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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1154

Filed: 3 July 2018

Chatham County, No. 14 CVD 762

THOMAS FOY KENNIHAN, JR., Plaintiff,

v.

ELIZABETH PALMER KENNIHAN, Defendant.

Appeal by defendant from order entered 11 April 2017 by Judge Beverly Scarlett in Chatham County District Court. Heard in the Court of Appeals 18 April 2018.

Collins Family Law Group, by Rebecca K. Watts, for plaintiff-appellee.

Heather Williams Forshey and Blake H. Larsen for defendant-appellant.

DIETZ, Judge.

Defendant Elizabeth Palmer Kennihan appeals from an order in an ongoing child custody and child support proceeding, in which the trial court ordered Ms. Palmer to undergo a psychiatric evaluation, ordered her to participate in a custody evaluation of her children, and held her in contempt with various corresponding purge conditions. As explained below, Ms. Palmer failed to establish that this Court

has jurisdiction over the interlocutory rulings at issue in this appeal, and we therefore dismiss the appeal for lack of jurisdiction.

Facts and Procedural History

In 2008, Defendant Elizabeth Palmer Kennihan and Plaintiff Thomas Foy Kennihan divorced. They had three children during the marriage, two of whom are minors. After the parties separated, they executed a separation agreement granting primary physical custody of the children to Ms. Palmer and visitation to Mr. Kennihan.

Beginning in 2014, the parties returned to court over various custody and support issues. Ultimately, many of these issues were resolved through consent orders, including a 22 December 2016 order that granted temporary physical custody to Mr. Kennihan with supervised visitation for Ms. Palmer and ordered Ms. Palmer to pay child support and to consult a psychiatrist.

Mr. Kennihan later moved the court to hold Ms. Palmer in contempt for failure to comply with the 22 December 2016 order. At the hearing on that motion, Ms. Palmer represented herself and, after repeated warnings from the court about her conduct, the court held Ms. Palmer in criminal contempt and sanctioned her by requiring her to leave the courtroom.

On 11 April 2017, the court entered an order on Mr. Kennihan's motion which, among other things, maintained Mr. Kennihan's temporary sole custody over the

children and placed limits on Ms. Palmer’s visitation rights. The court also held Ms. Palmer in civil contempt for failing to comply with the 22 December 2016 order and imposed various purge conditions. Finally, the court memorialized its earlier criminal contempt finding. Ms. Palmer timely appealed the order.

Analysis

We begin our analysis by examining our jurisdiction to review Ms. Palmer’s arguments on appeal. Ms. Palmer’s entire statement of the grounds for appellate review consists of the following sentence: “The Court of Appeals has jurisdiction over the appeal of the custody, child support and criminal contempt order by virtue of N.C. Gen. Stat. § 7A-27(b)(2) and N.C. Gen. Stat. § 7A-27(b)(3)(a).”

Section 7A-27(b)(2) of the General Statutes confers appellate jurisdiction on this Court “[f]rom any final judgment of a district court in a civil action.” Section 7A-27(b)(3)(a) confers jurisdiction “[f]rom any interlocutory order or judgment of a . . . district court in a civil action or proceeding that . . . [a]ffects a substantial right.”

We first examine whether the challenged order is a “final judgment of a district court in a civil action.” N.C. Gen. Stat. § 7A-27(b)(2). It is not. The order requires Ms. Palmer to submit to a psychiatric evaluation, requires the parties to obtain a custody evaluation from a court-referred professional, and, by its terms, anticipates further proceedings on various issues once these professionals submit their reports. Simply put, the order does not finally dispose of either the child support or child custody

issues raised in this proceeding. Thus, this Court does not have jurisdiction to review the challenged order under N.C. Gen. Stat. § 7A-27(b)(2).¹

We thus turn to whether Ms. Palmer has established jurisdiction to review the order under N.C. Gen. Stat. § 7A-27(b)(3)(a) because the order affects a substantial right. Importantly, when the appellant relies on Section 7A-27(b)(3)(a)'s substantial rights doctrine as a basis for appellate jurisdiction, the Rules of Appellate Procedure provide that the appellant's statement of the grounds for appellate review "must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." N.C. R. App. P. 28(b)(4). This rule is a mandatory part of establishing appellate jurisdiction. "It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994).

¹ Ms. Palmer does not assert that the trial court's memorialization of the criminal contempt ruling made in open court can be separated from the remainder of the order and treated as a separate, final judgment. But this does not impact our jurisdictional analysis because that ruling cannot be appealed directly to this Court. "A person found in criminal contempt may appeal in the manner provided for appeals in criminal actions, except appeal from a finding of contempt by a judicial official inferior to a superior court judge is by hearing de novo before a superior court judge." N.C. Gen. Stat. § 5A-17(a).

As Mr. Kennihan observes in his appellee brief, Ms. Palmer’s statement of the grounds for appellate review does not contain “sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right” as required by Rule 28(b)(4). Indeed, it does not contain any facts or argument at all, merely a citation to N.C. Gen. Stat. § 7A-27(b)(3)(a).

This Court is permitted to excuse nonjurisdictional appellate rules violations that do not prejudice the opposing party, but “Rule 28(b)(4) is not a ‘nonjurisdictional’ rule. Rather, the *only* way an appellant may establish appellate jurisdiction in an interlocutory case (absent Rule 54(b) certification) is by showing grounds for appellate review based on the order affecting a substantial right.” *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 77–78, 772 S.E.2d 93, 96 (2015); *see also Edwards v. Foley*, __ N.C. App. __, 800 S.E.2d 755 (2017).

We recognize that this precedent can have harsh consequences. In this case, for example, one can imagine arguments that *could* have been made for why the challenged order affects a substantial right. But a litigant’s duty to state the grounds for appellate review in the appellant brief in order to establish appellate jurisdiction is long-standing and well-settled. *See Jeffreys*, 115 N.C. App. at 380, 444 S.E.2d at 254.

Moreover, the General Assembly has provided this Court with a means to avoid the potential injustice that results from this type of jurisdictional defect—we have

broad authority under N.C. Gen. Stat. § 7A-32 to issue a writ of certiorari to review an appeal where the Court otherwise would lack appellate jurisdiction. But even after Mr. Kennihan filed his appellee brief, pointing out the deficiency in the statement of grounds for appellate review and asking this Court to dismiss the appeal for lack of jurisdiction, Ms. Palmer did not acknowledge the defect, nor ask this Court to exercise our discretionary power to issue a writ of certiorari. Thus, we are constrained to follow our holdings in *Jeffreys*, *Larsen*, and *Edwards* and dismiss this appeal for lack of appellate jurisdiction.

DISMISSED.

Judges DILLON and ARROWOOD concur.

Report per Rule 30(e).