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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 22-1060

Filed 7 May 2024

Guilford County, No. 20 CVD 7835

TANYA LEACH KENT, Plaintiff,

v.

WILLIE JOHNSON, Defendant.

Appeal by Defendant from order entered on 13 April 2022 by Judge K. Michelle Fletcher in Guilford County District Court. Heard in the Court of Appeals on 7 June 2023.

No brief filed for the pro se plaintiff-appellee.

Law Office of Stephen E. Robertson, P.L.L.C., by Stephen E. Robertson, for the defendant-appellant.

STADING, Judge.

Willie Johnson ("Defendant") appeals from an order awarding custody of his child M.J.[1] to Tanya Kent, the child's maternal aunt ("Plaintiff"). Defendant argues the trial court erred: (1) in finding Plaintiff had standing to assert a child custody claim; and (2) by concluding that an emergency existed warranting child custody

[1] A pseudonym is used to protect the minor child's identity. *See* N.C. R. App. P. 42.

placement with Plaintiff. For the reasons below, we affirm the trial court's order.

I. Background

M.J. was born to mother and Defendant in 2014. Defendant later moved in with mother when M.J. was seven months old and lived with them for two years without marriage. In 2016, Defendant and mother separated, and Defendant remarried in 2017. The trial court granted mother sole legal and physical custody of M.J. in 2018. From 2017 through October 2020, Defendant only saw M.J. four times.

In September 2020, mother passed away. M.J. had lived with Plaintiff, who is mother's sister and M.J.'s aunt. Following mother's passing, Defendant moved to modify an existing custody order to have M.J. live with him. Plaintiff moved to intervene for a modification of custody and for an *ex parte* temporary custody order. The *ex parte* custody order was based in part, on a 21 September 2020 incident, wherein Defendant had said to Plaintiff "that he would come and take the child from North Carolina and that Plaintiff would never see the child again." The trial court granted both motions in favor of Plaintiff. The trial court ultimately awarded primary legal and physical custody of M.J. to Plaintiff and allowed Defendant visitation on 13 April 2022. Defendant appealed.

II. Jurisdiction

Defendant petitioned for writ of *certiorari* requesting this Court to review a series of interlocutory orders, specifically the trial court's: (1) *ex parte* temporary order filed on 18 December 2020; (2) temporary custody order filed on 23 November

2020; and (3) order denying Defendant's motion to dismiss prior custody orders filed on 3 June 2021. Defendant maintains that this Court should issue the writ of *certiorari* because the trial court lacked subject matter jurisdiction over the contested matters since Plaintiff lacked standing to request sole legal custody of M.J.

"A temporary child custody order is normally interlocutory and does not affect any substantial right which cannot be protected by timely appeal from the trial court's ultimate disposition on the merits." *Sood v. Sood*, 222 N.C. App. 807, 809, 732 S.E.2d 603, 606 (2012) (citation omitted). In our discretion, we deny Defendant's petition for writ of *certiorari*. Instead, we address the trial court's subject matter jurisdiction on the merits of Defendant's appeal of the final custody order.

Defendant fails to address the issue of whether his appeal was timely filed to confer jurisdiction upon this Court. In civil actions and special proceedings, a party must file and serve a notice of appeal:

> (1) within 30 days after entry of judgment if the party has been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure; or
>
> (2) within 30 days after service upon the party of a copy of the judgment if service was not made within that three-day period . . .

N.C. R. App. P. 3(c) (2023). The order granting permanent custody of M.J. to Plaintiff was filed on 13 April 2022. Defendant filed his notice of appeal on 17 May 2022, more than thirty days after entry of judgment. Neither the record nor the order contains

a certificate of service confirming when Defendant was served. Under N.C. R. App. P. 3(c)(1), the clock does not begin to run against Defendant until there is a record showing he received the order. *Raymond v. Raymond,* 257 N.C. App. 700, 703–06, 811 S.E.2d 168, 170–72 (2018); *see Frank v. Savage*, 205 N.C. App 183, 186–87, 695 S.E.2d 509, 511 (2010); *see also Wallis v. Cambron*, 194 N.C. App. 190, 192–93, 670 S.E.2d 239, 241 (2008).

Plaintiff did not file an appellate brief and there is no offer of evidence showing when Defendant received the certificate of service. Without any indication from the record of when Defendant was served, we decline to presume that Defendant lost his right to appeal the final order. Defendant's appeal is therefore timely, and we consider his appeal under N.C. Gen. Stat. § 7A-27(b) (2023).

III. Analysis

Defendant contends that Plaintiff lacked standing to bring a custody claim, causing the trial court to lack subject-matter jurisdiction. Defendant also faults the trial court's finding an emergency existed to warrant M.J.'s placement with Plaintiff until a final order was entered. For the reasons below, we disagree with both arguments.

A. Standing

Defendant argues that the trial court erred in concluding it possessed subject matter jurisdiction over the child custody claim because Plaintiff lacked standing. "Standing is a necessary prerequisite to a court's proper exercise of subject matter

jurisdiction. Standing is a question of law which this court reviews *de novo*." *Perdue v. Fuqua*, 195 N.C. App. 583, 585, 673 S.E.2d 145, 147 (2009) (citing *Cook v. Union Cnty. Zoning Bd. of Adjust.*, 185 N.C. App. 582, 588, 649 S.E.2d 458, 464 (2007)); *Wellons v. White*, 229 N.C. App. 164, 173, 748 S.E.2d 709, 717 (2013). "Standing is jurisdictional in nature and consequently, standing is a threshold issue that must be addressed, and found to exist, before the merits of the case are judicially resolved." *In re S.E.P.*, 184 N.C. App. 481, 487, 646 S.E.2d 617, 621 (2007) (internal quotation marks omitted). Whether a plaintiff has standing to bring a claim is a determination made at the time of filing the complaint and thus is based on the allegations of the complaint. *Boseman v. Jarrell*, 364 N.C. 537, 546, 704 S.E.2d 494, 501 (2010) ("[a] [trial] court's subject matter jurisdiction over a particular matter is invoked by the pleading.")

"Any parent, *relative*, or other person . . . claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child." N.C. Gen. Stat. § 50-13.1(a) (2023) (emphasis added). If a party is considered to be a "relative" to the child under Section 50-13.1(a), then that party need only allege their biological relationship with the child. *Rodriguez v. Rodriguez*, 211 N.C. App. 267, 275–76, 710 S.E.2d 235, 238 (2011). This Court has defined "relative" as "a person connected with another by blood or affinity; a person who is kin with another." *Yurek v. Shaffer*, 198 N.C. App. 67, 77, 678 S.E.2d 738, 745 (2009) (internal quotation marks and citation omitted). "[T]o maintain a claim for custody on this basis, the party

seeking custody must allege facts demonstrating a sufficient relationship with the child and then must demonstrate that the parent has acted in a manner inconsistent with his or her protected status as a parent." *Moriggia v. Castelo*, 256 N.C. App. 34, 47, 805 S.E.2d 378, 385 (2017).

"A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child." *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997) (citations omitted). "Therefore, the parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child. *Id.* Non-parents must overcome the presumption that the biological parent has the superior right to the care, custody, and control of their child by clear, cogent, and convincing evidence. *Petersen v. Rogers*, 337 N.C. 397, 403–04, 445 S.E.2d 901, 905 (1994). Thus, for a non-parent to obtain custody, the non-parent must refute the presumption that the parent is constitutionally entitled to have care, custody, and control of the child. *See Webb v. Jarvis*, 284 N.C. App. 534, 538, 876 S.E.2d 123, 126–27 (2022) ("Accordingly, in a custody dispute between a parent and a nonparent where the parent has acted inconsistent with this presumption, the nonparent party would have standing, and applying the 'best interest of the child' standard would not offend the Due Process Clause.").

Plaintiff is M.J.'s aunt, the biological sister of his deceased mother, alleged:

> 7. Beginning in September of 2020, the minor child began residing exclusively with Plaintiff and her husband. [Mother] expressed her desire for Plaintiff to have care, custody, and control of the minor child after [mother died].
>
> 8. Throughout the minor child's life, Plaintiff has had a close, loving relationship with minor child. Plaintiff has had consistent contact with the minor child throughout his lifetime. Plaintiff has established a relationship in the nature of a parent-child relationship with the minor child. Plaintiff has standing to bring this action for custody of the minor child, as Plaintiff is a relative of the child.

Thus, Plaintiff alleged "a relationship in the nature of a parent and child relationship," is sufficient to support a finding of standing. *Ellison v. Ramos*, 130 N.C. App. 389, 394, 502 S.E.2d 891, 894 (1998).

Plaintiff's complaint also alleged Defendant had acted in manner inconsistent with his constitutionally protected status as a parent:

> 9. Defendant has acted in a manner inconsistent with his constitutionally protected status as a parent in that Defendant has neglected the minor child. Defendant has failed to shoulder the responsibilities that are attendant to raising the minor child and has shown absolutely no interest in the minor child's health, wellbeing, education, safety, or care.
>
> 10. Defendant has acted in a manner inconsistent with his constitutionally protected status as a parent in that Defendant has abandoned the minor child and has no relationship or bond with the minor child. From the years 2016 to 2018, Defendant only saw the minor child two times. Defendant has only seen the minor child one time since 2018, and that was a brief encounter. Defendant has not called or texted or spoken to the minor child.

> Defendant has never sent a birthday gift or card to the minor child on his birthday; nor has Defendant ever acknowledged the minor child's birthday. The minor child has never been to Defendant's home. The minor child has never met Defendant's wife, to whom he has been married since 2017.

Here, Plaintiff sufficiently alleged "some act[s] inconsistent with the parent's constitutionally protected status." *Yurek*, 198 N.C. App. at 75, 678 S.E.2d at 744 (citations omitted)." *Chavez v. Wadlington*, 261 N.C. App. 541, 546, 821 S.E.2d 289, 293 (2018), *aff'd*, 373 N.C. 1, 832 S.E.2d 692 (2019). Thus, the trial court had subject matter jurisdiction and Plaintiff had standing as a relative to bring forth the custody claim.

B. The Temporary Custody Order

Defendant's second argument on appeal asserts the trial court erred in finding and concluding an emergency existed to warrant child custody placement with Plaintiff under N.C. Gen. Stat. § 50-13.5(d)(3) (2023). A temporary interlocutory order is made moot by a subsequent permanent order, rendering the temporary order not reviewable by this Court. *See, e.g.*, *Metz v. Metz*, 212 N.C. App. 494, 498, 711 S.E.2d 737, 740 (2011) ("We will not consider Mr. Metz's challenge to the temporary support order because the entry of the 27 May 2010 permanent support order mooted any appeal of the 6 February 2009 temporary support order, which was interlocutory on its face."); *Smithwick v. Frame*, 62 N.C. App. 387, 391, 303 S.E.2d 217, 220 (1983) ("Any objections that defendants may have had to [the challenged] order,

interlocutory on its face, were made moot by the . . . Order awarding plaintiff permanent custody of his minor child. We therefore will not consider them."). Because we affirm the trial court's order granting permanent custody of M.J. to Plaintiff, we decline to address this matter moot interlocutory order under Defendant's petition for writ of *certiorari*.

IV. Conclusion

Based on the above, we hold the trial court possessed subject matter jurisdiction and affirm its order granting permanent custody to Plaintiff.

AFFIRMED.

Judges TYSON and MURPHY concur.

Report per Rule 30(e).