NO. COA01-1564

NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2002

WILLIAM HOWARD WEBB,
Plaintiff-appellant,
v. Rockingham County
No. 99 CVD 697

LINDA GADDY WEBB,
Defendant-appellee.

Appeal by plaintiff from order entered 25 September 2001 by Judge Pattie S. Harrison in Rockingham County District Court. Heard in the Court of Appeals 14 August 2002.

Anderson, Korzen & Associates, PC, by John J. Korzen, for plaintiff-appellant.

Hough & Rabil, PA, by David B. Hough, for defendant-appellee.

BRYANT, Judge.

William Howard Webb and Linda Gaddy were married on 16 August 1986. They adopted a child in 1992. The couple lived together until they separated on 24 September 1998. The same day, the parties entered into a separation agreement providing that the care, custody and control of the minor child would be placed jointly with both parties. Defendant would have primary

physical custody of the minor child and plaintiff would have secondary physical custody. On 8 April 1999, plaintiff filed a complaint seeking exclusive care, custody and control of the child and child support. A temporary custody order was entered 24 February 2000 by Judge Richard W. Stone. The judge ordered that the parties continue to abide by the custody provisions in the 24 September 1998 separation agreement. The matter was continued until 22 May 2000 for additional evidence. On 7 June 2000, a final custody order, awarding custody to plaintiff, was entered by Judge Stone. Defendant filed notice of appeal on 30 June 2000 but later withdrew the appeal. On 3 April 2001, defendant filed a motion requesting the court's recusal pursuant to Rule 60 of the North Carolina Rules of Civil Procedure and Canon 3(C)(1) of the Code of Judicial Conduct.[1] Defendant requested: 1) that Judge Stone recuse himself; 2) that all orders entered by Judge Stone regarding custody, visitation and child support be vacated; 3) reinstatement of visitation arrangements prior to Judge Stone's rulings; and 4) a new

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[1] Canon 3(C)(1)(a) states: "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where . . . [h]e has personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings . . . ." Code of Judicial Conduct Canon 3(C)(1)(a), 2001 Ann. R. N.C. 306-07.

hearing. On 19 July 2001, Judge Stone recused himself from further hearing on the matter.

On 25 September 2001, a hearing on defendant's motion for the court's recusal was held at a special session of the Civil District Court for Rockingham County, Judge Pattie S. Harrison presiding. Judge Harrison ruled that the custody order entered on 7 June 2000 be vacated and all orders entered by Judge Stone prior to the 7 June 2000 order would become binding upon the parties. A new hearing was granted with the new hearing date to be set within thirty days from Judge Harrison's order. Plaintiff filed notice of appeal from Judge Harrison's order on 27 September 2001.

The issue before this Court is whether the trial court erred in vacating the custody order entered by Judge Stone on 7 June 2000.

Substantial Right

First, we must examine whether the appeal is properly before this Court. "'An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.'" *Embler v. Embler*, 143 N.C. App. 162, 164, 545 S.E.2d 259, 261 (2001) (quoting

Veazey v. City of Durham, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950)). An interlocutory order is not immediately appealable. *Id.* However, immediate appeal may be taken from an interlocutory order when the challenged order "involves a substantial right that would be lost, prejudiced, or less than adequately protected if an immediate appeal is not permitted." *Miller v. Swann Plantation Dev. Co.*, 101 N.C. App. 394, 395, 399 S.E.2d 137, 138 (1991). There is a two-step test for determining the appealability of an interlocutory order based upon a substantial right. *Id.* "'[T]he right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment.'" *Id.* at 395, 399 S.E.2d at 139 (alteration in original) (quoting *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990)).

This Court determines whether an interlocutory appeal affects a substantial right on a case-by-case basis. *Embler*, 143 N.C. App. at 166, 545 S.E.2d at 262. The appellant bears the burden of establishing that a substantial right will be affected. *Id.* In this case, plaintiff argues that Judge Harrison's order affected a substantial right because the order vacated a final custody order without finding changed circumstances. We agree. Our Supreme Court has held that parents have a "constitutionally-

protected paramount right to custody, care, and control of their child." *Petersen v. Rogers*, 337 N.C. 397, 400, 445 S.E.2d 901, 903 (1994). Therefore, we hold that Judge Harrison's order affects a substantial right and the appeal is properly before this Court. We next proceed to plaintiff's assignment of error.

Substantial Change of Circumstances

Plaintiff argues that it was error for the trial court to vacate Judge Stone's 7 June 2000 permanent custody order without a showing of changed circumstances. We agree.

"A permanent custody order establishes a party's present right to custody of a child and that party's right to retain custody indefinitely." *Regan v. Smith*, 131 N.C. App. 851, 852, 509 S.E.2d 452, 454 (1998). It may only be modified or vacated upon a showing of "substantially changed circumstances affecting the welfare of the child." *Id.* at 853, 509 S.E.2d at 454. The party moving to have the order modified or vacated bears the burden of proving changed circumstances. *Id.* A court deciding the issue of permanent custody for the first time must determine who will "best promote the interest and welfare of the child." N.C.G.S. § 50-13.2(a) (2001). The custody order must include findings of fact which support the court's determination of what is in the best interest of the child. *Id.*

In this case, the 7 June 2000 Order is clearly a permanent custody order. Judge Stone makes the following pertinent findings of fact:

> 2. The basic facts at the time of the prior hearing include that this child was primarily cared for by his father prior to the parties [sic] separation on September, 1998. . . . However after the separation the mother's activities in her church and work interfered with the amount of time she spent with the child and the father filed this action for custody in April, 1999. That after filing of this action, the child was molested by the mother's boyfriend's son, which issue was not properly addressed by the mother. . . .
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> 3. Since the last hearing the mother has in fact married Steve Kalil, and the parties have operated under the terms of the temporary order entered on February 24, 2000. However additional problems have [sic] including that on April 17, 2000, the mother and her new husband became involved in an intense argument. During the argument the husband "took" the mother into their bedroom and locked the door. They argued so loudly that the child became fearful and "pounded" on the door and asked to be let in. The child went in the bedroom and observed Mr. Kalil with his arm around the mother's throat and his leg wrapped around hers. When the fearful child tried to call his father due to the violent situation, but [sic] Mr. Kalil took the phone away from him.
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> 4. Evidence was also presented and the court finds that Mr. Kalil's anger control problem is an ongoing problem that was evident [sic] his prior relationship in 1997. Mr. Kalil describes the problem as a problem with frustration and admits he is under

> doctor's care, and taking medication for the problem. The mother minimizes the problem and denies entirely the violence that was obviously witnessed by the child.
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> . . . .
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> 7. It appears from all the evidence that the child's best interest would be promoted by his being placed in the custody of his father with the mother having reasonable visitation privileges.

Because the 7 June 2000 order is a permanent custody order, it could only be vacated by a "showing of substantially changed circumstances affecting the welfare of the child." *Regan*, 131 N.C. App. at 853, 509 S.E.2d at 454. "'[T]he modification of a custody decree must be supported by findings of fact based on competent evidence that there has been a substantial change of circumstances affecting the welfare of the child[.]'" *Browning v. Helff*, 136 N.C. App. 420, 424, 524 S.E.2d 95, 98 (2000) (alteration in original) (quoting *Pulliam v. Smith*, 348 N.C. 616, 618-19, 501 S.E.2d 898, 899 (1998)).

Defendant did not allege changed circumstances, nor did Judge Harrison find changed circumstances. In fact, Judge Harrison contends she only ruled on the recusal motion. Judge Harrison stated, "What I'm trying to do, I'm not making any decisions in the custody case." We find Judge Harrison's contention curious considering Judge Stone had already recused himself two months before the hearing on defendant's motion.

Further, Judge Harrison did make a decision on custody. The 7 June 2000 order of Judge Stone awarding care, custody, and control of the minor child to plaintiff, was in effect on 19 July 2001 when Judge Harrison ruled on defendant's motion. In vacating Judge Stone's order, Judge Harrison reinstated primary custody to defendant. Judge Harrison even stated at the hearing on defendant's motions that "the child's residence, as a result of what has happened today, is going to change." However, Judge Harrison's decision was made without "findings of fact based on competent evidence that there has been a substantial change of circumstances." *Id.* As such, the 25 September 2001 order vacating the 7 June 2000 permanent custody order was error.

Based on the foregoing, we reverse the trial court's order of 25 September 2001 and remand for reinstatement of the 7 June 2000 permanent custody order.

REVERSED and REMANDED.

Judges McGEE and McCULLOUGH concur.

Report per Rule 30(e).