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NO. COA05-209

NORTH CAROLINA COURT OF APPEALS

Filed: 4 April 2006

DAVID L. LaBRIE,  
Plaintiff-Appellee,

v.

Iredell County  
No. 03 CVD 02282

PATRICIA ANN McGLONE,  
Defendant-Appellant.

Appeal by defendant from order dated 2 September 2004 by Judge Wayne L. Michael in District Court, Iredell County. Heard in the Court of Appeals 28 November 2005.

*No brief filed by plaintiff-appellee.*

*Judy Dalton for defendant-appellant.*

McGEE, Judge.

David L. LaBrie (plaintiff) and Patricia Ann McGlone (defendant) (collectively, the parties) are the parents of a minor child (the child) born 30 December 1992. The parties were never married but lived together for approximately nineteen years. The parties and the child moved to Iredell County from Dover, New Hampshire, in April 2002.

Plaintiff obtained an emergency ex parte custody order awarding him temporary custody of the child in September 2003. Pursuant to a hearing held 26 September 2003, a temporary custody order (temporary custody order) was entered, granting the parties

joint temporary custody of the child, with defendant having primary physical custody. The temporary custody order also ordered the following: (1) the parties were to adhere to the detailed schedule of custody and visitation set forth in the temporary custody order; (2) plaintiff was to obtain a substance abuse assessment and follow through with any recommended treatment; (3) both parties were to attend anger management classes; and (4) a guardian ad litem was appointed to represent the child.

The temporary custody order was subsequently modified by a consent order entered 5 February 2004. Under the consent order, the parties maintained joint legal custody of the child, but primary physical custody changed to plaintiff. The consent order set forth a detailed schedule of visitation between defendant and the child. The consent order also instructed defendant to convey one-half interest in the former family residence to plaintiff, at which time plaintiff would dismiss pending legal actions against defendant. Defendant was also instructed not to remove any items from the residence. After entry of the consent order, both parties filed motions for contempt, alleging violations of provisions of the consent order not pertaining to custody. Plaintiff also requested modification of child custody and child support. A hearing was held on both parties' motions on 24 August 2004.

At the time of the hearing, the child was eleven years old. The trial court interviewed the child in chambers with the consent of both parties. The trial court heard testimony from both parties, the child's counselor, plaintiff's adult daughter, and

defendant's sister. The trial court dismissed both parties' motions for contempt. The trial court made the following findings of fact relevant to the modification of custody:

13. Since the entry of [the] Consent Order, the Plaintiff has maintained primary custody of the minor child and has provided a good and suitable home for him. The Plaintiff and [the child] have a very close relationship.

14. The Plaintiff has expressed a desire to move back to Dover, New Hampshire, with [the child], where [the child] has lived most of his life. The Plaintiff believes there would be more economic opportunities for him in that area, and members of both parties' families live in that area including [the child's] maternal grandparents, and [defendant's] sisters, and numerous relatives on [plaintiff's] side of the family.

15. With the consent of the parties, the Court spoke with [the child], who is eleven years old, in chambers with the parties' attorneys present. [The child] appeared to the Court to be a mature and intelligent boy who stated a strong desire to live primarily with his father and to move with his father to New Hampshire should his father desire to move there. It is also clear to the Court from talking with [the child] and from evidence presented that the Defendant and various members of her family make derogatory remarks about the Plaintiff to [the child] which puts [the child] in the uncomfortable position of having to defend his father to them.

16. There is virtually no communication between the Plaintiff and the Defendant as they have not been able to resolve the hostile feeling they obviously have for each other arising out of their separation. It appears to the Court that the hostile feelings between the parties, and particularly the hostility felt by the Defendant towards the Plaintiff has rendered the current joint custody agreement unworkable out of consideration of [the child's] best interests. The Court finds that, therefore, since the entry of the Consent Order there has occurred a substantial

change of circumstances justifying a modification of said custody by placing [the child's] sole custody and control with the Plaintiff out of [the child's] best interests.

Based on these findings of fact, the trial court concluded, *inter alia*, that plaintiff should have sole custody of the child, subject to reasonable visitation privileges by defendant. Specifically, the trial court ordered that, in the event plaintiff relocated to New Hampshire, defendant would have monthly visitation, a three-week visitation in the summer, and Christmas vacation with the child. Defendant appeals. On appeal, defendant brings forth two assignments of error. Defendant's remaining assignments of error not argued in her brief are deemed abandoned. N.C.R. App. P. 28(b)(6).

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Defendant first argues there was insufficient evidence to support the trial court's finding of a substantial change of circumstances warranting modification of custody. We disagree.

It is well established that a trial court may order a modification of an existing child custody order only if it is determined "(1) that there has been a substantial change in circumstances affecting the welfare of the child; and (2) a change in custody is in the best interest of the child." *Evans v. Evans*, 138 N.C. App. 135, 139, 530 S.E.2d 576, 578-79 (2000) (internal citations omitted). In reviewing a trial court's order modifying child custody, an appellate court "must examine the trial court's findings of fact to determine whether they are supported by substantial evidence. Substantial evidence is such relevant

evidence as a reasonable mind might accept as adequate to support a conclusion." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (internal citations and quotations omitted). "It is a long-standing rule that the trial court is vested with broad discretion in cases involving child custody." *Pulliam v. Smith*, 348 N.C. 616, 625, 501 S.E.2d 898, 903 (1998).

This discretion is based upon the trial court's opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges. Accordingly, should we conclude that there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, even if record evidence might sustain findings to the contrary.

*Shipman*, 357 N.C. at 474-75, 586 S.E.2d at 253-54 (internal citations and quotations omitted).

In the present case, plaintiff filed a motion requesting modification of the custody arrangement set forth in the consent order. Therefore, plaintiff had the burden of proving that a substantial change in circumstances had occurred since 5 February 2004 and that the changed circumstances had affected the welfare of the child. In plaintiff's motion for modification, plaintiff alleged several changed circumstances: (1) defendant's "erratic" exercise of visitation privileges; (2) defendant's "harassing and uncooperative attitude"; (3) defendant's "constant and numerous comments of a derogatory nature regarding the plaintiff"; and (4) plaintiff's intention to relocate to New Hampshire.

From the language of its order, the trial court seemed to find

the substantial change in circumstances to be a lack of communication stemming from hostility between the parties, particularly on the part of defendant. In finding number sixteen, the trial court discussed at length the parties' lack of communication and their hostility, finding that "there is virtually no communication" between the parties and that "the hostile feelings between the parties, and particularly the hostility felt by the Defendant towards the Plaintiff has rendered the current joint custody agreement unworkable." Finding sixteen concluded: "The Court finds that, therefore, since the entry of the Consent Order there has occurred a substantial change of circumstances justifying a modification of said custody by placing [the child's] sole custody and control with the Plaintiff out of [the child's] best interests."

A review of the record shows plenary evidence to support the trial court's finding of a substantial change of circumstances. Plaintiff testified he would not answer defendant's phone calls because "[he didn't] need to be screamed at and yelled at or anything else." As a result of the parties' lack of communication, the child spoke directly with defendant to arrange visitation. Plaintiff testified defendant's exercise of her evening visitation privilege was "erratic" because defendant "never had her [work] schedule" and "didn't know which day she wanted [the child]."

Defendant testified that she tried for two months to arrange a weeknight visit with the child, but plaintiff would not take defendant's phone calls to arrange a visit. Defendant also

testified that she missed several weekend visitations because plaintiff would not take her phone calls. Defendant testified that, during visitation exchanges, plaintiff would give her "the finger" and would "mouth[] gestures" to her. Plaintiff would also curse at defendant saying "F--- you, you piece of sh--" and would swerve his vehicle toward defendant. Defendant testified that plaintiff swerved toward her vehicle while plaintiff had the child in the vehicle with him.

Defendant's sister admitted to leaving a message on plaintiff's cell phone in which she referred to plaintiff as an "ass hole." Defendant's sister also testified that defendant's mother made derogatory remarks about plaintiff in the presence of the child.

When questioned about a change in the child's relationship with defendant since the February 2004 consent order, the child's counselor testified that since September 2003 the child's relationship with defendant had improved. The counselor explained that he "[didn't] see any negative effect on [the child] any longer concerning those visits except for the occasion[al] what [the child] describes as fight[s] that [the parties] have[.]" The trial court asked the counselor if he was "aware of whether the situation . . . concerning telephone contact with the other parent [was] causing any anxiety or concerns" for the child. The counselor replied:

It is. We touched on it for the first time at our last session, and I wasn't clear what [the child's] tension and anxiety was about. He couldn't articulate it really well, but it was

clear to me that he was uncomfortable taking phone calls at times from his Mom. . . .

From this evidence, the trial court determined there was a change in circumstances sufficient to justify modification of custody. Further, the trial court found that the child was "put[] . . . in the uncomfortable position of having to defend his father" when defendant and her family members made derogatory statements about plaintiff. This finding of fact of an effect on the child's welfare, not assigned as error by defendant, is binding on appeal. See, e.g., *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (holding that a finding is binding on appeal where no exception is taken to the finding). This finding, as well as testimony by the child's counselor that the child was "uncomfortable" taking phone calls from defendant and experienced "tension and anxiety," support the determination that the substantial change of circumstances affected the welfare of the child. With this determination, the trial court was empowered to modify the prior custody order if such modification was in the best interest of the child. See *Evans*, 138 N.C. App. at 139, 530 S.E.2d at 578-79.

Defendant next argues the trial court abused its discretion in awarding plaintiff sole custody of the child. The trial court is given broad discretion in determining the custodial setting that will best promote the interest and welfare of minor children. *In re Peal*, 305 N.C. 640, 645, 290 S.E.2d 664, 667 (1982). Since the trial court had the opportunity to personally observe the parties, hear the witnesses, and determine credibility, the trial court's



decision should not be reversed absent a showing of an abuse of discretion. *See id.*

Defendant argues that the trial court erred in disregarding "a substantial portion" of defendant's testimony regarding defendant's wishes and her observation of the child. However, defendant cites no persuasive authority to support her contention. Moreover, it is well established that "it is within the trial court's discretion to determine the weight and credibility that should be given to all evidence that is presented during [a] trial." *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994). The evidence presented during the hearing included testimony by the child's counselor that the child was "very connected" to plaintiff. In the counselor's opinion, the child was mature enough to express himself with regard to his desires and wishes about his living arrangements. During the trial court's in camera interview with the child, the child expressed a "strong" desire to live primarily with plaintiff. In making a custody determination, a trial court may properly consider the desire of a child of "suitable age and discretion." *In re Peal*, 305 N.C. at 645, 290 S.E.2d 667; *see, e.g., In re Custody of Stancil*, 10 N.C. App. 545, 548, 179 S.E.2d 844, 846 (1971) (holding that "[a] child's preference as to who shall have his custody is not controlling; however, the trial judge should consider the wishes of a ten-year-old child in making his determination."). In light of this evidence, we find no abuse of discretion in the trial court's decision that awarding custody to plaintiff was in the best interest of the child.

Affirmed.

Chief Judge MARTIN and Judge ELMORE concur.

Report per Rule 30(e).