NO. COA00-1092

NORTH CAROLINA COURT OF APPEALS

Filed: 19 February 2002

STEPHEN MYERS,
Plaintiff

v. Johnston County
No. 00 CVD 108

KELLY O. MYERS,
Defendant

Appeal by defendant from orders entered 24 May 2000 by Judge Albert A. Corbett, Jr. in Johnston County District Court. Heard in the Court of Appeals 6 November 2001.

No brief for plaintiff-appellee.

Mitchell, Brewer, Richardson, Adams, Burns & Boughman, by Ronnie M. Mitchell, for defendant-appellant.

CAMPBELL, Judge.

Kelly Myers ("Defendant") appeals from the trial court's orders awarding custody of Stephen Austin Myers ("Austin") and Lorianna Leigh Myers ("Leigh") to Stephen Haywood Myers ("Plaintiff"). Austin and Leigh are the two minor children born during the marriage of Plaintiff and Defendant.

Plaintiff and Defendant were married on 4 June 1995 and separated on 15 October 1999. Austin was born on 15 August 1995 and is not the biological son of Plaintiff. However, Austin was named for Plaintiff, Plaintiff's name appears on Austin's birth

certificate, and Plaintiff is the only father figure Austin has ever known. Leigh was born on 8 January 1997 and is the biological daughter of the parties.

On 13 January 2000, Plaintiff filed the instant action seeking custody of Leigh. In his verified complaint, Plaintiff admitted that Austin, although born during Plaintiff's marriage with Defendant, is not his biological son "in that the Defendant was pregnant prior to the marriage and the meeting of the parties." At the outset of the custody hearing, Plaintiff made an oral motion to amend his complaint to seek custody of Austin. The record shows that counsel for Defendant informed the trial court that Defendant had filed a counterclaim seeking custody of both Austin and Leigh.[1] As a result, the trial court allowed Plaintiff's motion to amend his complaint and held a hearing on the custody of both children.

At the conclusion of the hearing, the trial court entered two orders, one for each child, containing identical findings of fact related to the parties' conduct before and after their separation, and relevant to the parties' individual fitness to provide proper care for Austin and Leigh. As to the custody of Leigh, the trial court made the following conclusion of law:

> Plaintiff is a fit and proper person to have the care, custody, and control of the minor child, Lorianna Leigh Myers, born January 8, 1997.

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[1] A copy of Defendant's counterclaim was not found in the court file by Judge Corbett and does not appear in the record on appeal.

As to the custody of Austin, the trial court made the following conclusions of law:

> 3. Plaintiff is a fit and proper person to have the care, custody and control of the minor child, Stephen Austin Myers, born August 15, 1995.
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> 4. Defendant is unfit to have the care, custody and control of the minor child, Stephen Austin Myers.
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> 5. Defendant has not acted in the best interest of the minor child.
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> 6. Defendant no longer enjoys a paramount status as a parent because of her failure to act in the best interest of the minor child.

Based on its findings and conclusions, the trial court awarded custody of both minor children to Plaintiff.

Defendant assigns error to the trial court's grant of Plaintiff's oral motion to amend his complaint to seek custody of Austin. Defendant also assigns error to the trial court's findings of fact and conclusions of law. Having reviewed the record, transcript, and Defendant's brief, we conclude that the trial court's order granting custody of Austin to Plaintiff should be reversed. We further conclude that the trial court's order granting custody of Leigh to Plaintiff should be vacated and the case remanded for a determination by the trial court, based on the evidence presented at the hearing and the findings of fact contained in the trial court's order, as to whether granting custody to Plaintiff will best promote the interest and welfare of Leigh.

"In a child custody case, the trial court's findings of fact are binding on this Court if they are supported by competent evidence, and its conclusions of law must be supported by its findings of fact." *Cantrell v. Wishon,* 141 N.C. App. 340, 342, 540 S.E.2d 804, 805 (2000). Further, "the findings and conclusions of the trial court must comport with our case law regarding child custody matters." *Id.* at 342, 540 S.E.2d at 806. This standard of review guides our examination of Defendant's arguments on appeal.

Custody of Leigh

Defendant's only assignment of error to the trial court's award of custody of Leigh to Plaintiff is that the trial court's findings of fact and conclusions of law do not support its custody determination. We agree.

In a custody dispute, custody is to be given "to such person, agency, organization or institution as will best promote the interest and welfare of the child." N.C. Gen. Stat. § 50-13.2(a)(2000). "In a custody proceeding between two natural parents (including [both] biological or adoptive parents), or between two parties who are not natural parents, the trial court must determine custody based on the "best interest of the child" test." *Adams v. Tessener,* 354 N.C. 57, 61, 550 S.E.2d 499, 502 (2001) (citing *Price v. Howard,* 346 N.C. 68, 72, 484 S.E.2d 528, 530 (1997)). "Before awarding custody of a child to a particular party, the trial court *must* conclude as a matter of law that the award of custody to that particular party 'will best promote the interest and welfare of the child.'" *Steele v. Steele,* 36 N.C.

App. 601, 604, 244 S.E.2d 466, 468 (1978) (quoting N.C.G.S. § 50-13.2(a)) (emphasis added). "The judgment of the trial court should contain findings of fact which sustain the [necessary] conclusion of law that custody of the child is awarded to the person who will best promote the interest and welfare of the child." *Green v. Green,* 54 N.C. App. 571, 572, 284 S.E.2d 171, 173 (1981). "These findings may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child." *Steele,* 36 N.C. App. at 604, 244 S.E.2d at 468.

Review of the record shows that the trial court's order contains numerous findings of fact which are relevant to the issue of the best interest and welfare of Leigh. However, the trial court failed to make the necessary ultimate conclusion that awarding custody to Plaintiff will best promote the interest and welfare of Leigh. Therefore, we remand for a determination, based on the hearing from which the trial court's original order was drawn, whether granting custody to Plaintiff will best promote the interest and welfare of Leigh.[2]

Custody of Austin

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[2] We are cognizant that the transcript of the custody hearing indicates that the trial court directed Plaintiff's counsel to draft an order which contained the trial court's conclusion that it was in the best interest of Leigh that custody be awarded to Plaintiff. However, the order subsequently signed by the trial court and entered on 24 May 2000 does not include this necessary conclusion. We refuse to speculate as to why the order was ultimately signed and entered without this necessary conclusion.

Defendant brings forward two assignments of error to the trial court's award of custody of Austin to Plaintiff. Defendant first contends that the trial court erred in allowing Plaintiff to amend his complaint to seek custody of Austin and by not treating the custody order as to Austin as a temporary custody order. We disagree.

The record shows that at the outset of the custody hearing the trial court inquired as to how many children were at issue. Defendant's counsel informed the court that Plaintiff had only asked for custody of Leigh. Plaintiff's counsel responded that Defendant had filed a counterclaim seeking custody of both children, and that Plaintiff wished to amend his complaint to seek custody of both children. Defendant's counsel confirmed that Defendant had filed a counterclaim seeking custody of both children. Based on Defendant's counterclaim, the trial court determined that custody of both Austin and Leigh was at issue. Defendant did not object to the trial court's determination at that time.

At the conclusion of the hearing, Defendant requested that the trial court treat the hearing as one for temporary custody as to Austin, and that Defendant have an opportunity to file responsive pleadings directed toward the oral amendment to Plaintiff's complaint. The trial court denied Defendant's request and directed that orders be drafted reflecting the trial court's grant of custody of both children to Plaintiff.

We conclude that the trial court acted properly in denying Defendant's objection to Plaintiff's oral amendment and in refusing to treat the custody order as to Austin as a temporary custody order. Having filed a counterclaim seeking custody of both children, and having failed to object to Plaintiff's oral amendment when it was allowed at the outset of the hearing, Defendant waived any objection to the trial court's decision to place the custody of both children at issue in the hearing. Thus, the trial court did not err in determining the custody rights as to both children.

Defendant further argues that the trial court's order granting custody of Austin to Plaintiff is not sufficient to support the removal of custody from a natural parent to a third party who is not a natural parent. We agree.

Initially, we need to determine whether Plaintiff is in fact Austin's biological father for purposes of the instant custody proceeding. As to this issue, the trial court made the following findings of fact:

> 26. Defendant testified that Plaintiff was not the biological father of the minor child, Stephen Austin Myers, although he was named after the Plaintiff, Plaintiff's name was on the child's birth certificate, and in all respects Plaintiff has treated the child as his own. Defendant testified that Plaintiff had been the child's father but that he was not the biological father.
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> 27. Plaintiff is the only father figure which the minor child, Austin, has ever known.

In addition, the trial court concluded, as a matter of law, that "[t]here is a presumption that the Plaintiff is the father of the minor child, Stephen Austin Myers."

However, in his verified complaint, Plaintiff admitted that Austin is not his biological child. "It is well settled that parties are bound by admissions and allegations within their pleadings unless withdrawn, amended or otherwise altered pursuant to N.C.R. Civ. P. 15." *Webster Enterprises, Inc. v. Selective Insurance Co.*, 125 N.C. App. 36, 41, 479 S.E.2d 243, 247 (1997). Such judicial admissions have "the same effect as a jury finding and [are] conclusive upon the parties and the trial judge." *Buie v. High Point Associates Ltd. Partnership*, 119 N.C. App. 155, 158, 458 S.E.2d 212, 215 (1995). "It naturally follows [that] the pleader cannot take a position contrary to its judicial admission." *Webster Enterprises*, 125 N.C. App. at 41, 243 S.E.2d at 247 (citing *Rollins v. Miller Roofing Co.*, 55 N.C. App. 158, 161-62, 284 S.E.2d 697, 700 (1981)).

Having admitted in his verified complaint that Austin is not his biological child, Plaintiff was precluded from taking a position contrary to this judicial admission. Consequently, under *Webster Enterprises* and *Buie*, the fact that Austin is not the biological child of Plaintiff was conclusively established unless Plaintiff withdrew, amended, or otherwise altered his judicial admission. The record shows that Plaintiff failed to amend his complaint, either by leave of court or by written consent of Defendant, as permitted under N.C. R. Civ. P. 15. Therefore, we conclude that the trial court erred in concluding, as a matter of law, that Plaintiff was the presumptive father of Austin. Thus, the dispute between Plaintiff and Defendant as to the custody of

Austin is governed by the law applicable to custody disputes between parents and nonparents.[3]

In *Petersen v. Rogers,* 337 N.C. 397, 445 S.E.2d 901 (1994), our Supreme Court emphasized this State's long-standing tradition of protecting "the paramount right of parents to custody, care, and nurture of their children . . . ." *Id.* at 402, 445 S.E.2d at 904. *Petersen* explicitly rejected the notion that a nonparent merely had to overcome a "higher evidentiary standard" in order to obtain child custody in a dispute with a natural parent, as well as the argument that "the welfare of the child is paramount to all common law preferential rights of the parents." *Id.* at 403, 445 S.E.2d at 905; *see also Seyboth v. Seyboth,* ___ N.C. App. ___, ___ S.E.2d ___ (COA00-1160, filed 6 November 2001). In the end, the *Petersen* Court held "that absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail." *Id.* at 403-04, 445 S.E.2d at 905.

In *Price v. Howard,* 346 N.C. 68, 484 S.E.2d 528 (1997), our Supreme Court recognized, as the United States Supreme Court had recognized, that protection of a parent's interest in the custody of his or her children is not absolute. *Id.* at 76, 484 S.E.2d at

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[3] We note that despite concluding that Plaintiff was the presumptive father of Austin, the trial court went on to conclude that "Defendant is unfit to have the care, custody and control of the minor child, Stephen Austin Myers." This conclusion indicates that the trial court was aware that, as to Austin, it was dealing with a custody dispute between a parent and a nonparent.

533; *see also Lehr v. Robertson,* 463 U.S. 248, 77 L. Ed. 2d 614 (1983). In light of this recognition, the Court in *Price* set forth the following test for determining when a parent loses his or her protected status and the "best interest of the child" analysis is triggered:

> 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. 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. If a natural parent's conduct has not been inconsistent with his or her constitutionally protected status, application of the "best interest of the child" standard in a custody dispute with a nonparent would offend the Due Process Clause. However, conduct inconsistent with the parent's protected status, which need not rise to the statutory level warranting termination of parental rights, *see* N.C.G.S. § 7A-289.32 (1995), would result in application of the "best interest of the child" test without offending the Due Process Clause. Unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy. Other types of conduct, which must be viewed on a case-by-case basis, can also rise to this level so as to be inconsistent with the protected status of natural parents. Where such conduct is properly found by the trier of fact, based on evidence in the record, custody should be determined by the "best interest of the child" test mandated by statute.

Price, 346 N.C. at 79, 484 S.E.2d at 534-35 (citations omitted); *see also Adams,* 354 N.C. at 61-62, 550 S.E.2d at 502 (2001).

In *Adams*, the Supreme Court summarized the meaning of *Petersen* and *Price* as follows:

> *Petersen* and *Price*, when read together, protect a natural parent's paramount constitutional right to custody and control of his or her children. The Due Process Clause ensures that the government cannot unconstitutionally infringe upon a parent's paramount right to custody solely to obtain a better result for the child. *See Troxel*, 530 U.S. at 72-73, 147 L. Ed. 2d at 61 ("the Due Process Clause does not permit a [s]tate to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made"). As a result, the government may take a child away from his or her natural parent only upon a showing that the parent is unfit to have custody, *see Jolly v. Queen*, 264 N.C. 711, 715-16, 142 S.E.2d 592, 596 (1965), or where the parent's conduct is inconsistent with his or her constitutionally protected status, *Price*, 346 N.C. at 84, 484 S.E.2d at 537. *See also* 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 224 (5th ed. 2000) (minor child should not be placed "in the hands of a third person except upon convincing proof that the parent is an unfit person to have custody of the child or for some other extraordinary fact or circumstance.").

Adams, 354 N.C. at 62, 550 S.E.2d at 503 (2001). The Supreme Court recently reaffirmed its *Price* and *Adams* holdings in *Speagle v. Seitz*, ___ N.C. ___, ___ S.E.2d ___ (No. 32PA01, filed 18 December 2001).

Turning to the case *sub judice*, "we first note that in custody cases, the trial court sees the parties in person and listens to all the witnesses," *Id.* at 63, 550 S.E.2d at 503, allowing the trial court to "detect tenors, tones and flavors that are lost in the bare printed record read months later by appellate judges." *Newsome v. Newsome*, 42 N.C. App. 416, 426, 256 S.E.2d 849, 855

(1979), *quoted in Pulliam v. Smith,* 348 N.C. 616, 625, 501 S.E.2d 898, 903 (1998). "Accordingly, the trial court's findings of fact are conclusive on appeal if there is competent evidence to support them, even though the evidence might sustain findings to the contrary." *Adams,* 354 N.C. at 63, 500 S.E.2d at 503 (citations omitted).

We also note that when the trial court awards custody to a nonparent, the natural parent's love must yield to another to serve the child's best interests. *Id.* Nonetheless,

> parents *normally* love their children and desire not only what is best for them, but also a deep and meaningful relationship with them. Therefore, the decision to remove a child from the custody of a natural parent must not be lightly undertaken. Accordingly, a trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence.

Id. (emphasis in original).

In the instant case, the trial court specifically concluded that "Defendant is unfit to have the care, custody and control of the minor child, Stephen Austin Myers." The trial court further concluded that "Defendant has not acted in the best interest of the minor child [Austin]," and "Defendant no longer enjoys a paramount status as a parent because of her failure to act in the best interest of the minor child [Austin]." In support of its determination that Defendant's conduct has been inconsistent with her constitutionally protected interest in the custody of Austin, the trial court made the following findings of fact:

11. Defendant has not been able to maintain stable employment, having had eleven (11) jobs since 1995. Defendant's income from previous employment has been around $7.00 per hour, with day care expenses being provided free of charge.

12. Defendant remained in the marital residence for approximately [two-and-one-half] months after the separation of the parties. She testified that she moved to Raeford in Hoke County because she was unable to pay her expenses in Johnston County, in spite of the fact that Defendant was giving her approximately $600 per month. Her stated reason for moving to Raeford was that there were better employment opportunities in the area. Defendant's income is approximately the same with her new employment after moving to Hoke County as it was in Johnston County; however, her lease payments are approximately $200.00 per month higher in Hoke County than they were in Johnston County and she has day care expenses.

13. Defendant has a boyfriend, Buck, who is employed with the U.S. Army; however, she denies that he is living with her or helping with financial obligations. Defendant testified that her parents are the ones assisting her financially. They are residing in Knightdale, and have resided in Knightdale for several years and continue to do so. In spite of Defendant's testimony that she has a good relationship with her parents and they assist her greatly financially, she chose to relocate in the opposite direction from their residence. Defendant's parents were not present for the hearing.

14. During the marriage, [Defendant] took out criminal assault charges on the [Plaintiff], resulting in Plaintiff's being incarcerated for forty-eight (48) hours. Defendant testified that she was made to drop them in order to get back the child, Austin. Certified records from the Johnston County Clerk of Court show that the matter was tried, and the Court found that the action was frivolous and that the prosecuting witness (i.e, the Defendant) was ordered to pay all costs of Court.

. . . .

16. Defendant works at Darryl's in Fayetteville and testified that she works straight hours 8:00 a.m. until 4:00 p.m. as a cook; however, Plaintiff has called Defendant on numerous occasions and at times a male voice would answer the phone late at night and say that Defendant was at work and that the children were with a sitter.

17. [Defendant] had told [Plaintiff] that when her boyfriend, Buck, moved to Arizona, she would be moving with him and taking the minor children with her. This move would occur within the next six (6) months.

18. Defendant has no relatives or anyone to assist her with the children in Hoke County.

19. Defendant's current income is $7.50 per hour.

20. Prior to the Defendant's move to Hoke County, she would travel to and from Fayetteville with the minor children late at night, justifying her action by telling Plaintiff that it was okay because the children were asleep.

21. On a cold day in January, 2000, Defendant brought the child, Lorianna Leigh, to the Plaintiff with only a thin shirt, pants, dress slippers with no socks, and no underpants.

22. Defendant constantly uses foul language around and to the minor children, such as "f--k you."

23. Plaintiff has talked to the Defendant on the telephone when the minor children were with her since the separation of the parties when he could tell she had been drinking.

24. Plaintiff discovered many beer bottles in a trash incinerator at the Johnston County residence of the Defendant after she moved to Hoke County. Plaintiff is not a user of alcoholic beverages.

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> 28. Defendant has allowed Austin, age four (4), to babysit for other younger children in the past.
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> 32. Since the separation of the parties, Defendant has refused to allow the Plaintiff to have time with Austin. Plaintiff has continually asked Defendant to allow him time to spend with Austin; however, Defendant has refused even after the minor child requested to stay with the Plaintiff. Defendant gave no explanation for her refusal to allow Austin and the Plaintiff to spend time together.
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> 34. During the first eighteen (18) months of Austin's life, he lived with Plaintiff's parents. Plaintiff would go see the child every day; however, Defendant would only see the child every three (3) or four (4) days, even though she lived next door to the Plaintiff's parents.
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> 35. Since the separation of the parties, Plaintiff's parents have asked Defendant on numerous occasions to visit with Austin. She has refused to allow Austin to visit with them in spite of the significant relationship which exists between them. . . .
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> . . . .

Defendant makes a general assertion that the trial court's findings of fact are not supported by competent evidence. However, Defendant does not specifically assign error to any of the trial court's findings of fact that relate to Defendant's conduct in raising her children and tend to support the trial court's determination that Defendant's conduct has been inconsistent with her constitutionally protected status. Thus, we conclude that the trial court's findings of fact are supported by clear and convincing evidence. We must therefore determine whether the trial

court's findings support its legal conclusion that Defendant's conduct has been inconsistent with her constitutionally protected interest in the custody of Austin.

The trial court found that Defendant has a history of being unable to maintain stable employment, that Defendant's monthly expenses are greater since she moved from Johnston County to Hoke County, and that "Defendant has no relative or anyone to assist here with the children in Hoke County." The trial court further found that Defendant uses improper language around the minor children, that Plaintiff testified that Defendant drinks around the minor children, and that Defendant has a history of traveling with the children late at night, or leaving the children with a babysitter late at night. In addition, the trial court found as fact one instance when Defendant did not have Leigh properly clothed on a cold day.

While the trial court's findings of fact demonstrate that Defendant is perhaps not the best of parents, this appears to be due in large part to Defendant's socioeconomic status. However, we agree with Defendant that her "socioeconomic status is irrelevant to a fitness determination" in a custody proceeding. *Raynor v. Odom,* 124 N.C. App. 724, 731, 478 S.E.2d 655, 659 (1996) (citing *Jolly v. Queen,* 264 N.C. 711, 713-14, 142 S.E.2d 592, 595 (1965)). While many of the trial court's findings of fact shed negative light on Defendant's ability to adequately care and provide for Austin's welfare, when viewed cumulatively, they do not support its conclusion that Defendant's conduct has been inconsistent with her

protected status as to the custody of Austin. Therefore, we conclude that the evidence of record does not constitute clear and convincing proof that Defendant's conduct has been inconsistent with her constitutionally protected right to custody of Austin. Accordingly, the trial court erred in awarding primary physical custody of Austin to Plaintiff, and the trial court's order is reversed.

In summary, we vacate the trial court's award of custody of Leigh to Plaintiff, and remand for further proceedings consistent with this opinion, and we reverse the trial court's award of primary physical custody of Austin to Plaintiff.

Reversed in part, vacated and remanded in part.

Judges GREENE and McCULLOUGH concur.

Report per Rule 30(e).