

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

2021-NCCOA-48

No. COA20-303

Filed 2 March 2021

Orange County, No. 18CVD1096

SUZANNE MICHELLE DAVIS, Plaintiff,

v.

ALBERT KELLY DAVIS, Defendant.

Appeal by Plaintiff from an order entered 10 October 2019 by Judge Joseph M. Buckner in Orange County District Court. Heard in the Court of Appeals 27 January 2021.

Fairman Family Law, by Kelly Fairman, for Plaintiff-Appellant.

No brief filed by Defendant-Appellee.

INMAN, Judge.

¶ 1

Plaintiff Suzanne Michelle Davis (“Mother”) appeals from a court order that denied her motions to modify custody and child support and established the outstanding amount of unpaid child support she owed to Defendant Albert Kelly Davis (“Father”) as of the time of the order. Mother first argues that an earlier child support order was entered in violation of N.C. Gen. Stat. § 50-13.7(a) (2019); we dismiss that portion of the appeal for a jurisdictional defect in the notice of appeal.

Mother next contends that, in denying her motions to modify, the trial court made unsupported findings as to Father's income and employment status. We agree that these findings and the conclusions based upon them are unsupported by the evidence and vacate the trial court's order in that respect. We affirm the trial court's denial of Mother's motion to modify custody and support, however, because Mother fails to argue or address an independent ground relied upon by the trial court in its ruling. Lastly, Mother challenges the trial court's finding establishing the amount of child support in arrears; we strike that finding and vacate the related portion of the decree as they are unsupported by the evidence.

I. FACTUAL AND PROCEDURAL HISTORY

¶ 2 Mother married Father in 1996. The couple had three children together before separating in 2010. The parties eventually divorced, though the record does not disclose precisely when.

¶ 3 Mother and Father appeared at a series of child custody and support hearings following their divorce. In the first hearing pertinent to this appeal, held on 14 November 2016, the trial court reviewed permanent child custody and heard a motion to modify child support filed by Father.¹ The trial court awarded Father sole legal custody of the children and ordered Mother to pay child support. The trial court

¹ During the hearing, the trial court also heard and denied Mother's motion to appoint a guardian ad litem. Mother has not appealed from that ruling.

determined Mother's child support obligation began in July 2016, calculated \$3,419.64 in arrearages as of that month, and ordered Mother to continue paying support at the rate of \$104 per month beginning 1 December 2016. The trial court entered a written order containing these modifications on 17 February 2017.

¶ 4 The trial court entered another order on 30 June 2017 which amended the 17 February 2017 order. The record does not disclose why the trial court entered the amended order.

¶ 5 The parties next appeared at a child support review hearing on 7 June 2017.² The trial court, in an order entered 13 November 2017, found that Mother had intentionally suppressed her income and ordered her to pay \$807.91 per month in child support beginning 1 June 2017. The trial court assessed \$8,267.10 in arrears against Mother as of 1 December 2016 and ordered her to pay the arrearage in monthly installments of \$500.

¶ 6 Mother failed to pay the ordered child support, leading Father to initiate contempt proceedings against her. The trial court entered an order on 3 May 2018 holding Mother in criminal contempt for failure to pay child support and sentenced Mother to 120 days imprisonment, which was suspended for a two-day active sentence with 18 months supervised probation and several payment conditions. The

² This hearing was held prior to the entry of the 30 June 2017 order amending the 17 February 2017 child custody and support order.

trial court ordered Mother to continue making the previously ordered monthly child support payments and arrears but made no findings as to the exact arrearage owed.

¶ 7 Mother moved to modify child support while Father was pursuing his contempt action. The parties subsequently agreed to change venue for the civil action from Wake to Orange County.

¶ 8 Wake County retained jurisdiction over the criminal contempt proceedings and, when Mother again failed to timely pay child support for several months in 2018 and 2019, her probation officer filed notices of probation violations against her.

¶ 9 In Orange County, prior to disposition of Mother's motion to modify child support, the parties agreed to a consent order temporarily altering the custodial arrangement. That order awarded Mother: (1) custody for one week per month; (2) custody for the Thursday through Monday ten days after that week of custody; and (3) a dinner visit on each Thursday during the ten days between Mother's periods of custody. The order also slightly modified the summer schedule to change the date and time of transition to 7 p.m. on Mondays and to give the minor children the ability to call either parent at any time.

¶ 10

Mother's motions³ to modify child support and custody were heard in Orange County District Court on 29 August 2019. Mother testified concerning her income and relationship with the children before arguing that the income changes and the relatively recent emancipation of the oldest child warranted a change in support and custody. Mother further argued that no payments would be in arrears if her support obligation were retroactively adjusted downward as of the date of emancipation. Father offered no evidence and instead moved for a directed verdict⁴ on the basis that Mother had failed to meet her burden of proof. On the specific issues of support and arrears, Father's counsel represented to the trial court—without introducing evidence—that Father's employment and income had changed such that any recalculation under the applicable child support guidelines would impose a child support obligation roughly equivalent to the one Mother already owed. Father's

³ A written motion by Mother to modify child custody does not appear in the record on appeal. However, the record does include a notice of hearing she filed for a “motion to modify child support and custody,” the order she appeals from states it was entered on a motion “to Modify Custody and to Modify Child Support,” and the trial transcript reveals that all parties and the court were there to hear and argue Mother's motions to modify both custody and child support.

⁴ Though styled as a motion for a directed verdict and referenced as such by the trial court in its order, Father's motion was in actuality a motion for involuntary dismissal under Rule 41(b) of the North Carolina Rules of Civil Procedure. *See Joyner v. Thomas*, 40 N.C. App. 63, 64, 251 S.E.2d 906, 907 (1979) (“The court, sitting without a jury, granted defendants' motion for directed verdict at the close of plaintiff's evidence. As plaintiff points out, the correct motion would have been for an involuntary dismissal under . . . Rule 41(b), since the action was being tried without a jury.”). This mistake by the parties and the court does not preclude us from treating it as a Rule 41(b) motion. *Id.*

counsel further asserted—again, without evidence—that Mother owed \$11,000 in arrears but that he would credit her \$1,352.

¶ 11 The trial court agreed with Father and entered an order to that effect on 10 October 2019. The order made the following findings of fact pertinent to this appeal:

12. Plaintiff did not meet her burden of proof which would support a change of physical custody based upon the best interests of the minor children.

13. Plaintiff did not meet her burden of proof which would support a change of legal custody based upon the best interests of the minor children. . . .

14. Defendant is currently employed as a substitute teacher for Orange County Schools, earning \$99.00 per day.

15. While Defendant held a different, and more remunerative job, prior to June of 2019, he was involuntarily released from employment and there was no evidence presented to support a finding that he has deliberately or negligently disregarded the needs of the children by losing or failing to obtain employment.

. . . .

17. The emancipation of the oldest child . . . is a substantial change in circumstances which would underlie a recalculation of child support.

18. Recalculation of the guidelines, using the actual incomes of the parties at the time of the hearing . . . does not generate an obligation less than the current \$807.00 per month.

. . . .

20. At the time of this hearing, Plaintiff's arrears are \$11,001.00.

21. That this Court has the inherent authority to deny motions advanced by a party who has failed to follow prior or contemporary court orders. In this case, Plaintiff has been repeatedly found in violation of the child support Orders in this matter, and it is appropriate as outlined in N.C.G.S. 1A-1 Rule 41 for this Court, in its discretion, to deny the current motions of the Plaintiff as she has willfully failed to pay child support as ordered.

22. Upon review of the circumstances of these parties in 2018 following emancipation and the filing of the motion to reduce, Defendant offered in open court to reduce or forgive the Plaintiff's arrears by \$1343.00 during legal argument.

. . . .

25. It is in the best interests of the minor child to continue under the Current Custody Orders, such that the physical custody schedule in the January 4, 2019 Consent Order should be a permanent physical custody order, sole legal custody shall remain with Defendant, and all provisions of the prior custody order not modified by the 1/4/2019 Order shall remain in full force and effect.

¶ 12 The order included conclusions of law consistent with the above findings. Mother entered timely notice of appeal, designating the 10 October 2019 order as the only order from which she appeals.

II. ANALYSIS

¶ 13 Mother presents three arguments on appeal: (1) the trial court violated N.C. Gen. Stat. § 50-13.7(a) by entering the 13 November 2017 order modifying child

support without a pending child support modification motion;⁵ (2) the trial court erred in denying her motions to modify child support and custody; and (3) that findings in the 10 October 2019 order concerning the amount of arrearages owed are unsupported by the evidence. We address each argument in turn.

1. *The 13 November 2017 Order*

¶ 14 Rule 3 of the North Carolina Rules of Appellate Procedure provides that a party's notice of appeal "shall designate the judgment or order from which appeal is taken." N.C. R. App. P. 3(d) (2021). "Proper notice of appeal is a jurisdictional requirement that may not be waived," and "the appellate court obtains jurisdiction only over the rulings specifically designated in the notice of appeal as the ones from which the appeal is being taken." *Chee v. Estes*, 117 N.C. App. 450, 452, 451 S.E.2d 349, 350 (1994) (citations omitted).

¶ 15 Mother's notice of appeal designates only the 10 October 2019 order as the one from which she appeals and makes no mention of the 13 November 2017 order challenged in her brief's first argument. Although there are alternative means of addressing orders affecting the final judgment designated in the notice of appeal, *see, e.g.*, N.C. Gen. Stat. § 1-278 (2019), Mother does not assert or purport to rely on them

⁵ Mother argues this is a jurisdictional defect; our Supreme Court has made clear that it is not. *See Catawba Cnty. v. Loggins*, 370 N.C. 83, 95, 904 S.E.2d 474, 483 (2017) ("[F]ailure to follow the directory requirements of N.C.G.S. § 50-13.7(a) regarding the filing of a motion in the cause does not divest the district court of jurisdiction.").

in her brief. Because Mother failed to designate the 13 November 2017 order in her notice of appeal, we lack jurisdiction to review it and dismiss this portion of Mother’s appeal. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 197, 657 S.E.2d 361, 365 (2008) (“The provisions of Rule 3 are jurisdictional, and failure to follow the rule’s prerequisites mandates dismissal of an appeal.” (quoting *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000))).

2. Denial of Mother’s Motions to Modify Child Support and Custody

¶ 16

Mother next contends that the trial court erred in denying her motions to modify child support and custody. She argues that she met her burden of proof showing the substantial change in circumstances necessary for modification. Mother also challenges the trial court’s findings concerning Father’s new employment and income are unsupported by the evidence. We agree with Mother that the trial court’s findings concerning Father’s employment status and earnings are unsupported; Father did not testify at the hearing, nor did he introduce any evidence regarding his employment or income. Statements by Father’s attorney are not evidence. *See, e.g., Crews v. Paysour*, 261 N.C. App. 557, 561, 821 S.E.2d 469, 471-72 (2018) (holding representations of counsel as to amount of child support paid was not evidence and could not support findings of fact on the issue). We therefore strike findings of fact 14, 15, and 18—which collectively established that any recalculation under the guidelines would not result in a change in child support based on Father’s counsel’s

representations—and vacate the portion of conclusion of law 5 stating Mother failed to carry her burden of proof necessary to modify child support.

¶ 17 Although we strike the unsupported findings and vacate the corresponding conclusion of law, we are nonetheless compelled to affirm the denial of Mother’s motions. In its order, the trial court expressly stated it denied Mother’s motions *independent of their merits* as a sanction for her failure to comply with prior child support orders. Specifically, the trial court included in its findings of fact:

21. . . . this Court has the inherent authority to deny motions advanced by a party who has failed to follow prior or contemporary court orders. In this case, [Mother] has been repeatedly found in violation of the child support Orders in this matter, and it is appropriate as outlined in N.C.G.S. 1A-1 Rule 41 for this Court, in its discretion, to deny the current motions of the [Mother] as she has willfully failed to pay child support as ordered.

The order then reiterated that the trial court was denying Mother’s motions both on the merits and as a sanction in its conclusions of law:

5. [Mother] failed to meet her burden of proof necessary to modify the child support order, and moreover, her motion to modify child support is denied upon the application of N.C.G.S. 1A-1 Rule 41.

¶ 18 This Court presumes that the lower court’s ruling is correct, and it is Mother’s burden as the appellant to demonstrate error. *Thompson v. Bass*, 261 N.C. App. 285, 292, 819 S.E.2d 621, 627 (2018). When an appellant fails to carry that burden, “it is not the role of this Court to create an appeal for an appellant or to supplement an

appellant’s brief with legal authority or arguments not contained therein.” *Id.* Because Mother has failed to argue, let alone demonstrate, that the denial of her motions as a sanction under Rule 41 was improper, she has not shown reversible error and waived review of that issue. *See id.* (holding appellant waived review of an issue when she “failed to submit any meaningful argument as to how the trial court erred”). We therefore affirm the trial court’s denial of Mother’s motions.⁶

3. Amount of Arrears

¶ 19 In her final argument, Mother challenges the trial court’s finding of fact 20 that she owed Father \$11,001.00 in arrears. This finding lacks any evidentiary basis, as Father’s counsel offered the dollar figure in argument only and presented no sworn testimony or other evidence to support it. Again, arguments of counsel cannot support factual findings. *Crews*, 261 N.C. App. at 561, 821 S.E.2d at 472. We therefore strike finding of fact 20 and vacate decretal paragraph 4, which requires Mother to pay the arrearages owed based in part on finding of fact 20.

III. CONCLUSION

¶ 20 For the foregoing reasons, we: (1) dismiss the portion of Mother’s appeal pertaining to the 13 November 2017 order; (2) strike findings of fact 14, 15, 18, and

⁶ Mother does not challenge the trial court’s decision to make permanent the temporary custody modifications from the 4 January 2019 consent order based on the best interests of the children.

DAVIS V. DAVIS

2021-NCCOA-48

Opinion of the Court

20 from the order denying her motions to modify; (3) affirm the denial of those motions; (4) vacate a portion of conclusion of law 5; and (5) vacate decretal paragraph 4.

DISMISSED IN PART; AFFIRMED AS MODIFIED IN PART; VACATED IN PART.

Judges COLLINS and GRIFFIN concur.

Report per Rule 30(e).