NO. COA01-584

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2002

SHERRI MOORE BROOKS,
Plaintiff,

v. Mecklenburg County
No. 99-CVD-4389 (ELL)

KELVIN RAYNARD BROOKS,
Defendant.

Appeal by plaintiff from order entered 3 January 2001 by Judge Eric L. Levinson in Mecklenburg County District Court. Heard in the Court of Appeals 18 February 2002.

A. Marshall Basinger, II, for plaintiff.

Tamela T. Wallace, for plaintiff.

Casstevens, Hanner & Gunter, by Dorian H. Gunter, for defendant.

BIGGS, Judge.

Kelvin Raynard Brooks (defendant) and Sherri Moore Brooks (plaintiff) were married on 18 April 1992. They lived together as husband and wife until 30 January 1999, when they separated. One child was born of this marriage on 29 July 1995.

Following their separation, on 19 March 1999, plaintiff filed an action seeking child support, child custody, alimony and equitable distribution. On 30 April 1999, the parties signed a consent order giving plaintiff temporary custody of the minor child and child support, and granting defendant visitation rights. On 21

May 1999, defendant filed an answer in which he counterclaimed for permanent child custody and support.

On 31 October 2000, a hearing was conducted on the parties' separate claims for permanent child custody and child support. The trial court entered an order on 3 January 2001, *nunc pro tunc* to 17 November 2000, awarding the parties joint legal custody and defendant primary physical custody of the minor child. From this order, plaintiff filed notice of appeal.

At the outset, we note that plaintiff appeals from a child custody and support order that does not address her claims for alimony or equitable distribution. Thus, this appeal is interlocutory, since it did not resolve all of the parties' claims arising out of this action. *See generally, Embler v. Embler,* 143 N.C. App. 162, 545 S.E.2d 259 (2001); *Veazey v Durham*, 231 N.C. 354, 57 S.E.2d 375 (1950). However, N.C.G.S. § 1-277 allows an appeal to be taken from an order or judgment of a superior or district court which affects a substantial right, or "'which constitutes a *final adjudication*, even when that determination disposes of only a part of the lawsuit.'" *Atassi v. Atassi,* 117 N.C. App. 506, 509, 451 S.E.2d 371, 373 (quoting *Oestreicher v. Stores,* 290 N.C. 118, 225 S.E.2d 797 (1976)) *disc. review denied* 340 N.C. 109, 456 S.E.2d 310 (1995); *see also,* N.C.G.S. § 1-277 (1999). In addition, this Court has held that a permanent child custody order is a final order. *Massey v. Massey,* 121 N.C. App. 263, 465 S.E.2d 313 (1996). Therefore, because the trial court's

order of child custody and child support is a final judgment as to those issues, it is immediately appealable.

Plaintiff first assigns as error the trial court's award of primary physical custody of the parties' minor son to defendant. Specifically, plaintiff contends that the trial court made insufficient findings of fact to support its conclusion that it is in the "best interest" that defendant be awarded custody, and that such award amounted to an abuse of discretion. We disagree.

North Carolina General Statute § 50-13.2 (1999), which governs child custody cases, reads in pertinent part:

> (a) An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, . . . as will best promote the interest and welfare of the child. . . . In making the determination, the court shall consider all relevant factors . . . and shall make findings accordingly. An order for custody must include findings of fact which support the determination of what is in the best interest of the child. Between the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child.

"A trial judge is vested with wide discretionary power in custody proceedings." *Henderson v. Henderson,* 121 N.C. App. 752, 755, 468 S.E.2d 454, 455 (1996) (citing *Green v. Green,* 54 N.C. App. 571, 573, 284 S.E.2d 171, 173 (1981)). When the trial court finds that both parents are fit and proper to have custody, but determines that it is in the best interest of the child for one parent to have custody, such determination will be upheld if it is supported by competent evidence. *Sain v. Sain, 134* N.C. App. 460, 517 S.E.2d 921 (1999); *see also, Cantrell v. Wishon,* 141 N.C. App.

340, 540 S.E.2d 804 (2000). This is true even where there is evidence supporting contrary findings. *In re Estate of Trogdon,* 330 N.C. 143, 409 S.E.2d 897 (1991); *Dixon v. Dixon,* 67 N.C. App. 73, 312 S.E.2d 669 (1984). Moreover, the trial judge is not required to find all the facts shown by the evidence, but only enough *material* facts to support the judgment. *Buckingham v. Buckingham,* 134 N.C. App. 82, 516 S.E.2d 869 (1999) (citations omitted).

In the case *sub judice,* plaintiff argues that the only "best interest" findings by the court are Findings of Fact Numbers 10, 12 and 27. We disagree.

The trial court made the following pertinent findings of fact in support of its determination that it is in the minor child's best interest that physical custody be awarded to defendant:

> 8. Prior to the parties' separation and subsequent to that time, both parties have been extremely attentive to [the minor child]'s physical and emotional needs. [The minor child] has been particularly well cared for by both parties and each has participated in all aspects of [the minor child]'s life, including his educational, religious and personal needs. . . .
>
> 9. [The minor child] has a very loving relationship with both Plaintiff and Defendant.
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> 10. Although Plaintiff has likely cared for more of [the minor child]'s medical, dental and physical needs, Defendant's slightly less involved role in these areas is mitigated by his additional, yet reasonable, work demands. The parties had agreed to own and operate a small business which caused Defendant to be out of the home during some evenings and on weekends, although Defendant sometimes took the minor child with him to his office to care

for him when necessary and to give the Plaintiff a break or other assistance.

. . . .

14. . . . Defendant maintains an appropriate household and physical environment for [the minor child]. Further, [the minor child] has many friends and playmates in the neighborhood where his father's home is located.

. . . .

16. Defendant has continued to have a close relationship with Plaintiff's father and brother, Mr. Stephen Moore. Defendant has maintained consistent contact with Mr. Moore in part so that Mr. Moore's child, [the minor child]'s first cousin, can interact with [the minor child] as much as possible, consistent with his relationship with his cousin prior to the parties' separation. Although Defendant has had less time with [the minor child] than the Plaintiff since the separation, Defendant has made sure that [the minor child] interacts with the Moore child more frequently than the Plaintiff.

17. Defendant has maintained a close relationship with the Plaintiff's family in Charlotte and also maintained extensive contact with his family outside the Charlotte area. Defendant's family is very supportive of the Defendant and very close to [the minor child].

18. Defendant is sincerely interested in continuing to foster [the minor child]'s relationships with Plaintiff and both sides of each party's family for the benefit of [the minor child].

19. Since the separation of the parties, Defendant has demonstrated that he is more willing than the Plaintiff to assure that [the minor child] has a healthy, consistent and nurturing relationship and connection with both parties' extended families.

20. Defendant has made genuine efforts to nurture the relationship with [the minor child] and the Plaintiff. He has seen to it

> that [the minor child] calls his mother on days when the child is in his care and has made sure that [the minor child] has appropriate Christmas gifts, Mother's Day gifts, etc. for his mother.
>
> 21. Defendant has demonstrated that he is more willing than the Plaintiff to assure that [the minor child] has a healthy, consistent and nurturing relationship with the other parent.
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> 22. Defendant has amply demonstrated his commitment to make sure that [the minor child] is "whole to the extent possible" given the separation of the Plaintiff and Defendant with respect to his efforts to assist in [the minor child]'s relationship with his mother, the Plaintiff, and the extended families of both parties.
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> . . . .
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> 27. Defendant has not exposed [the minor child] to dating partners since the separation. . . . Plaintiff has exposed [the minor child] to significant contact with her dating partner . . . .
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> . . . .
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> 29. Defendant's current employment affords him some flexibility with respect to his parenting responsibilities for [the minor child]. Defendant can sometimes work out of his home as he is a computer programmer. Defendant does not work on weekends and does not travel except on occasion for continuing education classes.

We conclude that these findings are supported by competent evidence in the record and are, therefore, binding on appeal. Further, we hold that these findings support the trial court's conclusion that it is in the best interest of the child to award custody to the defendant.

Moreover, we reject plaintiff's contention that the trial court did not properly consider that the child resided with her

since separation, or that she was the primary caregiver. We agree with plaintiff that the fact that the child has resided with her since the parties' separation, as well as their respective child care roles, are factors to be considered, like all other factors, when deciding what is in the best interest of the child. *Green v. Green,* 54 N.C. App. 571, 284 S.E.2d 171 (1981); *see also, Evans v. Evans,* 138 N.C. App. 135, 530 S.E.2d 576 (2000). However, we conclude that the trial court properly considered these factors in its findings. Moreover, the law is clear that where the court's findings are supported by competent evidence, as we have concluded they are in this case, even the existence of conflicting evidence, that might support contrary findings or an award of custody to plaintiff, is not a basis to overturn the trial court's decision on appeal. *Raynor v. Odom,* 124 N.C. App. 724, 478 S.E.2d 655 (1996).

Finally, plaintiff argues that the trial court's consideration of the child's exposure to plaintiff's dating partner was inappropriate. Our Court has held that the dating relationship of one of the parties alone is insufficient to determine custody; rather, it is a factor to be considered with all other factors. *Green,* 54 N.C. App. at 574, 284 S.E.2d at 174. Based on the above, we conclude that the court did not abuse its discretion in its award of primary physical custody to defendant; accordingly, we overrule each of plaintiff's assignments pertaining to that determination.

II.

Plaintiff argues next that the trial court erred in denying

her motion for a new trial and her motion to stay execution of the order. We disagree.

We note first that plaintiff, in her remaining assignment, violates N.C.R. App. P. 28(b)(5) which reads, "[a]ssignments of error not set in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." We will, however, exercise our discretion pursuant to N.C.R. App. P. 2 and review the merit of this assignment.

While plaintiff sets forth five grounds for a new trial pursuant to N.C.R. Civ. P. 59(a) in her motion for a new trial, she specifically contends that, pursuant to Rule 59(a)(7), the trial court's order was "erroneous, inadequate and/or insufficient in fact and in law to support the conclusion that calls for the change of custody placement and lifetime living arrangement of this minor child."

It is well settled that this Court's review of a trial judge's discretionary Rule 59 ruling "is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum and Cogdell v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). Thus, "'an appellate court should not disturb a *discretionary* Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice.'" *Anderson v. Hollifield*, 345 N.C. 480, 483, 480 S.E.2d 661, 663 (1997) (quoting *Campbell v. Pitt County Memorial Hosp.*, 321 N.C. 260, 265, 362 S.E.2d 273, 275

(1987)).

Based on our review of the record, we conclude that the trial court's order is supported by competent evidence and, thus, did not amount to a manifest abuse of discretion or a substantial miscarriage of justice. Moreover, plaintiff offers no support for her assertion that the trial court erred in denying her motion to stay execution of the order, and we find none. Accordingly, this assignment of error is overruled.

The order of the trial court is

Affirmed.

Chief Judge EAGLES and MCCULLOUGH concur.

Report per Rule 30(e).