NO. COA00-1271

NORTH CAROLINA COURT OF APPEALS

Filed: 19 February 2002

MICHAEL DEAN KANUPP,
Plaintiff

v. Caldwell County
No. 96 CVD 1509

KELLIE JEAN KANUPP,
Defendant

Appeal by plaintiff from: (1) a custody order entered 15 May 2000 by Judge Nancy L. Einstein in Caldwell County District Court; and (2) child support orders entered 13 September 2000 by Judge C. Thomas Edwards in Caldwell County District Court. Heard in the Court of Appeals 4 December 2001.

Wilson, Palmer, Lackey & Rohr, P.A., by Timothy J. Rohr, for plaintiff-appellant.

Todd, Vanderbloemen, Brady & LeClair, P.A., by Rachael A. LeClair, for defendant-appellee.

CAMPBELL, Judge.

Plaintiff appeals from an order that modifies an original joint custody order and now grants primary custody of the parties' minor child to defendant based on change of circumstances. Plaintiff also appeals from child support orders requiring him to pay child support based on this modified custody order, which were entered while plaintiff's appeal of the custody order was pending.

We remand this case to the trial court to enter appropriate findings to support its order allowing the custody modification.

Plaintiff and defendant were married on 23 December 1991. One minor child, Taylor Dean Kanupp ("Taylor"), was born of this marriage on 2 September 1992. The parties later separated and are now divorced. In a consent order entered on 22 April 1997, plaintiff and defendant were awarded joint custody of Taylor on a weekly rotating basis and rotating holidays year to year. No child support was to be paid by either party. Plaintiff has since remarried. Defendant temporarily resumed a relationship with Steven Brown ("Mr. Brown"), her husband from a previous marriage, but the two claim they are now just friends.

On 23 July 1999, plaintiff filed simultaneous verified motions for ex parte immediate custody of Taylor and modification of the earlier custody order. These motions alleged that a substantial change of circumstances affecting Taylor's welfare had taken place based on plaintiff's belief that defendant was engaging in alcohol and drug abuse in Taylor's presence and placing the minor child in a dangerous and inappropriate atmosphere. Per an ex parte order entered by Judge Jonathan Jones on 23 July 1999, defendant's custodial rights to Taylor were suspended and plaintiff was granted temporary sole custody of Taylor.

On 2 September 1999, after hearing evidence at a temporary custody hearing on 6 August 1999, Judge L. Suzanne Owsley entered a temporary custody order reflecting memorandum of judgment reinstating the original custody order. However, this temporary

custody order required defendant's visitation to be supervised at all times by her grandmother, Betty Miller ("Ms. Miller"), until plaintiff's custody motion could be fully heard.

The issue of custody modification was heard before Judge Nancy L. Einstein ("Judge Einstein") on 18 April 2000. After hearing all the evidence, the trial court entered a custody order on 15 May 2000, which included the following pertinent findings of fact:

> 9. Plaintiff, Michael Kanupp . . . does not maintain health insurance coverage on himself or his family.
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> 10. The relationship between Plaintiff and his current wife is somewhat volatile in that they have separated on at least two occasions. Defendant states they have separated three times because of domestic violence. . . .
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> 11. [Plaintiff's new wife] . . . denies Plaintiff has ever assaulted her[.] . . .
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> . . .
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> 13. During their marriage, Plaintiff was convicted of Assault on a Female upon Defendant. . . . At one point during this pending Motion in the Cause, Mr. Brown was angry with Defendant and called Plaintiff volunteering to testify for Plaintiff on Defendant's bad conduct, including drug use in front of the minor child. Defendant also filed a 50B Domestic Violence Order against Mr. Brown since resuming their relationship, which was later dismissed by Defendant.
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> 14. During Plaintiff's testimony, Mr. Kanupp testified about an incident wherein [sic] Taylor was bitten by a rottweiler while in the care of Defendant. Taylor was badly scratched, bruised and required 13 stitches on his temple and chin. Defendant was with Taylor on this occasion and explained it was an accident in the back of a truck when she was breeding her female rottweiler.

> 15. Plaintiff also testified about a July 1999 incident where Taylor had a spot the size of a nickel on his head, which was swollen and oozing. Defendant explained it as a bug bite and sent cream to put on it. Plaintiff took Taylor to a doctor and it apparently was infected, but easily treatable.
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> 16. During his testimony, Plaintiff only testified about bad things Defendant had done and never testified to his relationship with Taylor. The Court finds this notable.
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> 17. Both parties have been convicted of DWI. Defendant's is more recent.
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> 18. The Court also has questions about Defendant's misuse of alcohol and drugs, and particularly the choices she makes in relationships in her life. However, it is clear to the Court that she cares very deeply for her son and has his best interests at heart, in that she describes his schoolwork, the relationship she shares with him and her hopes for his future.

Based on these findings of facts, the trial court concluded that both parties were fit and proper persons to have the care, custody, and control of Taylor; however, "[t]he best interests of the minor child would be served by placing his primary custody with the Defendant, subject to liberal visitation with the Plaintiff." Also, the court ordered defendant to obtain a substance abuse assessment and plaintiff to obtain a domestic violence assessment, with both parties fully complying with any treatment recommended. On 9 June 2000, plaintiff timely filed notice of appeal with respect to this order.

On 26 July 2000, defendant filed a motion in the cause seeking child support. Plaintiff subsequently filed a motion to dismiss defendant's child support motion, alleging the trial court lacked

subject matter jurisdiction to hear the child support issue while the child custody issue was on appeal. Plaintiff's motion to dismiss was denied on 13 September 2000 by Judge C. Thomas Edwards ("Judge Edwards"). An order was entered by Judge Edwards stating that the trial court did have "subject matter jurisdiction to enter a child support order during the pendency of the appeal of the underlying Order of Custody." Thereafter, the parties entered into a consent order that required defendant to pay child support to plaintiff in the amount of $396.00 per month. However, the parties agreed that the issue of lack of subject matter jurisdiction was specifically reserved pending the defendant's appeal of the modified custody order. Plaintiff timely filed notice of appeal with respect to these child support orders.

The dispositive issue on appeal is whether the trial court erred in modifying the parties' original custody order and awarding primary custody of Taylor to defendant. We find that the court's findings of fact do not support its conclusions of law.

In cases involving child custody:

> [A] decision of the trial court should not be upset on appeal absent a clear showing of abuse of discretion. Findings of fact by a trial court must be supported by substantial evidence. A trial court's findings of fact in a bench trial have the force of a jury verdict and are conclusive on appeal if there is evidence to support them. However, the trial court's conclusions of law are reviewable *de novo*.

Browning v. Helff, 136 N.C. App. 420, 423, 524 S.E.2d 95, 97-98 (2000) (citations omitted).

A court order for custody of a minor child may be modified or vacated if the moving party can prove that there has been a substantial change in the circumstances affecting the welfare of the child. *Evans v. Evans*, 138 N.C. App. 135, 139, 530 S.E.2d 576, 578 (2000). This change in circumstances need not have adverse affects on the child. *Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998). "[A] showing of a change in circumstances that is, or is likely to be, beneficial to the child may also warrant a change in custody." *Id.* at 620, 501 S.E.2d at 900. "Once the moving party has shown a substantial change in circumstances affecting the welfare of the minor child, the trial court must determine whether a change in custody is in the best interest of the child." *Browning*, 136 N.C. App. at 423-24, 524 S.E.2d at 98.

Plaintiff argues that the trial court erred in modifying the parties' original order without making specific findings of fact and legal conclusions that there had been a substantial change of circumstances both affecting the welfare of Taylor and supporting modification in favor of defendant. We agree.

In the present case, plaintiff had the burden of proving that a substantial change in circumstances occurred since 22 April 1997, the date the original custody order was filed, which affected the welfare of Taylor in some manner. The modified custody order indicates that the court concluded plaintiff did not meet this burden, but instead, this burden was met by defendant. However, the court's pertinent findings (listed previously) are insufficient to establish that either party proved a substantial change in

circumstances. Furthermore, these findings raise questions as to the character of both parties and do not clearly indicate that either party is more suited than the other to be awarded primary custody of Taylor based on changed circumstances. Thus, there were insufficient findings to conclude that primary custody of Taylor should now be awarded to defendant.

Additionally, several of the court's findings of fact were based on unsubstantiated testimony that plaintiff abuses his new wife and defendant misuses alcohol and drugs. Our Supreme Court has held that "the modification of a custody decree must be supported by findings of fact based on competent evidence that there has been a substantial change of circumstances affecting the welfare of the child[.]" *Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974). Evidence of speculation or conjecture regarding a detrimental change is not competent evidence and will not support a change in custody. *See Wehlau v. Witek*, 75 N.C. App. 596, 599, 331 S.E.2d 223, 225 (1985). Therefore, these findings cannot be used to conclude that there has been a substantial change of circumstances affecting Taylor's welfare because they are not based on competent evidence.

Also, even if the court's pertinent findings of fact did support a change of circumstances, there were no findings regarding what effect the changed circumstances would have on Taylor's welfare. The only findings that even mention an effect on the minor child's welfare involve the two occasions when Taylor received injuries while in defendant's care. However, these

findings actually tend to support plaintiff's claim for primary custody. Therefore, these findings, in and of themselves, simply cannot be construed as supporting the court's conclusion that Taylor's primary custody should now be placed with defendant.

In conclusion, "when the court fails to find facts so that this Court can determine that the order is adequately supported by competent evidence and the welfare of the child is subserved, then the order entered thereon must be vacated and the case remanded for detailed findings of fact." *Crosby v. Crosby*, 272 N.C. 235, 238-39, 158 S.E.2d 77, 80 (1967). Thus, the modified order is vacated and remanded so that the trial court can make detailed findings of fact on the issue of change of circumstances. The court may take additional evidence based on events occurring since the last hearing and shall then make findings relating to custody and support based on this evidence as well as that currently in the record. Additionally, the child support orders that arose out of the modified custody order must also be vacated because the trial court was "divested of jurisdiction" to enter a child support award while the modified order was pending on appeal. *See Joyner v. Joyner*, 256 N.C. 588, 591, 124 S.E.2d 724, 726 (1962).

Remanded.

Judges GREENE and McCULLOUGH concur.

Report per Rule 30(e).