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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-127

Filed: 1 December 2020

Ashe County, No. 18 CVD 43

MORGAN PRICE, Plaintiff,

v.

JOSEPH BOCCARDY, Defendant.

Appeal by defendant from order entered 24 July 2019 by Judge William F. Brooks in Ashe County District Court. Heard in the Court of Appeals 7 October 2020.

Anné C. Wright for plaintiff-appellee.

Deal, Moseley & Smith, LLP, by Bryan P. Martin, for defendant-appellant.

ZACHARY, Judge.

Defendant Joseph Boccardy appeals from the trial court's order denying his Rule 60(b) motion to set aside a final custody order. After careful review, we affirm the trial court's order.

Background

Defendant and Plaintiff Morgan Price are the parents of A.B.[1] On 14 February 2018, Plaintiff filed a verified complaint seeking custody of A.B., three years old at the time, citing "a substantial risk of bodily injury and sexual abuse[.]" That same day, Plaintiff obtained an *ex parte* order granting her temporary legal and physical custody of A.B. On 28 February 2018, Defendant filed an answer denying Plaintiff's allegations, and a counterclaim seeking both temporary and permanent legal and physical custody of A.B. On 7 March 2018, the trial court entered a memorandum of judgment/order in which the parties agreed that the *ex parte* order would remain in full force until a hearing on the matter, with the modification that Defendant would have a minimum of one supervised visitation per week with A.B. at Our House Supervised Visitation Center ("Our House"). On 15 May 2018, Plaintiff filed her reply to Defendant's counterclaims.

After a series of hearings at which both parties were represented by counsel, on 8 August 2018, the trial court entered a temporary order (1) awarding full legal and physical custody to Plaintiff, (2) awarding Defendant supervised visits with A.B. at Our House for a minimum of one hour per week, and (3) providing for further hearings upon the completion of a family evaluation. On 28 November 2018, the trial court entered its memorandum of judgment/order modifying the temporary order after Defendant "was expelled from visitation at Our House." The memorandum of

[1] Initials are used to protect the identity of the minor child.

judgment/order provided that Defendant's visitation at Our House (for a minimum of one hour per week) could resume so long as Defendant abided by the rules and procedures of Our House, including the prohibition of weapons on site.

On 11 January 2019, the chief district court judge gave the parties notice that this matter had been specially set for hearing at 9:30 a.m. on 5 March 2019. On 13 February 2019, Defendant's counsel filed a motion to withdraw from the case, and gave notice that a hearing on her motion was scheduled for 27 February 2019. According to Defendant, "[t]he basis for her withdrawal was a difference of opinion . . . as to which witnesses should be subpoenaed to testify at the trial[.]" Defendant began searching for new counsel.

Defendant was present in court on 27 February 2019 to contest his attorney's motion to withdraw on the grounds that he had not yet been able to secure new counsel. Defendant maintains that his attorney was not present while he was in court, and that the presiding judge informed him that he could leave because "nothing could be heard without the attorneys present." Nonetheless, the matter was heard that day, and the trial court entered an order granting the motion to withdraw. Defendant states that he only discovered that the motion to withdraw had been granted when he received the order by mail on 1 March 2019.

On 5 March 2019, the custody matter came on for hearing before the Honorable William F. Brooks. Plaintiff and her counsel were present and ready to proceed, but

Defendant was not. At the trial court's direction, the bailiff went outside the courtroom and called for Defendant, but Defendant did not respond. The trial court then confirmed that notice of the hearing had been mailed to both parties, and contacted Defendant's former counsel, who confirmed that Defendant had been made aware of the scheduled date for the hearing and given his file.

The trial court then commenced the custody hearing. However, after the trial court heard Plaintiff's evidence, Defendant telephoned the office of the clerk of superior court, and spoke with a deputy clerk. According to Defendant, his former attorney's paralegal alerted him that "the Ashe County Clerk of Court was looking for him." Defendant told the deputy clerk that he was two hours away, in Black Mountain, and that he thought that the matter was set for 7 March rather than 5 March. Defendant said that he would leave immediately, but the deputy clerk with whom he spoke told him that "the hearing was already in progress, and to wait for a call back before driving[.]" A few minutes later, a deputy clerk called Defendant and informed him that the trial court had already made its ruling. That same day, the trial court entered a final permanent order (the "custody order"), which granted Plaintiff full legal and physical custody of A.B., and provided that although Defendant had not resumed his visitation since being expelled from Our House some months before, he could re-establish visitation with A.B. at Our House pursuant to the terms of the 28 November 2018 memorandum of judgment/order.

On 12 April 2019, Defendant filed a verified motion to set aside the custody order pursuant to Rule 60(b)(1) of the North Carolina Rules of Civil Procedure, contending that his failure to appear at the 5 March hearing was due to his excusable neglect. On 26 June 2019, Defendant's Rule 60(b) motion came on for hearing, again before Judge Brooks. On 24 July 2019, the trial court entered its order denying Defendant's motion to set aside the custody order, concluding that Defendant's failure to appear was not the result of excusable neglect. Defendant timely filed his notice of appeal.

Discussion

Defendant argues that the trial court abused its discretion in denying his motion to set aside the custody order pursuant to Rule 60(b)(1). After careful review, we disagree.

I. Standard of Review

The well-established rule is that "a motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975).

> A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.

White v. White, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citation omitted).

"What constitutes excusable neglect is a question of law which is fully reviewable on appeal. However, the trial court's decision is final if there is competent evidence to support its findings and those findings support its conclusion." *Mitchell County DSS v. Carpenter*, 127 N.C. App. 353, 356, 489 S.E.2d 437, 439 (1997) (citations and internal quotation marks omitted), *aff'd per curiam*, 347 N.C. 569, 494 S.E.2d 763 (1998).

II. *Challenged Findings of Fact*

"The findings of fact by the judge on a motion to set aside a judgment on the ground of excusable neglect are final, unless exception is made that there was no evidence to support the findings of fact, or that there was a failure to find sufficient material facts." *Ellison v. White*, 3 N.C. App. 235, 240, 164 S.E.2d 511, 514 (1968). "Findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if there is evidence to the contrary." *Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) (citation and internal quotation marks omitted). "Unchallenged findings of fact are binding on appeal." *Kabasan v. Kabasan*, 257 N.C. App. 436, 444, 810 S.E.2d 691, 698 (2018) (citation omitted).

Defendant challenges three of the trial court's findings of fact in its order denying his motion to set aside:

> 7) On February 27, 2019 the Court granted said attorney['s] motion to withdraw. The Defendant was present in court on that date.
>
> . . . .
>
> 14) The Defendant at first advised the Deputy Clerk he spoke to that he was given the date of March 7, 2019 for the hearing by his former attorney.
>
> 15) The Defendant later that day admitted to two Deputy Clerks he had been given the correct date[ ] of March 5, 2019 by his former attorney and he had just made a mistake as to the date.

Defendant asserts that these findings of fact "were not supported by the evidence." We disagree.

First, Defendant contends that finding of fact #7 is misleading, in that it "seems to suggest that [he] had the opportunity [to] oppose his attorney's motion to withdraw, and further that he left court on 27 February 2019 aware that [his attorney] had in fact been allowed to withdraw." Defendant does not argue that either sentence is factually incorrect or unsupported by the evidence. The plain language of finding of fact #7 is clear, and the factual accuracy of each sentence is supported not only by the record but also by Defendant's verified motion to set aside the custody order. Rather, Defendant challenges the implication of this finding of fact. Such an implication is the essence of the trial court's exercise of its discretion, and we cannot conclude that the trial court abused that discretion in making this finding of fact.

Defendant similarly challenges the implication of findings of fact #14 and #15: "The implication from these two paragraphs is that [Defendant] lied to the court about the trial date provided to him by his former attorney, . . . and that during a phone call with the clerk's office 'later that day,' he admitted this was a lie." We disagree with Defendant's interpretation of these findings. Finding of fact #15 plainly refers to a mistake on Defendant's part, rather than implying that he lied to the court.

However, Defendant also challenges the evidentiary support for these findings of fact. Defendant asserts that "there was no evidence put before the [t]rial [c]ourt on 26 June 2019 to support these findings," and speculates that the findings may have been "pulled from" finding of fact #9 in the custody order. That finding reads, in its entirety:

> Plaintiff had concluded her evidence when the clerk's office received a call from Defendant that he was in Black Mountain, NC. [Defendant] stated that he believed the matter to be set for March 7th, 2019 that being the date he was given by his former attorney. Later in a telephone conversation he admitted to two Deputy Clerks in the Ashe C[o]unty Clerk's office that he had made a mistake and had been given the date of March 5th, 2019 by his former attorney.

Defendant asserts that this is "troubling, as these findings cite statements from 'two Deputy Clerks' who do not appear to have been sworn in as witnesses at the custody trial."

"The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary." *Kabasan*,

257 N.C. App. at 440, 810 S.E.2d at 696 (citation omitted). "Moreover, where a trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal." *Id.* (citation and internal quotation marks omitted). However, we need not consider every finding of fact; it is well settled that in non-jury trials "where there are sufficient findings of fact based on competent evidence to support the trial court's conclusions of law, the judgment will not be disturbed because of other erroneous findings which do not affect the conclusions." *In re Estate of Pate*, 119 N.C. App. 400, 403, 459 S.E.2d 1, 2, *disc. review denied*, 341 N.C. 649, 462 S.E.2d 515 (1995); *accord In re Custody of Stancil*, 10 N.C. App. 545, 549, 179 S.E.2d 844, 847 (1971) (concluding that a judgment "is sufficient if enough *material* facts are found to support [it]").

Assuming, *arguendo*, that in the instant case the trial court erred in making the challenged findings of fact, "erroneous findings unnecessary to the determination do not constitute reversible error." *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006). The remaining unchallenged findings of fact amply support the trial court's conclusion that Defendant's failure to appear for the scheduled custody hearing was not due to his excusable neglect. Therefore, Defendant's contention is overruled.

III. *Excusable Neglect*

"What constitutes excusable neglect depends upon what, under all the surrounding circumstances, may be reasonably expected of a party in paying proper attention to his case." *Trivette v. Trivette*, 162 N.C. App. 55, 62, 590 S.E.2d 298, 304 (2004) (citation omitted). "A party has a duty to keep himself advised as to the time and date his cause is calendared for trial [ ]or hearing; and when a case is listed on the court calendar, he has notice of the time and date of the hearing." *Standard Equip. Co., Inc. v. Albertson*, 35 N.C. App. 144, 146, 240 S.E.2d 499, 501 (1978) (citation and internal quotation marks omitted).

This Court has repeatedly determined that a party's negligence with regard to a hearing date does not constitute excusable neglect. In *Trivette*, the defendant in a child custody action moved to set aside an order on the grounds of excusable neglect where he

> had notice of the motion to modify custody and find [him] in civil contempt, was aware that the motion was set for hearing on 6 June 2001, and was aware the hearing had been continued on 6 June 2001 until some date in the future. On 20 July 2001, [the] defendant was put on actual notice that the hearing was scheduled for 23 July 2001. Furthermore, [the] defendant was aware for at least two months that his attorney intended to withdraw and that he needed to obtain new counsel.

Trivette, 162 N.C. App. at 62-63, 590 S.E.2d at 304. This Court concluded that the defendant's failure to appear at a hearing of which he had actual notice, and for which he was aware he needed to obtain new counsel, did not constitute excusable neglect. *Id.* (holding that the "defendant had an affirmative duty to inquire as to the date to

which his hearing had been continued, and thus, may not now assert that his negligence in failing to do so constituted excusable neglect”).

Here, the unchallenged findings of fact in the trial court’s order denying Defendant’s Rule 60(b)(1) motion to set aside include the following:

> 5) On January 11, 2019 Notice of Hearing was sent to the parties’ attorneys by the Court for a special setting on March 5, 2019 at 9:30 a.m. at the Ashe County Courthouse.
>
> 6) On February 7, 2019 motion was filed by [Defendant’s attorney] to withdraw as counsel for Defendant with notice for February 27, 2019 being served on counsel for Plaintiff and Defendant.
>
> . . . .
>
> 8) On March 5, 2019 this matter was called for hearing at 9:30 a.m. The Plaintiff and Plaintiff’s counsel were in court ready to proceed. The Defendant was not in court nor was any attorney on his behalf.
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> 9) The Court directed the bailiff to go outside the courtroom and call out the Defendant but to no avail.
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> 10) The Court made inquiry of court personnel, but no one reported any contact from the Defendant.
>
> 11) Inquiry was made to Defendant’s former attorney[’]s office and said office advised the Defendant was aware of this particular court date March 5, 2019 and he had been given his file from their office.
>
> 12) The hearing was commenced, and the Plaintiff presented evidence by way of witness.
>
> 13) After Plaintiff had concluded her evidence the Clerk of Superior Court of Ashe Count[y’]s office received a

> telephone call from the Defendant that he was in Black Mountain, NC.

These unchallenged findings of fact, which are binding on appeal, *Kabasan*, 257 N.C. App. at 444, 810 S.E.2d at 698, clearly establish that Defendant had actual notice of the 5 March hearing, in that notice had been sent to his attorney, who confirmed that Defendant was aware of the court date. Indeed, Defendant admits in his verified motion that he had notice of the 5 March date; in detailing his search for a new attorney, he states that one of the attorneys he contacted regarding representation told him that "she would be out of the country *on the scheduled hearing date of March 5, 2019*[.]" (Emphasis added). As was the case in *Trivette*, the trial court's findings of fact in the instant case establish that Defendant "was put on actual notice that the hearing was scheduled for [5 March 2019]. Furthermore, defendant was aware for [almost one month] that his attorney intended to withdraw and that he needed to obtain new counsel." *Trivette*, 162 N.C. App. at 62-63, 590 S.E.2d at 304. Although Defendant claims he was in a "panic over losing his attorney," he nonetheless "had an affirmative duty to inquire as to the date [of] his hearing . . . and thus, may not now assert that his negligence in failing to do so constituted excusable neglect." *Id.* at 63, 590 S.E.2d at 304.

Finally, Defendant's argument on appeal relies heavily on the two-pronged test set forth in *Baylor v. Brown*, 46 N.C. App. 664, 670, 266 S.E.2d 9, 13 (1980). However, this Court in *Baylor* addressed the application of Rule 60(b)(6) (other reasons

justifying relief), rather than Rule 60(b)(1) (excusable neglect). *See id.* ("[T]he setting aside of a judgment *pursuant to G.S. 1A-1, Rule 60(b)(6), of the Rules of Civil Procedure* should only take place where (1) extraordinary circumstances exist and (2) there is a showing that justice demands it." (emphasis added)). Regardless, even if Rule 60(b)(6) were applicable here, Defendant has not shown that "extraordinary circumstances exist" or "that justice demands" setting aside the trial court's order in the present case. *Id.*

> A lawsuit is a serious matter. He who is a party to a case in court must give it that attention which a prudent man gives to his important business. That was not done in this case. . . . The regular and orderly course of court procedure must be followed, and litigants who disregard this have no cause to be surprised if they find themselves in the condition of those who, not observing the schedule, arrive at the station after the train has left.

Pepper v. Clegg, 132 N.C. 312, 315-16, 43 S.E. 906, 907 (1903) (citation and internal quotation marks omitted).

Conclusion

For the foregoing reasons, Defendant has not shown that the trial court abused its discretion in denying his motion to set aside the custody order. Accordingly, the trial court's decision is affirmed.

AFFIRMED.

Judges BERGER and BROOK concur.

Report per Rule 30(e).