729, 478 S.E.2d 655, 658 (1996); *see also Riley v. Ken Wilson Ford, Inc.*, 109 N.C. App. 163, 168, 426 S.E.2d 717, 720 (1993) ("When the trial judge sits as [the] trier of fact she has the duty to determine the credibility of the witnesses and weigh the

evidence; her findings of fact are conclusive on appeal if supported by competent evidence." (citations omitted)).

In *Malone I*, this Court held that the trial court shall make findings of fact pursuant to Section 50-13.4(c) and could, in its discretion, terminate child support prior to Doug's high school graduation from the home school program. *Malone I*, ___, N.C. App. at ___, 784 S.E.2d at 210. Section 50-13.4(c) provides the following:

> Payments ordered for the support of a child shall terminate when the child reaches the age of 18 except:
>
> . . . .
>
> (2) If the child is still in primary or secondary school when the child reaches age 18, support payments shall continue until the child graduates, otherwise ceases to attend school on a regular basis, fails to make satisfactory academic progress towards graduation, or reaches age 20, whichever comes first, unless the court in its discretion orders that payments cease at age 18 or prior to high school graduation.

N.C. Gen. Stat. § 50-13.4(c)(2) (2017). "The trial court's consideration of the factors contained in [Section] 50-13.4(c) is an exercise in sound judicial discretion however, and if its findings are supported by competent evidence in the record, its determination as to the proper amount of support will not be disturbed on appeal." *Boyd*, 81 N.C. App. at 78, 343 S.E.2d at 586 (citation omitted).

Accordingly, the trial court made the following finding:

> 34. That this court in its discretion orders that child support terminates prior to the minor child's high school

> graduation. This court in determining such has taken into consideration the minor child's special needs and other abilities, the progress he has been making towards graduation in August of 2013, the additional care and provisions made by Plaintiff for the minor child over and beyond what the statute provides, and the fact that the separation agreement was far more generous than the statutory guidelines.

"[A]ny determination requiring the exercise of judgment or the application of legal principles is more properly classified as a conclusion of law." *Lamm v. Lamm*, 210 N.C. App. 181, 189, 707 S.E.2d 685, 691 (2011) (citation, quotation marks, and ellipses omitted). "A finding of fact that is essentially a conclusion of law will be treated as a fully reviewable conclusion of law on appeal." *Id.* (citation omitted).

Finding of Fact 34 is a mixed conclusion of law and finding of fact, with the first sentence making an application of legal principles to the facts of the case. Here, the trial court has exercised its discretion pursuant to Section 50-13.4(c)(2) and made its determination based on evidence presented. Applying judicial review consistent with the standard pertaining to a conclusion of law, we hold that it is supported by findings of fact and logical judicial reasoning. Further, we hold the trial court did not abuse its discretion pursuant to Section 50-13.4(c) in terminating child support prior to Doug's high school graduation in August 2013.

Defendant also contends that Finding of Fact 10 is inconsistent and contradictory to other findings and conclusions in the October 13, 2016 Order. Finding of Fact 10 states the following:

> That the child support provision stated that the father would continue to provide support at the level outlined herein "until such time as six (6) months have elapsed since the child was enrolled in full-time school (and has remained in school for six months). Thereafter, for the next twenty-four months, the father shall pay child support in the amount of fourteen hundred ($1,400.00) dollars per month, plus the incidental expense listed above. Thereafter, the father shall pay child support in the amount of twelve hundred ($1,200.00) dollars per month, plus the incidental expenses listed above, until such time as the child becomes emancipated under North Carolina law or turns age eighteen, unless he is still a full-time secondary school student in which case it will continue until he is no longer a full-time secondary school student or turns age twenty, whichever first occurs." At the time the motion was filed, the child support obligation was $1,200.00 per month. The Plaintiff's child support obligation terminated as of *February*, 2013.

(Emphasis added).

A clerical error is "an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination." *Zurosky v. Shaffer*, 236 N.C. App. 219, 235, 763 S.E.2d 755, 765 (2014) (citation and brackets omitted). The discovery of a clerical error in the trial court's order requires this Court to "remand the case to the trial court for correction because of the importance that the record speak the truth." *In re J.C.*, 235 N.C. App. 69, 73, 760 S.E.2d 778, 781 (2014) (citation and internal quotation marks omitted), *rev'd in part on other grounds*, 368 N.C. 89, 772 S.E.2d 465 (2015).

From the record on appeal, it is apparent that the trial court added the last sentence in the October 13, 2016 Order when compared with the previous Order on Child Support entered June 26, 2014. In light of the other findings of fact and conclusions of law, it is clear that this inconsistency in Finding of Fact 10 amounts to a clerical error, as the additional findings of fact, conclusions of law, and transcripts of the September 1 and October 12, 2016 hearings show the trial court did not intend for the child support to terminate in February 2013, but instead March 2013. Accordingly, we remand for correction of the clerical error found in Finding of Fact 10 in the October 13, 2016 Child Support Order.

IV. Conclusions of Law

Defendant contends the trial court erred by making Conclusions of Law 2-4 that were unsupported by sufficient findings of fact contained in the order issued upon remand from *Malone I*, specifically that the order is not in the child's best interest, Plaintiff's failure to pay was willful, and the trial court did not comply with N.C. Gen. Stat. § 50-13.4(c)(2). We disagree.

> Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Farmers Bank v. Brown Distributors, 307 N.C. 342, 353, 298 S.E.2d 357, 363 (1983) (citations omitted).

In light of the findings of fact contained in its order, the trial court made the following conclusions of law and judgment:

> 1. That the court has jurisdiction over the parties and over the subject matter of this action.
>
> 2. That this order is in the minor child's best interest.
>
> 3. That the court finds that Plaintiff's failure to pay was not willful.
>
> 4. After consideration of N.C.G.S. §[50-13.4(c)(2)], and after hearing all of the evidence, the Court exercises its discretion in ordering payments to the Defendant to cease prior to the child's high school graduation or its equivalent.
>
> Therefore, it is hereby ordered, adjudged and decreed:
>
> 1. That the motion to terminate child support is granted as of March 2013.
>
> 2. That Plaintiff is to pay child support for February 2013 in the amount of $1,200.00 by November 1, 2016.
>
> 3. That Plaintiff is to pay $180.00 for his portion of the son's internet service, by November 1, 2016 less any amounts that had [been] previously paid.
>
> 4. That Defendant's Motion for Contempt and Attorney's fees is denied.

It is clear from the record on appeal that the trial court made proper conclusions of law that are supported by sufficient findings of fact contained in the

October 13, 2016 Order. Further, the conclusions of law are supported by substantial evidence presented and the result of findings of fact made over several hearings on January 10, 2014; February 18, 2014; February 21, 2014; September 1, 2016; and October 12, 2016 that are the product of sound judicial reasoning and proper application of the law. At the October 12, 2016 hearing, the trial court stated:

> So I'm prepared to take your order and enter my ruling. I am going to require him to pay the February 28th, . . . in my discretion [pursuant to N.C. Gen. Stat. § 50-13.4(c)(2)], which I can do . . . .
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> . . . .
>
> [T]he period I was looking at being October [2012] and January [2013], and that's the only credible evidence that I found . . . based on additional evidence that . . . you've given me today. And there was a lot of testimony, which I did look back through. I didn't look at the transcript, but I looked back through my notes, and I'm going to find that . . . [h]e owes February of 2013, because he did not make that payment, and he owes $1,200 for that . . . .

The trial court's final order upon remand from this Court in *Malone I* shows the trial court properly considered evidence to support its findings of fact; made sufficient findings of fact to support its conclusions; and its conclusions properly supported the final judgment. *See Farmers Bank*, 307 N.C. at 353, 298 S.E.2d at 363; *see also Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980).

The trial court properly found that Plaintiff's child support obligation terminated as of March 2013 pursuant to Section 50-13.4(c)(2). Accordingly, we hold

the trial court made proper conclusions of law based upon the evidence presented and the facts of this case.

Conclusion

We affirm the trial court in granting Plaintiff's motion to terminate child support. We remand to the trial court for correction of the clerical error, and affirm the remainder of the judgment.

AFFIRMED; REMANDED FOR CORRECTION OF CLERICAL ERROR.

Judges DILLON and ZACHARY concur.

Report per Rule 30(e).