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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-636

No. COA21-108

Filed 16 November 2021

Orange County, No. 99CVD1586

CHRISTY SILVIUS SCOTT (now Cappelletti), Plaintiff,

v.

GIFFORD DANIEL SCOTT, Defendant.

Appeal by defendant from orders entered 23 January 2020 and 31 July 2020 by Judge Joseph M. Buckner in Orange County District Court. Heard in the Court of Appeals 20 October 2021.

Manning, Fulton & Skinner, by Michael S. Harrell, for Defendant-Appellant

Meynardie & Nanney, PLLC, by Joseph H. Nanney, Jr., for Plaintiff-Appellee

CARPENTER, Judge.

¶ 1 Gifford Daniel Scott ("Defendant") appeals from the trial court's order (the "Contempt Order") finding him in civil contempt for failing to comply with the terms of a separation agreement and property settlement (the "Separation Agreement") he entered into with his former spouse, Christy Silvius Cappelletti ("Plaintiff"), formerly known as Christy Silvius Scott. The Separation Agreement required him to contribute $2,000 annually towards their child's college fund. Additionally,

Defendant appeals from the trial court's order denying his motion to set aside the Contempt Order and to order a new trial. Because all of Defendant's arguments set forth in the record relate to the Contempt Order, we consider Defendant's appeal of the 31 July 2020 order abandoned. *See Reliable Props., Inc. v. McAllister*, 77 N.C. App. 783, 785, 336 S.E.2d 108, 109 (1985), *disc. rev. denied*, 316 N.C. 379, 342 S.E.2d 897 (1986) ("Although defendant gave notice of appeal, he did not bring forward and argue any assignments of error. Thus, defendant's appeal is abandoned."). We hold the findings of fact made in the trial court's 23 January 2020 Contempt Order are supported by competent evidence, and the conclusions of law are supported by findings of fact. Accordingly, we affirm the Contempt Order.

I. Factual and Procedural Background

¶ 2 Plaintiff and Defendant were married on 6 June 1992, separated on 2 November 1998, and divorced on 8 November 1999. During their separation, they entered into the Separation Agreement, which was later incorporated into their divorce judgment ("the Order"). The parties have one son, JDS, who was born of the marriage on 23 April 1996.

¶ 3 On 17 July 2019, Plaintiff filed a motion to hold Defendant in civil contempt for failure to contribute to JDS's college fund, pursuant to their Separation Agreement. The exact provision alleged to have been violated reads "[h]usband shall contribute the sum of $2,000 (TWO THOUSAND DOLLARS) per year to the fund

established during the marriage known as [JDS's] college fund. Said fund shall remain a joint account with both Husband and Wife as joint trustees and held for the education of their minor child."

¶ 4 A hearing was held on 19 November 2019 before the Honorable Judge Joseph M. Buckner in Orange County District Court on Plaintiff's contempt motion. Plaintiff did not attach a copy of the Separation Agreement to her motion or submit a copy as an exhibit at the hearing. However, Plaintiff's verified motion to hold Defendant in contempt summarized the pertinent clause of the Settlement Agreement.

¶ 5 Following the hearing, Judge Buckner entered an order on 23 January 2020 holding Defendant in civil contempt for his failure to pay into JDS's college fund. Defendant filed a motion to set aside the Contempt Order and to order a new trial on Plaintiff's contempt motion. Judge Buckner denied that motion in his 31 July 2020 order. Defendant appeals from the 31 July 2020 order denying his motion as well as the 23 January 2020 Contempt Order.

II. Jurisdiction

¶ 6 This Court has jurisdiction to address Defendant's appeal of the Contempt Order pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2019) as a final judgment of a district court in a civil action.

III. Issues

¶ 7 The issues on appeal are whether: (1) the trial court conducted an appropriate

contempt hearing, pursuant to N.C. Gen. Stat. § 5A-23; (2) the trial court erred by holding Defendant in civil contempt for failure to uphold certain terms of the parties' Separation Agreement; (3) the trial court erred when it treated Plaintiff's verified motion as an affidavit, forming the evidentiary basis for its finding of contempt; and (4) Plaintiff met her burden of proof to show that the Separation Agreement was still in effect.

IV. Standard of Review

¶ 8 When reviewing contempt orders, this Court looks at "whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997). "The trial court's conclusions of law drawn from the findings of fact are reviewable de novo." *State v. Simon*, 185 N.C. App. 247, 250, 648 S.E.2d 853, 855 (citations omitted), *disc. rev. denied*, 361 N.C. 702, 653 S.E.2d 158 (2007).

V. Analysis

¶ 9 On appeal, Defendant challenges the trial court's Contempt Order on the grounds: (1) the civil contempt hearing was inadequate under the statute; (2) Plaintiff failed to show there was an account established for JDS's college savings in which Defendant could deposit funds pursuant to the Separation Agreement; and (3) the evidence presented was insufficient to support finding him in civil contempt. For the reasons set forth below, we disagree.

A. Procedure for Contempt Hearing

¶ 10 Defendant first argues the trial court failed to conduct a statutorily required trial upon Plaintiff's civil contempt motion before holding him in civil contempt. Specifically, Defendant contends "[t]here was certainly no 'trial' before the trial court on [Plaintiff's] motion . . . ." To support his argument, Defendant calls attention to the facts that the hearing lasted sixteen minutes, no witnesses were called, and some exhibits were submitted to the court without context or foundation.

¶ 11 According to the pertinent statute, "[p]roceedings for civil contempt may be initiated by motion of an aggrieved party giving notice to the alleged contemnor to appear before the court for a hearing on whether the alleged contemnor should be held in civil contempt." N.C. Gen. Stat. § 5A-23(a1) (2019). Additionally, in a civil contempt hearing, "[t]he judicial officer is the trier of facts." N.C. Gen. Stat. § 5A-23(d) (2019). Further, this Court presumes the trial court "knows and follows the applicable law unless an appellant shows otherwise." *State v. Jones*, 260 N.C. App. 104, 108, 816 S.E.2d 921, 924 (2018).

¶ 12 Defendant also asserts, without citation to authority, that "[u]nder the plain language of the civil contempt statute, the judge is to conduct a trial to determine the facts as to whether the alleged contemnor is actually in contempt." Plaintiff correctly points out that there is no such statutory requirement. Rather, the statute appoints the judicial officer as the trier of facts. *See* N.C. Gen. Stat. § 5A-23(d). Here, the

record shows the hearing was initiated by Plaintiff, and notice was given to Defendant to appear before the court for a hearing to decide whether he should be held in contempt. During that hearing, Judge Buckner, the trier of fact, considered all the evidence presented by the parties and came to a conclusion consistent with applicable laws. Since Defendant has failed to offer evidence to overcome the presumption that the trial judge followed the statutorily required procedure, we find the civil contempt hearing was conducted properly, pursuant to N.C. Gen. Stat. § 5A-23.

B. Finding of Defendant in Civil Contempt

¶ 13 In his second argument, Defendant maintains he was improperly held in contempt because Plaintiff failed to prove an account for JDS's college funds existed, and without a showing of such evidence, Plaintiff has not proved that Defendant's contribution was possible. He contends Plaintiff's failure to produce evidence that such an account exists precludes him from culpability for failure to pay. Defendant also argues that he was under no obligation to "generally" pay for college. Rather, his obligation was to pay $2,000 per year into a "joint account with both [parties] as joint trustees . . . ." Plaintiff contends that the existence or non-existence of a specific account is irrelevant because the actual language of the Order merely refers to a "fund," which is otherwise undefined. After careful review, we are not persuaded by Defendant's arguments.

¶ 14 Before a party can be held in civil contempt, the trial court must make several findings, including a finding demonstrating "[t]he noncompliance by the person to whom the order is directed is willful." N.C. Gen. Stat. § 5A-21(a)(2a) (2019). This Court has held that "[w]illfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so." *Sowers v. Toliver,* 150 N.C. App. 114, 118, 562 S.E.2d 593, 596 (2002). "It is well-settled that it is within the trial court's discretion to determine the weight and credibility that should be given to all evidence that is presented during the trial." *Moss v. Moss*, 222 N.C. App. 75, 80, 730 S.E.2d 203, 206 (2012) (internal quotations and citations omitted).

¶ 15 Here, the Order incorporated the terms of the parties' Separation Agreement, which required Defendant to pay $2,000 per year into JDS's college fund. Plaintiff presented to the trial court a quarterly statement for an account set up for JDS's college fund. Although the account was held solely in Plaintiff's name, Defendant offered no evidence to refute the finding that he failed to contribute to the account. In fact, Defendant admitted in an email sent to Plaintiff, which was submitted to the trial court, he used money from JDS's college fund to pay for child support and "didn't replace it." Defendant further stated "I'm not covering [JDS's] college expenses this year. His college fund with me is all tapped out." Nevertheless, Defendant offered in his email to help JDS secure a loan through the State Employees' Credit Union.

¶ 16 The record is sufficient for the trier of fact to conclude that Defendant had the

ability to comply with the Order, and he deliberately failed to do so. Defendant's argument that Plaintiff failed to set up a specific account for JDS's college fund, thereby preventing Defendant from making payments, is without merit given the evidence that he understood his obligation to pay $2,000 annually, had the ability to do so, and chose not to. *See Sowers*, 150 N.C. App. at 118, 562 S.E.2d at 596. Because the evidence presented was offered without objection and showed willful failure to comply with the order, the trial court did not err in holding Defendant in civil contempt. *See Moss*, 222 N.C. App. at 80, 730 S.E.2d at 206.

C. The Evidentiary Burden of Proof

¶ 17 In his final argument, Defendant contends the trial court incorrectly drew negative inferences from his failure to respond to Plaintiff's motion, effectively and improperly shifting the burden of proof onto him.

¶ 18 The burden of proof in a civil contempt matter is solely upon the aggrieved party. N.C. Gen. Stat. § 5A-23(a1). Additionally, during a civil contempt proceeding, the motion of the aggrieved party "must include a sworn statement or affidavit . . . setting forth the reasons why the alleged contemnor should be held in civil contempt." *Id.* A verified pleading "may be treated as an affidavit if it (1) is made on personal knowledge, (2) sets forth such facts as would be admissible in evidence, and (3) shows affirmatively that the affiant is competent to testify to the matters stated therein." *Page v. Sloan*, 281 N.C. 697, 705, 190 S.E.2d 189, 194 (1972).

¶ 19 First, Defendant claims that he "literally had no obligation to file any response to [Plaintiff's] motion." Although it is true Defendant had no obligation to present evidence to the trial court, nothing in the record indicates he objected to the evidence provided by Plaintiff. Further, the evidence provided by Plaintiff satisfied the statutory requirement by setting forth the reasons Defendant should be held in civil contempt. *See Page*, 281 N.C. at 705, 190 S.E.2d at 194; *see also* N.C. Gen. Stat. § 5A-23(a1). Any inference that may have been drawn by the trial court from Defendant's failure to respond is fundamentally different than a misallocation of the burden of proof.

¶ 20 Second, Defendant takes issue with the trial court treating Plaintiff's verified motion as an affidavit, upon which it could base subsequent orders. Defendant argues the trial court improperly allowed the "affidavit [that is required from the aggrieved party] to initiate the contempt proceeding" to "simultaneously . . . conclude the proceeding." This argument ignores that fact that this Court regularly affirms orders in which underlying evidence to support the orders' findings of fact consist solely of affidavits. *See, e.g.*, *Harter v. Eggleston*, 272 N.C. App. 579, 583, 847 S.E.2d 444, 448 (2020) (determining that affidavits and verified motions made by parties constituted competent evidence to support the order); *Harrison v. Harrison*, 180 N.C. App. 452, 454–55, 637 S.E.2d 284, 286–87 (2006) (concluding the plaintiff's verified motion for contempt constituted sufficient evidence to support the order holding the defendant

in contempt); *see also Scotland Cnty Dep't of Soc. Servs. v. Powell*, 155 N.C. App. 531, 539–40, 573 S.E.2d 694, 699 (2002) (affirming a child support order in which the trial court relied solely on financial affidavits to determine whether childcare expenses were reasonable). Further, the treatment of the verified pleading as an affidavit was proper because Plaintiff made it based on personal knowledge, it set forth facts that were admissible in evidence, and it showed that she was competent to testify to the matters stated. *See Page*, 281 N.C. at 705, 190 S.E.2d at 194. Because Plaintiff's motion satisfied the three requirements for treatment of a verified pleading as an affidavit, the trial court did not err when admitting it as an evidentiary basis for holding Defendant in contempt. *See id.* at 705, 190 S.E.2d at 194. Lastly, Plaintiff satisfied her burden of proof because the verified motion and supporting documents were accepted by the trial court, and Defendant did not object. *See Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 694, 611 S.E.2d 179, 183 (2005). The trial court properly exercised its discretion in deciding what weight and credibility to give the verified motion. *See Moss*, 222 N.C. App. at 80, 730 S.E.2d at 206.

VI. Conclusion

¶ 21 We hold the trial court did not err when it found Defendant in civil contempt for failure to comply with the terms of the parties' Separation Agreement because the initial hearing was conducted according to statutory requirements. Furthermore, the

trial court's findings of fact are supported by competent evidence, and in turn, support the conclusions of law.

AFFIRMED.

Judges GRIFFIN and JACKSON concur.

Report per Rule 30(e).