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NO. COA01-407

NORTH CAROLINA COURT OF APPEALS

Filed: 5 February 2002

TYRONE LOVETT SMITH,
Plaintiff-Appellee,

v.

Forsyth County
No. 00 CVD 5072

ADRIENNE HODGE SMITH,
Defendant-Appellant.

Appeal by defendant from order entered 17 November 2000 by Judge Victoria Roemer in Forsyth County District Court. Heard in the Court of Appeals 14 January 2002.

Lennard D. Tucker for defendant-appellant.

Nancy L. Wooten for plaintiff-appellee.

BRYANT, Judge.

Tyrone Lovett Smith ("plaintiff") and Adrienne Hodge Smith ("defendant") were married on 15 August 1992 and had two children, Jazmyne Cymone Smith, born on 13 April 1994, and Lance Alexander Smith, born on 11 December 1998. The parties separated on 23 October 1999 and have lived in separate homes since that time. Defendant continues to occupy the marital home.

Plaintiff is employed at the Forsyth County Department of Social Services and works during the day. Defendant is employed at USAir and works the third shift. Pursuant to the parties' work schedule, the parties shared custody of the children under an

arrangement where plaintiff:

had the physical and residential custody of the two children each evening of the week except those two evenings when the Defendant is not working; that during the week the Plaintiff picks up the children after work at approximately 8:00 p.m. and returns them to the Defendant the following morning; that on the weekends Plaintiff has the children all day on Saturday and Sunday afternoons as well.

On 17 May 2000, plaintiff filed a complaint seeking primary residential custody on an emergency and permanent basis. Plaintiff alleged that on 15 April 2000, defendant had "discovered that Plaintiff was seeing someone and in 'retaliation' the Defendant refused to allow the children to stay with the Plaintiff as had been the practice until then." Defendant resumed their normal custody arrangement on 29 April 2000. Defendant further alleged, however, "[t]hat upon learning the 'significance' of the custodial arrangement as to the calculation of child support, the Defendant has again threatened to remove the children from Plaintiff's care." On 19 May 2000, the trial court entered an emergency custody order finding probable cause to believe the allegations in plaintiff's complaint, and awarded plaintiff primary residential custody of the minor children on an emergency basis, subject to the secondary residential custody of the defendant.

On 26 May 2000, defendant moved the trial court to dissolve the emergency custody order, disputing the allegations contained in plaintiff's complaint. On 15 November 2000, *nunc pro tunc* 27 May 2000, the trial court entered an order maintaining the *status quo*, but ordering plaintiff to pay defendant \$600.00 a month. On 17

November 2000, the trial court entered an order granting plaintiff primary physical custody and defendant secondary physical custody of the children. The trial court also ordered defendant to pay \$489.00 a month in child support. Defendant appeals.

We first consider whether the trial court abused its discretion in awarding custody of the children to plaintiff. Defendant contends that the trial court failed to consider the fact that she is the party who has taken care of the educational and medical needs of the children. Additionally, defendant asserts that awarding custody of the children to plaintiff, who shares an apartment with his girlfriend, is manifestly unsupported by reason. Defendant argues that the decision shows that the trial court failed to consider plaintiff's adulterous conduct. Additionally, defendant contends that the trial court was biased, and that the decision to award custody to plaintiff was based on the fact that plaintiff is an employee of the Forsyth County Department of Social Services.

After careful review of the record, briefs and contentions of the parties, we affirm that part of the order awarding custody to plaintiff. First, defendant has not included a copy of the transcript. "Where such evidence is not included in the record, it is presumed that the findings are supported by competent evidence, and the findings are conclusive on appeal." *Nunnery v. Baucom*, 135 N.C. App. 556, 562, 521 S.E.2d 479, 484 (1999) (quoting *In re Botsford*, 75 N.C. App. 72, 74-75, 330 S.E.2d 23, 25 (1985)). Thus, the only question for the Court is whether the trial court's

findings of fact support its conclusions of law. The trial court found as fact that both parents were fit and proper persons to provide care for the children; that the defendant's prior work schedule was "better" for the children, and defendant changed her work schedule without discussing the matter with plaintiff; and that while defendant provided for the medical and academic needs of the children, defendant also did not allow plaintiff to participate. Furthermore, the trial court's order makes it clear that it did consider defendant's contentions, namely that plaintiff was living with his girlfriend, by ordering that plaintiff not "cohabit with any person of the opposite sex to whom they are not related by blood or marriage" when he had physical custody of the children. Additionally, the trial court ordered defendant to provide for separate bedrooms for each of the children, and to acquire a "breathing machine" for Lance's use, because Lance had breathing difficulties which sometimes required the use of the machine. These findings support the trial court's award of primary physical custody to plaintiff.

We additionally note that defendant points to no evidence in the record to support her allegation that the trial court was biased in favor of plaintiff because he works for the Forsyth County Department of Social Services. The mere fact that the trial court awarded custody to plaintiff is not sufficient to support an unsubstantiated allegation. Accordingly, we find no abuse of discretion.

Defendant next contends that the trial court abused its

discretion in ordering her to pay plaintiff \$489.00 a month in child support. We agree that the trial court did err in calculating the child support obligation. The trial court ordered a joint or shared custody arrangement. Pursuant to the trial court's order, defendant has overnight physical custody of the children two nights a week; one week in each of the months of June, July, and August; during the Christmas vacation period, from December 25 until the end of the public school vacation period during even-numbered years, and from the beginning of the public school vacation period until December 25 during odd-numbered years; the Thanksgiving vacation period during odd-numbered years; and Good Friday through Easter Sunday during even-numbered years. Pursuant to this arrangement, defendant will have custody of the children for more than 123 days each year. According to Worksheet B of the Child Support Guidelines, when a parent has overnight custody of the minor child for more than 123 days, Worksheet B is the proper worksheet. However, the trial court erroneously used Worksheet A, the worksheet used where one parent has sole custody of the children. Accordingly, the determination of the amount of child support to be paid by defendant must be reversed and the matter remanded to the trial court for recalculation using the correct worksheet.

Affirmed in part; reversed and remanded in part.

Judges WYNN and THOMAS concur.

Report per Rule 30(e).