NO. COA05-1322

NORTH CAROLINA COURT OF APPEALS

Filed: 5 September 2006

JIM NGUYEN,
Plaintiff

v. Mecklenburg County
No. 05-CVD-966

VIEN LE,
Defendant

Appeal by Plaintiff from order entered 16 June 2005 by Judge Rebecca T. Tin in Mecklenburg County District Court. Heard in the Court of Appeals 16 May 2006.

Daniel J. Clifton for Plaintiff-Appellant.

Troy & Watson, P.A., by Christian R. Troy, for Defendant-Appellee.

STEPHENS, Judge.

Plaintiff father ("Plaintiff") appeals from the trial court's child custody order entered 16 June 2005 awarding Defendant mother ("Defendant") primary custody of the parties' minor child and visitation rights to Plaintiff. Plaintiff contends that the trial court's order was not supported by sufficient findings of fact. We agree. We therefore vacate the trial court's order and remand the case for further findings of fact.

Plaintiff and Defendant met on or about 15 December 2000 and started dating about 18 January 2003. Defendant became pregnant by

Plaintiff in 2003 and gave birth to their son on 18 February 2004. The three lived together in Charlotte for the first four or five months of the child's life. In June 2004, Defendant returned with the child to her native Hawaii for a month-long visit. While in Hawaii, Defendant decided she wanted to permanently relocate, with her son, from North Carolina to Hawaii. When Defendant returned to Charlotte, she lived with Plaintiff and their son in a rental house they shared with Plaintiff's cousin and his girlfriend. This living arrangement continued until September 2004, when Defendant, without her son, returned to Hawaii to continue her education. Defendant testified that she left her son with Plaintiff because she "wanted to go back to finish up school. . . . . I was looking to better my future and my son's future. If I was to get my four-year degree, I would have a better job, better pay, . . . I wouldn't have to[] . . . live on minimum wage." Additionally, Defendant testified that before she returned to Hawaii, she and Plaintiff had agreed to share custody of the child; "six months here, six months there, and [Plaintiff] had agreed to that."

On 13 January 2005, Plaintiff filed a complaint requesting temporary emergency custody, permanent custody, and child support. On 18 January 2005, the trial court, reasoning that "the minor child would suffer immediate irreparable injury if Defendant were allowed to remove him from the jurisdiction of the North Carolina courts[,]" awarded Plaintiff exclusive emergency custody of the child. On 15 March 2005, following a hearing, a temporary child custody order was entered which gave the parties joint custody of

the child for alternating weeks. The permanent custody hearing was held before the Honorable Rebecca T. Tin in Mecklenburg County District Court on 19 May 2005. At that hearing, the evidence tended to show the following:

Plaintiff is a twenty-two-year-old resident of Charlotte, North Carolina. He dropped out of high school in tenth grade and, at the time of the hearing, was pursuing his graduate equivalent degree (GED). Plaintiff works in the service department of "Beck Import" and earns nine dollars an hour, working five days a week for ten hours a day and every other Saturday. Plaintiff testified that he lives in his parents' home, along with seven other individuals. He does not have a separate bed for his son. Consequently, when his son stays with him, they share a bed.

Plaintiff testified that he provides financial support for his son and spends time with him. When he is not working, Plaintiff plays with his son, feeds him, bathes him, puts him to bed, and takes him shopping. However, the evidence also showed that on two occasions when Plaintiff had weekend custody of his son, he instead visited friends in Raleigh or spent the weekend at the beach. During the period from September 2004 until February 2005, Plaintiff, with the help of his family, cared for his son while Defendant was in Hawaii. Defendant did not provide any financial support to Plaintiff during this time. While Plaintiff is at work, his parents watch his son in exchange for a weekly fee of one hundred dollars. After Defendant returned to Charlotte in February 2005, she and Plaintiff agreed to share the cost of child care.

Plaintiff testified, however, that Defendant paid her share on only two occasions.

Plaintiff maintains health insurance for his son for which he pays forty-five dollars a week. He has also established a savings account for the child's education and retirement, although it is unclear how much money is in the account, who controls the account, or how much of the money Plaintiff actually contributed. Further, while Plaintiff has taken on financial and certain child care responsibilities, there are certain aspects of the child's life about which Plaintiff's knowledge is lacking. For example, Plaintiff acknowledged that he does not know the name of the child's pediatrician, his child's shoe size, or what size clothes he wears.

Plaintiff's mother, Lan Vu, testified that Plaintiff is a capable parent and does take care of his son. However, she further stated that Defendant only plays with the child and does not support the child or take care of him.

Defendant is a twenty-year-old resident of Hawaii. She graduated from high school when she was sixteen years old and attended two years of college at the University of North Carolina at Charlotte as a pre-med biology major. Defendant testified that she cannot continue her education in North Carolina because of financial constraints. However, as a native Hawaiian, she has a scholarship at the University of Hawaii at Manoa.

Defendant testified that she does not have a strong support system in North Carolina. She has no transportation, her only

family member in the state does not have room for her to live, and Plaintiff's family "kicked" her out of their house. However, she testified that "if I . . . moved back [to Hawaii], . . . I would have the support that I needed to go back to school[.]" Defendant stated that because her parents own their own business and her mother works from home, her parents would be able to provide child care while she is in class or at work.

While living in North Carolina, Defendant worked at an Eckerd Pharmacy in Charlotte as the head pharmacist technician, earning eight dollars an hour and working forty hours a week. This work led to additional opportunities and, at the time of the hearing, she had three job offers in Hawaii, pending her return.

Defendant has taken responsibility for her son's medical affairs. She knows all of the doctors who care for her son and has taken him to all but one of his medical appointments.

On 29 April 2005, the child was admitted to the hospital for four days for treatment of pneumonia. Defendant stayed with her son the entire time he was admitted. She knew all of the child's discharge instructions including the name of all the medications, the frequency of doses, and the date of all follow-up appointments. Plaintiff, on the other hand, went home and had a beer before going to the hospital to see his son. Once he arrived, he remained with his son for only a short period of time. When his son left the hospital, Plaintiff did not know the discharge instructions or any information regarding further treatment.

After the hearing, on 16 June 2005, the trial court entered an order awarding custody of the minor child and child support to Defendant with visitation rights to Plaintiff. Plaintiff appeals.

By his only assignment of error, Plaintiff argues that in its child custody order, the trial court failed to include sufficient findings of fact to support its conclusions of law. For the following reasons, we agree.

When evaluating a child custody order, this Court must determine "'whether a trial court's findings of fact are supported by substantial evidence, . . . [and] if the trial court's factual findings support its conclusions of law.'" *Martin v. Martin*, 167 N.C. App. 365, 367, 605 S.E.2d 203, 204 (2004)(quoting *Shipman v. Shipman*, 357 N.C. 471, 475, 586 S.E.2d 250, 254 (2003)(citations omitted)). North Carolina law provides that "[a]n order for custody of a minor child . . . shall award . . . custody . . . to such person . . . as will best promote the interest and welfare of the child[] [and] . . . must include findings of fact which support the determination of what is in the best interest of the child." N.C. Gen. Stat. § 50-13.2(a) (2005).

> The requirement for appropriate findings of fact and conclusions of law is not designed to encourage ritualistic recitations by the trial court. The requirement is designed to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system. Without such findings and conclusions, it cannot be determined whether or not the judge correctly found facts or applied the law thereto.

Montgomery v. Montgomery, 32 N.C. App. 154, 158, 231 S.E.2d 26, 29 (1977)(citing *Jones v. Murdock*, 20 N.C. App. 746, 203 S.E.2d 102 (1974)). These findings cannot "consist of mere conclusory statements that the party being awarded custody is a fit and proper person to have custody and that it will be in the best interest of the child to award custody to that person." *Dixon v. Dixon*, 67 N.C. App. 73, 77, 312 S.E.2d 669, 672 (1984)(citations omitted). The findings may include any factors related to the evidence, any issue relevant to the best interests and welfare of the child, or any competing parties' physical, mental, or financial fitness to have custody. *Steele v. Steele*, 36 N.C. App. 601, 244 S.E.2d 466 (1978). However, the findings "'bearing on the party's fitness to have care, custody, and control of the child and the findings as to the best interests of the child must resolve all questions raised by the evidence pertaining thereto.'" *Dixon*, 67 N.C. App. at 78, 312 S.E.2d at 672 (quoting *In re Kowalzek*, 37 N.C. App. 364, 370, 246 S.E.2d 45, 48, *appeal dismissed and disc. review denied*, 295 N.C. 734, 248 S.E.2d 863 (1978)). If the trial court does not make sufficient findings of fact to support its determination, then the order is fatally defective, *Dixon*, 67 N.C. App. at 76-77, 312 S.E.2d at 672, and must be vacated and remanded for further detailed findings of fact. *Green v. Green*, 54 N.C. App. 571, 575-76, 284 S.E.2d 171, 174-75 (1981).

In this case, the trial court made the following pertinent findings of fact:

> 5. The minor child has resided in Charlotte, North Carolina since birth except for a period

> of approximately 4 weeks in the summer of 2004, when the mother and the minor child resided in Hawaii.
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> . . . .
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> 7. The minor child was ill and hospitalized on or about April 29, 2005 through on or about May 2, 2005. Mother stayed with the child at the hospital during those days, while father visited with the sick child only once during that time.
> 8. Mother is best able to care for the needs of the minor child, and mother is a fit and proper person to have primary care, custody and control of the minor child, subject to visitation with father.

Based on these findings of fact, the trial court concluded that "[i]t is in the best interest and welfare of the minor child that his primary custody be placed with mother, subject to visitation with father[.]"

From our review of the transcript and record, it is clear that the trial court resolved the ultimate issues presented by the evidence, but failed to support its resolution with sufficient factual determinations in the custody order. When a trial court sits without a jury, it "must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal." *Coble v. Coble*, 300 N.C. 708, 712-13, 268 S.E.2d 185, 189 (1980) (citations omitted). This requirement is not an elevation of form over substance or "the result of an obeisance to mere technicality." *Id.* at 714, 268 S.E.2d at 190. Instead, it is necessary to enable effective appellate review. *Id.*

Because the trial court failed to include adequate findings, it is impossible for this Court to determine the factors on which the court relied to reach its decision. Although the evidence presented during the hearing, including Plaintiff's and Defendant's living situation, professional and educational history and goals, and their respective abilities to care for the child's daily and medical needs, is sufficient to support the trial court's final determination, the trial court must make the specific findings of fact that tell the parties and this Court why it reached that determination. Therefore, the order of the trial court is

VACATED AND REMANDED.

Judges WYNN and GEER concur.

Report per Rule 30(e).