An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

NO. COA01-577

NORTH CAROLINA COURT OF APPEALS

Filed: 18 June 2002

TERESA MITCHELL ICARD,
Plaintiff-Appellant,

v.

Scotland County
No. 99 CVD 046

GREGORY REDDIN ICARD,
Defendant-Appellee.

Appeal by plaintiff from order entered 26 October 2000 by Judge Richard T. Brown in Scotland County District Court and order entered 14 December 2000 by Judge Richard T. Brown in Scotland County District Court. Heard in the Court of Appeals 25 March 2002.

William L. Davis, III, for plaintiff-appellant.

Etheridge, Moser, Garner, Bruner and Wansker, P.A., by Terry R. Garner, for defendant-appellee.

EAGLES, Chief Judge.

Teresa Mitchell Icard ("plaintiff") appeals from a modification to a custody order and from an order finding her in contempt. After careful review of the briefs and record, we affirm.

Plaintiff and Gregory Reddin Icard ("defendant") were married on 13 December 1997. Prior to the marriage, a minor child was born

to plaintiff and defendant on 16 March 1996. The parties separated in December 1998.

Plaintiff commenced the initial custody matter on 20 January 1999 seeking custody of the minor child and defendant filed a counterclaim seeking custody. The matter was heard on 15 February 2000 in Scotland County District Court. The trial court filed a Custody Order on 16 May 2000 which awarded joint legal custody of the minor child to plaintiff and defendant and awarded primary physical custody to plaintiff.

Plaintiff met Charles Edward Carter ("Carter") on 10 September 1999. The two began a dating relationship shortly after meeting and plaintiff became pregnant in November 1999. Defendant and his stepmother, Cheryl Icard, began observing and videotaping plaintiff's apartment in Maxton, North Carolina, on 27 April 2000. Plaintiff gave birth to a child on 9 August 2000. Plaintiff was granted an absolute divorce from defendant in October 2000. Subsequently, plaintiff and Carter were married.

Defendant filed a motion in the cause seeking a modification in custody on 16 June 2000. This matter was heard in Scotland County District Court before Judge Richard T. Brown on 20 September 2000. The trial court issued an order on 26 October 2000 awarding primary physical custody to defendant. Plaintiff filed notice of appeal.

On 30 November 2000, defendant filed a contempt motion alleging that plaintiff violated the terms of the 26 October 2000 Custody Order by "repeatedly picking [the minor child] up early

from the prekindergarten program" and "failing to take [the minor child] to the prekindergarten program on the mornings she is required to do so." Judge Brown conducted a hearing on 14 December 2000 and entered an order finding plaintiff in contempt. Plaintiff appeals the 26 October 2000 Custody Order and the 14 December 2000 Contempt Order.

Plaintiff raises three issues on appeal. Plaintiff contends that the trial court erred in concluding that a substantial change in circumstances affecting the welfare of a child existed to justify modification of a custody order and that plaintiff intentionally and willfully violated the 26 October 2000 Custody Order. Plaintiff also contends that the trial court did not have jurisdiction to conduct the contempt proceeding on 14 December 2000 while the 26 October 2000 Custody Order was on appeal. After careful review, we affirm.

Plaintiff first contends that the trial court's findings of fact and conclusions of law that a substantial change in circumstances affecting the welfare of the minor child existed are not supported by the evidence. We are not persuaded.

The trial court made the following findings of fact.

> 8. That on many occasions, the plaintiff's vehicle, and a vehicle owned and operated by Charles Edward Carter have been located at the said apartment, by the defendant and his stepmother, at hours ranging from 12:03 a.m. until 5:16 a.m., during times when the plaintiff had the aforesaid minor child in her physical custody. The court finds that there has been a pattern of cohabitation by the plaintiff with Charles Edward Carter, during periods of time when the minor

child of the parties has been in the plaintiff's physical custody, in violation of the order of this court filed herein on May 16, 2000.

9. That notwithstanding the plaintiff's explanations that the said Charles Edward Carter left the apartment, and even if he did so leave the apartment, the evidence indicates that he was there many nights until late at night or early morning, while [the minor child] was present in the apartment, although this was denied by the plaintiff.

. . . .

11. That the plaintiff's actions in cohabiting with another man to whom she is not married constitute an inappropriate example for the minor child of the parties to this action.

12. That the plaintiff's own testimony that she left her car at the apartment during periods to make it appear that she lived therein, in order to satisfy her lease requirements, would constitute a subterfuge.

. . . .

14. That since the entry of the said order, the defendant has changed jobs, and no longer is employed at ARA in Cheraw, South Carolina, but is now employed at Wade S. Dunbar Insurance Agency in Laurinburg, North Carolina, and because he now lives much closer to his work, he has more time available to spend with the minor child of the parties.

15. The court finds that the plaintiff's disregard for the terms of the previous order of the court, prohibiting her cohabitation with a member of the opposite sex to whom she is not related by blood or marriage during periods of time when she has the physical custody of the minor child, constitutes a material

> and substantial change in the circumstances of the parties.
>
> 16. The court finds that the minor child of the parties is of such an age and discretion that his exposure to the defendant cohabiting on an overnight basis with her boyfriend is contrary to his best interest, and adverse to his best interest, because he is of such an age that his exposure to such conduct is detrimental to his best interest and welfare. All of the evidence indicates that he is an intelligent child, and could understand the significance of his mother occupying the same residence with a man to whom she is not married.
>
> 17. Further, the court finds that, because of the stability which the defendant has maintained, and his employment closer to his home, together with the fact that the plaintiff has occupied a residence on several nights with a person of the opposite sex to whom she is not married, constitutes a change of circumstances of such a nature that a change of custody will beneficially affect the child in the future. That there is no evidence before the court of any improper conduct on the part of the defendant.

The trial court concluded that:

> 2. That there has been a material and substantial change in the circumstances of the parties, which, in the court's discretion, requires a modification of the previous order of this court relating to custody, because of the adverse effect of the plaintiff's conduct, as set forth in the findings of fact, on the child; and that because of said material and substantial change in the circumstances of the parties, the child will be beneficially affected by a modification of custody.

Plaintiff argues that there is insufficient evidence to support a finding of cohabitation in Findings of Fact #9, 11, 12,

and 15. Plaintiff contends that at most the evidence showed that Carter spent the night with plaintiff on some weekends or that Carter spent the night alone in plaintiff's apartment when plaintiff was in the hospital having their baby. Plaintiff also contends that there was insufficient evidence to support Finding of Fact #16. Plaintiff argues that there was no "evidence to indicate that [the minor child] was intelligent enough to understand the significance of the mother occupying the same residence with a man to whom she is not married." Further, plaintiff contends that there was insufficient evidence to support Finding of Fact #17. Plaintiff argues that the evidence of defendant's new employment and stability along with plaintiff occupying a residence with a person of the opposite sex several nights a week does not support a finding that a change of circumstances has occurred and that a change of custody would be beneficial to the minor child.

"[I]n custody cases, the trial court sees the parties in person and listens to all the witnesses. This allows the trial court to 'detect tenors, tones and flavors that are lost in the bare printed record read months later by appellate judges.'" *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001) (citations omitted).

> Once the custody of a minor child is determined by a court, that order cannot be altered until it is determined (1) that there has been a substantial change in circumstances affecting the welfare of the child and (2) a change in custody is in the best interest of the child. A party seeking modification of a child custody order bears the burden of proving the existence of a substantial change

> in circumstances affecting the welfare of the child.

Evans v. Evans, 138 N.C. App. 135, 139, 530 S.E.2d 576, 578-79 (2000) (citations omitted). "The required change in circumstances need not have adverse effects on the child. '[A] showing of a change in circumstances that is, or is likely to be, beneficial to the child may also warrant a change in custody.'" *Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 98 (2000) (citations omitted). "It is well established law in this state that a substantial change in circumstances affecting the welfare of a child must be supported by findings of fact based on competent evidence." *White v. White*, 90 N.C. App. 553, 557, 369 S.E.2d 92, 95 (1988). "The court's findings of fact are conclusive if supported by any competent evidence, . . . even though there is evidence to the contrary, or even though some incompetent evidence may have been admitted." *In re McCraw Children*, 3 N.C. App. 390, 392, 165 S.E.2d 1, 3 (1969). "However, the trial court's conclusions of law are reviewable *de novo*." *Browning*, 136 N.C. App. at 423, 524 S.E.2d at 98. "In cases involving child custody, the trial court is vested with broad discretion. Matters of custody expressly include visitation rights. The decision of the trial court should not be upset on appeal absent a clear showing of abuse of discretion." *Id.* at 423, 524 S.E.2d at 97 (citations omitted).

Here, there is competent evidence in the record to support the trial court's findings which support the conclusion that there has been a substantial change in circumstances affecting the welfare of

the minor child. Testimony showed that plaintiff and Carter started a relationship in September 1999, that plaintiff and Carter engaged in sexual intercourse and that plaintiff became pregnant in November 1999. Their child was born in August 2000. Plaintiff and defendant were not divorced until October 2000 and plaintiff and Carter were married by the time of the contempt hearing in December 2000.

Plaintiff's lease on her apartment in Maxton, North Carolina, also began in April 2000. The record shows that defendant and his stepmother observed and videotaped plaintiff's apartment on twenty-three occasions between 27 April and 17 September 2000. The times of the observations varied between 9:19 p.m. and 5:28 a.m. On thirteen of the days observed, plaintiff's and Carter's vehicles were at plaintiff's apartment. On ten of those thirteen occasions, plaintiff had custody of the minor child. On four other nights, only Carter's vehicle was parked at the apartment. Carter's vehicle was present at the apartment seventeen of the twenty-three times that defendant and his stepmother observed plaintiff's apartment. There was also testimony that Carter and plaintiff shared the use of their vehicles.

Further, the evidence shows that the minor child is "an intelligent child, and could understand the significance of his mother occupying the same residence with a man to whom she is not married." Plaintiff's own testimony provides that the minor child is "smart" and that "[h]e takes in a lot . . . ."

We note that defendant changed employment since the entry of the initial custody order. The evidence shows that before defendant's job change, defendant had to travel twenty-five to thirty minutes to work each day. The evidence further shows that defendant's new job, which is closer to home, has allowed him to spend more time with the minor child, take him to school, pick him up from school, and coach his soccer team.

The evidence supports the trial court's findings which in turn support its conclusion that a substantial change in circumstances exists which affected the welfare of the minor child.

"Once the trial court makes the threshold determination that a substantial change has occurred, the trial court then must consider whether a change in custody would be in the best interests of the child." *West v. Marko*, 141 N.C. App. 688, 691, 541 S.E.2d 226, 228 (2001). "The trial court is in the best position to determine what is in the best interests of the child. It is a difficult determination and one made by observing the witnesses and weighing the evidence." *White*, 90 N.C. App. at 557, 369 S.E.2d at 95 (citations omitted). "As long as there is competent evidence to support the trial court's findings, its determination as to the child's best interests cannot be upset absent a manifest abuse of discretion." *Metz v. Metz*, 138 N.C. App. 538, 541, 530 S.E.2d 79, 81 (2000).

In Finding of Fact #16, the trial court stated that the minor child's "exposure to the defendant cohabiting on an overnight basis with her boyfriend is contrary to his best interest, and adverse to

his best interest" and "detrimental to his best interest . . . ." The trial court concluded that the minor child would be "beneficially affected by a modification of custody." We consider the pertinent language from Finding of Fact #16 as a conclusion of law even though it is labeled as a Finding of Fact. *See In re Helms*, 127 N.C. App. 505, 510-11, 491 S.E.2d 672, 675-76 (1997). Reading the above quoted sections of Finding of Fact #16 along with the quoted language of Conclusion of Law #2, we conclude that the trial court did not err in concluding that it is not in the minor child's best interest to remain in the primary custody of plaintiff and that the minor child will be "beneficially affected" by placing him in the primary custody of defendant. This determination is supported by competent evidence and the trial court's findings of fact.

Plaintiff next contends that the trial court erred in denying defendant's motion to dismiss which alleged that the trial court did not have jurisdiction to conduct the contempt proceeding on 14 December 2000 while the 26 October 2000 Custody Order was being appealed. We do not agree.

Plaintiff argues that G.S. § 1-294 removes jurisdiction of the matter to the appellate court while an appeal is pending. G.S. § 1-294 states that "[w]hen an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; . . . ."

However, G.S. § 50-13.3 entitled "Enforcement of order for custody" is also applicable here. G.S. § 50-13.3(a) states that: "[n]*otwithstanding the provisions of G.S. 1-294*, an order pertaining to child custody which has been appealed to the appellate division is enforceable in the trial court by proceedings for civil contempt during the pendency of the appeal." (Emphasis added). Even though plaintiff perfected her appeal of the 26 October 2000 Custody Order before defendant filed his motion for civil contempt for violation of the 26 October 2000 Custody Order, the trial court retained jurisdiction for the purposes of enforcing the custody order through proceedings for civil contempt. *But see Rosero v. Blake*, __ N.C. App. __, __ S.E.2d __ (May 21, 2002) (No. COA01-350, COA01-483). The trial court properly denied plaintiff's motion to dismiss.

Next, plaintiff contends that the trial court's findings of fact and conclusions of law that plaintiff intentionally and violated the 26 October 2000 Custody Order are not supported by the evidence.

The trial court made the following findings:

> 3. That since the entry of the aforesaid order, [the minor child] has missed several days from the prekindergarten program, including October 18, November 1, November 13, November 15, November 16, November 22, November 29, and November 30.
>
> 4. That the plaintiff contends that on the said occasions, the child has been sick, but yet the plaintiff's father testified that on the evening of October 31, 2000, which was Halloween, [the minor child] was eager to go out for trick or treating, was excited, and that they took him out for a evening of trick

> or treat, without any proof whatsoever that the following day he was sick.
>
> 5. That on all the remaining days since October 6, 2000, through the end of November, 2000, while [the minor child] has been in the physical custody of the defendant he has regularly attended the prekindergarten program.
>
> 6. That the plaintiff has produced some medical records, but no records reflecting that the child was unable to attend school, and no medical records at all for several of the days that he has missed.
>
> 7. That the plaintiff testified that, in her opinion, if she was not working, it was more important that [the minor child] be with her than that he attend the prekindergarten program.
>
> . . . .
>
> 10. That the plaintiff has willfully and intentionally violated the terms of the aforesaid order of the court, in failing to return [the minor child] to the Laurinburg Presbyterian Church Prekindergarten Program on the mornings that her visitation terminates under the terms of the order.

The trial court concluded "[t]hat the plaintiff's violation of the terms of the aforesaid order constitutes a willful and intentional contempt of this court and its orders."

Plaintiff argues that the evidence did not show that she willfully or intentionally violated the custody order. Plaintiff contends that the minor child was sick on the days that he did not attend school. We are not persuaded.

"Review in contempt proceedings is limited to whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Adkins v. Adkins*, 82

N.C. App. 289, 292, 346 S.E.2d 220, 222 (1986). "Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment." *Hartsell v. Hartsell*, 99 N.C. App. 380, 385, 393 S.E.2d 570, 573 (1990), *aff'd*, 328 N.C. 729, 403 S.E.2d 307 (1991).

"In the context of a failure to comply with a court order, the evidence must show that the person was guilty of 'knowledge and stubborn resistance' in order to support a finding of willful disobedience." *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 290-91 (1997).

> In order to support a finding of wilfulness in a civil contempt proceeding there must be evidence to establish as an affirmative fact that defendant possesses the current ability to comply with the order. Although specific findings as to the contemnor's present means are preferable, this Court has held that a general finding of present ability to comply is sufficient basis for the conclusion of wilfulness necessary to support a judgment of civil contempt.

Hartsell, 99 N.C. App. at 385, 393 S.E.2d at 574 (citations omitted).

The record contains competent evidence to support the trial court's findings. Plaintiff testified that "[w]hen I'm out of work, I keep my son home with me, I do." The record also contains testimony that the minor child was absent from the prekindergarten program on 1, 13, 15, 16, 22, 29, and 30 November when the minor child was in plaintiff's custody. Testimony also shows that the minor child did attend the prekindergarten program on 14, 17, 20,

21, and 28 November when the minor child was in defendant's custody. Further testimony shows that when defendant had custody of the minor child in November 2000 and up to the time of the hearing in December, the minor child attended the prekindergarten program. The record also shows that plaintiff produced one medical record at the hearing which was a 25 September 2000 note from Dr. Faulkenberry which provided that the minor child "had a three day history of a cough." The record is silent as to any other medical reports showing that the minor child was sick during October or November.

The trial court also found "[t]hat the plaintiff is able to comply with the order or is able to take reasonable measures that would enable her to comply." Competent evidence exists in the record to support the trial court's findings. These findings support the trial court's conclusions of law. This assignment of error is overruled.

Accordingly, the orders of the trial court are affirmed.

Affirmed.

Judges HUDSON and BRYANT concur.

Report per Rule 30(e).