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NO. COA02-34

NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2002

DONNA FORNER,  
Plaintiff-Appellant,

v.

Catawba County  
No. 97 CVD 1317

BRADLEY GABRIEL,  
Defendant-Appellee.

Appeal by plaintiff from order entered 19 September 2001 by Judge Jonathan L. Jones in District Court, Catawba County. Heard in the Court of Appeals 30 September 2002.

*Crowe & Davis, P.A., by H. Kent Crowe, for plaintiff-appellant.*

*Sigmon, Sigmon, Isenhower & Poovey, by W. Gene Sigmon, for defendant-appellee.*

McGEE, Judge.

Plaintiff and defendant, who were never married to each other, are the parents of a minor child born on 11 July 1991. Plaintiff filed a complaint seeking a child support order in May 1997. The trial court found defendant was several years younger than plaintiff and was quite dependent on his parents to help in providing care for the minor child. The trial court also found plaintiff was married and had a stepdaughter. The court awarded joint custody of the minor child to the parties in an order entered

4 January 1999, granting primary custody of the minor child to plaintiff and visitation to defendant. The trial court also ordered defendant to pay back child support, continuing child support, and one-half of the minor child's uninsured medical expenses.

Defendant filed a motion in the cause on 4 January 2001 seeking modification of the custody order on the basis of an alleged substantial change in circumstances. He filed an amended motion in the cause on 13 June 2001. Plaintiff filed a motion in the cause for contempt on 7 August 2001 in which she asserted defendant had willfully failed to pay one-half of the minor child's uninsured medical expenses. She also filed a motion for Rule 11 sanctions.

The trial court heard testimony from both parties as well as from the minor child's stepmother, school principal and maternal aunt. Based on the evidence presented, the trial court found the following facts in its 19 September 2001 order:

4. That at the time of the prior hearing the Defendant was living with his parents and was quite dependant on his parents to help in providing care for the minor child. . . .

. . .

6. That at the time of the January 3rd Order the Plaintiff was married and had a stepdaughter by her husband.

7. The evidence indicates that there has been a change of circumstances in the Defendant's marital status and Defendant's family status, including the extended family and the changes are to the benefit of the minor child.

8. The Defendant is now married to Natalie

Howard Gabriel.

9. The Defendant and Natalie Howard Gabriel now own a three bedroom, two bath house off of Grassy Creek Road, in Catawba County, North Carolina.

. . .

11. That at the time of the January 3rd hearing the Defendant did not own a residence and was dependant upon his parents for a residence for himself and the minor child. . . .

12. That the Plaintiff's marital situation has changed after the entry of the January 3, 1999 Order in that the Plaintiff and her husband experienced marital difficulties and are now separated.

. . .

17. That since the entry of the prior Order of this Court, the minor child has established a pattern of tardiness. That at the time of the hearing on January 3, 1999, the minor child had fourteen or fifteen tardies. Beginning the school year 1999 the number of tardies was forty and in the 2000 - 2001 school year 44 tardies.

18. That the minor child has no bedtime curfew and has a pattern of late bedtimes. The Plaintiff testified that football practice was the cause [of] the tardies but the Court finds as a fact that the tardies also occur when there is no football practice.

19. That the Plaintiff has a continuing inability to make a ten year old child get up to get to school on time and the tardies are a reflection of late night bedtimes.

20. That the Plaintiff is an area trainer in cosmetics for Bobbie Brown Cosmetics and in her employment travels extensively. . . . That on a regular basis Plaintiff travels twenty days per month with an average of two to three or four hours of travel time per day. That the extensiveness of Plaintiff's travels makes it difficult for the Plaintiff to spend

the necessary time with homework and is another cause of the minor child's inability to get to bed on time.

21. That the work records reflect[] as a fact that a good portion of her work includes Saturday work and that twenty-five percent of this occurs while she has the child in her care.

. . .

24. The Plaintiff and the Defendant have disagreements over allowing the minor child to ride trail bikes and that on June 13, 2001 the minor child was involved in a motorcycle accident when the Plaintiff was riding the minor child on a trail bike. That the minor child received fractures to his ankle and did not receive medical attention for three days. That the Defendant father was not notified and the Plaintiff's sister took the minor child to the doctor even though the prior Order required that substantial medical decisions involving the minor child be communicated to the other party.

25. That on one occasion in September 2000 the minor child experienced disciplinary problems with a substitute teacher. That the minor child continues to have difficulty following school rules and regulations involving getting to school on time and behavior in the classroom.

26. That the minor child is in need of stability and the need to have one place as the primary residence. That the minor child needs to have a place that he considers where he lives as his home and the other residence a place of visitation.

27. That the Defendant's home is now more stable than the Plaintiff's home.

Based on these and other findings, the trial court concluded that there had been a substantial change of circumstances affecting the welfare of the minor child and the best interest of the minor child would be served by a transfer of the primary residence and physical

custody to defendant. The trial court granted defendant primary physical custody of the minor child subject to plaintiff's visitation. Plaintiff appeals from the trial court's order.

Plaintiff first specifically argues the evidence does not support findings of fact 17-19 and 24-27. She contends findings of fact 17, 18, 23, 24 and 25 do not have any evidentiary predicate. She states "there is no connection between tardies, curfew, or lack thereof, and any detrimental effect on this minor child" and "the record [is] absolutely silent as to how [the minor child's] recalcitrance in getting up in the morning adversely affects him." Plaintiff argues that while the lack of notification to defendant about the minor child's ankle fractures "may have been a technical violation of the court's previous order, . . . it was not such a horrific mistake as to justify a change in custody." She contends that defendant's motion in the cause did not raise stability as an issue and that the trial "court merely presupposes that stability, or lack thereof, is adversely affecting this minor child." Plaintiff asserts the trial court abused its discretion and its decision should be reversed. We disagree.

A trial court "is vested with broad discretion in cases involving child custody." *Pulliam v. Smith*, 348 N.C. 616, 624, 501 S.E.2d 898, 902 (1998). The trial court "'has the opportunity to see the parties in person and to hear the witnesses,'" *Falls v. Falls*, 52 N.C. App. 203, 209, 278 S.E.2d 546, 551 (quoting *Brooks v. Brooks*, 12 N.C. App. 626, 630, 184 S.E.2d 417, 420 (1971)), *disc. review denied*, 304 N.C. 390, 285 S.E.2d 831 (1981), and its

findings turn on the witnesses' credibility in large part. *Brandon v. Brandon*, 132 N.C. App. 646, 652, 513 S.E.2d 589, 593 (1999). When competent evidence supports the trial court's findings of fact, they are binding on appeal. *Sain v. Sain*, 134 N.C. App. 460, 464, 517 S.E.2d 921, 925 (1999).

The trial court heard testimony from defendant and the school principal as to the minor child having forty-four tardies during the 2000-2001 school year, which the school principal stated was excessive. His school and attendance records were introduced into evidence, showing the minor child also had forty tardies during the preceding year. Plaintiff testified the minor child's bedtime "usually is around 10:00, sometimes 10:30[,]" but she stated it was not a rule that he had to be in bed by 10:30 p.m. She admitted "it is difficult to get [the minor child] up and get him to school." Although plaintiff attributed the tardies to the minor child's football practice, she testified football practice occurred from August until the end of December.

Plaintiff conceded the minor child's report card contained the comment that he "has a hard time following school rules," and she described his misconduct as being out of his seat and talking during class activities. Both the school principal and plaintiff testified to one discipline incident in which the minor child was sent to the school office.

Although defendant was thirty minutes away at work, plaintiff had her sister take the minor child for medical attention for ankle fractures and did not notify defendant. Our review of the

record shows competent evidence in the form of the testimony of the parties, the maternal aunt and the school principal, along with the school, attendance and work records entered into evidence, which supports the challenged findings of fact.

Plaintiff next argues the trial court's findings of fact do not support its conclusions of law and that the trial court erred by placing primary physical custody of the minor child with defendant. She contends the trial court abused its discretion in determining that it was in the minor child's best interest for defendant to have primary physical custody. We disagree.

The trial court's findings of fact must support its conclusions of law. *Sain*, 134 N.C. App. at 464, 517 S.E.2d at 925. Since the entry of the 1999 order, defendant has married and purchased a home, while plaintiff and her husband have separated due to marital difficulties. The trial court noted plaintiff's employment required extensive travel and contributed to the minor child's inability to get to bed on time. In addition to the excessive number of tardies, the trial court found the minor child also had difficulty in following school rules involving classroom behavior. The trial court observed that plaintiff's sister took the minor child for medical treatment of his ankle fractures and that defendant was not notified. Based upon its findings of fact, the trial court concluded "there has been a substantial change of circumstances affecting the welfare of the minor child and the best interest of the minor child would be served by a transfer of the primary residence and physical custody to the Defendant." We hold

that the trial court's findings of fact are sufficient to support its conclusion that there was a substantial change in circumstances. The trial court did not err in granting custody of the minor child to defendant.

We affirm the order of the trial court.

Affirmed.

Judges WYNN and CAMPBELL concur.

Report per Rule 30(e).