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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-988

Filed: 21 August 2018

Camden County, No. 15-CVD-59

CHRISTINA M. WHITMORE, Plaintiff,

v.

JUSTEN LEE WHITMORE, Defendant.

Appeal by Defendant from order entered 3 April 2017 by Judge Edgar L. Barnes in Camden County District Court. Heard in the Court of Appeals 19 February 2018.

Richard Croutharmel, for defendant-appellant.

MURPHY, Judge.

Justen Lee Whitmore (Defendant) appeals from the 3 April 2017 order finding him in contempt for his failure to comply with a child support order previously entered during the course of domestic litigation between the parties. Defendant contends that that the trial court's contempt order must be vacated because there was insufficient evidence of his willful failure to comply with the child support order. In light of the record showing that Defendant had the ability to comply with his child

support obligations, and that he merely disagreed with the original child support order, the contempt order is affirmed.

BACKGROUND

Defendant and Plaintiff were married in 2009 and had one child together in 2010. In February of 2015, Defendant and Plaintiff separated. On 28 March 2016, Judge Amber Davis entered a child support order that obligated Defendant to pay $711.00 per month and determined that Defendant had an arrearage of $8,532.00, which was to be paid down in $50.00 monthly installments. At the time the child support order was entered, Defendant had a monthly income of $4,401.46. Defendant, as part of his military retirement benefits, also has a $1,600.00 monthly housing allowance.

On 12 August 2016, Plaintiff filed a motion to show cause and requested the trial court to hold Defendant in contempt for his failure to comply with the 28 March 2016 child support order. In the time since the child support order was entered, Defendant had not made any child support payments. The trial court subsequently entered two show cause orders directing Defendant to appear and show cause why he should not be held in contempt of court. A civil contempt hearing was held on 7 February 2017, and Defendant was asked about the reasons he did not pay child support. Defendant testified that he disagreed with this child support:

> *Plaintiff's Counsel*: To get back to my question, if you don't agree with the Judge's order, you just don't have to follow

> it?
>
> *Defendant*: That's why the motion was filed for a new child support hearing.
>
> *Plaintiff's Counsel*: It's kind of a yes or a no question. You either agree with that statement, or you don't agree with that statement.
>
> *Defendant*: It depends on the situation.
>
> *Plaintiff's Counsel*: In this situation you agree that--
>
> *Defendant*: I disagree with this child support.

Defendant also testified that if he paid $711.00 in child support each month he would become "homeless."

> *Defense Counsel*: And is it your testimony here today that you can't afford to pay the $711 a month, the order last year?
>
> *Defendant*: If I pay that, I'll be homeless, and I will not be able to have my son because I can't afford --.

The trial court held Defendant in civil contempt for his failure to comply with the 28 March 2016 child support order. The trial court ordered Defendant into custody for civil contempt, but his release was authorized subject to compliance with the following condition:

> The Defendant pay $711.00 forthwith to the Court, and will thereafter be released from custody[.]

On 7 February 2017, the same day as the contempt hearing, Defendant paid $711.00 and was released from custody.

On 3 April 2017, the trial court entered the written civil contempt order, and Defendant timely appealed this order. He argues that the trial court erred by holding him in contempt because the evidence did not establish that his failure to comply with his child support obligations was "willful." For the reasons that follow, we disagree.

STANDARD OF REVIEW

In reviewing a civil contempt order, we are "limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Middleton v. Middleton*, 159 N.C. App. 224, 226, 583 S.E.2d 48, 49 (2003) (citation omitted). We review the conclusions of law reached by the trial court de novo, freely substituting our judgment for that of the trial court. *Tucker v. Tucker*, 197 N.C. App. 592, 594, 679 S.E.2d 141, 143 (2009). We afford great deference to a trial court's findings of fact. *See McAulliffe v. Wilson*, 41 N.C. App. 117, 121, 254 S.E.2d 547, 550 (1979).

> When there are competing inferences arising from testimony of witnesses in a case, it is for the trier of fact to decide between them. The findings of fact by a trial court in a non-jury trial have the force and effect of a verdict by a jury and are conclusive on appeal if supported by competent evidence, even though the evidence might sustain findings to the contrary. The wisdom of this rule is especially apparent in situations such as the one presented by the instant case where the cold record reveals testimony from each party that precisely contradicts that of the other, and the evidence of either party, if believed, would support a finding for that party. The trial court, having had the fullest opportunity to hear the testimony and observe the demeanor of the parties . . . should be accorded deference

> unless his findings and conclusions are manifestly unsupported by the record.

Id. at 120-21, 254 S.E.2d at 550 (citation omitted).

CIVIL CONTEMPT: LEGAL PRINCIPLES

Civil contempt is governed by N.C.G.S. § 5A-21 (2017):

> (a) Failure to comply with an order of a court is a continuing civil contempt as long as:
>
> (1) The order remains in force;
>
> (2) The purpose of the order may still be served by compliance with the order;
>
> (2a) The noncompliance by the person to whom the order is directed is willful; and
>
> (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

Thus, "[i]f . . . the finding that the failure to pay was willful is not supported by the record, the decree committing defendant to imprisonment for contempt must be set aside." *Henderson v. Henderson*, 307 N.C. 401, 409, 298 S.E.2d 345, 351 (1983) (citations omitted); *see also Tigani v. Tigani*, ____ N.C. App. ____, ____, 805 S.E.2d 546, 549 (2017) (stating that "to find a party in civil contempt, the court must find that the party acted willfully in failing to comply with the order at issue"). A "person in civil contempt holds the key to his own jail by virtue of his ability to comply." *Jolly*

v. Wright, 300 N.C. 83, 93, 265 S.E.2d 135, 143 (1980), *overruled on other grounds by McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993).

> Willfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so. Therefore, in order to address the requirement of willfulness, the trial court must make findings as to the ability of the [contemnor] to comply with the court order during the period when in default. . . .Second, once the trial court has found that the party had the means to comply with the prior order and deliberately refused to do so, the court may commit such [party] to jail[.] . . . At that point, however, . . . the court must find that the party has the present ability to pay the total outstanding amount.

Tigani, ____ N.C. App. at ____, 805 S.E.2d at 549 (alterations in original) (internal quotation marks and citations omitted).

ANALYSIS

Defendant first challenges Finding of Fact 2:

> That on March 28, 2016, this Court entered an Order for Child Support which required the Defendant to pay child support to the Plaintiff in the sum of $711.00 per month beginning on April 1, 2015.

This finding is supported by competent evidence because on 28 March 2016, Judge Amber Davis entered an order for child support in this amount and the trial court was permitted to take judicial notice of this prior order. *See, e.g.*, *In re W.L.M. & B.J.M.*, 181 N.C. App. 518, 523, 640 S.E.2d 439, 442 (2007) ("In any event, this Court repeatedly has held that a trial court may take judicial notice of earlier proceedings in the same case.").

Defendant next challenges Finding of Fact 7:

> That the Plaintiff has incurred unreimbursed medical and dental expenses for the benefit of the minor child, has provided those itemized expenses to the Defendant and his prior counsel, and the Defendant has failed to reimburse his 67% portion of those expenses to the Plaintiff, in violation of the March 28, 2016 order.

Defendant takes issue with this finding due to Plaintiff's use of an out-of-network medical provider which increased his total out-of-pocket expenses. However, this argument is merely an attempt by Defendant to collaterally attack the underlying child support order, and is also irrelevant to the present appeal. The parties' child support order does not make Defendant's obligation to reimburse Plaintiff contingent upon the use of an in-network medical provider. Moreover, the evidence shows, and Defendant's brief admits, that Defendant failed to reimburse Plaintiff for the minor child's medical expenses. Therefore, Finding of Fact 7 is supported by competent evidence.

Defendant also challenges a portion of Finding of Fact 8 regarding his income on the date of the contempt hearing:

> The Court finds that the Defendant currently receives income in the amount of $1628.00 per month plus a housing allowance in the amount of $1600.00 per month.

Defendant maintains that it is "undecided" whether his $1,600.00 housing allowance which is part of his "GI Bill" benefits, should be classified as income for child support purposes under our Child Support Guidelines. This argument, similar to the one

advanced by Defendant regarding Finding of Fact 7, is another attempt to collaterally attack the underlying child support order. Since Defendant's own testimony adequately supports Finding of Fact 8, this finding is supported by competent evidence.[1]

> *The Court*: Okay. Mr. Whitmore, what's your current total income from the military?
>
> *Defendant*: Just from the VA, Your Honor, $1620.00.
>
> *The Court*: And housing allowance, how much is that?
>
> *Defendant*: That's $1600.00 as well.

Defendant next challenges Finding of Fact 9:

> That the justification offered by the Defendant for his failure to pay support in any amount since the entry of the March 28, 2016 order was that he disagreed with a daycare allowance that included in the calculation of child support.

After review of Defendant's testimony we conclude that this finding is also supported by the evidence. Specifically, during the civil contempt hearing, and in response to a question asking why he had not paid any child support, Defendant testified that he had a "big issue" with the amount of his son's child care costs.

> *Plaintiff's Counsel*: Why have you paid no child support?
>
> *Defendant*: As it was addressed, I have a big issue with this $400.00 that she is claiming. That is not adequate childcare, not adequate, but it is not a fair amount for child

[1] Finding of Fact 8 is supported despite the *de minimis* $8.00 discrepancy between Defendant's testimony that he received $1,620.00 in VA benefits and the written finding that Defendant received income in the amount of $1,628.00 per month.

> support for after school care for a child, a school-aged child where she is claiming $800.00 a month. I've talked to childcares, numerous ones. Most it's $200.00, but I'm being told $400.00 a month.

Shortly thereafter, Defendant testified that he disagreed with this child support order.

Defendant also challenges Findings of Fact 10 and 11[2] on the grounds that he did not have the ability to pay the child support, and "would have become homeless" if he had done so. The trial court found in relevant part:

> That the Defendant has had the means and ability to pay to the Plaintiff the sum of $711.00 per month as required by the March 28, 2016 order.
>
> That the Defendant has failed to provide any adequate explanation for paying nothing to the Plaintiff for the past eleven (11) months, and for failing to make any effort to comply in any way with the prior order of this Court.

After review of the record, we conclude that Defendant's argument appears to be nothing more than a bald assertion unsupported by any evidence or explanation that the trial court found persuasive to meet his burden. *See Tigani*, ____ N.C. App. at ____, 805 S.E.2d at 549 (2017) (finding when a civil contempt proceeding under

[2] Unlike Findings of Fact 2, 7, and 8, which are "evidentiary facts," Findings of Fact 10 and 11 are more in the nature of "ultimate facts." *See Kelly v. Kelly*, 228 N.C. App. 600, 607, 747 S.E.2d 268, 276 (2013) ("Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other. In consequence, the line of demarcation between ultimate facts and legal conclusions is not easily drawn. An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts. Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law." (citation omitted)).

N.C.G.S. §5A-23(a) is initiated by the order of a judicial official directing the alleged contemnor to appear and show cause, "the alleged contemnor has the burden of proof" to show why he should not be held in civil contempt). During the relevant period, the evidence showed that Defendant received between $3220.00 and $4300.00 per month in total financial compensation. Had Defendant made his monthly court ordered payments of $711.00, he would have been left with between $2509.00 and $3581.00 to meet his housing and personal needs. Furthermore, the unchallenged findings demonstrate that Defendant had "no housing related expenses that [were] not covered by his housing allowance," and Defendant failed to provide documentation or an estimate of any additional expenses.

> *Defense Counsel*: Without getting too detailed, what are your other approximate expenses?
>
> *Defendant*: Auto insurance, cell phones, food for myself, my son, and our dogs, electric, cable, I mean bare necessities pretty much other than like, you know, I'm not sitting here going out partying. I'm not -- I do buy my son clothes, shoes. I just recently bought him a pair of shoes for basketball.

Defendant's proffered explanation that he would become "homeless" if he paid $711.00 per month in child support is specious at best. Regarding his ability to comply with the order, the evidence also showed that Defendant was employed by a manufacturing company, pursuing a degree in Engineering, and leasing an apartment with a monthly rent of $900.00. "The trial court, having had the fullest

opportunity to hear the testimony and observe the demeanor of the parties . . . should be accorded deference unless his findings and conclusions are manifestly unsupported by the record." *McAulliffe*, 41 N.C. App. at 121, 254 S.E.2d at 550. Findings of Fact 10 and 11 are supported by the evidence.

We now address Defendant's argument that his failure to pay child support was not "willful" as required by N.C.G.S. § 5A-21(a)(2). We disagree with Defendant's contention that the contempt order's omission of the word "willful" is fatal to the order's validity. Although it is true that the order does not contain any finding of fact or conclusion of law expressly stating that Defendant's failure to pay child support was "willful," the use of the word "willful" was not necessary in this case due the trial court's use of legally equivalent language. The trial court concluded that Defendant's failure to comply with the 2016 child support order was "without justifiable excuse."

> The Court therefore concludes that the Defendant has failed to comply with [the] March 28, 2016 order of this Court without justifiable excuse.

The trial court's language that Defendant's failure to comply was "without justifiable excuse" is legally synonymous with a finding that Defendant's failure was "willful." Moreover, this conclusion, along with the trial court's other findings of fact, sufficiently address the contempt statute's requirement of willfulness. Adopting Defendant's position would elevate form over substance and frustrate the purpose of

the civil contempt statute, which is "to compel obedience to orders and decrees." *Thompson v. Thompson*, 223 N.C. App. 515, 518, 735 S.E.2d 214, 216 (2012); *see also O & M Indus. v. Smith Eng'r Co.*, 360 N.C. 263, 268, 624 S.E.2d 345, 348 (2006) ("The Court may also consider the policy objectives prompting passage of the statute and should avoid a construction which defeats or impairs the purpose of the statute.").

Notwithstanding the contempt order's omission of the word "willful" and its derivations, the evidence and trial court's findings of fact support its conclusion that that Defendant's failure to comply with the child support order was "without justifiable excuse." Furthermore, the trial court's findings sufficiently address Defendant's willfulness as they establish that Defendant had the "ability to comply" with the child support order on the day of the hearing and that his failure to do so was "deliberate and intentional." *Tigani*, ___ N.C. App. at ____, 805 S.E.2d at 549. Defendant's testimony that he disagreed with this child support order is also evidence of a "stubborn resistance" that our appellate courts have found instructive in determining whether a defendant has willfully disobeyed a court order. *See Meehan v. Lawrence*, 166 N.C. App. 369, 378, 602 S.E.2d 21, 27 (2004). Accordingly, the trial court did not err by holding Defendant in civil contempt.

CONCLUSION

Defendant's argument that the trial court erred by concluding that his failure to pay child support was willful is without merit. The 3 April 2017 civil contempt order is affirmed.

AFFIRMED.

Chief Judge McGEE and Judge BRYANT concur.

Report per Rule 30(e).