NO. COA05-1290

NORTH CAROLINA COURT OF APPEALS

Filed: 01 August 2006

BERNARD McGEE,Jr.

v. Rutherford County
No. 00 CVD 686

PAMELA McGEE (SHARPE)

Appeal by defendant from judgment entered 15 April 2005 by Judge Mark E. Powell in Rutherford County District Court. Heard in the Court of Appeals 11 May 2006.

No brief for plaintiff-appellee.

Dameron, Burgin & Parker, by Phillip T. Jackson, and Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C., by David B. Goldstein, pro hac vice, for defendant-appellant.

STEELMAN, Judge.

The parties were married on 14 February 1990, separated on 22 April 2000, and divorced on 24 August 2004. There are three children of the marriage, Bethany, Kerrie and Benjamin. The children, respectively, were 15, 13 and 10 at the time of this appeal. The parties began attending Word of Faith Fellowship Church ("Word of Faith", "WOFF", or "the church") in 1993, along with their girls. Benjamin also attended the church after his birth. Word of Faith practices a form of prayer called "blasting"

prayer. In an order involving the parties entered 8 December 2000, Judge C. Randy Pool described blasting prayer as follows:

> This Court finds that blasting is a high pitched, shrill, piercing, non-verbal scream. The purpose of blasting was described by witnesses for both the Plaintiff and Defendant as for use in driving out devils. Children are said by WOFF authority figures, staff and school personnel to be "given to the control of devils" which necessitates blasting.
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> Blasting has been and is used on children from birth and will occur from within 1 foot of a child. Frequently, more than one person engages in blasting at one time. Children are blasted repeatedly for hours. Children and adults are sometimes physically restrained while being subjected to blasting.

Plaintiff filed a complaint seeking custody of the three children and equitable distribution on 5 July 2000, claiming that defendant was not a "fit and proper person to have legal custody of" the children. Defendant filed an answer and counterclaim 13 September 2000, requesting custody of the children, and alleging plaintiff was unfit to have legal custody of the children. This matter was initially heard before Judge Pool in Rutherford County District Court, and he rendered his order on 8 December 2000. Judge Pool found, *inter alia*, that certain practices of Word of Faith, including blasting prayer, had "an adverse effect on the health, safety and welfare of children[,]" and "pose a potential harm . . . ." The trial court granted joint legal custody of the children to the parties, and established a custody schedule. Judge Pool further ordered: "Neither parent shall allow the children to be permitted to engage in blasting (or loud prayer), or the gesturing identified on the video tape exhibit, by either parent."

By motion to show cause filed 7 October 2004, plaintiff alleged that defendant was in violation of multiple provisions of Judge Pool's order, including the ban on blasting prayer; moved for defendant to be adjudged in contempt of court; and requested that he be awarded custody of the children. By motion filed 10 December 2004, defendant moved the trial court to modify the 8 December 2000 order to allow that the children "may participate fully in their religious practices and religious worship." Defendant based her motion on substantial change of circumstances since the entry of Judge Pool's order.

Judge Powell entered judgment in the matter on 15 April 2005. The parties reached a voluntary agreement with respect to many custody issues. Judge Powell found that defendant had complied with Rutherford County Department of Social Services' requests for the children to undergo physical and psychological examinations, and that the September 2001 written evaluation reports by the Department of Social Services' recommended doctors, Dr. Ann Crummie and Dr. Bob Crummie, "stated that no harm was found and that the children did not show any unusual pathology." Following these reports, defendant began permitting the children to participate in blasting prayer. The children continued to participate in blasting prayer until plaintiff complained to Department of Social Services in January of 2003 about these practices.

Department of Social Services conducted an investigation that was closed on 19 December 2003 with no finding of abuse, neglect or dependency. Department of Social Services workers, and Drs. Ann

and Bob Crummie, testified that "they had observed no severe depression, anxiety, withdrawal, or aggressive behavior on the part of the children; that the children were polite, well-mannered, cooperative, and open with them." Judge Powell was personally impressed by the "demeanor, poise and manners" of Bethany and Kerrie, and noted that Benjamin "appears to be a very pleasant and well-mannered young man." Judge Powell further found that the children had consistently expressed their wishes to be allowed to participate in blasting prayer.

Judge Powell determined, however, that he was bound by the prior order entered by Judge Pool, and therefore declined to consider any change of circumstances other than the age and maturity of the children in deciding whether to permit them to engage in blasting prayer. Based on this criteria, Judge Powell determined that the two girls had reached sufficient age and maturity to decide for themselves whether to engage in blasting prayer, but determined that Benjamin had not. Judge Powell ruled that the "order of Judge Pool concerning Benjamin is unchanged in its restrictions." From this judgment defendant appeals.

In defendant's first argument, she contends that the trial court erred in failing to consider all evidence of changed circumstances in its judgment denying modification of Judge Pool's order with respect to Benjamin. We agree.

Judge Powell found as fact that "[a]lthough the prior order of December, 2000 was a temporary order, because it had been followed for such a long period of time [with no further hearings on the

matter] it has become a non-temporary order." This finding is not challenged on appeal. Because Judge Powell found Judge Pool's order to be a final order, he concluded: "The court believes that the only issue to be decided in regard to these religious practices is whether the minor children have reached an age of sufficient maturity to make such a decision for themselves." However:

> The entry of an Order in a custody matter does not finally determine the rights of parties as to the custody, care and control of a child, and when a substantial change of condition affecting the child's welfare is properly established, the Court may modify prior custody decrees. However, the modification of a custody decree must be supported by findings of fact based on competent evidence that there has been a substantial change of circumstances affecting the welfare of the child, and the party moving for such modification assumes the burden of showing such change of circumstances.

Blackley v. Blackley, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974). "Changed conditions will always justify inquiry by the courts in the interest and welfare of the children, and decrees may be entered as often as the facts justify.'" *In re Bowen*, 7 N.C. App. 236, 241, 172 S.E.2d 62, 65 (1970). When hearing a motion alleging a substantial change of circumstances warranting modification of a custody order,

> courts must consider and weigh all evidence of changed circumstances which affect or will affect the best interests of the child, both changed circumstances which will have salutary effects upon the child and those which will have adverse effects upon the child. In appropriate cases, either may support a modification of custody on the ground of a change in circumstances.

Pulliam v. Smith, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998).

> ". . . the welfare of the child at the time the contest comes on for hearing is the controlling consideration. . . . It may be well to observe . . . that the law is realistic and takes cognizance of the ever changing conditions of fortune and society. While a decree making a judicial award of the custody of a child determines the present rights of the parties to the contest, it is not permanent in its nature, and may be modified by the court in the future as subsequent events and the welfare of the child may require. . . ."

Shepherd v. Shepherd, 273 N.C. 71, 74, 159 S.E.2d 357, 360 (1968) (citation omitted).

In the instant case, it is clear that the trial court did not consider all evidence of changed circumstances when determining whether to modify the provisions of the custody order. The trial court erroneously believed it was limited to consideration of whether the minor children had achieved sufficient age and maturity to make their own religious decisions. Though Judge Powell found that the older girls were of sufficient age and maturity to make the choice to engage in blasting prayer, concerning Benjamin he found: "The court is not persuaded that Benjamin has reached [sufficient maturity to make his own religious decisions], although he appears to be a very pleasant and well-mannered young man." For this reason, and this reason alone, the trial court declined to modify the custody order as it pertained to Benjamin.

Judge Powell made numerous findings of fact, including that Department of Social Services had initiated an investigation of the minor children in December of 2000; that Department of Social Services had recommended physical and psychological evaluations of

the children, and that defendant had complied with these requests; that the children obtained psychological counseling pursuant to these evaluations; that the counselors, Drs. Robert and Ann Crummie, found "no harm was found and that the children did not show any unusual pathology"; that Department of Social Services closed its file on the children with no findings of abuse, neglect or dependency in December of 2001; that following the close of the Department of Social Services' file, defendant resumed allowing the children to participate in blasting prayer, which continued until approximately January of 2005; that Department of Social Services initiated a second investigation in February of 2003 upon learning that the children were participating in blasting prayer, and that the file was again closed with no finding of abuse, neglect or dependency in December of 2003; that all the children testified that they enjoyed blasting prayer, and wished to be allowed to participate in it; that Drs. Robert and Ann Crummie and two Department of Social Services workers testified that they had observed "no severe depression, anxiety, withdrawal, or aggressive behavior on the part of the children; that the children were polite, well-mannered, cooperative, and open with them"; and that Judge Powell observed the children to be "responsive, open and credible in their testimony."

By the terms of Judge Powell's order, he did not consider any of this evidence in making his determination whether there existed a substantial change in circumstances warranting modification of Benjamin's custody order. The trial court was, upon petition of

defendant, required to consider all evidence of changed circumstances prior to ruling on modification of the custody restrictions. *Pulliam*, 348 N.C. at 619, 501 S.E.2d at 899. Because the trial court failed to consider all relevant evidence of changed circumstances, we must reverse the judgment as it pertains to Benjamin's right to participate in blasting prayer. We remand with instruction to the trial court to consider all relevant evidence of changed circumstances in making its ruling on this issue.

We further note a puzzling inconsistency in Judge Powell's order. He asserts that he is bound by Judge Pool's determination that "blasting prayer" had "an adverse effect on the health, safety and welfare" of the children. However, because of their ages, he allowed the two older children to participate in this detrimental practice. The welfare of the child is the "polar star" for the trial court's decisions in such cases. The "'expressed wish of a child of discretion is . . . never controlling upon the court, since the court must yield in all cases to what it considers to be for the child's best interests, regardless of the child's personal preference.'" *Bost v. Van Nortwick*, 117 N.C. App. 1, 22, 449 S.E.2d 911, 923 (1994) (citations omitted). If the practice of "blasting prayer" is in fact detrimental to the children, then the trial court should not have allowed the minor children to participate in this activity, regardless of their age or consent.

In light of our holding above, we do not address defendant's second argument on appeal. *See State v. Lambert*, 146 N.C. App. 360, 368, 553 S.E.2d 71, 77 (2001). Further, defendant's arguments on

appeal were limited to the trial court's determination that Benjamin may not participate in blasting prayer. Defendant has not argued on appeal that the judgment was in any other manner erroneous. Therefore, defendant has abandoned her right to appeal any additional issues related to the judgment, and the judgment is otherwise affirmed. *Strader v. Sunstates Corp.*, 129 N.C. App. 562, 567-68, 500 S.E.2d 752, 755 (1998).

Because respondent has not argued her other assignments of error in her brief, they are deemed abandoned. N.C. R. App. P. Rule 28(b)(6) (2005).

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judges McGEE and ELMORE concur.

Report per Rule 30(e).