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NO. COA02-1609

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2003

LEE EDWARD COX,
Plaintiff,

v.

Randolph County
No. 00 CVD 1991

DEANA GAIL COX,
Defendant.

Appeal by Defendant from order entered 2 April 2002 by Judge Michael A. Sabiston, District Court, Randolph County. Heard in the Court of Appeals 12 November 2003.

Bell and Browne, P.A., by Charles T. Browne, for Defendant.

Robert T. Newman, Sr. for Plaintiff.

WYNN, Judge.

This appeal presents the issue of whether the trial court erred by granting visitation rights to Plaintiff Lee Edward Cox who married Defendant Deana Gail Cox over a year after the birth of her minor child. We remand for additional findings.

The record shows that the parties married on 23 April 1998. Although the parties engaged in a sexual relationship prior to marriage, the child was conceived during a period of time in which the parties were not intimately involved. Indeed, the record indicates that Deana Cox informed Lee Cox that the child was not

his before the child was born. Nevertheless, Lee Cox's name was entered on the birth certificate as the minor child's father. On 18 September 2000, the parties separated, and Lee Cox brought an action seeking joint custody and visitation of the minor child. In her answer and counterclaim, Deana Cox denied Lee Cox was the biological father, alleged that Third Party Defendant Bobby Eugene Hughes was the biological father, and sought a cessation of all visitation between Lee Cox and the minor child. Thereafter, a genetic test confirmed Bobby Hughes as the biological father of the minor child. From the trial court's determination that Lee Cox was a fit and proper person to have visitation with the minor child and order of visitation between Lee Cox and the minor child subject to conditions, Deana Cox appeals.

On appeal, Deana Cox contends the trial court erred in awarding visitation to Lee Cox because she has a constitutionally protected right to control her minor child's associations. Although we agree that natural parents have this constitutionally protected right, we conclude the trial court rendered insufficient findings of fact and conclusions of law upon which we can adequately review its order.

Natural parents have a constitutionally protected interest in the companionship, custody, care, and control of their children. *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997). This interest is "a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she

will act in the best interest of the child." *Id.*

Therefore, the parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child. If a natural parent's conduct has not been inconsistent with his or her constitutionally protected status, the application of the 'best interest of the child' standard in a custody dispute with a nonparent would offend the Due Process Clause. However, conduct inconsistent with the parent's protected status, which need not rise to the statutory level warranting termination of parental rights, would result in application of the 'best interest of the child' test without offending the Due Process Clause. Unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy. Other types of conduct, which must be viewed on a case-by-case basis, can also rise to this level so as to be inconsistent with the protected status of natural parents. Where such conduct is properly found by the trier of fact, based on evidence in the record, custody should be determined by the 'best interest of the child' test mandated by statute.

Id. Thus, while in general natural parents have a constitutionally protected interest in the companionship, custody, care, and control of their children, such right may be altered "if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child." *Id.*; see also *Ellison v. Ramos*, 130 N.C. App. 389, 502 S.E.2d 891 (1998) (holding that a third party who has a relationship in the nature of parent and child will suffice to support a finding of standing).

In this case, Lee Cox makes no claim to entitlement to the presumptions of a natural parent. Rather, he argues that the trial

court properly applied the "best interest" standard because the record shows evidence that would have supported findings showing that Deana Cox acted inconsistent with her paramount status as a natural parent. However, the Order is devoid of any findings of fact or conclusions of law relating to the fitness of Deana Cox as a parent¹ or indicating Deana Cox acted inconsistently with her protected status as the natural parent. Without such findings, we cannot adequately review the Order below and must remand for further findings of fact.

Vacated.

Judges TIMMONS-GOODSON and ELMORE concur.

Report per Rule 30(e).

¹ After the trial court entered its Order on 2 April 2002, Deana Cox moved pursuant to Rule 60 for a correction of the Order contending "the order does not contain findings of fact or conclusions of law necessary to grant primary custody of the minor child, ..., to the defendant as the court intended." However, prior to filing this motion, Deana Cox filed her Notice of Appeal to this Court on 12 July 2002, divesting the trial court of jurisdiction in this matter. See *Wiggins v. Bunch*, 280 N.C. 106, 184 S.E.2d 879 (1971) (indicating that when an appeal is taken the trial court is divested of jurisdiction, except to aid in certifying a correct record).