

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA01-873

NORTH CAROLINA COURT OF APPEALS

Filed: 4 June 2002

ANTHONY ALFRED BURCH,  
Plaintiff

v.

Gaston County  
No. 97CVD2108

ELIZABETH COOPER BURCH  
(now NICOLETTI),  
Defendant

Appeal by defendant from order entered 16 April 2001 by Judge Angela G. Hoyle in Gaston County District Court. Heard in the Court of Appeals 28 May 2002.

*Gray, Layton, Kersh, Solomon, Sigmon, Furr, & Smith, P.A., by William E. Moore, Jr.; and Hodnett Law, P.A., by Michael K. Hodnett, for plaintiff appellee.*

*James R. Carpenter for defendant appellant.*

McCULLOUGH, Judge.

This appeal arises out of a custody dispute between plaintiff Anthony Alfred Burch and defendant Elizabeth Cooper Burch. The parties were once married, but are now divorced and are the parents of two minor children: Kayla Marie Burch, born 30 April 1990 and Joseph Anthony Burch, born 20 May 1997. By consent order entered 11 July 1997, the parties agreed that defendant would have primary physical custody of the minor children. Primary physical custody

of the minor children continued with defendant, despite plaintiff's 16 April 1999 motion in the cause seeking a modification of the July 1997 custody order. After plaintiff failed to return the minor children to the custody of defendant following weekend visitation on 16 through 18 February 2001, both plaintiff and defendant, through counsel, brought this matter to the attention of the district court. Plaintiff asked the court to hear an oral motion to modify custody and grant him temporary custody of the minor children until a full hearing could be heard. Defendant requested that the court hear her motion by which she sought a "pick-up order" for the minor children.

The court heard evidence concerning the parties' oral motions on or about 19 February 2001. After speaking with the parties' oldest child in chambers, and hearing the testimony of the parties and arguments of counsel, the court entered an order granting plaintiff "temporary" custody of the minor children pending psychological evaluation of the parties and their children. The order also specifically provided that the matter be set for mediation for 30 April 2001, with the court retaining jurisdiction of the matter "pending further Orders of the Court." Defendant noticed appeal.

While neither party raises the issue, we note that the custody order from which defendant appeals is temporary in nature, and therefore, interlocutory. See *Dunlap v. Dunlap*, 81 N.C. App. 675, 676, 344 S.E.2d 806, 807 (1986), *disc. review denied*, 318 N.C. 505, 349 S.E.2d 859 (1986) (noting that "[a]n interlocutory order is one

that does not determine the issues, but directs some further proceeding preliminary to a final decree." ). In *Berkman v. Berkman*, this Court stated, "A temporary child custody order is interlocutory and 'does not affect any substantial right . . . which cannot be protected by timely appeal from the trial court's ultimate disposition of the entire controversy on the merits.'" 106 N.C. App. 701, 702, 417 S.E.2d 831, 832 (1992) (quoting *Dunlap*, 81 N.C. App. at 676, 344 S.E.2d at 807 (1986)); but see *Brewer v. Brewer*, 139 N.C. App. 222, 228, 533 S.E.2d 541, 546 (2000) (noting that "[t]he trial court's mere designation of an order as 'temporary' is not sufficient to make the order interlocutory and nonappealable." ).

Here, the district court's order is truly temporary in nature. The court's order directs that "temporary" custody of the parties' minor children be transferred to plaintiff, pending psychological evaluation of the parties and the minor children to better determine the issue of where the children should be permanently placed. The order also provided that mediation would be scheduled to commence just two weeks after entry of the order. In accordance with the Court's holding in *Berkman*, we, therefore, dismiss defendant's appeal as interlocutory.

Dismissed.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

Report per Rule 30(e).