An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1084

Filed: 7 August 2018

Wake County, No. 12 CVD 12875

MICHELLE KOVASALA, Plaintiff,

v.

KENNETH KOVASALA, Defendant.

Appeal by defendant from orders entered 14 and 20 February 2017 by Judge Michael J. Denning in Wake County District Court. Heard in the Court of Appeals 1 May 2018.

Griffiths Family Law, by Debra A. Griffiths, for plaintiff-appellee.

Allen and Spence, PLLC, by Scott E. Allen, for defendant-appellant.

BRYANT, Judge.

Where the trial court did not have jurisdiction to amend an order entered after notice of appeal was entered, we vacate and remand the order to the trial court. Where the trial court properly ordered *specific performance* of breach of a separation agreement to provide spousal support, while acknowledging it did not have authority to *modify* the agreement, we affirm the trial court.

Plaintiff Michelle Kovasala and defendant Kenneth Kovasala were married on 11 November 1985, and had three children. On 2 October 2010, the parties entered into a Separation Agreement and Property Settlement ("the Agreement"). Pursuant to the Agreement, defendant agreed to "provide child support of $3,000 per month and . . . provide non-taxable spousal support of $5,000." The Agreement was never presented to a court for incorporation into a court decree.

On 11 September 2012, plaintiff filed a Complaint alleging breach of contract and specific performance; seeking equitable distribution and attorney's fees; and moving to enforce the Agreement. Defendant filed an answer and counterclaims for child custody and equitable distribution, but did not raise a defense as to the validity of the Agreement.

On 22 October 2013, plaintiff's claims for breach of contract and motion to enforce the Agreement were heard. The trial court entered an order on specific performance, damages, and enforcement of the Agreement, concluding, *inter alia*, that defendant "failed to assert defenses to the validity of the Agreement . . . and has consequently waived his defenses to the validity or enforcement of the Agreement." The trial court found that defendant intentionally depressed his income to deprive plaintiff and minor children of spousal and child support and had breached the Agreement by failing to make timely payments. The trial court concluded defendant had the ability to pay a reduced amount for spousal and child support based on his

projected income and ordered that defendant specifically perform the reduced support provisions of the Agreement and otherwise comply with the Agreement.

The trial court's order, initially entered on 17 December 2013, was amended on 9 January 2014, *nunc pro tunc November 1, 2013*.[1] Neither party appealed the trial court's order on specific performance.[2]

On 14 February 2017, the trial judge entered an order for contempt and attorney's fees after finding defendant was in arrears for spousal and child support. On 17 February 2017, defendant filed a notice of appeal from the 14 February order. On 20 February 2017, the trial judge signed an amended order to correct the remaining balance owed to plaintiff. Defendant appeals from both orders.

On appeal, defendant argues the trial court erred in: (I) calculating arrearages under the Agreement; (II) entering an amended order regarding contempt and attorneys' fees on 20 February 2017; (III) concluding that the 9 January 2014 order did not modify or amend defendant's obligation for spousal support and child support; and (IV) refusing to modify defendant's spousal support.

I

[1] This trial order for specific performance followed a preliminary injunction hearing where both parties were enjoined from withdrawing from any shared financial accounts.

[2] Throughout this opinion, we refer to this order as the 9 January 2014 order.

We first address defendant's argument regarding the arrearages under the Agreement. Defendant contends that the trial court erred in calculating his obligation for child and spousal support to accrue on an ongoing basis. This issue relates to an order issued on 9 January 2014 where the trial court made specific findings that defendant pay certain arrearages as a remedy for noncompliance with the Agreement. Defendant did not appeal this order over the last four years, and we decline to extend review at this time. Our review is limited to the proper issues on appeal, including spousal modification, which we discuss in further detail below.

II

Defendant argues the trial court erred in entering an amended order on 20 February 2017. Specifically, defendant argues the trial court lacked jurisdiction to amend its original order entered 14 February 2017 because defendant gave proper notice of appeal three days prior to the amendment. Therefore, the trial court was divested of its jurisdiction. We agree.

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

Generally, the trial court is divested of its jurisdiction over a matter once a notice of appeal is given and the appeal is awaiting perfection. *Webb v. Webb*, 50 N.C. App. 677, 678, 274 S.E.2d 888, 88–89 (1981). "While an appeal is not perfected until

it is actually docketed in the appellate division, a proper perfection relates back to the time of the giving of the notice of appeal, rendering any later orders or proceedings upon the judgment appealed from void for want of jurisdiction." *Swilling v. Swilling*, 329 N.C. 219, 225, 404 S.E.2d 837, 841 (1991); *see* N.C. R. App. P. 12 (2017) (an appeal is perfected when docketed by filing the appellate record with the Court of Appeals and paying the docket fees).

In the instant case, the trial court entered the 14 February 2017 order, which was appealed on 17 February. Thereafter, the trial court amended the order to reflect the correct amount of arrearages owed to plaintiff for spousal support. Upon the appeal being docketed with this Court, the perfection date of the order related back to the 17 February notice of appeal depriving the trial court of jurisdiction over subsequent orders or proceedings. Therefore, following perfection of the appeal, the trial court's amended order subsequently entered was void and we must vacate the amended order as the trial court was without jurisdiction to enter it at that time.

Notwithstanding our vacating the amended order, we note that defendant's obligation to pay arrearages pursuant to the 14 February 2017 order remains.[3] Accordingly, we address defendant's arguments as to the 14 February 2017 order.

III–IV

[3] In the 14 February 2017 order, the trial court calculated the total amount of arrearages owed for specific performance between the period of 1 November 2013 and 1 July 2016 ($165,000), then deducted the arrearages defendant paid ($101,280) to estimate a total balance of $41,716.00. However, the trial court amended that order to reflect a corrected total balance of $63,720.00.

Defendant argues the trial court erred in its findings pertaining to defendant's obligation for spousal support. Specifically, defendant contends the trial court erred by: not modifying spousal support; determining that the January 2014 order on alimony did not replace the terms of the Agreement; determining that arrearages could accrue on an ongoing basis under the Agreement; and concluding defendant's motion to modify spousal support should be denied. We disagree.

"It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Where a trial court issues an order reducing spousal and child support from the specified amount in an unincorporated separation agreement, we review those decisions for abuse of discretion only. *Beall v. Beall*, 290 N.C. 669, 673–74, 228 S.E.2d 407, 410 (1976) (The amount [of spousal and child support] is a reasonable subsistence, to be determined by the trial judge in the exercise of a sound judicial discretion from the evidence before him . . . [it] is reviewable, but it will not be disturbed in the absence of a clear abuse of discretion.").

"A separation agreement which is not incorporated into a court judgment is a contract and cannot be modified [by the court] absent the consent of the parties." *Rose v. Rose,* 108 N.C. App. 90, 94, 422 S.E.2d 446, 448 (1992). "Unlike child support and custody issues involving minors, the trial court has no 'inherent or statutory

authority to protect the interests and provide for the welfare' of competent adults." *Lasecki v. Lasecki*, ___ N.C. App. ___, 809 S.E.2d 296, 310 (2017) (citing *Pataky v. Pataky,* 160 N.C. App. 289, 296, 585 S.E.2d 404, 409 (2003)). Therefore, the trial court cannot modify a party's obligation to pay spousal support in a separation agreement, "but it could order specific performance of the [a]greement in an amount less than that demanded in the [a]greement upon determining that [a party] was not capable of performing to the full extent of his obligations." *Id.* at ___, 809 S.E.2d at 310–11.

The trial court made the following relevant findings of fact in its January 2014 order:

> 5. On October 2, 2010, the parties entered into a valid Separation Agreement and Property Settlement (hereinafter "Settlement Agreement"). Pursuant to the Separation Agreement, Defendant was obligated to pay to Plaintiff support totaling $8,000 per month. $3,000 of said support payments for child support and $5,000 of said support payment for non-taxable spousal support. *The Separation Agreement is a private contract between the parties and was never incorporated into any court order nor were there any subsequent actions by the parties or the Court which resulted in the incorporation of the Separation Agreement.* Thus, Defendant's obligation to pay non-taxable spousal support to Plaintiff in the amount of $5,000 per month may only be modified by a subsequent written and properly executed agreement of the parties.
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> 13. . . . The amount representative of Defendant's spousal support obligation was the amount that the

> Defendant *was then* in a position to specifically perform under the Separation Agreement. The Court is absent any jurisdiction or authority [to] change the Defendant's contractual obligation as set forth in the Separation Agreement and in no way relieves Defendant's underlying obligation to Plaintiff for the entire $5,000 in non-taxable spousal support due each month under the terms of the Separation Agreement.
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> 14. Defendant's underlying obligation to pay $5,000 each month to Plaintiff in non-taxable spousal support in addition to the modified child support amount of $1,875 each month remains intact and for each month Defendant fails to pay the full amount due, he has and continues to accrue arrearages.
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> 36. The Amended Order entered on January 9, 2014 continues to remain in full force [and] effect and does not alter the ongoing obligation Defendant owes to Plaintiff in non-taxable spousal support and for so long as Defendant has a spousal support obligation to Plaintiff pursuant to the Separation Agreement, Defendant shall continue to owe a total of $5,000 to her each month for her non-taxable spousal support in addition to ongoing child support payments as ordered.

The trial court held that "[t]he Amended Order entered on [9 January] 2014 continues to remain in full force." The trial court found defendant breached the Agreement by intentionally suppressing his income to avoid paying plaintiff spousal support. As a result, defendant was ordered to specifically perform the terms of the Agreement by paying "3,275 per month to plaintiff in non-taxable spousal support"

as a remedy based on the circumstances that "[d]efendant was then in a position" to pay.

Defendant argues that the trial court abused its discretion in entering the order contending it was a modification of the Agreement for spousal support. Contrary to defendant's argument, the trial court has consistently indicated that the adjustment to spousal support was not intended to be a permanent modification to the Agreement. The trial court has stated that it has "no authority to modify the ultimate terms of the parties' separation agreement regarding spousal support." Moreover, defendant's existing obligation to pay $5,000 in spousal support under the Agreement is not altered or amended. Nevertheless, defendant contends the order fundamentally rewrote previous orders and the Agreement. This argument is without merit.

The Agreement expressly provides, with respect to spousal support, that it "can be altered and amended only by further written agreement signed by the parties." The record does not reflect a written agreement was submitted to adjust spousal support. The order specifically stated "[d]efendant is ordered [to] comply with the [c]ourt's previous order of specific performance and to make best efforts to pay the full [amount] due each month." The order merely restated previous orders as to defendant's obligation to pay $5,000 and the trial court's reasoning for ordering specific performance.

Accordingly, the trial court did not abuse its discretion in ordering specific performance of defendant's spousal support obligation pursuant to the Agreement. Defendant is contractually bound to pay plaintiff $5,000 in spousal support *per month* until the parties agree otherwise. Absent the Agreement being incorporated into a judicial decree, the trial court has no authority to alter the terms of the Agreement. We affirm the trial court's 14 February 2017 order finding defendant in contempt. We vacate the 20 February 2017 amended order regarding the remaining arrearages owed by defendant from 1 November 2013 to 1 July 2016, and we remand back to the trial court for any necessary adjustments.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judges CALABRIA and HUNTER, JR., concur.

Report per Rule 30(e).