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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-341

Filed 19 December 2023

Guilford County, No. 20 CVD 3674

DARRIS PARKER, Plaintiff,

v.

TIFFANY PRINCESS MCCOY, Defendant.

Appeal by Defendant from order entered 28 September 2022 by Judge Kelvin D. Smith in Guilford County District Court. Heard in the Court of Appeals 18 October 2023.

*No brief filed for Plaintiff-Appellee.*

*Mercedes O. Chut for Defendant-Appellant.*

GRIFFIN, Judge.

Defendant, Tiffany Princess McCoy, appeals from the trial court's contempt order. Defendant contends the trial court erred in: (A) failing to enter necessary findings for civil contempt and establish purge conditions; (B) suspending an existing permanent custody order and entering new custodial provisions within the contempt order; and (C) awarding attorneys' fees. We hold the trial court erred in each of these

respects and therefore vacate the contempt order and remand for further proceedings.

### **I. Factual and Procedural Background**

Defendant and Plaintiff, Darris Parker, were in a dating relationship and had a child in September 2019. On 28 February 2020, Defendant filed a complaint for child custody. On 9 March 2020, Plaintiff filed a complaint for custody and child support. The matters came on for hearing 14 and 21 July 2021. On 1 September 2021, the trial court entered a permanent custody order (“Permanent Order”) in which it decreed Defendant and Plaintiff would share physical custody with Defendant having primary custody and Plaintiff having secondary custody.

On 13 May 2022, Plaintiff filed a motion for contempt and attorneys’ fees alleging Defendant was in contempt of court for failing to comply with the Permanent Order. Plaintiff claimed Defendant refused to allow Plaintiff to have visitation with their child over Thanksgiving and Christmas 2021 and had refused to allow visitation in 2022, except on one occasion in March. The trial court entered an order to show cause on 13 May 2022.

On 24 May 2022, Plaintiff and Defendant entered a consent memorandum of judgment (“Consent Judgment”) which continued Plaintiff’s motion for contempt until 9 August 2022 and gave Plaintiff specific visitation periods in addition to those decreed in the Permanent Order. On 12 July 2022, Plaintiff filed a motion to modify custody and another motion for contempt and attorneys’ fees alleging Defendant was in contempt of court as she had failed to comply with the Permanent Order and

Consent Judgment. On 13 July 2022, the trial court entered a new show cause order directing Defendant to appear in court on 9 August 2022. On 20 July 2022, the trial court entered a continuance order noting Plaintiff and Defendant agreed to continue the matter until 24 May 2022. The court also ordered, in addition to Plaintiff's parenting schedule contained in the Permanent Order, that he would have visitation as was agreed in the Consent Judgment.

Plaintiff's motions for contempt came on for hearing in Guilford County District Court on 9 August 2022. On 28 September 2022, the trial court entered a contempt order ("Contempt Order") holding Defendant in civil contempt and requiring Defendant pay Plaintiff's attorneys' fees. Further, the trial court's order included a temporary order suspending the Permanent Order until 9 January 2023 and imposing a new custodial provisions.

On 28 October 2022, Defendant timely filed notice of appeal.

## **II. Analysis**

Defendant argues the trial court erred in: (A) failing to enter necessary findings for civil contempt and establish purge conditions; (B) suspending an existing permanent custody order and entering new custodial provisions within the contempt order; and (C) awarding attorneys' fees.

### **A. Necessary Findings for Civil Contempt and Purge Conditions**

Defendant contends the trial court erred in failing to enter necessary findings for civil contempt and establish purge conditions. We agree.

In reviewing an order from a contempt proceeding, this Court is “limited to determining whether competent evidence supports the findings of fact and whether those findings support the conclusions of law.” *Blanchard v. Blanchard*, 279 N.C. App. 280, 284, 865 S.E.2d 693, 697 (2021) (citation omitted). Additionally, we review the trial court’s apprehension of the law de novo to determine whether the trial court considered the issues presented under the correct legal standards. *Id.* (citation omitted). Where the “trial court applied the correct law in its analysis and ruling, we conduct the regular de novo review to determine if the trial court’s legal conclusions are supported by its findings of fact.” *Id.* (citation and emphasis omitted).<sup>1</sup>

***1. Failure to Make Necessary Findings of Fact***

Our General Statutes state a defendant may be held in civil contempt for failure to comply with an order of a court where:

- (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.

N.C. Gen. Stat. § 5A-21(a) (2023). To hold a defendant in civil contempt, the trial

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<sup>1</sup> This standard of review is also the standard under which we review Defendant’s contentions in section II.B.

court must, at the conclusion of a hearing on a motion for contempt, “enter a finding for or against the alleged contemnor on each of the elements set out in [N.C. Gen. Stat. § 5A-21(a)].” N.C. Gen. Stat. § 5A-23(e) (2023).

Relevant here, the trial court, in its Contempt Order, entered the following Findings:

- 35. The [Permanent Order] and the [Consent Judgment] were valid orders and both Orders were in effect at all times herein relevant.
- 36. [ ] Defendant mother has failed to comply with the prior Orders of the court, and she had the means and ability to comply with the orders, but she willfully failed to do so, and she does not have a lawful excuse for her failure to comply with the orders of the Court.

Through Finding of Fact 36, the trial court undoubtedly made the requisite finding on both N.C. Gen. Stat. § 5A-21(a)(2a) and (a)(3). However, the trial court’s Finding of Fact 35 states the previous orders were in effect but not that they remain in effect, or in force, as is stated in N.C. Gen. Stat. § 5A-21(a)(1). The trial court also failed to make a finding under N.C. Gen. Stat. § 5A-21(a)(2) as to whether the purpose of the order could still be served by compliance with the order.

The trial court failed to make the requisite findings on (a)(1) and (a)(2). Because the trial court failed to make the requisite findings under N.C. Gen. Stat. § 5A-21(a)(1) and (a)(2) as required by N.C. Gen. Stat. § 5A-23(e), we remand the Contempt Order for further findings consistent with N.C. Gen. Stat. § 5A-23(e).

## ***2. Failure to Include Purge Conditions***

The general purpose of civil contempt is not to punish but to “preserve the rights of private parties and to compel obedience to orders and decrees made for the benefit of such parties.” *Hardy v. Hardy*, 270 N.C. App. 687, 690, 842 S.E.2d 148, 151 (2020) (citations omitted). Thus, where civil contempt is found, the trial court “must enter an order finding the facts constituting contempt and specifying the action which the contemnor must take to purge himself or herself of the contempt.” *Id.* These purge conditions “cannot be impermissibly vague, but must ‘clearly specify what the defendant can and cannot do . . . in order to purge herself of the civil contempt.’” *Wilson v. Guinyard*, 254 N.C. App. 229, 238, 801 S.E.2d 700, 706 (2017) (quoting *Cox v. Cox*, 133 N.C. App. 221, 226, 515 S.E.2d 61, 65 (1999)).

Upon review of the trial court’s Contempt Order, we hold the trial court erred as it either failed to include a purge condition altogether or included a purge condition so impermissibly vague that we are unable to recognize it was intended to serve as a purge condition.

## **B. Suspension of Permanent Order and Entry of Temporary Order**

Defendant argues the trial court erred in suspending the Permanent Order and entering a temporary order with new custodial provisions within the contempt order. We agree.

As a general matter, our Court has previously held trial courts,

must be careful not to confuse the purposes of modification and contempt. The court modifies custody or visitation because substantial changes in circumstances have made a

different disposition in the best interest of the child. A custodian should not violate the visitation order, but if he or she does, then ordinarily the proper response is a finding of contempt, not modification.

*Jackson v. Jackson*, 192 N.C. App. 455, 463–64, 665 S.E.2d 545, 551 (2008). A custody order may be modified upon a motion by either party or anyone interested, where “substantial changes in circumstances have made a different disposition in the best interest of the child.” *Id.* at 459, 665 S.E.2d at 549 (citation omitted) (“The trial court may not *sua sponte* enter an order modifying a previously entered custody decree.”). Here, while Plaintiff filed a motion to modify custody prior to the proceedings concerning Plaintiff’s motion for contempt, the motion to modify had yet to be calendared and was not before the court. Further, the trial court failed to make any finding or determination as to the best interest of Plaintiff’s and Defendant’s child. Thus, where the trial court’s order served as a modification to the Permanent Order, the modification was made in error.

### **C. Attorneys’ Fees**

Defendant argues the trial court erred in awarding attorneys’ fees. We agree.

The trial court has statutory authority to award attorneys’ fees to a party who successfully pursues a motion for contempt in child custody cases. *See Wiggins v. Bright*, 198 N.C. App. 692, 695, 679 S.E.2d 874, 876 (2009). Whether a party has met the statutory requirements for an award of attorneys’ fees is a question of law. *Crews v. Paysour*, 261 N.C. App. 557, 566, 821 S.E.2d 469, 475 (2018). Although we typically

review a trial court's award of attorneys' fees for abuse of discretion, we must review statutory requirements *de novo*. *Sarno v. Sarno*, 255 N.C. App. 543, 548, 804 S.E.2d 819, 824 (2017). "Only when these requirements have been met does the standard of review change to abuse of discretion for an examination of the amount of attorney[s] fees awarded." *Id.* (citations omitted).

Under North Carolina General Statute, section 50-13.6, trial courts are granted the authority to award attorneys' fees in an action or proceeding for custody of a minor child, including a motion in the cause for the modification. *See* N.C. Gen. Stat. § 50-13.6 (2023). However, before ordering payment of these attorneys' fees, the trial court must make two findings of fact: "the party to whom the attorney's fees were awarded was (1) acting in good faith and (2) has insufficient means to defray the expense of the suit." *Wiggins*, 198 N.C. at 696, 679 S.E.2d at 876 (internal marks and citation omitted). Additionally, the order must contain findings "upon which a determination of the requisite reasonableness can be based." *Wilson v. Guinyard*, 254 N.C. App. 229, 238, 801 S.E.2d 700, 707 (2017) (internal marks and citations omitted).

Here, the trial court ordered Defendant pay attorneys' fees stating:

[ ] Defendant mother shall pay to [ ] Plaintiff's attorney the amount of \$2,500.00, to reimburse him for a portion of his costs and attorney fees. She shall pay this amount by



February 9, 2023[.]<sup>2</sup>

The trial court failed to make requisite findings as to whether Plaintiff was acting in good faith and whether Plaintiff had insufficient means to defray the expense of the suit. Further, the trial court also failed to make any findings concerning the reasonableness of the fees. Thus, the trial court failed in its award.

### **III. Conclusion**

For the aforementioned reasons, we vacate the trial court's contempt order and remand.

VACATED AND REMANDED.

Judge DILLON and TYSON concur.

Report per Rule 30(e).

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<sup>2</sup> We recognize the trial court is authorized to order Defendant pay attorneys' fees and that this order may serve as a purge condition. *See Hartsell v. Hartsell*, 99 N.C. App. 380, 390, 393 S.E.2d 570, 576 (1990). However, as stated in section II.A.2., if the trial court did intend these fees to serve as a purge condition, the condition was impermissibly vague as the trial court failed to indicate whether paying the fees by the specified date would allow Defendant to purge herself of contempt.