IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-206

Filed: 5 November 2019

Surry County, No. 17 CVD 919

WILLIAM MASON BEANE, Plaintiff,

v.

KATHERINE SUE DUCKSTEIN, Defendant.

Appeal by Defendant from custody order entered 9 September 2018 by Judge William F. Southern, III, in Surry County District Court. Heard in the Court of Appeals 15 October 2019.

Dotson Law Firm, PLLC, by Marshall F. Dotson III, for the Plaintiff.

Attorney J. Clark Fischer for the Defendant.

BROOK, Judge.

Katherine Duckstein ("Defendant" or "Ms. Duckstein") appeals from an order entered by Judge William F. Southern, III, assigning joint legal and joint physical custody to her and William Beane ("Plaintiff" or "Mr. Beane"), the father of her child, N.B.[1] Defendant has failed to show the trial court abused its discretion in assigning

[1] To protect the identity of the juvenile we will refer to him by initials.

Defendant and Plaintiff joint physical and legal custody. We affirm the trial court's order.

I. Background

Defendant and Plaintiff met while they both were pursuing college degrees in education. They had a child together, N.B., in February of 2016. During the year the couple lived together with N.B., Plaintiff worked fulltime to provide for the family, and Defendant provided N.B. with fulltime care. The couple separated in February of 2017, and Defendant moved with N.B. to Pennsylvania to live with her parents, N.B.'s grandparents. On 16 June 2017, Plaintiff sought an *ex parte* emergency child custody order, assigning him full temporary custody of N.B. until a hearing on the order on 26 June 2017. The trial court thereafter assigned the parents temporary joint physical and legal custody on an alternating two-week on, two-week off basis, with each parent driving with N.B. to a restaurant in West Virginia to facilitate this arrangement every other Sunday. The trial court also ordered that each parent was "entitled to ten (10) minutes of 'Face Time' [video call] with the child when he is in the other parent's physical custody between 6:30 PM and 8:30 PM, which Face Time periods shall not be interrupted by the custodial parent[.]"

On 29 August 2017, when the temporary custody arrangement expired per the 26 June 2017 order, the trial court entered an order extending the same arrangement. On 29 November 2017, after a two-day hearing, the trial court again extended the

same custody arrangement. Defendant then moved for a custodial evaluation and for a continuance on 10 January 2018, which the trial court did order on 16 February 2018. The trial court granted Defendant's continuance after a hearing held on 7 February 2018 for the parties to comply with the custodial evaluation and discontinued the court-ordered FaceTime sessions. The custodial evaluation was completed by Dr. Samuel B. Gray, Psy.D in June 2018.

Dr. Gray recommended that "Ms. Duckstein [be] awarded primary physical custody and both parents retain joint legal custody." Dr. Gray found that N.B. "associates [Defendant] as his primary caregiver." He further recommended that each parent seek individual counseling, Defendant "to address her anxiety, her dysfunctional personality traits, and the impact of these on the current conflict and on [N.B.]'s emotional, psychological, and social development." Dr. Gray recommended Plaintiff seek individual counseling "to address his dysfunctional personality traits and the resulting passive aggressive patterns of response." Dr. Gray reported that N.B. "has been diagnosed with separation anxiety disorder and an adjustment disorder by Dr. Carrosso, Psy.D.[,]" but that "these diagnoses were based on what primarily appears to be Ms. Duckstein's reports and not based on observations of this child while in [Dr. Carrosso's] office." Dr. Gray noted that Ms. Duckstein reported N.B. was experiencing some "emotional outbursts, . . . self-harm, and clingy behavior[,]" and Dr. Gray concluded these behaviors were "likely reactions to the

separations from his primary caregiver that he experiences every two weeks" and that "the adjustment to an arrangement like this for a two-year-old is expected to be difficult and expected to lead to some discomfort." Dr. Gray reported additional issues related to the custody arrangement:

> Results of this evaluation suggest a fairly healthy two-year-old struggling with the transitions of a two week alternating schedule and having to drive eight hours in a vehicle every two weeks. He has exhibited some clingy behaviors and emotional reactions to caregivers that leave him. He is going through this experience every two weeks and at his age, this arrangement is not working out very well for him. Consistent with Dr. Carrosso's report, this child does appear to be suffering from a mild to moderate degree of separation anxiety. And it should be said that that is an expected reaction for a child this age placed in this situation. In other words, this is a normal healthy child, placed in an unwinnable situation that has led to separation anxiety.

Dr. Gray further found that N.B. was "experiencing moderately adverse effects due to the present custody arrangement[.]" Additionally, Dr. Gray found "this arrangement is not in [N.B.]'s best interests[,]" that "such a plan has far more costs than benefits[,]" and that the two-week on, two-week off arrangement "appears to be a systematic traumatization imposed on [N.B.] and creates an aversive childhood experience." Dr. Gray reported that "[r]epeated aversive childhood experiences can have lasting impacts on developing emotional and social capacities."

A final custody hearing was held on 18 August 2018. On 9 October 2018, the trial court entered a final custody order ordering that "[t]he parties shall have joint

legal custody of [N.B.]" and that "the parties shall have true, joint physical custody of [N.B.] on an alternating two-week on, two-week off basis[.]" The trial court ordered that exchanging N.B. shall not exceed five minutes in duration. It further ordered that "[t]ext messages between the parties shall be limited to those which relate to [N.B.] and nothing else. Further, these text messages shall be as brief as possible and entirely civil in nature[.]" The trial court limited the previously ordered Facetime sessions "[g]iven the problems that the parties have previously had" conducting it in a civil manner. Once N.B. begins kindergarten at age five, the court ordered that Defendant shall assume full primary physical custody. The trial court described the manner in which the parties would handle visitation once N.B. begins kindergarten, but that portion of the order is not at issue in this appeal.

The trial court made the following findings of fact, *inter alia*:

> 23. The parties have continued to share [N.B.]'s physical custody on the above referenced rotating, two-week on, two-week off schedule since the entry of the June 26th Order[,] and no apparent harm has come to the child while in the custody of either the Plaintiff or the Defendant, aside from the typical scratches, scrapes, bruises, etc., to be expected of any toddler of [N.B.]'s age;
>
> . . .
>
> 32. According to the Defendant, she was diagnosed with Obsessive-Compulsive Disorder (hereinafter "OCD") at an early age, though the Defendant claims to have adapted to her condition and managed to control it without medication(s) by the time she reached the eighth grade;

33. This Defendant's diagnosis of OCD is confirmed in the evaluation of Dr. Sam Gray, along with a diagnosis of anxiety. Dr. Gray also commented on a number of other issues related to the Defendant that, if uncorrected or allowed to continue, could or would have a detrimental affect [sic] upon [N.B.]. Consequently, Dr. Gray recommended that the Defendant seek counseling, and medication if recommended, for her OCD, anxiety and other psychological issues;

34. The [c]ourt notes that it itself, on not less than two (2) separate hearing dates, observed the Defendant experiencing episodes of what can best be described as 'emotional meltdowns' of one degree or another;

35. It is the [c]ourt's opinion, based upon the content of Dr. Gray's evaluation and its observation of the Defendant, her behavior and her demeanor in [c]ourt over a period of several days, that the Defendant does not have either her OCD or her anxiety issues under control;

36. It is disturbing to the [c]ourt that during the past six (6) months or so, the Defendant has essentially had [N.B.] poked, probed and prodded by any number of professionals with respect to any number of perceived 'deficiencies and/or delays' on the part of the child. Of particular concern is the Defendant's conduct in having the child evaluated for autism when the custody evaluation of Dr. Gray clearly points out that there is nothing about [N.B.] that would indicate a concern for autism. Such obsessive behavior on the part of the Defendant is not in [N.B.]'s best interests.

37. Dr. Gray's evaluation also indicated certain issues related to the Plaintiff's psyche, most noteworthy being Dr. Gray's opinion that the Plaintiff may be somewhat Narcissistic in nature. Consequently, Dr. Gray also recommended that the Plaintiff seek counseling;

38. Overall, based upon the content of Dr. Gray's evaluation and the [c]ourt's observation of the parties,

their behavior and their demeanor in [c]ourt over a period of several days, the [c]ourt finds that the psychological issues related to the Defendant warrant immediate consideration;

39. Based upon the [c]ourt's observation of the parties and their extended family while in the courtroom, the evidence, testimony and exhibits presented to the [c]ourt and the content of Dr. Gray's evaluation, the [c]ourt finds that the degree of acrimony existing between the parties to this action, as well as their extended family members, rivals that of any other custody proceeding that the undersigned has ever presided over. At the conclusion of this [c]ourt's hearing on Monday, August 13th, 2018, the [c]ourt was compelled to chastise the Defendant's parents for their behavior toward the [c]ourt, the Plaintiff and the Plaintiff's father in response to the [c]ourt's judgment in this action;

. . .

43. It is clear to the [c]ourt that, at least at this time, civil, significant and meaningful communications between the parties in a direct manner is not possible and is not recommended at this time except as is absolutely necessary. Each of the parties, in their own way, contributes to this failure in communications, the Defendant by regularly and consistently addressing the Plaintiff in a profane, contemptuous and demeaning manner, and the Plaintiff by essentially shutting down all communications with the Defendant when she addresses him in this way, which, according to Dr. Gray, exacerbates the Defendant's anxiety issues with respect to the child;

. . .

47. Each of the parties effectively parents with the child, and it is clear that each of the parties loves [N.B.] very much. Each of the parties, despite their respective psychological issues as reported in the custody evaluation

of Dr. Gray, has demonstrated appropriate parenting skills in Dr. Gray's presence during the process of his custody evaluation;

48. Having discussed much regarding the parties' various strengths and weaknesses as a parent and their respective scores on a multitude of tests administered to them, Dr. Gray's overall custody recommendation comes down, in a nutshell, to his opinion that the child's best interests would be served by placing him with the Defendant, primarily because, in his opinion, the child recognizes the Defendant as being his primary caregiver;

49. This [c]ourt does not opine as to the validity of Dr. Gray's opinion that this child of the age of only twenty-eight months at the conclusion of Dr. Gray's evaluation period "identifies" with the Defendant as being his "primary caregiver", however, this opinion is not, in the [c]ourt's opinion, an overriding determination that should control the [c]ourt's decision in this case to the exclusion of all other evidence presented to the [c]ourt, but is only one of many factors for the [c]ourt to take into consideration as it determines what is in [N.B.]'s best interests with respect to his custody schedule, and the [c]ourt is not persuaded by Dr. Gray's position in this regard at this time and would further find that the recommendation is counterintuitive when reviewing Dr. Gray's own observations of the Defendant;

50. Both the Plaintiff and the Defendant have the skills and the support network within their families and communities to allow them to be effective and appropriate parents and caregivers for [N.B.];

51. Each of the parties' residential facilities are sufficiently adequate to provide proper shelter for the minor child, and each of the parties, either directly or by way of their extended families, has the financial resources necessary in order to adequately provide for the needs of the minor child; and

> 52. The Plaintiff and the Defendant, at this time, are each fit and proper persons to continue sharing joint, legal custody and true, joint, physical custody of their son, [N.B.] . . . (though this matter will clearly require a custody change when the child commences kindergarten, which change is contemplated and hereinafter provided for by this [c]ourt) and it is in the best interests of [N.B.], at this time, for his parents to continue having his joint, legal custody and his true, joint, physical custody.

The trial court then made the following conclusion of law: "The Plaintiff and the Defendant are each, at this time, fit and proper persons to continue sharing joint, legal custody and true joint, physical custody of their son, [N.B.] and the entry of this Permanent Custody Order is in, and promotes, the best interests of [N.B.]." Defendant noticed appeal from this custody order on 22 October 2018.

II. Jurisdiction

Jurisdiction lies with this Court as an appeal from a final judgment under N.C. Gen. Stat. § 7A-27(b)(2).

III. Standard of Review

Our review of child custody decisions is a three-prong inquiry: "(1) whether the challenged findings of fact are supported by substantial evidence; (2) whether the trial court's findings of fact support its conclusions of law; and (3) whether the trial court abused its discretion in fashioning the custody and visitation order." *Peters v. Pennington*, 210 N.C. App. 1, 12, 707 S.E.2d 724, 733 (2011). "In a child custody case, the trial court's findings of fact are conclusive on appeal if supported by substantial

evidence[.]" *Id.* "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). "Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal." *Peters*, 210 N.C. App. at 13, 707 S.E.2d at 733 (internal marks and citation omitted).

"[T]he trial court need not make a finding as to every fact which arises from the evidence; rather, the court need only find those facts which are material to the resolution of the dispute." *Carpenter v. Carpenter*, 225 N.C. App. 269, 271, 737 S.E.2d 783, 785 (2013) (citation omitted). A trial court's order may be overturned on appeal "where it fails to make detailed findings of fact" or "where the findings of fact are too meager to support the award." *Id.* at 273, 737 S.E.2d at 787 (citation omitted). And sufficient evidence may exist to support a trial court's custody order "even if there is sufficient evidence to support contrary findings." *Peters*, 210 N.C. App. at 12-13, 707 S.E.2d at 733.

The "polar star" of child custody cases is the best interest of the child standard. *Wyatt v. Wyatt*, 27 N.C. App. 134, 137, 218 S.E.2d 194, 196 (1975). In determining what form a custody arrangement should take in order to be in the best interest of the child, the trial court has wide discretion. *Woncik v. Woncik*, 82 N.C. App. 244, 247, 346 S.E.2d 277, 278-79 (1986). Such discretion includes the "discretion to determine the weight and credibility that should be given to all evidence that is

presented during the trial." *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994). This discretion includes the discretion to evaluate expert witnesses' opinions and conclusions. *Berry v. Berry*, ___ N.C. App. ___, ___, 809 S.E.2d 908, 913 (2018).

IV. Analysis

Defendant argues that "the trial court abused its discretion by continuing a rotating biweekly custody schedule[.]" We reject this argument as the trial court sufficiently supported its factual findings and conclusions of law and, further, the trial court's custody order is not so unreasoned as to constitute an abuse of discretion.

Because Defendant has not challenged any particular findings of fact, the trial court's findings are binding on appeal. *See id.* The findings here are not "too meager to support the award[,]" *Carpenter*, 225 N.C. App. at 273, 737 S.E.2d at 787, nor are they "merely recitations of the evidence[,]" *Williamson v. Williamson*, 140 N.C. App. 362, 364, 536 S.E.2d 337, 339 (2000). The custody order makes clear that the trial court considered and weighed the evidence before it. It found that both Defendant and Plaintiff were fit and proper parents. It found that both parties have personality issues and mental health concerns, but that nevertheless "[e]ach of the parties effectively parents with the child, and it is clear that each of the parties loves [N.B.] very much."

Defendant argues that the trial court abused its discretion because the custody order made only "superficial references" to Dr. Gray's evaluation and because it

"failed either to address the substance of the evaluations' [sic] findings or to justify ordering a custody schedule that the evaluation found to be actively damaging to the minor child[.]" The trial court's order not only referenced Dr. Gray's evaluation but also evidenced its consideration of the evaluation's particular recommendations. However, the trial court was under no obligation here to follow that recommendation. *See Berry*, ___ N.C. App. at ___, 809 S.E.2d at 913 ("Nothing [Appellant] argues indicates the trial court disregarded its appointed expert's findings; it merely exercised its appropriate role as the ultimate fact finder in weighing the evidence presented before it.").

Indeed, the trial court exercised its discretion to evaluate all of the evidence before it, and "it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence[.]" *Coble v. Coble*, 300 N.C. 708, 712-13, 268 S.E.2d 185, 189 (1980). The trial court considered, but did not ultimately agree with, Dr. Gray's ultimate conclusion that full physical custody should be assigned to Defendant, stating that the court was "not persuaded by Dr. Gray's position in this regard."

Given the trial court's ability to view and weigh the credibility of the other evidence in the record, such reasoning does not constitute an abuse of discretion. Further, the trial court's conclusions of law, namely, that continuing joint physical custody on an alternating two-week on, two-week off basis is in N.B.'s best interest,

were supported by adequate findings of fact. *See Peters*, 210 N.C. App. at 13, 707 S.E.2d at 733.

V. Conclusion

"[T]he trial judge is entrusted with the delicate and difficult task of choosing an environment which will, in his judgment, best encourage full development of the child's physical, mental, emotional, moral and spiritual faculties." *In re Peal*, 305 N.C. 640, 645, 290 S.E.2d 664, 667 (1982). The trial court's findings of fact here are supported by competent evidence, the findings support the court's conclusions of law, and the conclusions of law in turn support the court's exercise of its discretion in assigning the parties joint physical and legal custody. *See Peters*, 210 N.C. App. at 12, 707 S.E.2d at 733.

Defendant has failed to show the trial court abused its discretion in awarding her and Plaintiff joint custody or in rendering its determinations regarding the credibility of the custody expert's report. In an abuse of discretion review, "we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record." *State v. Cummings*, 361 N.C. 438, 447, 648 S.E.2d 788, 794 (2007) (citation omitted). We hold that the trial court did not abuse its discretion, and we affirm.

AFFIRMED.

Judges BRYANT and TYSON concur.

Report per Rule 30(e).