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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-342

Filed: 19 May 2020

Guilford County, No. 06 CVD 11417

ANNDREA RISEN, Plaintiff,

v.

PAUL RISEN, Defendant.

Appeal by plaintiff from order entered 6 August 2018 by Judge Mark T. Cummings in District Court, Guilford County. Heard in the Court of Appeals 13 November 2018.

Cynthia Ann Hatfield, for plaintiff-appellant.

Lee M. Cecil, for defendant-appellee.

STROUD, Judge.

Plaintiff appeals from an order holding her in civil contempt for failing to comply with a prior child custody order. Several of the trial court's findings of fact are not supported by the evidence, and without those findings of fact, the trial court's conclusions of law are not supported by the findings. In addition, the trial court's decree includes several provisions regarding potential punishment of the minor

children which are beyond the court's authority in this action. We reverse the trial court's order.

I. Background

Plaintiff-mother and defendant-father were married and had two children born in 2002 and 2004. During the relevant time period at issue in this order the older child, Greta, was 15, and the younger, Pat, was 13, though both were within a month of turning 16 and 14.¹ The parties divorced, and in 2014 the trial court entered a detailed temporary custody order granting joint legal and physical custody of the children to the parties, with Mother to have primary physical custody and Father to have secondary custody. On 6 January 2015, the trial court entered a consent order modifying some provisions of the temporary custody order based on the parent coordinator's memorandum of action; the memorandum modified custody for holidays and travel outside of the country. On 21 November 2017, the trial court entered another consent order finding that the temporary custody order "is now permanent by the operation of law" and continuing the hearing on both parties' pending motions to modify custody.

On 29 March 2018, the trial court entered an order holding Mother in criminal contempt based upon a prior motion filed by Father regarding visitation.² On 23 April

¹ Pseudonyms are used.

² We do not have the 29 March 2018 criminal contempt order in our record but both parties and the trial court reference it.

2018, Father filed a verified “DEFENDANT’S MOTION TO SHOW CAUSE REQUEST FOR CONTEMPT AND ATTORNEY FEES AND MOTION TO COMPEL VISITATION” alleging Mother had failed to comply “with the terms of the September 19, 2014 Order of this Court,” specifically as to certain custody provisions by withholding the children and attempting to alienate the children from Father. The motion also requested the trial court to compel the minor children themselves to comply with the order, although the children did not have guardians *ad litem* and were not represented by counsel. The specific time period covered by Father’s contempt motion as clarified at the start of the hearing was “March 29, 2018, to April 23rd, 2018[.]” because there was a prior contempt hearing and order “which would have dealt with all issues before that[.]” Thus, the focus of this particular hearing was extremely limited, encompassing visitation for approximately three weeks. On 6 August 2018, the trial court entered an order concluding Mother was in civil contempt, and Mother timely filed notice of appeal from this order.

We first note that we have had difficulty understanding portions of the parties’ arguments and the trial court’s order because our record does not include the criminal contempt motion and order which immediately preceded this motion and order. Father’s motion for contempt references a prior order holding Mother in criminal contempt on 29 March 2018. Father alleged Mother,

was found in criminal contempt of Court by the Honorable
Mark Cumming by Order of this Court on March 29th,

2018. Plaintiff has appealed the matter to Superior Court, which is currently pending. Plaintiff continues her violation of Judge Vincent's order even though she has been found in criminal contempt by Judge Cummings.

Also relevant to the particular visits in question, the parenting coordinator entered a memorandum of action on 20 April 2018, regarding scheduling issues for the particular weekend which is the primary focus of Father's contempt motion. The 20 April 2018 memorandum states in part:

[I]n the fall of 2017 the Plaintiff/Mother discontinued effectuating the custodial schedule, keeping the children in her custody. *This issue was again before the Court on Defendant/Father's Motion for Contempt in March 29, 2018. The Court issued its Order finding the Plaintiff/Mother in Contempt of Court and sentenced Plaintiff/Mother to 30 days in jail, suspending all but 24 hours thereof for 12 months and placing Plaintiff/Mother on supervised probation for 12 months. There are additional terms of this Order which are not set forth herein and reference is made thereto for said details.* Plaintiff/Mother has notified the PC that she has appealed the Order but the PC has not been provided documents relevant to said appeal.

The Contempt Order was entered just as the minor children of the parties were beginning their Spring Break holiday from school. Under the guiding custody order and Memorandums relating thereto that have been entered since said Order, the Plaintiff/Mother had custody of the children throughout the Spring Break holiday this year. Spring Break ended on Monday, April 9th when the children returned to school and the weekend following their return to school was their mother's routine weekend for custody. The weekend beginning yesterday, April 19, 2018 is the Defendant/Father's routine weekend with the children.

The PC wrote both parents asking the Plaintiff/Mother to confirm that she was not picking up the children, or having a third party do so, on Thursday, April 19th in respect of the routine schedule where they were to be with their father. The PC has not received a response to that message, The Defendant/Father was asked if he had the children and he reported that he did not.

The Plaintiff/Mother applied for a Domestic Violence Protective Order on April 18, 2018 asking the Court to interrupt Defendant's custodial rights and allow her sole custody. The Court entered an Order denying the ex parte request.^[3] The PC has communicated to the parents that the routine schedule set forth in Judge Vincent's Order should be followed by the parents. This Memorandum of Action is being issued to clarify the custodial scheduling that governs the children's schedule at this time.

The parents shall follow the schedule set forth below consistent with the Court's Order. The parents should note that the appeal from the Contempt Order does not provide any right to the Plaintiff/Mother to disregard the custodial schedule set forth in Judge Vincent's Order. The schedule is as set forth on the attached and incorporated Custody Tables through the end of May, 2018. The PC will forward the custody tables for June through the summer in the next week.

The father shall have custody of the minor children from Thursday through Sunday night, returning them to school on Monday morning the first, third and fifth weekends of every month. The Memorandum of Action defining the first/third/fifth weekend is referred to if there is question thereon. The table attached and incorporated herein sets forth the weekend schedule consistent with that Memorandum of Action.

³ The documents regarding the domestic violence protective order are not included in our record.

The father should have been able to obtain custody of the children on Thursday, April 19, 2018 and enjoy custody through the weekend, returning them to school on Monday morning, April 23rd. Since he does not have the children as of the entry of this Order, this weekend shall be modified so that he returns the children to school on Tuesday morning, April 24, 2018. Thereafter the schedule shall be as set forth on the attached table.⁴

Each parent should be supportive of the resumption of the schedule to the children, insulate the children from conflict between the adults, not discuss the court proceedings with the children and otherwise remain neutral with the children regarding the conflicts between the parents.

The Plaintiff/Mother shall not go to the children's school, or send a third party to their schools, to pick up the children on the Father's custodial days, beginning with today, Friday, April 20, 2018. Neither parent shall appear at the children's school during the transition times when they are not the parent in custody of the children under Judge Vincent's Order. A copy of this Memorandum will be provided to each child's school so that can assist in the effectuation of these provisions.

(Emphasis added.) Thus, both Father's contempt motion and the memorandum by the parenting coordinator, which addressed this visitation, noted the criminal contempt order, but neither the prior motion for criminal contempt nor the order is included in our record on appeal.

Because of the prior criminal contempt motion and order, at the beginning of

⁴ The table referred to in the memorandum was not attached to the copy in our record.

the hearing, counsel for Mother clarified that the motion for contempt under consideration addressed only the time period of 29 March 2018 to 23 April 2018, since the 29 March 2018 order addressed any prior violations by Mother. Father's counsel did not contend otherwise, and his motion for contempt addresses only this time period. Although the absence of the prior criminal contempt proceedings and other documents noted above from our record makes the parties' arguments more difficult to understand, we can address the arguments without them, since Father's motion for contempt references only Mother's violation of the 19 September 2014 custody order – often referred to as the Vincent order – and according to the memorandum, Father was originally scheduled to have visitation Thursday, 19 April 2018 and to return them to school on Monday, 23 April 2018.

II. Civil Contempt

Mother contends the trial court erred by determining she was in civil contempt of the custody order.

A. Standard of Review

“The standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law.” *Trivette v. Trivette*, 162 N.C. App. 55, 60, 590 S.E.2d 298, 302–03 (2004).

Conclusions of law are reviewed *de novo* and are subject to full review. In reviewing a trial judge's findings of fact, we

are strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.

In re Thompson, 232 N.C. App. 224, 226–27, 754 S.E.2d 168, 170–71 (2014) (citations and quotation marks omitted).

B. Findings of Fact

Because Mother challenges many of the trial court's findings of fact, we will quote almost all the substantive provisions of the order verbatim. The trial court's footnotes in the order are in parentheses.

4. Defendant filed his Motion April 23, 2018, arguing that Plaintiff violated, and continued to be in violation of, Judge Vincent's September 19, 2014 Order (hereinafter, "the Vincent Order"). Specifically, Defendant alleges that Plaintiff "has willfully refused and failed to comply with the court-ordered provisions of the Custody Order regarding the custody schedule and terms", that Plaintiff "withheld the minor children from Defendant unjustifiably and willfully", that Plaintiff "refused to co-parent" with Defendant, and that Plaintiff, by her actions, "is attempting to alienate the children from the Defendant[.]"
5. The Vincent Order is hereby incorporated by reference as if fully set[]out herein. And, although the Vincent Order was captioned a "Temporary Order", neither Plaintiff nor Defendant filed subsequent pleadings with the Court within one-year, or a reasonable time thereafter, to prevent the Vincent Order from becoming a permanent Order[.]

6. By Order dated May 1, 2018, Judge Vincent ordered Plaintiff to appear and show cause, having found probable cause to believe that Plaintiff was in violation of the Vincent Order.
7. From the Defendant's presentation and solicitation of evidence, the Court finds the following:
 - a. The Vincent Order grants him custody of the minor children every 1st, 3rd, and 5th (when applicable) Thursday to Monday while school is in session.
 - b. The Vincent Order grants him primary physical custody of the minor children in the summer. During the summer, Plaintiff has custody of the minor children every other weekend from Thursday at 5:00pm until Monday at 9:00am (The Summer Schedule starts the day that the school is dismissed for the summer until the day prior to the resumption of school). During the summer, Plaintiff also has custody of the minor children for two consecutive weeks of vacation, provided that she gives Defendant thirty (30) days notification of the consecutive weeks Plaintiff sought to have. (The Order allowed both parties to travel outside the Country with the minor children, provided that the traveling parent provide notification to the other parent within ninety (90) days of the time of travel. Both parents were required to submit the travel destination, flight numbers and the contact numbers to the other parent. If the traveling parent left the United States with the minor children, he or she was required to provide the other parent with an itinerary of where the children would be staying.)
 - c. The Plaintiff would intentionally schedule activities for the children during Defendant's custodial time, including, theatrical

rehearsals and counseling session. (The Vincent Order prohibited either party from making any commitment for the minor child that would involve the other party's time, effort or expense without first obtaining the agreement of the other party.)

- d. Since December 2017, Defendant has not had any custodial time with [Greta], and has only had a partial weekend with [Pat] in the same time period.
- e. After the Court held Plaintiff in contempt on March 29, 2018, and specifically finding as fact that Defendant never abused the minor children physically or psychologically, Plaintiff filed two Domestic Violence Protection Orders, as guardian ad litem for the minor children, against Defendant. Defendant filed the 50B Domestic Violence Protective Order right before Defendant was to gain custody of the minor children. (The Parenting Coordinator filed a Memorandum of Action that included a 2018 School Custody Calendar (hereinafter, "the Calendar") for the Months April 2018 and May 2018 (Defendant's Exhibit 2). The calendar gave Plaintiff custody of the minor child during Spring Break. Under the Vincent Order, Defendant was entitled to custody of the minor children during Spring Break in even-numbered years; however, as a result of an earlier error that resulted in Defendant having the minor children during Spring Break in an odd-number year, the Parenting Coordinator informed the parties that Plaintiff would have custody of the minor children during Spring Break this year. There was a dispute as to whether the Parenting Coordinator had this power, and even if she didn't, whether the Parties, by their conduct, had agreed that Defendant

would have the minor children for Spring Break on odd-numbered years, and the Plaintiff on even-number years. This Court leaves that issue for a subsequent court hearing. According to the Calendar, Defendant would resume his custody of the minor children on April 19, 2018.) In the 50B Complaint, Plaintiff alleged the same conduct for which the Court had already considered and found not to be credible.

- f. Plaintiff's boyfriend caused a warrant to be issued against Defendant for allegedly committing a larceny. In the warrant, Plaintiff's boyfriend alleged that Defendant stole his [the boyfriends] phone when Defendant took the phone from one of the minor children. The phone had been given by the boyfriend to the minor child, and was the property of the minor child. On the warrant's affidavit, Plaintiff and her boyfriend checked the box that Defendant was armed and dangerous. At the time, Plaintiff knew or had reason to know that the Plaintiff did not own a firearm, and made this notation without regard to the Defendant's safety.
- g. By email dated April 19, 2018, Plaintiff told Defense counsel to instruct Defendant not to contact her anymore.
- h. Plaintiff did not make the children available for transfer to the Defendant on April 19. When Defendant went to one of the minor children's school to get her, she wasn't there. Defendant was subsequently able to get the younger minor child on April 20, but was not able to get the older minor child. While the youngest minor child was in the custody of Defendant, Plaintiff caused Defendant to be served with the 50B notice.
- i. Plaintiff continued to pick up the minor children from school on days where Defendant

was supposed to have custody of the minor children; if she did not personally pick the minor children up, she would arrange for someone else to pick up the minor children, usually a parent of the minor children's friend.

8. Plaintiff gave no credible justifications for her actions, and at numerous points during her testimony was either evasive in her answers or gave illogical and potentially untrue testimony: By way of example:
 - a. Plaintiff testified that she didn't pick up the oldest minor child from school on Friday April 20, but couldn't remember whether or not said minor child rode with Plaintiff to Charlotte. She subsequently said that she didn't know where the minor child was during the weekend and didn't take any steps to check on the whereabouts of the minor child.
 - b. Plaintiff testified that she took away the oldest minor child's key to the home in an attempt to prevent her from coming home during Defendant's custodial time. However, when questioned on cross-examination, Plaintiff admitted that the key she took away from the minor child was to the home at which they no longer resided.
 - c. At one point in the hearing, Plaintiff testified that she intended to take the Children back to Canada during the week of August 6 (even though she had already took the minor children to Canada this summer, and had not given Defendant 90 days notification that she would be taking the children back to Canada), later, when pressed about the minor children being with Defendant during this time period under the Order, Plaintiff asserted that the youngest minor child actually would be beginning school.

9. Plaintiff's conduct, as illustrated above, shows willful disobedience of, resistance to, and interference with the Court's lawful process, order, directive, instruction and execution. Plaintiff's conduct also exhibit[s] her guilt of knowledge and stubborn resistance.
10. At all times, Plaintiff had the ability and present means to comply with the Court's order.
11. Plaintiff's non-compliant conduct continues even today, and Plaintiff has not shown a willin[g]ness to correct her conduct.

Mother challenges findings of fact or subsections thereof for findings 7, 8, 9, and 11 as not supported by the evidence.

1. Finding of Fact 7

Mother challenges seven subsections of finding of fact seven.

a. Finding of Fact 7(b)

Mother contends finding of fact 7(b) "is factually accurate" but "footnote 2 references a requirement that each give 90 days notice of travel outside the country" which was modified by the 6 January 2015 consent order "to require only 15 days notice." Footnote 2 provides,

The Order allowed both parties to travel outside the Country with the minor children, provided that the traveling parent provide notification to the other parent within ninety (90) days of the time of travel. Both parents were required to submit the travel destination, flight numbers and the contact numbers to the other parent. If the traveling parent left the United States with the minor children, he or she was required to provide the

other parent with an itinerary of where the children would be staying.

Mother is correct. Finding of fact 7(b) footnote 2 is incorrect, as the January 2015 consent order changed the notification period from 90 days to 15 days. But since none of the contempt allegations address notification regarding travel, this finding has limited, if any, relevance to the issues on appeal.

b. Finding of Fact 7(c)

Mother argues finding of fact 7(c) “is not supported by the evidence” because “[t]he Court found that . . . [Mother] had scheduled activities during . . . [Father’s] time with the children and gave only two specific examples ‘theatrical rehearsals and a counseling session’” with only a single rehearsal mentioned in testimony and despite the fact that both parties had agreed to take their daughter to counseling in the consent order. Finding of fact 7(c) provides, “The Plaintiff would intentionally schedule activities for the children during Defendant’s custodial time, including, theatrical rehearsals and counseling session.”

Both parties’ briefs focus heavily on the parenting coordinator’s scope of authority in modifying or adjusting the parties’ custodial schedule. In addition, the parenting coordinator was working with the parties to resolve their disputes regarding the April 2018 schedule. The parenting coordinator’s memorandum regarding visitation on the weekend of 20 April 2018 was entered *on* 20 April 2018. The memorandum directed that Father would have the children from 20 April 2018

until return to school on Tuesday morning, 24 April 2018. Father filed his motion for contempt on 23 April 2018, a day before his visit was to end. However, at this point we are only addressing Mother's challenges to the findings of fact.

As to the findings of fact, we agree with Mother that the evidence does not support a finding that she "intentionally" scheduled theater rehearsal during Father's time. Pat was 14 years old at the time of the order and was taking a drama class. There was no evidence Mother had any control over when the drama teacher scheduled mandatory rehearsals or projects. The drama teacher scheduled a rehearsal or drama activity after regular school hours on 23 April and the rehearsal conflicted with Father's scheduled custodial time after school, but there was no evidence Mother did anything to influence the drama class rehearsal schedule.⁵ And until the parenting coordinator's 20 April memorandum directing that Father would have the evening of 23 April, under the Vincent Order Mother would have been responsible for picking Pat up on 23 April.

The evidence regarding Pat's counseling sessions is similar. Both parties had the authority to communicate with the therapist to schedule or re-schedule sessions

⁵ Mother testified the drama activity after school was part of the class, and Father testified it was a "project," but Father acknowledged Pat was in drama and presented no evidence that Mother had any control over the drama class requirements or schedule.

as needed.⁶ There is no doubt the parties had difficulty communicating; this is a high conflict case with a parenting coordinator. But the fact that Pat had a therapy session scheduled does not necessarily mean that Mother intentionally scheduled a therapy session during Father's custodial time. Father testified Pat went home with him,⁷ so either he took her to that particular session or she missed it.

The trial court did not find any other "activities" Mother allegedly scheduled during Father's custodial time relevant to the very limited time period covered by the contempt motion.⁸ The custody order did not guarantee Father that his time with the children would be uninterrupted by any commitments such as school activities or therapy; the custody order instead granted both Mother and Father, as joint legal and physical custodians, the privilege and responsibility to participate in these activities. Finding of fact 7(c) is not supported by the evidence to the extent that it finds Mother intentionally scheduled activities during Father's time.

c. Finding of Fact 7(d)

⁶ The temporary custody order included the "PARENTING GUIDELINES of the 18th Judicial District" which provide, "Each party shall have direct access to the child's teachers, counselors, school and religious advisors the same as if the parent were the sole custodian of the child."

⁷ According to Father's testimony he sent Pat's friend's father to pick her up while he got the dog, Murphy. Pat did not leave with the friend's father, but he did eventually go back to school with Murphy and picked up Pat.

⁸ Again, our review is limited to this contempt order addressing a very short period of time. It is possible the trial court made similar findings regarding prior alleged violations by Mother in the criminal contempt order, but that order is not in our record.

Mother again contends this finding of fact is “factually accurate” but argues “it is conclusory and without findings as to the cause. Further, Judge Cummings appears to be considering potential violations outside the scope of this hearing and during the time period addressed by the March 2018 Contempt Order.” Finding of fact 7(d) provides, “Since December 2017, Defendant has not had any custodial time with [Greta], and has only had a partial weekend with [Pat] in the same time period.” Mother testified that Father had only had custody of Pat the one weekend he took her home from counseling, and he had not seen Greta since December of 2017. But we note this finding does not address why the children had not visited with Father during this time.⁹ Mother is correct that the specific time period covered by the contempt motion was “March 29, 2018, to April 23rd, 2018[,]” because there was a prior contempt hearing and order “which would have dealt with all issues before that[.]” The allegedly contemptuous acts addressed at this hearing occurred during a period of about three weeks. We do not agree with Mother that considering when the children have been with each parent as “outside the scope of this hearing” when the issue is whether Mother is in contempt of a custody order though we do note that the basis of contempt at this hearing had to be acts between 29 March 2018 and 23

⁹ Based upon the transcript, it appears this time period may have been addressed in the criminal contempt order which is not in our record. Since the hearing was limited to the period after 29 March 2018, the parties did not present evidence regarding visitation prior to this date.

April 2018. In fact, the very next finding notes the prior contempt hearing on 29 March 2018.

d. Finding of Fact 7(e)

Finding of fact 7(e) provides,

After the Court held Plaintiff in contempt on March 29, 2018, and specifically finding as fact that Defendant never abused the minor children physically or psychologically, Plaintiff filed two Domestic Violence Protection Orders, as guardian ad litem for the minor children, against Defendant. Defendant filed the 50B Domestic Violence Protective Order right before Defendant was to gain custody of the minor children. In the 50B Complaint, Plaintiff alleged the same conduct for which the Court had already considered and found not to be credible.

Mother contends finding of fact 7(e)

references facts not offered in evidence in this hearing. Judge Cummings appears to be using facts presented in prior hearings and finding and conclusions from the March 2018 Contempt Order, which was on appeal during the hearing of this matter and has since been vacated.^[10] The Court has no authority to use evidence from other hearings or rulings that are on appeal or have been reversed. There was no evidence offered in this hearing as to the specific allegations made by . . . [Mother] in the referenced 50B complaint or to the allegations Judge Cummings “considered and not found not to be credible” previously[.]

¹⁰ Mother’s *argument* also “references facts not offered in evidence at this hearing” and not included in our record. As discussed above, neither the March 2018 contempt order nor any order vacating that order, which logically would have been entered after the hearing at issue, was included in our record. Whether or not it was vacated, we cannot rely upon any findings in the criminal contempt order because it is not in our record.

Our review of this issue is subject to the limitations noted above in our discussion of the absence of the prior criminal contempt order from our record on appeal. Although there is discussion of the prior domestic violence proceedings in the transcript and record, the pleadings and orders in the domestic violence proceedings are not in our record nor were they presented to the trial court.

At the beginning of the hearing, counsel for Mother clarified that the motion for contempt under consideration addressed only the time period of 29 March 2018, to 23 April 2018 because the “order on the previous hearing . . . dealt with all issues before that[.]” Ultimately, the evidence supports the findings to the extent that it notes the *existence* of a prior criminal contempt order and prior domestic violence proceedings, as there was testimony to this effect, but as to any factual details of the prior criminal contempt order or the domestic violence proceedings, Mother is correct that this finding is not supported by the evidence and none of this information is in our record. Further, it is impossible for us to review the trial court’s finding that “Plaintiff alleged the same conduct for which the Court had already considered and found not to be credible” where none of the pleadings or orders regarding the “conduct” are in our record.

Father argues that the trial court properly relied upon his memory of other proceedings between the parties: “Plaintiff offers no legal support for the proposition that a trial court must pretend that he or she is unaware of prior filings or proceedings

between the same parties, involving essentially the same subject matter, over which he or she presided.” Father is correct that the trial judge should not be “unaware of prior filings or proceedings[,]” but if the trial court is making findings of fact, those findings must still be supported by evidence or the court file *presently* before the court. We appreciate the fact that the trial judge, who has heard prior proceedings, has familiarity with the parties and prior proceedings, but the trial court and counsel should ensure that the record includes sufficient information regarding any proceedings outside this case to support findings and appellate review. The trial court cannot base findings of fact solely upon on its memory of evidence presented at hearing in other cases because it is impossible for this Court to review the sufficiency of the evidence to support those findings unless some documentation of the evidence in the other proceedings is in the record. *See generally Hensey v. Hennessy*, 201 N.C. App. 56, 67–68, 685 S.E.2d 541, 549 (2009) (“[A] judge’s own personal memory is not evidence. The trial court does not have authority to issue an order based solely upon the court’s own personal memory of another entirely separate proceeding, and it should be obvious that the evidence which must be taken orally in open court” must be taken in the case which is at bar, not in a separate case which was tried before the same judge. Appellate review of the sufficiency of the evidence to support the trial court’s findings of fact is impossible where the evidence is contained only in the trial judge’s memory.” (quotation marks omitted)).

We also acknowledge that the trial court is the sole judge of the credibility of the evidence. *GEA, Inc. v. Luxury Auctions Mktg., Inc.*, 259 N.C. App. 443, 455, 817 S.E.2d 422, 432 (2018) (“The trial judge is the sole authority of the weight and credibility that should be given to the parties’ testimony and evidence.”). But since the prior criminal contempt order and the domestic violence pleadings and orders are not in our record, we are unable to determine *what* “same conduct” the trial court found to be not credible in either proceeding.

Father also contends that finding of fact 7(e) is subject to “judicial notice” under Rule of Evidence 201(b). But these facts are not subject to judicial notice as defined by the Rules of Evidence, as they are not “generally known” nor “capable of accurate and ready determination[.]” *See* N.C. Gen. Stat. § 8C-1, Rule 201(b) (“A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”). Father is correct that a prior order of the court or prior proceedings are often acknowledged in a manner our courts have referred to as “judicial notice,” but this type of “judicial notice” is distinct from judicial notice as defined by Rule 201(b) as it normally involves prior proceedings or orders in the same action or in a related case. *See generally Georgia-Pac. Corp. v. Bondurant*, 81 N.C. App. 362, 367, 344 S.E.2d 302, 306 (1986) (“A court may take judicial notice of its own

prior proceedings, and if requested to take notice of its prior proceedings it must do so.” (citations omitted)); *see also West v. G. D. Reddick, Inc.*, 302 N.C. 201, 202, 274 S.E.2d 221, 223 (1981) (“This Court has long recognized that a court may take judicial notice of its own records in another interrelated proceeding where the parties are the same, the issues are the same and the interrelated case is referred to in the case under consideration.” (citations omitted)). But neither this Court nor the trial court may take judicial notice of orders or proceedings if that information is not included in the record of the case under consideration:

Ordinarily, a court, in deciding one case, will not take judicial notice of what may appear from its own records in another and distinct case, unless made part of the case under consideration, even though between the same parties or privies and in relation to the same subject matter.

It was held in *Daniel v. Bellamy*, 91 N.C. 78, that in a proceeding against executors for an account that a Probate Court could not take judicial notice of the fact that the probate of the will naming defendants as executors had been revoked in another proceeding in the same court.

This is far from saying that an appellate court may not take judicial notice of, and give effect to its own records in another, but interrelated, proceeding, particularly where the issues and parties are the same, or practically the same, and the interrelated case is specifically referred to in the case on appeal in the case under consideration.

State v. McMilliam, 243 N.C. 775, 777, 92 S.E.2d 205, 207 (1956) (citations omitted), *overruled on other grounds by State v. Lombardo*, 306 N.C. 594, 295 S.E.2d 399 (1982).

Thus, we cannot take judicial notice of factual details in the prior proceedings – the criminal contempt order – or related proceedings – the domestic violence protective action -- where the pleadings and orders in those proceedings are not included in our record on appeal. In conclusion, finding of fact 7(e) was not supported by the evidence. *See id.*

e. Finding of Fact 7(f)

Plaintiff next challenges finding of fact 7(f) as unsupported by the evidence, specifically regarding the ownership of the phone at issue and the content of the warrant affidavit. Finding of fact 7(f) provides,

Plaintiff's boyfriend caused a warrant to be issued against Defendant for allegedly committing a larceny. In the warrant, Plaintiff's boyfriend alleged that Defendant stole his [the boyfriend's] phone when Defendant took the phone from one of the minor children. The phone had been given by the boyfriend to the minor child, and was the property of the minor child. On the warrant's affidavit, Plaintiff and her boyfriend checked the box that Defendant was armed and dangerous. At the time, Plaintiff knew or had reason to know that the Plaintiff did not own a firearm, and made this notation without regard to the Defendant's safety[.]

Mother argues that the larceny warrant was not part of the evidence, and thus there was not evidence to support finding of fact 7(f). The testimony regarding the larceny warrant and the phone is quite confusing. In context it appears Mother has a cell phone; Greta has a cell phone; and Pat has a cell phone that she uses as her own but technically belonged to Mother's boyfriend. It appears Father took the phone

from Pat believing that Pat owned the phone, and then a larceny warrant was taken out for Father. Mother contends her boyfriend took out the warrant. Father's own testimony was:

Q. Who charged you with larceny?

A. That was either him or his dad.

In context, "him or his dad" referred to Mother's boyfriend or mother's boyfriend's father as Mother, Greta, and Pat, are all referred to with female pronouns throughout the transcript. As to the "armed and dangerous" allegation in the warrant, Father testified, "And Ms. Risen checked it off, and her – her boyfriend checked it off, and then they wrote a paragraph saying that I've got weapons in my house." Thus, even Father's testimony indicates it was Mother's boyfriend, and not Mother who filled out and checked boxes on the warrant. Father's motion did allege that Mother interfered with his phone calls to the children, but if *Father* took Pat's phone away from her, it is not clear how this finding would support contempt by *Mother* as to interfering with phone contact. But Father's motion for contempt did not address the larceny charges as the basis for any violation of a court order, and there is no finding regarding when the larceny charges occurred, so this finding has limited if any relevance to contempt.

f. Finding of Fact 7(h)

Mother again challenges the evidence to support finding of fact 7(h) which provides,

Plaintiff did not make the children available for transfer to the Defendant on April 19. When Defendant went to one of the minor children's school to get her, she wasn't there. Defendant was subsequently able to get the younger minor child on April 20, but was not able to get the older minor child. While the youngest minor child was in the custody of Defendant, Plaintiff caused Defendant to be served with the 50B notice.

Father's testimony regarding April 19th is quite confusing. Father was scheduled to have visitation beginning on Thursday, April 19 upon the children's release from school.¹¹ Under the order, Father was required to pick the children up from their schools; each attended a different school. Father testified at trial that on Thursday he started to go to Pat's school, but he knew he would not make it there in time, so he headed to Greta's school instead, but he was late getting to her school also. When Father arrived at Greta's school, both schools had already released for the day and neither child was still at school. Mother testified that she did not pick the children up on 19 April or 20 April and on the morning of 20 April she went to Charlotte. But according to Father's own testimony, he realized he had the responsibility to pick the children up *on time* after school, but he arrived at both schools late; he did not explain why.

¹¹ Father's motion exhibit notes "Early release day- added to revised schedule due to snow days" for the week of 23 April 2018. It is not clear which day was an "early release day."

The parenting coordinator issued her memorandum on the morning of 20 April 2018, noting that Father was to pick the children up from school that day and he would keep them until 24 April to make up for the overnight visit he missed on 19 April. Father testified that on Friday, 20 April 2018, he made arrangements for a friend, Bob, the father of one of Pat’s friends, to pick Pat up from school, but she did not go with him. Father ultimately did pick Pat up that afternoon, after returning home to get the family dog, Murphy, and she spent the weekend with him. On Monday, 23 April, Father testified he was supposed to get Pat again after school, but she had a drama “project” after school so he was unable to pick her up; Father distinguishes the drama project from the play in which Pat had the leading role the following week. According to the parenting coordinator’s memorandum, under the usual visitation provisions, Mother would have picked the children up from school on 23 April, but this night of visitation was added to Father’s time on 20 April based upon the night he missed on 19 April.

There was no evidence presented on where Greta was on 19 April 2018 when Father arrived late at her school to pick her up. Mother testified that she did not pick either child up that day. The trial court made a confusing finding regarding Mother’s testimony regarding Greta’s house key which we can interpret only as implying that Greta had gone home — to her Mother’s house — that weekend. But the order does not make an actual finding of where Greta was on the 20 April weekend. Even

viewing Father's testimony generously, it appears Greta simply left school because Father did not pick her up when school ended. The evidence does not support a finding that Mother failed to make the children available at school for Father to pick up.

g. Finding of Fact 7(i)

Plaintiff contests finding of fact 7(i) which provides,

Plaintiff continued to pick up the minor children from school on days where Defendant was supposed to have custody of the minor children; if she did not personally pick the minor children up, she would arrange for someone else to pick up the minor children, usually a parent of the minor children's friend.

We first note that the calendar noting dates Father alleged he missed visits, which was attached to Father's motion for contempt, ends on 30 April 2018. Again, there is no evidence to support finding of fact 7(i). The time period covered by the motion for contempt and hearing was very short, and the April 19 through 24 time period at issue has been thoroughly discussed above. There was no other evidence that Mother picked the children up at the times at issue and no evidence she picked the children up on any other day Father was supposed to get them during the short period addressed by the contempt order. Nor is there any evidence Mother arranged for anyone else to pick up the children during this short time period. This finding is not supported by the evidence.

h. Finding of Fact 8(b) and (c)

Mother argues finding of fact 8(b) and (c) are problematic. Finding of fact 8(b) and (c) provides

8. Plaintiff gave no credible justifications for her actions, and at numerous points during her testimony was either evasive in her answers or gave illogical and potentially untrue testimony: By way of example:

. . . .

b. Plaintiff testified that she took away the oldest minor child's key to the home in an attempt to prevent her from coming home during Defendant's custodial time. However, when questioned on cross-examination, Plaintiff admitted that the key she took away from the minor child was to the home at which they no longer resided.

c. At one point in the hearing, Plaintiff testified that she intended to take the Children back to Canada during the week of August 6 (even though she had already took the minor children to Canada this summer, and had not given Defendant 90 days notification that she would be taking the children back to Canada), later, when pressed about the minor children being 'with Defendant during this time period under the Order, Plaintiff asserted that the youngest minor child actually would be beginning school.

Findings 8(b) and (c) are recitations of testimony, and not findings of fact, and at most, address reasons the trial court found Mother not to be credible. *See generally Long v. Long*, 160 N.C. App. 664, 667–68, 588 S.E.2d 1, 3 (2003) (“[T]he trial court’s order lacks adequate findings of fact to support a conclusion of cohabitation because the findings were mere recitations of testimony and evidence. N.C. Gen. Stat. § 1A–1, Rule 52(a)(1) requires that in all actions tried upon the facts without a jury, the

court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. This Court has found that findings that merely recapitulate the testimony or recite what witnesses have said do not meet the standard set by the rule.” (citation, quotation marks, ellipses, and brackets omitted)). In any event, the prior orders did not require Mother to take away house keys from the children. Mother’s testimony regarding a potential future trip to Canada was not relevant to any of the allegations of Father’s contempt motion. To the extent the trial court was noting Mother’s potential future violation of the order by failing to give 90 days advance notice, as discussed above, the notice provision had been changed to 15 days. We are unable to determine the relevance of these “findings” to the allegations of contempt.

i. Findings of Fact 9 and 11

Mother contends finding of fact 9 is conclusory. Finding of fact 9 states, “Plaintiff’s conduct, as illustrated above, shows willful disobedience of, resistance to, and interference with the Court’s lawful process, order, directive, instruction and execution. Plaintiff’s conduct also exhibit[s] her guilt of knowledge and stubborn resistance.” Since we have already determined that many of the prior findings upon which finding of fact 9 relies are not supported by the evidence, this finding is also not supported by the evidence.

Finding of Fact 11 is similar to Finding 9 as it relies upon the prior findings. Finding of fact 11 states, “Plaintiff’s non-compliant conduct continues even today, and Plaintiff has not shown a willin[g]ness to correct her conduct.” Since many of the prior findings are not supported by the evidence, finding of fact 11 also fails.

III. Conclusions of Law and Decree

Because conclusions of law must be supported by the findings of fact, and we have found there is not competent evidence to support the substantive findings upon which the trial court found Mother to be in contempt, we necessarily must determine the conclusions of law also fail. *See Trivette*, 162 N.C. App. at 60, 590 S.E.2d at 302–03. Further, although we must reverse the order for the reasons noted above, we will also address some of Mother’s arguments regarding the decree.

The contempt order decree provided as follows:

1. The Plaintiff is hereby held in civil contempt.
2. The Plaintiff is sentenced to 30 days in the custody of the Sheriff of Guilford County.
3. Plaintiff can purge herself of the contempt by taking all reasonable steps to transfer actual custody of the minor children to Defendant for the remainder of the summer. The actual transfer shall include, but is not limited to, transferring all clothing and personal use items to Defendant’s residence, confiscating all keys to all residences from the minor children. Once Defendant, through her attorney, or an agent working on her behalf, shows the Court that this transfer has happened, she shall be immediately released from custody.

4. Any subsequent violation of the Order before the termination of the 30 day sentence, shall subject the Plaintiff to the balance of said sentence.
5. Plaintiff is ordered not to permit the minor children to enter into any residence she owns, rents, or that is owned or rented by her significant other, family member, or friend.
6. The minor children are Order [sic], and said Order shall be enforced by the Juvenile Contempt powers of the Court, to reside with and in the custody of Defendant at all times required under the Vincent Order.

Although both children are teens, and Greta may already be 18 by the time this opinion is issued, the parties still have a couple more years of sharing custody and visitation of Pat, who will soon be 16. Since this has been a high conflict case, we will address some of the terms of the decree to avoid future confusion and to protect the best interests of the children. We do not wish to leave any impression that the trial court's decrees regarding the children being excluded from Mother's home or invocation of juvenile contempt powers could have been affirmed even if we could affirm the trial court's conclusions as to civil contempt as to Mother. Father's motion requested both that Mother be held in civil contempt *and* that the children themselves be compelled to comply with the order. In other words, even if the order holding Mother in contempt could be affirmed, the portions of the order decree

addressing the custody of the minor children and purporting to compel the minor children would be reversible.

The order decreed in part that

Plaintiff can purge herself of the contempt by taking all reasonable steps to transfer actual custody of the minor children to Defendant for the remainder of the summer. *The actual transfer shall include, but is not limited to, transferring all clothing and personal use items to Defendant's residence, confiscating all keys to all residences from the minor children.* Once [Plaintiff], through her attorney, or an agent working on her behalf, shows the Court that this transfer has happened, she shall be immediately released from custody.

(Emphasis added.) In addition, the trial court ordered that

Plaintiff is ordered not to permit the minor children to enter into any residence she owns, rents, or that is owned or rented by her significant other, family member, or friend.

The order on appeal was a contempt order and did not address modification of custody of the children. Yet the order provides that Mother is to exclude the children from entering any residence she owns or rents and from entering any residence of a “significant other, family member, or friend.” Mother argues this is in essence a *sua sponte* modification of custody. If the children cannot enter Mother’s home, she cannot exercise physical custody of them.

Father argues that Mother has taken this provision out of context by contending that it excludes the children from her residence entirely. Father contends

that read in context, this provision can only apply to the “Defendant’s 2018 summer custodial period” and that Mother’s argument is an “absurd interpretation[.]” We agree that the trial court almost certainly did not intend to order Mother to exclude the children from her home and the homes of all family members until they attain the age of 18, but Mother’s interpretation is not “absurd[.]” The order is very poorly worded, at best, and it does not clearly limit the exclusion of the children from Mother’s home to the summer of 2018. When a trial court is setting forth provisions to purge contempt and a party is subject to imprisonment for violation of the terms of the order, those terms must be entirely clear. Even if the order can be interpreted as Father claims, the literal terms of the order require Mother to exclude the children from Mother’s home and the homes of all friends and family members, and the order does not set a time limit for this exclusion.

Of even more concern than the poorly worded decree provision regarding exclusion from Mother’s home is the trial court’s, and Father’s, apparent intent to hold the children themselves in contempt for failing to visit with Father. The trial court decreed:

6. The minor children are Order [sic] and said Order shall be enforced by the Juvenile Contempt powers of the Court, to reside with and in the custody of Defendant at all times required under the Vincent Order.

Mother argues that the order “appears to treat the children in this matter as if they are required to comply with a court order in an action to which they are not parties.” Mother contends the children

were not represented and had no input in the “Vincent Order” (presumably the Temporary Custody Order although Judge Vincent has entered multiple orders in this matter and at least 3 are included in the Record on Appeal) and were only 9 and 11 when it was entered. Also, the Vincent Order requires in decree paragraph 4 that neither parent is to discuss any aspect of the case with the minor children. Thus Judge Cummings’ order would require the parties to violate Judge Vincent’s order in order to tell the children what is in Judge Vincent’s order. Further, Judge Cummings is ordering the children to comply with the terms of Judge Vincent’s order although some of those terms have been modified by subsequent orders and rulings and directives of the Parenting Coordinator. Also, Judge Cummings does not have authority to direct the children’s actions and subject them to contempt without appointing them a Guardian ad Litem, which is required in any case in which a juvenile is a party to an action. Neither child participated in the contempt hearing or was given an opportunity to be heard before the Court subjected them to its directives, violating their constitutional right to due process.

The strong undercurrent in the hearing and the order on appeal order is the refusal of the children— ages 14 and 16 at the time of the order — to visit with Father, although there are no findings to this effect. Father’s contempt motion also included a specific request that *the children* be compelled by the court to carry out the

visitation schedule.¹² Father argues that this decretal provision does not hold the children in contempt but “it appears that Judge Cummings was simply signaling to the parties that the court has additional authority and remedies to address potential noncompliance with the court’s order.” The transcript shows that the trial court did more than just “signal” its authority to the parties: the trial court had the children present in court during rendition of the order and directed comments to the children:

[THE COURT:] The minor children are hereby ordered, and said order shall be enforced by the juvenile contempt powers of the Court, to reside with and in the custody of the Defendant at all times required under the Vincent order.

What that means, young ladies, is that the Court is ordering you to reside with your father on the dates required under the order.

Your -- if you violate this, you'll be subject to the contempt powers of the court pursuant to North Carolina General Statue as it relates to juveniles. What that could mean is that you'll be taken into secure custody and transferred to the juvenile detention facility. Do you understand?

(No audible response.)

THE COURT: I'm sorry, I do not know what that means.

[Greta]: Yes, sir.

[Pat]: Yes, Your Honor.

¹² Father’s motion requested: “That the children subject of this action and current Order, . . . [Greta and Pat], be compelled by this Court to carrying out the visitation schedule with Defendant, and that Plaintiff be compelled to facilitate and not otherwise interfere with the facilitation of visitation as court ordered.”

(Emphasis added.) Father’s brief references and attaches copies of North Carolina General Statute §§ 5A-31 and 5A-32 regarding contempt by a juvenile arguing,

Although the first clause of paragraph 6 clearly contains a typographical error, the remainder of this paragraph simply affirms the power of the District Court to enforce order of the court against juveniles. Chapter 5A, Article 3 of the North Carolina General Statutes directly addresses the power of the district court to find a juvenile in direct or indirect contempt for willful disobedience of, resistance to, or interference with a court’s lawful process, order, directive, or instruction or its execution.” N.C. Gen. Stat. § 5A-31(a)(3).

(Quotation marks, brackets, and footnote omitted omitted.) But North Carolina General Statutes §§ 5A-31 and -32 cited by Father address direct criminal contempt by juveniles and have never been cited in any case other than a juvenile delinquency proceeding under Chapter 7B. *See generally* N.C. Gen. Stat. §§ 5A-31, -32 (2019).¹³ The trial court has no authority to hold a minor child who has no guardian *ad litem* nor representation by counsel in indirect civil or criminal contempt for refusing to visit a parent in a Chapter 50 custody case. A juvenile can be held in indirect contempt only in a juvenile proceeding under Chapter 7B. *See* N.C. Gen. Stat. § 5A-33 (2017) (“Indirect contempt by a juvenile may be adjudged and sanctioned only pursuant to the procedures in Subchapter II of Chapter 7B of the General Statutes.”). This is not a juvenile delinquency case.

¹³ North Carolina General Statute § 5A-31 was amended in 2017 effective December of 2019, but the amendment does not change our analysis.

The trial court's rendition of the entire order in the presence of the children and threat to place them *in a juvenile detention facility* was inappropriate, particularly considering the Vincent custody order required the parties to "adhere to the following ground rules" in parenting the children:

- (a) Neither parent will discuss, *nor allow anyone else to discuss, the conduct* of the other parent in the presence of the child.
- (b) Neither parent will say or do anything in the presence of the child that would interfere with or otherwise diminish the natural love, affection, or respect that the child has for the other parent.
- (c) *Neither issues relating to visitation or to child support shall be discussed in the presence of the child.*

(Emphasis added.) Although we recognize that at times, children must attend court hearings for various reasons such as to testify, the children here did not testify. The trial court should adhere to these "ground rules" as well.

IV. Conclusion

Most of the trial court's findings of facts are not supported by competent evidence, and the findings which are supported by the evidence do not support its conclusions of law regarding civil contempt. Neither the findings of fact nor conclusions of law support the trial court's order directed to the children themselves and the decree provisions compelling the children to visit with Father under threat of commitment to a juvenile detention facility; these provisions were beyond the trial court's statutory authority. Therefore, we reverse the entire order.

RISEN V. RISEN

Opinion of the Court

REVERSED.

Judges MURPHY and BROOK concur.

Report per Rule 30(e).