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NO. COA05-166

NORTH CAROLINA COURT OF APPEALS

Filed: 06 June 2006

JAMES FARRELL,

Plaintiff,

v.

Cumberland County  
No. 01 CVD 6195

ANGELA FARRELL,

Defendant.

and

OLIVIA FARRELL,

Intervenor.

Appeal by defendant from order entered 26 August 2004 by Judge Robert J. Stiehl, III in Cumberland County District Court. Heard in the Court of Appeals 28 November 2005.

*Angela Wyett, pro se appellant.*

ELMORE, Judge.

Angela Wyett, formerly Angela Farrell (defendant), appeals from an order granting primary custody of defendant's two minor children to Olivia Farrell and secondary custody with visitation rights to defendant. For the reasons that follow, we reverse and remand this case for additional findings of fact.

The order of the trial court recited the following factual history of the case: Defendant is a resident of Maryland. James

Farrell (plaintiff) and Olivia Farrell (intervenor) are residents of Cumberland County, North Carolina. Plaintiff and defendant were married on 13 November 1998, separated on 10 July 2001, and were divorced in January of 2004. Defendant married Donald Wyatt on 14 March 2004. Plaintiff and defendant have two children, Michael Farrell, born in 1999, and Lynette Farrell, born in 2001. Intervenor is the paternal grandmother of Michael and Lynette Farrell.

The minor children have lived with intervenor and her companion, Steve Woodward, since December of 2002. Intervenor is retired from Sprint and is available to care for Michael and Lynette full time. Defendant moved to Maryland in December 2002 and lived with Mr. Wyatt's family. Subsequently, defendant moved into a two bedroom apartment with Mr. Wyatt and their minor child, Matthew. Defendant has had problems with the cleanliness of her home, but since moving to the two bedroom apartment has improved the conditions of her living environment. The minor children are fearful of Mr. Wyatt, their stepfather.

Plaintiff filed an action seeking immediate temporary custody of the children on or about 14 August 2001. The district court granted temporary custody to plaintiff and ordered that Mr. Wyatt be restrained from being in the presence of the children. On 27 March 2002 plaintiff and defendant were awarded joint custody, with primary custody to plaintiff and secondary custody to defendant with visitation. Defendant filed a motion for contempt and custody modification on 4 November 2002. The district court found

plaintiff in civil contempt for refusing to allow defendant visitation on two separate occasions in accordance with the previous order of the court. In its order entered 13 February 2003, *nunc pro tunc* 19 December 2002, the court directed that defendant's weekend visitation resume and continue as scheduled.

Intervenor filed a motion for modification of custody, and the trial court held a hearing on 23 and 24 March 2003. In its order, the court found that defendant admitted to anger control problems with her children and that defendant had inappropriately disciplined the children. The court also found that the children have flourished in the care of intervenor. Plaintiff lives in a trailer that has no power and is not in a condition suitable for children. Plaintiff was convicted of statutory rape in 2002 and has been permitted supervised visitation with the children.

Based upon its findings, the court concluded that defendant and intervenor are both fit and proper persons to have custody of the children. The court concluded that it is in the best interests of the children for intervenor to have primary custody, defendant to have secondary custody with visitation, and plaintiff to have supervised visitation as agreed to by intervenor.

Defendant contends on appeal that the trial court violated her constitutional right to custody of her natural children in failing to enter adequate findings of fact. We agree. "[N]atural parents have a constitutionally protected interest in the companionship, custody, care, and control of their children." *Price v. Howard*, 346 N.C. 68, 72, 484 S.E.2d 528, 530 (1997) (citing *Peterson v.*

*Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994)). However, a parent may lose this due process right if (1) the parent is found to be unfit; or (2) the parent's conduct is inconsistent with her constitutionally protected status. *David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005). "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." *Price*, 346 N.C. at 79, 484 S.E.2d at 534-35.

The trial court must find by clear and convincing evidence that the natural parent has acted in a way inconsistent with her constitutionally protected status in order to grant custody to a non-parent. *David N.*, 359 N.C. at 307, 608 S.E.2d at 753-54; *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001). Our Supreme Court, in *David N.*, reversed and remanded the trial court's order finding that the natural father's conduct amounted to abandonment, neglect, abuse or other acts inconsistent with his constitutionally protected status. The Court held that the trial court erred in failing to apply the clear and convincing evidence standard set forth in the *Adams* opinion. *David N.*, 359 N.C. at 307, 608 S.E.2d at 754.

In *Bennett v. Hawks*, 170 N.C. App. 426, 613 S.E.2d 40 (2005), this Court reversed and remanded the order of the trial court for failure to apply the clear and convincing evidence standard in determining that the mother's conduct was inconsistent with her

constitutionally protected status. The order of the trial court must state expressly that the court has found clear and convincing evidence because the general standard of proof in a child custody action is a preponderance of the evidence. *Id.* at 429, 613 S.E.2d at 42.

Here, the trial court did not recite what standard of proof it applied to the evidence of defendant's conduct which could be found to be inconsistent with her constitutionally protected status. The court referenced inappropriate discipline and the fact that Mr. Wyett observed that defendant "abandons the opportunity for [] contact" with the children. But the court did not find that, although defendant is a fit and proper person to have legal custody of the children, defendant acted inconsistently with her constitutionally recognized status. The trial court's failure to find by clear and convincing evidence that defendant acted in a way inconsistent with her status as a natural parent requires a reversal of its order. On remand, the court should enter findings in compliance with the clear and convincing evidence standard set forth by our Supreme Court in *Adams* and reaffirmed in *David N.*

Reversed and Remanded.

Chief Judge MARTIN and Judge McGEE concur.

Report per Rule 30(e).