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NO. COA01-1065

NORTH CAROLINA COURT OF APPEALS

Filed: 20 August 2002

TIMOTHY McKYER,

Plaintiff,

v.

Mecklenburg County

No. 00-CVD-9237

FONTELLA McKYER

Defendant.

Appeal by defendant from order entered 13 April 2001 by Judge Regan A. Miller, District Court, Mecklenburg County. Heard in the Court of Appeals 22 May 2002.

Marnite Shuford, for plaintiff-appellee.

Michelle D. Reingold, for defendant-appellant.

WYNN, Judge.

The two minor children of Timothy and Fontella McKyer are the subject of this appeal; following their marital separation, the trial court awarded Timothy McKyer custody of the children. Although Fontella McKyer makes several arguments on appeal, the essence of her appeal is whether the trial court erred in making the determination that Timothy McKyer "is a fit and proper person to have the custody, care and control of the two children and it is in the best interest of the children that he become the primary caregiver." On review of the record, we find no abuse of

discretion by the trial judge in ordering primary custody with the father.

The McKyers married in 1991; their two children were born in 1995 and 1998. Timothy McKyer played professional football for twelve years with seven different National Football League teams. The couple moved to Charlotte, North Carolina in 1995, while he played for the Carolina Panthers and later for the Atlanta Falcons and Denver Broncos. In October 1995, Fontella McKyer's mother, Mary Gray, moved into the marital home to help in the care of the McKyers' first child.

When Timothy McKyer stopped playing football after the 1997-1998 season, Fontella McKyer started working part-time as a receptionist with a local insurance company. In the meantime, Timothy McKyer hired an agent to help him find employment in communications as a radio host or football commentator.

In May 2000, the couple separated by agreement with Timothy McKyer moving out of the marital home and Fontella McKyer remaining in it. Their minor children also remained at the martial home although the separation agreement did not address custody.

In June 2000, Timothy McKyer brought this action seeking primary custody of the two minor children; however in October 2000, the trial court, by *ex parte* order, granted Fontella McKyer temporary custody of the children and instructed Timothy McKyer to pay child and post-separation support. Following a full hearing in April 2001, the trial court awarded primary custody of the minor children to Timothy McKyer with visitation rights for Fontella

McKyer. From that order, Fontella McKyer appeals.

The issue on appeal is whether the appellate record shows that the trial judge abused his discretion by awarding custody of the two minor children to the father. We answer: No, because even though there is evidence to sustain findings to the contrary, the record shows competent evidence to support the trial court's findings. *Adams v. Tessener*, 354 N.C. 57, 63, 500 S.E.2d 499, 503 (2001) ("the trial court's findings of fact are conclusive on appeal if there is competent evidence to support them, even though the evidence might sustain findings to the contrary").

As between natural parents, a trial court must award custody of children to the parent that it determines "will best promote the interest and welfare of the child." N.C. Gen. Stat. § 50-13.2(a) (2001). In making that determination, statutory law requires the trial court to: "consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party and shall make findings accordingly." N.C. Gen. Stat. § 50-13.2 (a). In short, under North Carolina law, the findings by the trial court must "support the determination of what is in the best interest of the child." *Id.* Moreover, as between natural parents, "no presumption shall apply as to who will better promote the interest and welfare of the child". *Id.*

The trial court's findings "may concern physical, mental, or financial fitness or any other factors brought out by the evidence

and relevant to the issue of the welfare of the child." *Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E.2d 466, 468 (1978).

It is not necessary for the trial judge to make detailed findings of fact upon each item of evidence offered at trial. It is necessary, however, that he make the material findings of fact which resolve the issues raised. In each case the findings of fact must be sufficient to allow an appellate court to determine upon what facts the trial judge predicated his judgment.

Morgan v. Morgan, 20 N.C. App. 641, 642, 202 S.E.2d 356, 357 (1974); See also *Adams*, 354 N.C. at 63, 500 S.E.2d at 503; *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975)); *In re Orr*, 254 N.C. 723, 726, 119 S.E.2d 880, 882 (1961). However, because the trial judge is in a position to observe those vitally interested, examine the evidence and render justice on all the facts, we ordinarily consider the findings of the trial court to be conclusive on appeal if supported by competent evidence. See *Tyner v. Tyner*, 206 N.C. 776, 780-81, 175 S.E. 144, 147 (1934). Consequently, because the trial judge has that opportunity to see and hear the parties and witnesses in person, our Courts have long recognized it as "mandatory, in such a situation, that the trial judge be given a wide discretion in making his determination," and therefore, "his decision ought not be upset on appeal absent a clear showing of abuse of discretion." *Greer v. Greer*, 5 N.C. App. 160, 163, 167 S.E.2d 782, 784 (1969).

In this case, Fontella McKyer argues the trial judge abused his discretion by making findings of fact that "overlooked" relevant evidence she claims shows she should have been awarded

custody. She argues that the "overlooked" evidence of Timothy McKyer's physical, verbal and emotional abuse of her, necessitated a determination that it was in the best interest of the children to be placed with her. However, although the trial court did not make a finding as to whether the abuse did or did not occur, this issue is adequately addressed by the trial court's findings.

In its findings, the trial court acknowledged that marital problems occurred prior to the separation and incorporated several of the instances in its findings of facts. For example, the trial court specifically found that:

10. By February 1999 the fact that husband was no longer playing football or earning the salary of a professional athlete affected the emotional relationship between the parties. They began arguing about money and household expenses. Husband had decided that he could no longer afford to pay his mother-in-law \$600.00 per month and provide her with free room and board. He also believed that her presence adversely affected his role as the head of the household, but he never specifically requested that she move out of the marital home.

11. Between February 1999 and May 9, 2000, husband engaged in behavior that was destructive to the marital relationship. On February 4, 1999, husband grabbed wife in such a manner as to cause her physical harm in the presence of the younger son. He began using the home computer in such a way to allow wife to discover that he was searching in foreign countries for a new, more submissive wife on the Internet. Husband allowed at least one woman to respond to his computer solicitations by writing to him at his home address with reckless disregard as to whether wife would discover the letter. Husband would purposefully leave home just before wife arrived from work and remain away until late at night. Husband prepared a "divorce

worksheet" that he left for wife to discover in the home office. This behavior was designed to be cruel and to make wife's life unbearable to the point that she would agree to separation of the parties.

These findings show that the trial judge considered the evidence presented by Fontella McKyer but in his discretion, he decided that the findings did not compel the award of custody to her. Since the record shows that he considered the evidence presented by Fontella McKyer, we can find no abuse of discretion by the trial judge in deciding to give more weight to other evidence presented.

Fontella McKyer further argues that the trial court did not fully consider her evidence showing Timothy McKyer's arrest for assault and communicating threats against her mother and sister, which she again contends showed that the best interest of the children was to be placed with her. However, the record shows that there was conflicting testimony regarding the incident that led up to the charges against Timothy McKyer. The trial court found that:

on May 11, 2000 husband appeared at the marital home without prior notice during the middle of the day while wife was at work and the children were in the care of wife's mother. Husband demanded that he be allowed to take the children with him for the remainder of the afternoon. This behavior caused a physical confrontation between husband, wife's mother and wife's sister that resulted in husband being arrested for assault. This incident and the hostile emotional state of husband during this time period caused substantial and possibly irreparable damage to husband's relationship to his mother-in-law. The evidence about this particular incident does not establish that either child was harmed either emotionally or physically during the incident.

Notwithstanding, the conflicting evidence of this incident from the testimony of Timothy McKyer, Ms. Gray and her daughter, Fontella McKyer contends that the trial court failed to follow *Adams v. Tessener*, 354 N.C. 57, 550 S.E.2d 499 (2001), in which the biological father lost his presumptive rights as the natural parent because of criminal convictions including driving an automobile with no insurance or registration, driving while his license was revoked, appearing drunk and disruptive in a public place, and two counts of careless and reckless driving. However, unlike the father in *Adams*, Timothy McKyer was found not guilty on the charges brought by Ms. Gray and her daughter; indeed, the record does not indicate that Timothy McKyer had any record of criminal convictions.

Significant to our holding that the trial court did not abuse his discretion in this case, we note that the trial judge made extensive and detailed findings covering evidence that supported custody for and against the husband. The findings demonstrate that the trial judge considered all of the evidence presented but chose to exercise his discretion by weighing the evidence in favor of the husband. For example, the trial court made the following findings of fact that:

9. Throughout 1998, husband concentrated on maintaining his physical fitness regimen in hopes that he would be offered a contract. By December 1998 husband concluded that a team would not employ him. At husband's insistence, wife obtained a job with an insurance company as a receptionist. Wife's mother took on more responsibility with respect to the two children while the wife worked. Although husband did not have full-

time employment, he did not take on more responsibility for the care of the children, preferring to spend his time racing motorcycles and engaging in other recreational activities.

16. After the parties separated, husband began exhibiting for the first time a keen and sincere interest in his two sons. He developed more interest and concern about the older son's educational progress to the extent that he was able to uncover the fact that the child had a developmental disability that would require professional treatment. Husband took both children with him on a trip to Texas to visit his relatives, including his mother. He began insisting on being able to visit the children more often as the "Interim Separation Agreement" contained no provisions concerning custody, child support or visitation privileges. . . .

17. Husband now maintains a very flexible schedule that allows him to be available for childcare most of the day every day. He is able to establish a class schedule that allows him to spend a majority of the day with the children. He has purchased a four-bedroom home near the church that wife attends. The home is fully furnished with bedrooms for both children. Husband's efforts since the date of separation to become a more involved parent have been clumsy and have at times exhibited his inexperience with the responsibility of the daily care of the children. However, husband's efforts have been sincere and have not resulted in any physical or emotional harm to the children.

18. Wife's role as the primary care giver to the children has changed as she has taken on the responsibilities of full-time employment. While she describes her employer as sensitive to her role as a parent, her schedule is clearly not as flexible as that of the husband at this time. Wife relies on her mother to provide substantial assistance in caring for the children. However, wife's mother has no legal or financial obligation to continue her role as the children's "nanny." Given the fact that she has maintained a separate household in Texas, there is a substantial

likelihood that she will return to Texas once the marital home is sold. Moreover, the continued involvement of the wife's mother as a primary caregiver for the children is a source of disruption and conflict to the family and further efforts to maintain her present role may result in harm to the children's relationship to the father.

19. Husband is a fit and proper person to have the primary care, custody and control of the two children and it is in the best interest of the children that he become the primary caregiver at this time and under the present circumstances.

20. Wife is a fit and proper person to have regular visitation with the children and it is in the best interest of the children that she have liberal visitation as she develops her own economic and emotional independence.

21. It is not in the best interest of the children that their primary care be arranged in such that wife and her mother are the primary custodians with husband having a limited role in the life of these two children.

22. Prior to the date of separation, wife was clearly a dependent spouse as she clearly earned little or no income and lived a lifestyle based upon husband's income that in 1992 was in excess of \$1,000,000.00. However, both parties anticipated and expected that their lifestyle would change dramatically once husband's football career ended and the family had to depend on his ability to earn a living in other ways. Wife currently has and will have monthly expenses of \$3365.54 regardless of whether the children continue to live primarily with her. However, this includes \$555.00 that wife spends each month on the car payment for a luxury automobile that wife purchased after the parties separated, a "mortgage payment" of \$1424.38 and expenditures for the maintenance of the marital home that the parties agree is worth or than \$600,000.00 Wife testified that she intends to move into a substantially less expensive home once the marital home is sold and these monthly expenses will decrease

substantially. Wife presently has a net income of \$2104.00 and is maintaining health insurance for both children. Wife is a dependent spouse and is need of financial support from husband.

23. At the time of trial, husband did not have any full-time employment but was making reasonable efforts to obtain training and experience that would aid him in maximizing his future earning potential either in professional sports broadcasting, motivational speaking or as a coach and teacher. As was his plan before his football career ended, husband is supporting himself and his family by depleting his savings and relying on his investment and endorsement income that does not exceed \$15,000.00 per year. Husband is not voluntarily reducing or minimizing his income to avoid his financial obligations to his family.

24. At the time of trial the marital home has not yet been sold but the parties have property with a net value of nearly \$1,000,000.00, which awaits disposition pursuant to claims for equitable distribution. In light of wife's testimony about her intention to move to a less expensive house in a community that is about twenty-five miles from husband's present home, the Court cannot yet determine the reasonable financial needs of wife or the ability of husband to pay alimony or attorney's fees until this Court determines equitable distribution issues. Husband is not seeking child support at this time.

These findings broadly recognized evidence showing that Timothy McKyer's behavior was not at all times exemplary; however, we can find no abuse in the trial judge's discretion to find that: "Husband is a fit and proper person to have the primary care, custody and control of the two children and it is in the best interest of the children that he become the primary caregiver at this time and under the present circumstances." Indeed, in determining custody,

misconduct or perceived misconduct, it is not enough alone to deny custody to a party. See *In re Pitts*, 2 N.C. App. 211, 162 S.E.2d 524 (1968). Moreover, even if this Court in considering the evidence in the cold record on appeal would reach a different result, it is not our role to weigh the evidence, as long as there is sufficient evidence to support the trial court's findings and there is not clear abuse of discretion, we must uphold the trial court's findings of facts. Since the record shows evidence to support the trial judge's findings, those findings are conclusive on appeal even though the evidence might sustain a finding to the contrary. See *Raynor v. Odom*, 124 N.C. App. 724, 728, 478 S.E.2d 655, 658 (1996).

In light of our conclusion that the trial court's findings are supported by competent evidence even though such evidence could also sustain a contrary finding, we summarily reject the additional challenges to the findings by the trial court. Accordingly, we find no abuse of discretion by the trial judge in awarding custody to Timothy McKyer.

Affirmed.

Judges HUNTER and CAMPBELL concur.

Report per Rule 30(e).