NO. COA01-59

NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2002

LISA NELSON HOLCOMB,
Plaintiff,

v.

Wake County
No. 99 CVD 2171

RICHARD OWEN HOLCOMB,
Defendant.

Appeal by defendant from judgment entered 4 August 2000 by Judge Fred M. Morelock in Wake County District Court. Heard in the Court of Appeals 5 November 2001.

Gailor & Associates, P.L.L.C., by Carole S. Gailor and Kimberly A. Wallis, for plaintiff.

Woodruff & Associates, by Carolyn J. Woodruff, for defendant.

BIGGS, Judge.

Defendant appeals from judgment awarding plaintiff custody of their four minor children. For the reasons herein, we affirm the trial court.

Richard Owen Holcomb (defendant) and Lisa Nelson Holcomb (plaintiff) were married on 8 June 1984, and lived together as husband and wife until 15 February 1998 when they separated. Four children were born of this marriage and all of the children were

minors at all times relevant to this action.

While married, plaintiff, defendant and their minor children were active members of the Walnut Street Church of Christ. However, on 15 February 1998, when plaintiff learned of defendant's affair with a former employee and fellow church member, the couple separated and plaintiff and the children began attending a different church in Fuqua-Varina; defendant attended a church in Cary. Plaintiff remained in the marital residence, while defendant rented an apartment before moving into a rental home.

Despite efforts to reconcile, defendant and plaintiff were unable to do so. On 25 February 1999, plaintiff filed for post-separation support, permanent alimony, custody, child support, equitable distribution and attorney fees. On 24 March 1999, the trial court ordered defendant and plaintiff to mediate the issues of child custody and/or visitation; however, they were unable to reach an agreement. On 18 May 1999, the trial court ordered the issues of child custody and/or visitation set for trial. On 28 May 1999, defendant and plaintiff divorced. On 6, 7, 8, 9, 14 and 15 December 1999, a hearing was held on the issue of custody.

On 4 August 2000, the trial court entered judgment for permanent custody granting primary physical custody of the minor children to plaintiff. Defendant gave written notice of appeal on 1 September 2000.

North Carolina Gen. Stat. § 50-13.2 (1999) provides in pertinent part,

> (a) An order for custody of a minor child . . . 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, 754, 468 S.E.2d 454, 455 (1996) (citations omitted). "The welfare of the child is the paramount consideration . . . in exercising this discretion." *Dean v. Dean*, 32 N.C. App. 482, 483, 232 S.E.2d 470, 472 (1977) (quoting *Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1994)). Where there is competent evidence to support a judge's findings of fact, conclusions of law supported by such findings will not be disturbed on appeal. *Green v. Green,* 54 N.C. App. 571, 284 S.E.2d 171 (1981)*; see also, In re Estate of Trogden*, 330 N.C. 143, 409 S.E.2d. 897 (1991).

I.

Defendant first contends that the trial court erred in permitting questioning and testimony concerning the religious beliefs and practices of the parents. We disagree.

We note, at the outset, that defendant has failed to preserve objection to the questioning and testimony concerning the religious beliefs and practices of the parents in violation of Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure. We will,

however, exercise our discretion under Rule 2 of the North Carolina Rules of Appellate Procedure and review the merits of this assignment.

In awarding custody, trial courts are permitted to consider an array of factors in order to determine what is in the best interest of the child. *Phelps v. Phelps,* 337 N.C. 344, 446 S.E.2d 17 (1994). The court must select "an environment which will best promote the full development of [the child's] physical, mental, moral and spiritual" development. *Dean,* 32 N.C. App. at 484, 232 S.E.2d at 472 (quoting *Blackley*, 285 N.C. at 362, 204 S.E.2d at 681). Thus, the factors considered by the court may include the constitutionally protected choices or activities of the parents. *Phelps,* 337 N.C. at 353, 446 S.E.2d at 22. The Court in *Phelps* stated that "[a] parent . . . has a fundamental constitutional right to religious freedom under the First Amendment, yet judges may consider the spiritual welfare of a child, as evidenced by the attendance of church or participation in religious activities, in reaching their decision on custody." *Id.* at 353, 446 S.E.2d at 22; see also, *Dean*, 32 N.C. App. at 483-84, 232 S.E.2d at 471-72 (spiritual welfare is a factor that may be considered by the court).

In the case *sub judice,* defendant challenges the following findings of the trial court relevant to its inquiry into religion:

> . . . .
>
> 17. Following defendant's public confession, the plaintiff found it necessary to respond to questions raised by the older children about the substance of the defendant's confession.

> Plaintiff tried to answer the children's questions in an age-appropriate manner consistent with her religious beliefs and those of the children. While the defendant has accused the plaintiff and the members of the church which she currently attends, the Fuquay-Varina Church of Christ, of participating in alienating the children by pointing out biblical passages, quoting scripture to the children, or praying for him all of which the defendant perceive[d] as condemnatory of him, the [c]ourt finds that after the separation the defendant has attempted to distance himself from some of the beliefs and principles of the Church he embraced prior to the separation. The [c]ourt finds that neither the plaintiff, nor members of the church she attends, by the exercise of their religious beliefs and principles have attempted to or in fact have alienated any of the children from the defendant.
>
> . . . .
>
> 32. Both parties are members of the Church of Christ although neither party continues to worship at the church attended by the family prior to the separation. The mother and children attend the Church of Christ in Fuquay Varina. The defendant use[] to attend service at the Church of Christ in Fuquay Varina but did not become a member and attends elsewhere. The parties' exercise of their religious beliefs, while having had an impact on the children during the marriage and after the separation, is not a factor in the court's determination of the appropriate custodial arrangement. The court has no preference for either parties' choice or manner of exercising his or her religious beliefs. The [c]ourt finds that there is no causal relationship between the religious practices of either party and any actual or probable harm to any of the children.

This Court has held that "'a limited inquiry into the religious practices of the parties is permissible if such practices may adversely affect the physical or mental health or safety of the child, and if the inquiry is limited to the impact such practices

have upon the child.'" *In re Huff*, 140 N.C. App. 288, 295, 536 S.E.2d 838, 843 (2000) (quoting *Petersen v. Rogers*, 111 N.C. App. 712, 719, 433 S.E.2d 770, 775, *rev'd on other grounds*, 337 N.C. 397, 445 S.E.2d 901 (1994)), *disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001).

We conclude that the trial court's inquiry into defendant's religion in the case *sub judice*, was not so extreme as to abridge his religious freedom and was tailored to assess its impact on the children's spiritual welfare.

Moreover, there is substantial evidence unrelated to the religion of the parents to support the trial court's conclusion that the best interests of the minor children require that plaintiff be awarded the primary care and custody of them. Thus, if there was error, we deem it harmless.

Accordingly, this assignment of error is overruled.

II.

Defendant next contends that the trial court committed reversible error by purporting to grant both joint custody and sole custody in the same order. We disagree.

North Carolina Gen. Stat. § 50-13.2(b) provides, in pertinent part:

> (b) An order for custody of a minor child may grant joint custody to the parents, exclusive custody to one person, . . ., or grant custody to two or more persons, ... Any order for custody shall include such terms, including visitation, as will best promote the interest and welfare of the child. . . . Absent an order of the court to the contrary, each parent shall have equal access to the records of the minor child involving the health,

> education, and welfare of the child.

In the case *sub judice,* the trial court ordered the following:

> 1. The plaintiff and defendant shall share joint legal custody of the minor children . . . .
>
> 2. The plaintiff shall have primary physical custody of the minor children, who will have their residence with her subject to defendant's visitation. . . .

In addition, the trial court specifically provided in paragraph 18 of its decree that while "[e]ach party will have day to day decision[] making authority with regard to routine matters" when the children are with the respective party, where the parties are unable to agree on education, medical, dental, school activities, sports and counseling, "plaintiff will have the right to make the final decision."

We find this order to be clear, unambiguous and consistent with the court's findings. Further, we conclude that defendant's reliance on *Patterson v. Taylor*, 140 N.C. App. 91, 95, 535 S.E.2d 374, 377 (2000), is misplaced. The Court in *Patterson* stated, that "because the issue before us arises out of a voluntary separation agreement, our holding is limited to the interpretation of the term ["joint legal custody"] in such an agreement." Here, no such agreement is at issue.

Therefore, defendant's assignment of error is overruled.

III.

In defendant's next assignment of error he argues that the trial court's findings of fact are not supported by competent evidence, that the conclusions of law are not supported by the

findings and that the order is not supported by the court's conclusions. We find no merit to this argument.

The trial court made 42 specific Findings of Fact. Upon our review of the record, we conclude that there is evidence in the record to support the trial court's findings. Moreover, we are bound by these findings even if there is evidence in the record to support a contrary finding. *Adams v. Tessener*, 354 N.C. 57, 550 S.E.2d 499 (2001). In addition, we hold that these findings form a valid basis for the court's conclusions of law and its judgment.

Great deference must be given to the trial court to determine which parent is in the best position to promote the best interest of the children. *See generally, Elrod v. Elrod,* 125 N.C. App. 407, 481 S.E.2d 108 (1997); *see* N.C.G.S. § 50-32.2 (1999). We will not upset the court's order absent an abuse of discretion which we hold has not occurred in this case.

Accordingly, defendant's assignment is overruled and we affirm the trial court.

Affirmed.

Chief Judge EAGLES and Judge MARTIN concur.

Report per Rule 30(e).