NO. C0A06-548

NORTH CAROLINA COURT OF APPEALS

Filed: 19 August 2008

JACALYN ANN LEATHERWOOD BALLEW,
Plaintiff

v.

Buncombe County
No. 05 CVD 2796

CHRISTOPHER PATRICK BALLEW,
Defendant



Appeal by plaintiff from order entered 4 November 2005 by Judge Marvin P. Pope, Jr. in Buncombe County District Court. Heard in the Court of Appeals 13 May 2008.



*Mary Elizabeth Arrowood, for plaintiff-appellant.*

*Wade Hall, for defendant-appellee.*

CALABRIA, Judge.

Jacalyn Ann Leatherwood Ballew ("plaintiff") appeals an order of the trial court, concluding as a matter of law that it is in the best interests of L.B. ("the minor child") for plaintiff and Christopher Patrick Ballew ("defendant") (collectively, "the parties") to have joint custody of the minor child. We affirm.

Plaintiff is the biological mother and defendant is the biological father of the minor child, born on 20 June 1997. The parties were married on 4 March 1995 and subsequently divorced in June 2002. On 14 June 2002, the trial court entered an order concluding as a matter of law that it is in the best interests of

the minor child for the parties to have joint legal custody and for plaintiff to have primary physical custody. On 20 February 2003, defendant filed a motion seeking, *inter alia*, modification of child support and insurance coverage. On 30 June 2005, the Honorable Anna F. Foster entered an order that, *inter alia*, lowered defendant's monthly child support payment to $400 per month and excused defendant from carrying health insurance for the minor child. On 27 June 2005, an order was entered transferring the venue from Cleveland County to Buncombe County. On 29 August 2005, defendant filed a motion seeking, *inter alia*, a modification of custody. On 22 November 2005, the trial court entered an order with the following pertinent findings of fact:

> 1. That there is a substantial change in circumstance that would warrant a modification of the previous Order entered June 14, 2002 . . . .
> 2. That the [d]efendant is not on active duty with the Navy and is currently enlisted in the reserves but not on alert, thereby allowing more time with the minor child.
> 3. That the [p]laintiff has not taken necessary steps to uphold the father/son relationship nor has she allowed the [d]efendant access to school and medical records.
> 4. That the parties live in the same neighborhood and are both near the minor child's school, but have trouble communicating with each other regarding the concerns and arrangements such as pick up times for the minor child.
> 5. That it has been more than three (3) years since the entry of the last order [regarding custody] entered on June 22, 2002.
> 6. That the [d]efendant has a good relationship with the minor child and that [d]efendant takes his son hunting, fishing, bike riding . . . .

7. That the parties should have joint custody of the minor child . . . .
8. That the [d]efendant should maintain health and dental insurance on the minor child . . . .
9. That the exchange of the minor child shall be from Monday to Monday with the pick up and delivery to take place at the minor child's school. That in the event the minor child does not have school the parties shall transfer the minor child to the other parent's residence on Monday morning at 9:00 a.m., that when exchanging the minor child neither party will get out of their vehicles, but will wait until they see the minor child enter the home of the other parent.
10. That the parties shall communicate with each other through a composition notebook placed in a manila envelope and put in the minor child's backpack each week.
11. That the minor child shall be with his mother during the weeks that she has her step-son, Austin.
12. That both parties have the burden of raising their son . . . .
13. That the previous orders shall remain in full force and effect except as herein modified.

Based upon the above findings of fact, the court concluded "that it is in the best interest of the minor child for the parties to have joint custody of the minor child with the minor child altering every week with each parent." From the order, plaintiff appeals.

On appeal, plaintiff contends the trial court erred by (I) failing to grant her motion to dismiss at the close of defendant's evidence; (II) finding there had been a substantial change of circumstances that would warrant a modification of the existing custody order; (III) failing to find that the substantial change of circumstances affected the welfare of the minor child; (IV) finding

as fact number three since the finding of fact is not supported by competent evidence; (V) concluding that it is the best interests of the minor child for the parties to have joint custody of the minor child; and (VI) making a drastic modification of the existing custody order.

## I. Standard Of Review

"Our trial courts are vested with broad discretion in child custody matters." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003). Trial courts are afforded broad discretion because:

> In child custody cases, where the trial judge has the opportunity to see and hear the parties and witnesses, the trial court has broad discretion and its findings of fact are accorded considerable deference on appeal. So long as the trial judge's findings of fact are supported by competent evidence, they should not be upset on appeal.

*Westneat v. Westneat*, 113 N.C. App. 247, 250, 437 S.E.2d 899, 900-01 (1994) (quotation omitted). Accordingly, "the trial court's findings of fact are conclusive if there is evidence to support them, even though the evidence might sustain a finding to the contrary." *Raynor v. Odom*, 124 N.C. App. 724, 729, 478 S.E.2d 655, 658 (1996).

## II. Motion For Involuntary Dismissal

We first address plaintiff's argument that the trial court erred by failing to grant her motion to dismiss defendant's motion for change in custody at the close of defendant's evidence since defendant failed to show a substantial change in circumstances existed affecting the welfare of the minor child. Plaintiff's

motion made at the close of defendant's evidence is treated as a Rule 41(b) motion for involuntary dismissal. *Hamilton v. Hamilton*, 93 N.C. App. 639, 642, 379 S.E.2d 93, 94 (1989). However, since plaintiff presented her own evidence, she waived her right to appeal the denial of her motion to dismiss at the close of defendant's evidence. *Id.* Accordingly, this assignment of error is overruled.

III. Substantial Change In Circumstances

Since plaintiff's two arguments on appeal relate to a substantial change in circumstances, we address these arguments together. Specifically, plaintiff argues that the trial court erred by (I) finding that there had been a substantial change in circumstances that would warrant a modification of the existing custody order and (II) making a drastic modification of the existing custody order when no substantial change in circumstances affecting the welfare of the minor child existed. We disagree.

The party moving for a modification of an existing custody order must show there has been a substantial change in circumstances affecting the welfare of the child. *Pulliam v. Smith*, 348 N.C. 616, 618-19, 501 S.E.2d 898, 899 (1998). Moreover:

> courts must consider and weigh all evidence of changed circumstances which affect or will affect the best interests of the child, both changed circumstances which will have salutary effects upon the child and those which will have adverse effects upon the child. In appropriate cases, either may support a modification of custody on the ground of a change in circumstances.

*Id.* at 619, 501 S.E.2d at 899.

"When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence." *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). However, "should we conclude that there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, even if record evidence 'might sustain findings to the contrary.'" *Shipman*, 357 N.C. at 475, 586 S.E.2d at 253-54 (quoting *Pulliam*, 348 N.C. at 625, 501 S.E.2d at 903).

In the instant case, a review of the record reveals that at the time of the initial custody hearing in May 2002, defendant served in the United States Navy ("the Navy") and was stationed in Norfolk, Virginia. Defendant subsequently decided to change his status in the Navy from active duty to reservist in order to move closer to his son. Therefore, after plaintiff and the minor child moved to Buncombe County in 2003, defendant also moved to Buncombe County.

Plaintiff argues that when the 2002 order was entered, the order contemplated that defendant would complete his service in the Navy and stated as follows:

> 1. That the parties shall exercise joint legal custody of the minor child . . . with the [p]laintiff to exercise primary physical custody of the minor child,

> subject to visitation with the [d]efendant as follows:
>
> A. Military Leave: For so long as the [defendant] is active in the United States Navy, the [plaintiff] agrees to work with the [defendant] in scheduling ongoing visitation to coordinate with the [defendant's] leave, provided the [defendant] gives the [plaintiff] no less than twenty-four (24) hours notice that he wishes to exercise visitation.
>
> B. Alternate Weekends Following Naval Service: Upon the [defendant's] completion of service in the United States Navy, he shall have no less than every other weekend from Friday at 6:00 p.m. until Sunday at 6:00 p.m.
>
> C. Christmas: The [parties] shall coordinate Christmas with the [defendant's] scheduled leave. . . .
>
> [D.] Thanksgiving: The [parties] shall work together to coordinate Thanksgiving holiday with the [defendant's] leave from the service. . . .

The trial court further ordered that defendant shall have summer vacation with the minor child.

However, according to the 2002 order, defendant's visitation with the minor child was a minimum amount of visitation because of defendant's military service. The wording in the order, "Upon the [defendant's] completion of service in the United States Navy, he shall have *no less than every other weekend* . . . ." illustrates this minimum standard. Moreover, the order stated that the parties shall coordinate defendant's holiday time with the minor child around defendant's scheduled leave from the Navy. Finally, the order does not set out defendant's holiday visitation with the minor child after defendant completed his service with the Navy.

Plaintiff also argues that the court already addressed the issue of modification of custody in 2003 after defendant had

completed his service in the Navy. In 2003 defendant filed a motion for modification of child support, *inter alia*, after completing his service in the Navy. Since he was no longer paid the salary that he received while he served in the Navy, the court granted a reduction in his child support payments. The issue of custody was not before the trial court. Plaintiff's argument is without merit.

Changes in circumstances sufficient to support a modification of custody do not have to be changes that adversely impact the minor child's welfare. Changes that benefit the minor child also may serve as a change in circumstance to warrant a modification of custody. *Pulliam*, 348 N.C. at 619, 501 S.E.2d at 899.

In the instant case, defendant completed his active duty with the Navy and relocated to Buncombe County to reside closer to the minor child. At the time of the hearing, defendant suffered a torn ligament in his leg and therefore could not be deployed due to his medical status. This fact benefits the minor child since defendant can continue to reside close to the minor child without worrying about future deployment. The minor child also developed a close relationship with his paternal relatives and enjoyed playing with defendant's nephew and cousin.

Thus, we conclude there was substantial evidence in the record to support the trial court's finding that a substantial change in circumstances occurred warranting a change in custody. Since sufficient evidence supports the trial court's finding to modify custody, we conclude the trial court did not make a drastic

modification of the existing custody order. These assignments of error are overruled.

IV. Finding of Fact Number Three

Plaintiff argues that the trial court erred by making finding of fact number three since that finding was not supported by evidence in the record. We disagree.

As stated above, on appeal we determine whether the trial judge's findings of fact are supported by competent evidence. *Westneat*, 113 N.C. App. at 250, 437 S.E.2d at 901.

In the order, the trial judge stated as finding of fact number three: "[t]hat the [p]laintiff has not taken necessary steps to uphold the father/son relationship nor has she allowed the [d]efendant access to school and medical records." At the hearing, defendant testified that when he tried to pick up the minor child from school, plaintiff did not tell the minor child's teacher that defendant was the minor child's father. Therefore, the school's personnel would not allow defendant to leave the school with the minor child. Furthermore, since plaintiff never told the minor child's teacher that defendant was the minor child's father, the minor child's teacher would not allow defendant to see the minor child's grades. Defendant had to provide a copy of the "divorce agreement" to the teacher in order to see the minor child's grades. Defendant further testified that he received all the information about the minor child's health from plaintiff, but he did not know the minor child's physician.

Moreover, the parties testified that they experienced communication problems between them regarding the appropriate time the minor child finished school in order to pick him up on time. Plaintiff testified that the minor child finished school at two-thirty in the afternoon. Plaintiff claimed that she told defendant in mediation to arrive at the school around two-fifteen so he could get in line to pick up the minor child. However, when defendant was scheduled to pick up the minor child, he called plaintiff ten minutes after school ended for the day and had just left his house. Plaintiff then had to pick up the minor child from school and defendant met plaintiff at plaintiff's house to retrieve the minor child for his weekend visitation. Defendant testified that he thought the minor child finished school at three o'clock and claimed plaintiff never told him the correct time to pick up the minor child. In addition, plaintiff admitted in her testimony that there were certain weekends when defendant could not keep the minor child due to his work schedule, and she did not allow defendant to keep the minor child on additional weekends. Plaintiff stated that since defendant continually changed jobs, she did not want to alter defendant's scheduled weekends with the minor child because there was not "enough stability." Therefore, we conclude sufficient evidence supports the trial judge's finding of fact number three. This assignment of error is overruled.

V. Best Interests of the Minor Child

Plaintiff argues that the trial court erred by concluding that it is in the best interests of the minor child for the parties to have joint custody of the minor child. We disagree.

"In making the best interest decision, the trial court is vested with broad discretion and can be reversed only upon a showing of abuse of discretion." *Jordan v. Jordan*, 162 N.C. App. 112, 118, 592 S.E.2d 1, 4 (2004) (citation omitted). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *Id.* (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

In the instant case, the record reveals that at the time of the custody hearing, defendant lived five minutes from plaintiff's house in Buncombe County. Defendant stated that he lived approximately four miles from the minor child's elementary school, and that the minor child could continue to ride the school bus when he stayed at defendant's house. In addition, the minor child has his own bedroom at defendant's house. When the minor child stays with defendant, they go hunting and fishing. As previously stated, the minor child has developed a close relationship with defendant's nephew and cousin. Plaintiff stated that there were several times when the minor child told her he wanted to visit defendant. The minor child also has asked plaintiff if he could spend an extra night at defendant's house. We conclude ample evidence exists to support the trial court's conclusion that it is in the best interests of the minor child for the parties to have joint custody.

As such, the trial judge did not abuse his discretion and this assignment of error is overruled.

VI. Welfare Of The Minor Child

We next address plaintiff's contention that the trial court erred by failing to conclude that the change of circumstances affected the welfare of the minor child.

"If a substantial change in circumstances is shown, the trial court must consider whether modification of the custody order would be in the best interest of the child." *Kowalick v. Kowalick*, 129 N.C. App. 781, 785, 501 S.E.2d 671, 674 (1998). In the instant case, the trial court found from the evidence presented that since the original custody order was entered:

> 1. That there is a substantial change in circumstance that would warrant a modification of the previous Order entered June 14, 2002 . . . .
> 2. That the [d]efendant is not on active duty with the Navy and is currently enlisted in the reserves but not on alert, thereby allowing more time with the minor child.
> 3. That the [p]laintiff has not taken necessary steps to uphold the father/son relationship nor has she allowed the [d]efendant access to school and medical records.
> 4. That the parties live in the same neighborhood and are both near the minor child's school, but have trouble communicating with each other regarding the concerns and arrangements such as pick up times for the minor child.
> . . . .
> 6. That the [d]efendant has a good relationship with the minor child and that [d]efendant takes his son hunting, fishing, bike riding . . . .

Thus, the trial court found a number of substantial changes in circumstances to warrant a modification of custody. After making these findings of fact, the trial court concluded "[t]hat it is in the best interest of the minor child for the parties to have joint custody of the minor child with the minor child altering every week with each parent." By concluding "it is in the best interest of the minor child," the trial court implied that the change in circumstances affected the welfare of the child, and therefore, supported the change in custody. Additionally, when reviewing a trial court's order modifying custody, this Court reviews the entire order and the court's inclusion of the phrase "affecting the welfare of the child" is not determinative. *Karger v. Wood*, 174 N.C. App. 703, 709, 622 S.E.2d 197, 202 (2005). "Such an application would place form over substance." *Id.*

Here, the trial court listed facts regarding defendant's good relationship with the minor child; that the parties have trouble communicating with each other regarding child care arrangements; and that defendant changed his status with the Navy from active duty to reservist in order to allow him to spend more time with the minor child. More importantly, the trial court's first finding specifically states "[t]hat there is a substantial change in circumstance that would warrant a modification of the previous [o]rder entered June 14, 2002 . . . ." Accordingly, we conclude that the trial court's findings support its conclusions. This assignment of error is overruled.

## VII. Conclusion

We conclude that there is substantial evidence in the record to support the trial court's findings of fact. We also determine that the trial court's findings of fact support the trial court's conclusions. As such, the trial court did not abuse its discretion in granting defendant's motion for modification of an existing child custody order.

Affirmed.

Judges WYNN and GEER concur.

Report per Rule 30(e).