NO. COA01-934

NORTH CAROLINA COURT OF APPEALS

Filed: 18 June 2002

KRISTEN ST. CLAIR,

Plaintiff,

v. Iredell County
No. 99 CVD 1146

SHANNON ST. CLAIR,

Defendant.

Appeal by plaintiff from custody order entered 6 December 2000 by Judge Mark S. Culler in Iredell County District Court. Heard in the Court of Appeals 20 May 2002.

Sally H. Scherer and Katherine E. Jean, for plaintiff-appellant.

No brief filed for defendant-appellee.

TYSON, Judge.

I. Facts

Kristen St. Clair ("plaintiff") married Shannon St. Clair ("defendant") on 13 October 1995. Prior to the marriage plaintiff had a daughter, Morgan Elizabeth Stetser St. Clair, whom defendant adopted. One child was born to plaintiff and defendant, Madison Leah St. Clair. Plaintiff and defendant separated and each sought custody of both minor children. On 11 June 1999, a Temporary Custody Order was entered awarding the parties joint custody. On

19 August 1999, a Temporary Custody Order was entered awarding defendant sole custody. On the same day, a Mediated Consent Order was entered in which the parties agreed that plaintiff would obtain a psychological evaluation. On 6 December 1999, the trial court entered an order awarding defendant permanent sole custody of both minor children. Plaintiff appeals.

II. Issues

The issues presented are whether: (1) the trial court failed to make findings of fact on material issues raised by the evidence, (2) the trial court erroneously relied upon its recollections of a previous hearing, (3) the trial court erred by incorporating orders previously entered, (4) the trial court's findings of fact are supported by competent evidence and conclusions of law are supported by the findings of fact, (5) the trial court abused its discretion by denying plaintiff a reasonable time to present her case, and (6) the trial court erred in ordering plaintiff to pay defendant's attorney fees. We affirm the award of custody, vacate the award of attorney fees, and remand.

III. Standard of Review

The guiding principle in custody and visitation disputes is the best interest and welfare of the child. *In re Jones*, 62 N.C. App. 103, 105, 302 S.E.2d 259, 260 (1983). An order for the custody of a minor child should award custody to "such person . . . as will best promote the interest and welfare of the child." N.C. Gen. Stat. § 50-13.2(a) (2001). The trial court is given broad discretion in determining the custodial setting that will

best promote the interest and welfare of minor children. *In re Peal*, 305 N.C. 640, 645, 290 S.E.2d 664, 667 (1982). Appellate review of the trial court's custody order is confined to whether the court abused its discretion. *Newsome v. Newsome*, 42 N.C. App. 416, 426, 256 S.E.2d 849, 855 (1979). Since the trial court had the opportunity to personally observe the parties, hear the witnesses and determine credibility, the trial court's decision should not be reversed absent a showing of an abuse of discretion. *Id*.

IV. Material Issues

Plaintiff argues that the trial court failed to make necessary findings of fact on material issues raised by the evidence. The trial court made the following pertinent findings of fact and conclusions of law:

> 4. Since the last hearing Plaintiff has moved from Welcome, North Carolina to Greensboro, North Carolina to Statesville, North Carolina, and finally, to her present address, also in Statesville, North Carolina. Plaintiff presently resides in the basement of a home owned by Paul Bonham. Plaintiff has changed jobs at least two times since the last hearing.
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> 5. Since the last hearing Defendant and the children have continued to reside in the marital home of the parties in Iredell County, North Carolina. Neither party has made any of the mortgage payments on the home since immediately prior to their separation, and as a result of foreclosure action, the home is scheduled to be auctioned . . . . [Defendant] and the children have been invited to take up residence in the basement of [defendant's] mother's home, which is adjacent to the marital home. [Defendant] left his former employment at Statesville Jewelry and Loan to work at a bicycle shop but has returned to the

jewelry store because his employer there . . . allows him the flexibility of adjusting his hours to accommodate the children's schedules and needs.

. . . .

8. Several of Plaintiff's witnesses testified that Defendant has used marijuana in their presence or been under the influence of marijuana in the children's presence. Defendant denies these statements. The extent to which the testimony of Plaintiff's witnesses on the issue of clothing and personal grooming for the girls differs from the testimony of more objective witnesses[,] such as their counsellor [sic] and their teachers[,] tends to diminish the credibility of Plaintiff's witnesses regarding other matters. This Court simply finds as fact that Defendant has used marijuana in the past and that it would be in the children's best interest that neither party abuse alcohol or use controlled substances not prescribed by a licensed physician.

9. Defendant is a fit and proper party to have custody of the children.

10. Prior to the separation of the parties the Plaintiff slit her wrists in the bathroom of the marital home while the children were present in the home . . . . Except for Plaintiff's testimony to the effect she had lost one of her jobs since the last hearing due to constantly missing work to attend court, counselling [sic] and the psychological evaluation, there was no evidence provided during this hearing concerning to what extent Plaintiff has followed up on the matters indicated in the discharge summary . . . .

11. Madison's problems in wetting and soiling herself began after her parents had a conflict in December 1999, while exchanging the children at Defendant's home. Plaintiff contends that Defendant broke the windshield of her car and threw rocks at the car while the children were in it. Defendant contends that Plaintiff ran over his foot and tried to hit him with the car. Defendant caused Plaintiff to be charged with some form of

> assault, which was dismissed after an Assistant District Attorney evaluated the case. Defendant claims the Assistant District Attorney did not get his side of the story before the case was dismissed. Plaintiff obtained an Ex Parte [sic] Order pursuant to N.C.G.S. 50-B, which was ordered to remain in effect for six months by The Honorable Judge James M. Honeycutt.
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> 13. The Court finds that neither party has made the mortgage payment on the marital home where the children have been residing and that Plaintiff's failure to make all the child support payments and both parties' failure to pay the mortgage will now result in the Court deciding whether the children should live with the Plaintiff in Mr. Bonham's basement or whether the children should live with the Defendant in his mother's basement. . . .
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> 15. Prior to the separation of the parties[,] Plaintiff was the primary caretaker of the children. Since Plaintiff cut her wrists[,] Defendant has been the primary caretaker of the children. The testimony of the counsellor [sic] and the school teachers demonstrate that the children are doing well with the Defendant. The testimony of Dr. Batten, coupled with Plaintiff's job changes and changes of residence, the fact of her having cut her wrists while the children were in the home with her, the fact of Plaintiff's alcohol abuse around the time she attempted suicide and the fact Plaintiff has failed to keep her child support obligation current demonstrate that it continues to be contrary to the best interests of the children for them to be placed in the custody of the Plaintiff.

Plaintiff first argues that the trial court failed to make a determination of "the effect" of the domestic violence incident upon defendant's parental fitness and the best interests of the children. We disagree. The trial court found as fact that Madison began wetting and soiling herself, as a result of the incident, and

that defendant took appropriate steps to provide counseling and medical attention.

Plaintiff next contends that the trial court failed to determine "the effect" of evidence of defendant's use of illegal drugs. However, the trial court found as fact that several of plaintiff's witnesses testified about defendant's use of marijuana and found plaintiff's witnesses not credible.

Plaintiff also argues that the trial court failed to make any findings as to the significance of her attempted suicide incident, as well as her job and residence changes, on her parental fitness and the best interests of the children. We disagree.

The trial court found that Dr. Batten conducted a psychological evaluation of plaintiff. The trial court summarized Dr. Batten's testimony that "his biggest concern for the Plaintiff was her impulsive decision-making and poor planning," and that a "bad" direction for plaintiff would be job changes, geographical changes, or substance abuse. The trial court quoted from Dr. Batten's Report that the "impulsive wrist-cutting episode of October 1998 was also an example of a situation where [plaintiff's] anticipation of the long-term consequences of an emotionally-based, impulsive decision was poor." The trial court found and concluded that Dr. Batten's testimony, coupled with plaintiff's recent job changes, changes of residence, attempted suicide while the children were in the home, and alcohol abuse around the time she attempted suicide "demonstrate that it continues to be contrary to the best interests of the children for them to be placed in the custody of

the Plaintiff."

Plaintiff, citing *Evans v. Evans*, 138 N.C. App. 135, 142, 530 S.E.2d 576, 580 (2000), argues that the trial court failed to make the required comparison between the parties as to which of them is "best-fitted to give the child the home-life, care, and supervision that will be most conducive to its well-being." The trial court's order clearly reflects that it compared the conduct of both parties, as well as the home environment each would provide. Plaintiff's argument that the trial court expressed an attitude that the basement in Mr. Bonham's house is inadequate is without merit. The trial court found as fact that, as a result of both parties failing to pay the mortgage, it must choose between the basement of Mr. Bonham's house and the basement of defendant's mother's house. This fact is further evidence that the parties are "not able to communicate effectively or work together to jointly carry out actions designed to promote the children's best interests." These assignments of error are overruled.

V. Previous Hearing

Plaintiff argues error in the trial court's reliance on recollections regarding a previous hearing and its incorporation of orders previously entered in this action without modification. The trial court stated in its findings of fact that "[t]he August 19, 1999, Orders are incorporated by reference into these Findings of Fact as if set out fully, herein." Plaintiff contends that the findings of fact in the temporary and permanent orders are inconsistent and that the trial court failed to indicate the

recollections upon which it relied, preventing this Court's review and depriving her of a fair trial. We disagree.

The trial court's findings were based on evidence adduced at this hearing and the evidence presented at the 15 July 1999 hearing for temporary custody, before Judge Culler. During the 15 July 1999 hearing, the court heard testimony regarding the circumstances surrounding plaintiff's attempted suicide. This Court has previously held that "[i]t is not improper for a trial court to take judicial notice of earlier proceedings in the same cause." *Raynor v. Odom*, 124 N.C. App. 724, 728, 478 S.E.2d 655, 657 (1996).

We also find no merit to plaintiff's argument that findings of fact in the Temporary Consent Order and Mediated Consent Order conflict with the permanent custody order entered. The findings of fact entered in each order reflects facts as of the time of their entry. These assignments of error are overruled.

VI. Competent Evidence

Plaintiff contends that the trial court's findings of fact are not supported by the evidence, and its conclusion of law that it is in the children's best interests that defendant have sole custody is not supported by the findings of fact. We disagree.

Plaintiff assigns error to the trial court's findings of fact 1-17 and conclusions of law 1-3. However, plaintiff's brief only addresses findings of fact 5, 7, 9, 10, 13, and 15, and only conclusion of law number 3. Plaintiff fails to discuss findings of fact 1-4, 6, 8, 11-12, 14, and 16-17, as well as conclusions of law 1-2. Accordingly, plaintiff's assignments of error with respect to

those findings of fact and conclusions of law not argued in her brief are deemed abandoned. *See* N.C.R. App. P. 28(a) (2001); *see also McManus v. McManus*, 76 N.C. App. 588, 591, 334 S.E.2d 270, 272 (1985).

Generally, on appeal from a case heard without a jury, the trial court's findings of fact are conclusive if there is competent evidence to support them, even though the evidence might sustain a finding to the contrary. *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975); *Chandler v. Chandler*, 108 N.C. App. 66, 71-72, 422 S.E.2d 587, 591 (1992). "The trial judge's decision will not be upset, in the absence of a clear abuse of discretion, if the findings are supported by competent evidence." *Sheppard v. Sheppard*, 38 N.C. App. 712, 715, 248 S.E.2d 871, 874 (1978); *see Wachovia Bank & Trust Co., N.A. v. Bounous*, 53 N.C. App. 700, 706, 281 S.E.2d 712, 715 (1981).

Plaintiff argues that the trial court found in findings of fact five and thirteen that her failure to make all support payments caused foreclosure of the marital home and such findings are not supported by competent evidence. As stated above, we interpret the findings of the trial court that both parties failed to pay the mortgage payment and plaintiff's failure to make support payments as further evidence that the parties are "not able to communicate effectively or work together to jointly carry out actions designed to promote the children's best interests."

Finding of fact seven provides:

> Some of the teachers testified that there is a long line of automobiles in front of the

> school each morning when children are being dropped off and that traffic in the area of the school is congested because of another school nearby. School records admitted into evidence indicate that the children have been absent or tardy on several occasions while residing with the Defendant.

Plaintiff argues that the fact that Madison was absent 9 times and tardy 23 times during the first semester of school is "more than several times." The testimony of the children's teachers and counselor was that the children are happy and eager to learn.

Plaintiff argues that finding of fact nine is not supported by competent evidence. Plaintiff contends that the evidence shows that: (1) the children missed a great deal of school while with defendant, (2) the family home was being foreclosed, (3) defendant failed to take the children to the dentist, (4) the children have serious health problems, (5) defendant committed an act of domestic violence against her in the children's presence, and (6) defendant uses illegal drugs. The evidence shows that the children are clean, well-groomed, generally happy, and doing well in school; that Madison is no longer wetting and soiling herself, or experiencing sores, rashes or infections; that defendant sought medical treatment and counseling for the children; and that the children have a good and loving relationship with defendant.

Plaintiff finally argues that findings of fact ten and fifteen with respect to a suicide attempt is not supported by the evidence. Plaintiff relies on a statement by Dr. Batten that the incident "was not a genuine suicide attempt." The evidence shows that plaintiff cut her wrists and was admitted to a psychiatric hospital

for a week after the incident. Plaintiff stated to Dr. Batten that she had "tried to kill myself" and attributed her suicidal impulses to the stressful situation she was experiencing at that time.

Plaintiff also contends that the conclusion of law that it is in the best interests of the children to award sole custody to defendant is not supported by the findings of fact. Plaintiff raises the same arguments with respect to the evidence of domestic violence, failure to take the children to the dentist, serious health problems of the children, absence or tardiness at school, and the use of illegal drugs. For the reasons previously stated, there was competent evidence to support the findings of fact which in turn support the trial court's conclusions at law. These assignments of error are overruled.

VII. Conduct of the Hearing

Plaintiff argues that the trial court abused its discretion in limiting the time which her counsel had to present evidence and cautioning her counsel that it would not hear issues previously addressed in the 19 August 1999 hearing.

Under Rule 403, evidence, although relevant, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2001). The decision whether to exclude relevant evidence under Rule 403 lies within the sound discretion of the trial court, *State v. Braxton*, 352 N.C. 158, 186, 531 S.E.2d 428, 444, *cert.*

denied, 531 U.S. 1130, 148 L. Ed. 2d 797 (2000), and "'its ruling may be reversed for abuse of discretion only upon a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision,'" *State v. Richmond*, 347 N.C. 412, 429, 495 S.E.2d 677, 686 (quoting *State v. Collins*, 345 N.C. 170, 174, 478 S.E.2d 191, 194 (1996)). Plaintiff has failed to show the trial court abused its discretion. These assignments of error are overruled.

VIII. Attorney Fees

Finally, plaintiff argues that the trial court did not make sufficient findings of fact to sustain the award of attorney fees to defendant. Plaintiff contends that the trial court did not make the required findings of fact as to the reasonableness of the fees. We agree.

An award of attorney fees will be reversed if it constitutes an abuse of discretion. *Clark v. Clark*, 301 N.C. 123, 136, 271 S.E.2d 58, 67 (1980). Attorney fees may be awarded in custody, child support, and alimony cases upon adequate findings of fact that the moving party acted in good faith and had insufficient means to defray the expense of the suit. N.C. Gen. Stat. § 50-13.6 (2001); *see also Voshell v. Voshell*, 68 N.C. App. 733, 736-37, 315 S.E.2d 763, 765 (1984). The trial court must also make specific findings of fact concerning the lawyer's skill, the lawyer's hourly rate, and the nature and scope of the legal services rendered. *In re Baby Boy Scearce*, 81 N.C. App. 662, 663-64, 345 S.E.2d 411, 413 (1986). Whether these requirements are met is a question of law,

reviewable on appeal. *Taylor v. Taylor*, 343 N.C. 50, 54, 468 S.E.2d 33, 35 (1996).

Here, the trial court made the necessary findings of fact that defendant acted in good faith and did not have sufficient means to pay his legal fees. However, the record is devoid of findings of fact regarding the nature and scope of the legal services rendered, the skill and time required, and the customary hourly rate, upon which a determination of the reasonableness of the fee could be based. *See Horner v. Horner*, 47 N.C. App. 334, 339-40, 267 S.E.2d 65, 67 (1980); *Powell v. Powell*, 25 N.C. App. 695, 700-01, 214 S.E.2d 808, 812 (1975). Accordingly, the award of attorney fees is vacated and remanded to the trial court for appropriate findings of fact and entry of an order based thereon.

Affirmed in part, vacated in part and remanded.

Chief Judge EAGLES and Judge McGEE concur.

Report per Rule 30(e).