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NO. COA03-323

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2003

ISAAC G. FORESTER,

Plaintiff,

v.

Wilkes County
No. 01 CVD 1248

TAMARA B. FORESTER,

Defendant.

Appeal by plaintiff from order entered 7 January 2003 by Judge David V. Byrd in Wilkes County District Court. Heard in the Court of Appeals 19 November 2003.

McElwee Firm, P.L.L.C., by William H. McElwee, IV, for plaintiff-appellant.

Respess & Jud, by W. Wallace Respess, Jr., and Marshall Hurley, P.L.L.C., by Marshall Hurley, for defendant-appellee.

ELMORE, Judge.

Isaac G. Forester (plaintiff) appeals an order dismissing his motion seeking modification of his monthly child support obligations to his former wife, Tamara B. Forester (defendant). For the reasons discussed herein, we affirm.

Plaintiff and defendant were married on 24 June 1979, separated on 13 May 2000, and divorced on 2 October 2001. Two children were born of their marriage, Andrew Isaac Forester (Drew)

on 4 April 1985, and Benjamin Stewart Forester (Ben) on 26 November 1987. On or about 3 July 2001, plaintiff filed a complaint seeking absolute divorce, joint legal and physical custody of the children, and calculation of the parties' respective child support obligations. Defendant answered and counterclaimed, seeking primary custody of the children and an award of child support consistent with the presumptive North Carolina child support guidelines.

On 5 February 2002, plaintiff and defendant entered into a consent judgment, which provided in pertinent part as follows:

1. The Plaintiff and the Defendant shall continue to have joint legal and physical custody of the minor children of this marriage.

. . . .

3. The Plaintiff shall pay to the Defendant the sum of \$700.00 per month commencing on February 1, 2002, and on each and every month thereafter for so long as the minor children reside primarily with the Defendant. . . .

. . . .

On 30 September 2002, plaintiff filed a motion seeking modification of the consent judgment's child support provisions.¹ In his motion, plaintiff asserted that because the children were "actually residing in the home of defendant" at the time the consent judgment was entered, his child support obligation was calculated using North Carolina child support worksheet A.

¹Because plaintiff did not file this motion using the form promulgated by the Administrative Office of the Courts, the trial court required him to re-file his motion using the AOC form, which plaintiff did on 22 November 2002.

Plaintiff contended that in the several months prior to his filing the motion, the children had been spending "a more substantial amount of time with the Plaintiff or with third-parties," with the result being that the children were by then spending less than half of their nights at defendant's home. Plaintiff argued this constituted a change of circumstances justifying recalculation of his support obligation, using North Carolina child support worksheet "B" rather than worksheet "A".²

On 12 December 2002, the trial court heard arguments on plaintiff's motion, at which both parties were represented by counsel. Plaintiff testified that when he entered the consent order in February 2002, he "was living about eight miles out of town . . . and the boys were spending very few nights with [him]." Plaintiff testified that he thereafter bought a house in town, and that as a result "[t]he children have started spending more time with [him]." Plaintiff then testified that he kept a log of where each child spent every night from April 2002 through November 2002. Reading from the log, plaintiff testified that from April 2002 until he filed his motion in September 2002, Drew spent 30 percent of the nights with plaintiff, thirty-one percent with defendant, and thirty-nine percent with third parties. During the same period, plaintiff testified that Ben spent thirty-three percent of the nights with plaintiff, forty-five percent with defendant, and

²According to the North Carolina child support guidelines promulgated by the Administrative Office of the Courts, worksheet "B" should be used to calculate child support when one or more of the children spend more than 122 overnights per year with each parent.

twenty-two percent with third parties. Plaintiff testified that if these numbers were extrapolated over the course of a year, they would result in the children spending over 123 nights with plaintiff.

Following plaintiff's presentation of evidence, the trial court granted defendant's motion to dismiss. On 3 January 2003, the trial court entered an order, with findings of fact, in pertinent part, as follows:

3. The parties entered into a Consent Judgment . . . which was filed on the 5th day of February, 2002.
. . . .
5. The Consent Order provides that the Plaintiff shall pay to the Defendant the sum of \$700.00 per month on each and every month for so long as the minor children reside primarily with the Defendant.
. . . .
7. The Court specifically finds that while the minor children have spent some additional overnights, they continue to reside primarily with the Defendant.
8. The Court is bound by the plain language of the [consent order] which states that so long as the minor children reside primarily with the Defendant, the Plaintiff shall pay the sum of \$700.00 per month. The minor children continue to reside primarily with the Defendant.

Based upon these findings of fact, the trial court concluded:

1. That there has not been a substantial change within the plain reading of the [consent order].
2. That the Plaintiffs' [sic] Motion should be dismissed.

From the trial court's order dismissing his motion to modify his child support obligation, plaintiff appeals.

Plaintiff first asserts the trial court failed to apply the standard for modifying child support orders set forth in N.C. Gen. Stat. § 50-13.7 and instead ruled that modification of plaintiff's child support obligations was precluded solely by the consent order's language. This assignment of error is without merit.

North Carolina General Statute § 50-13.7(a) (2001) provides that a court order awarding child support "may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party" "When the parties have entered into a consent order providing for the custody and support of their children, any modification of that order must be based upon a showing of a *substantial* change in circumstances *affecting the welfare of the child.*" *Woncik v. Woncik*, 82 N.C. App. 244, 247, 346 S.E.2d 277, 279 (1986) (emphasis added). The party moving for modification of such an order bears the burden of showing such a change of circumstances. *Id.*

In the instant case, plaintiff has presented evidence which, at best, tends to show that the children are spending more nights in his home than they were when the consent order establishing his child support obligations was entered. This evidence does not, however, support a contention that defendant's home is no longer either child's primary residence. Plaintiff's own evidence indicates that each child continues to spend a greater percentage of nights at defendant's home than at his. The only evidence regarding the frequency of overnight visits with third parties at the time the consent order was entered was plaintiff's testimony on

cross-examination that the children spent the night with friends then, and continue to do so. While it may be true that both children are spending fewer nights at defendant's home than they were when the consent order was entered, we conclude that plaintiff has failed to carry his burden of showing that this constitutes a substantial change in circumstances affecting the welfare of either child.

Our review of the transcript reveals that, at the close of plaintiff's evidence, defendant's trial counsel moved to dismiss plaintiff's motion on the following grounds:

. . . I would move to dismiss the motion for [sic] that there hasn't been a showing of a change of circumstances [W]hile there may have been some increases in the amount of time that [plaintiff] is able to spend with his sons, I do not believe that it rises to the level of a substantial change of circumstances affecting the best interests of the minor children, which I submit to you is the standard.

. . . .

In granting defendant's motion to dismiss from the bench, the trial court stated as follows:

I think I get the gist of [plaintiff's counsel's] argument, that the parties, by their bargaining, do not remove from the Court the authority to do whatever is in the best interest of these children, and obviously that's correct. . . . I think the Court is bound by the language in the Order as to whether there's been a substantial and material change of circumstances justifying a modification of the [consent order].

. . . .

Moreover, in the order dismissing plaintiff's motion, the trial court concluded as a matter of law "[t]hat there has not been a substantial change within the plain reading of the [consent

order].” We conclude from the foregoing that the trial court applied the proper standard in dismissing plaintiff’s motion to modify his child support obligations on the grounds that plaintiff failed to carry his burden of showing a substantial change in circumstances affecting the children’s welfare. *Woncik*, 82 N.C. App. at 247, 346 S.E.2d at 279. The trial court therefore correctly declined to order that plaintiff’s child support obligations be recalculated using worksheet “B” of the child support guidelines. *McGee v. McGee*, 118 N.C. App. 19, 26, 453 S.E.2d 531, 536, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 189 (1995) (modification of a child support order involves a two step process, in which the court must first determine that a substantial change of circumstances has occurred before applying the child support guidelines to calculate the proper amount of support).

Because we hold that the trial court properly dismissed plaintiff’s motion to modify the provisions of the consent order concerning his child support obligations, we need not address plaintiff’s remaining assignments of error.

Affirmed.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).