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NO. COA05-683

NORTH CAROLINA COURT OF APPEALS

Filed: 6 June 2006

MILTON BAKER,
Plaintiff

v.

Mecklenburg County
No. 03 CVD 17497

HALLIE J. DUNLAP,
Defendant

Appeal by defendant from orders entered 29 July 2004 and 15 February 2005 by Judge Regan A. Miller in Mecklenburg County District Court. Heard in the Court of Appeals 22 March 2006.

No brief filed for plaintiff-appellee.

Q. Shanté Martin for defendant-appellant.

CALABRIA, Judge.

Hallie J. Dunlap ("defendant") appeals from an order of the trial court, awarding primary physical custody of Q.J.B. ("the minor child") to Milton B. Baker ("plaintiff"). Defendant also appeals from an order denying post-trial motions for a new trial and relief from the custody order. We affirm.

Defendant is the biological mother and plaintiff is the biological father of the minor child, who was born on 15 September 2000. Defendant and plaintiff never married; rather, they lived

together with the minor child from March 2002 to May 2003, at which point the relationship between defendant and plaintiff deteriorated. Defendant then left plaintiff's residence and lived with a friend for a short time before moving to her present home in Charlotte, North Carolina.

After the separation, plaintiff voluntarily paid child support and defendant voluntarily granted visitation to plaintiff. Based on the agreed upon visitation schedule, plaintiff could see the minor child on Tuesday and Thursday evenings at the residence of defendant's friend as well as have overnight visits with the minor child at plaintiff's residence every other weekend. During visitations between plaintiff and the minor child at the residence of defendant's friend, defendant purposefully removed herself from the residence. However, defendant testified that plaintiff would wait at the residence until she returned in order to argue with her. Plaintiff testified that he remained at the residence until defendant returned because he did not feel comfortable leaving the minor child with defendant's friend.

Subsequently, the relationship between defendant and plaintiff further deteriorated, and defendant ultimately refused to allow visitations at her friend's residence during the week. Defendant testified that plaintiff then stated he would provide no further financial support in the absence of a child support order. At that point, defendant filed for child support, and a trial court ordered plaintiff to pay child support.

On 24 October 2003, defendant filed a domestic violence complaint against plaintiff. Defendant alleged that plaintiff had been following her and calling her at home in a manner that caused her substantial emotional distress. The trial court then issued a protective order that prohibited plaintiff from contacting defendant, granted defendant temporary custody of the minor child, and limited plaintiff's visitation with the minor child to alternating weekends and Thursday evenings. Plaintiff was to pick up the minor child from daycare on Friday afternoons for weekend visitations and return the child to defendant at 8 a.m. on Monday mornings.

After plaintiff began exercising his visitation privileges, defendant withdrew the minor child from daycare and changed exchange sites twice to locations closer to her home. In order to accommodate a change in plaintiff's work schedule, plaintiff asked defendant to meet him at 7:30 a.m. rather than 8 a.m. for exchange of the minor child. While defendant initially complied with the request, she soon refused to meet at the earlier time. On several occasions, plaintiff elicited the assistance of law enforcement officers to accompany him when he returned the minor child to defendant's residence in order to avoid being accused of violating the protective order. Plaintiff subsequently reached an agreement with the minor child's previous daycare facility to allow him to leave the minor child there for pick-up by defendant to avoid going to her residence.

On 10 October 2003, plaintiff filed a complaint seeking primary custody of the minor child. At a hearing in Mecklenburg County District Court, Judge Regan A. Miller ("Judge Miller") concluded: plaintiff "is a fit and proper person to have primary physical custody" and "it is in the best interest and welfare of the child that father be awarded custody." Accordingly, on 29 July 2004, the trial court ordered primary physical custody of the minor child to plaintiff and granted defendant visitation. Defendant then filed post-trial motions including a motion to stay the 29 July 2004 order, a motion for relief from the order, and a motion for a new trial. District Court Judge Nathaniel Proctor heard the post-trial motions and denied the motions on 29 November 2004, concluding he "lack[ed] authority to sit as [the] Court of Appeals and weigh the validity of Judge Miller's Order. Defendant must either file a timely appeal or make an appropriate motion before Judge Miller himself." Defendant then made additional motions for a new trial and relief from the order, which were heard and denied by Judge Miller on 15 February 2005. From the 29 July 2004 custody order and the 15 February 2005 post-trial motions order, defendant appeals.

Defendant initially argues, inter alia, her assignments of error numbers 3 and 4, which state:

3. The District Court's findings of fact are not supported by substantial evidence.
4. The District Court's findings of fact do not support the conclusions of law.

This Court has held that assignments of error such as numbers 3 and 4 are insufficient to challenge the findings of fact and

conclusions of law. Specifically, we have held, "Where findings of fact are challenged on appeal, each contested finding of fact must be separately assigned as error, and the failure to do so results in a waiver of the right to challenge the sufficiency of the evidence to support the finding." *Okwara v. Dillard Dept. Stores, Inc.*, 136 N.C. App. 587, 591, 525 S.E.2d 481, 484 (2000) (citations omitted). This is because "[a] single assignment [of error] generally challenging the sufficiency of the evidence to support numerous findings of fact . . . is broadside and ineffective" under N.C. R. App. P. 10 (2006). *Wade v. Wade*, 72 N.C. App. 372, 375-76, 325 S.E.2d 260, 266 (1985) (citations omitted). Similarly, an appellant must "except and assign error separately to each . . . conclusion that he or she contends is not supported by the evidence[.]" *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 684, 340 S.E.2d 755, 759-60 (1986). Because defendant has failed to properly assign error to any findings or conclusions, the findings and conclusions are conclusively established. *Static Control Components, Inc. v. Vogler*, 152 N.C. App. 599, 603, 568 S.E.2d 305, 308 (2002). Accordingly, we need not address the related assignments of error.

Defendant additionally argues the following assignments of error:

1. The District Court committed an error of law in ruling that it is in the best interest of the minor child that the plaintiff have primary physical custody.
2. The District Court abused its discretion in ruling that it is in the best interest of the minor child that the plaintiff have primary physical custody.

5. The District Court committed an error of law in its application of the best interest of the child standard.

This Court has held, assignments of error that are broad, vague, and unspecific do not comply with N.C. R. App. P. 10(c)(1) (2006). In re Appeal of Lane Co., 153 N.C. App. 119, 123, 571 S.E.2d 224, 226-27 (2002). Under this standard, assignments of error numbers 1 and 5 are insufficient since they fail to identify the issues briefed on appeal. See May v. Down East Homes of Beulaville, Inc., __ N.C. App. __, __, 623 S.E.2d 345, 346 (2006) (holding that assignments of error stating a trial court's rulings were "contrary to the caselaw of this jurisdiction" were insufficient to preserve issues for appellate review). See also Wetchin v. Ocean Side Corp., 167 N.C. App. 756, 759, 606 S.E.2d 407, 409 (2005) ("Such an assignment of error is designed to allow counsel to argue anything and everything they desire in their brief on appeal. 'This assignment--like a hoopskirt--covers everything and touches nothing'" (citations omitted)). Accordingly, we do not address assignments of error 1 and 5.

However, defendant's assignment of error 2 is sufficiently specific to raise the issue that the trial court abused its discretion by concluding it was in the best interests of the minor child that primary physical custody be granted to plaintiff. Specifically, defendant argues the trial court abused its discretion in awarding primary physical custody of the minor child to plaintiff because one of the trial judge's comments "indicate[] he removed [the minor child] from his mother's primary care to

penalize [defendant] for seeking protection and by obtaining a protective order entered by another Mecklenburg County judge."

In an initial custody determination, a trial court shall award custody to such a person "as will best promote the interest and welfare of the child." N.C. Gen. Stat. § 50-13.2(a) (2005). If a party makes a motion for modification of a custody order, there must be a showing of changed circumstances. N.C. Gen. Stat. § 50-13.7 (2005). However, "[i]f a child custody order is temporary in nature and the matter is again set for hearing, the trial court is to determine custody using the best interests of the child test without requiring either party to show a substantial change in circumstances." *LaValley v. LaValley*, 151 N.C. App. 290, 292, 564 S.E.2d 913, 915 (2002). We have noted, "The trial judge is vested with broad discretion in child custody cases, and that discretion must be exercised to serve the welfare and needs of the children." *Woncik v. Woncik*, 82 N.C. App. 244, 247, 346 S.E.2d 277, 279 (1986) (citations omitted). Moreover, "[t]he decision of the trial judge regarding custody will not be upset on appeal absent a clear showing of abuse of discretion, provided that the decision is based on proper findings of fact supported by competent evidence." *Id.*

In the case sub judice, the facts show that a temporary custody order was previously entered in favor of defendant, and defendant does not argue on appeal that the trial court improperly used the best interests of the child test rather than the substantial change in circumstances test. We, accordingly,

consider whether the trial court abused its discretion in determining that awarding custody to plaintiff was in the minor child's best interests.

In her narration of testimonial evidence,¹ defendant states that she asked the trial judge the reason for the custody award, and the judge responded that he awarded custody to plaintiff because he believed defendant was using a protective order to prevent plaintiff from seeing the minor child. Defendant cites Woncik for the proposition that "Child custody cannot be used as a tool to punish an uncooperative parent." 82 N.C. App. at 248, 346 S.E.2d at 279. In context, Woncik states:

Child custody cannot be used as a tool to punish an uncooperative parent. See Lee v. Lee, 37 N.C. App. 371, 246 S.E.2d 49 (1978). Standing alone, such interference would normally only warrant a contempt citation. However, where, as here, such interference becomes so pervasive as to harm the child's close relationship with the noncustodial parent, there can be a conclusion drawn that the actions of the custodial parent show a disregard for the best interests of the child, warranting a change of custody.

Id.

1. Defendant was unable to file on appeal a transcript for the proceeding occurring 26 July 2004 because the recording of the proceeding was blank. Transcripts must be filed with this Court "if the appellant intends to urge on appeal that a finding or conclusion of the trial court is unsupported by the evidence or is contrary to the evidence[.]" N.C. R. App. P. 7(a)(1) (2006). See Hicks v. Alford, 156 N.C. App. 384, 389, 576 S.E.2d 410, 414 (2003). Petitioner did, however, file as part of the record on appeal an accounting of the trial court proceedings in narrative form pursuant to N.C. R. App. P. 9(c)(1) (2006).

In this case, the trial court specifically concluded that "Plaintiff father is a fit and proper person to have primary physical custody of the minor child and it is in the best interest and welfare of the child that father be awarded custody." The findings further indicate that defendant had obstructed plaintiff's visitation with the minor child, and "[plaintiff] is the parent who is more likely to foster a relationship between the child and both parents." On these facts, as in *Woncik*, "there can be a conclusion drawn that the actions of the custodial parent show a disregard for the best interests of the child," 82 N.C. App. at 248, 346 S.E.2d at 279. For the foregoing reasons, we hold that there is no clear abuse of discretion in the trial court's conclusion that it is in the best interests of the minor child that primary physical custody be granted to plaintiff.

Defendant's final argument on appeal states, "the trial court abused its discretion by failing to grant a new trial where the trial court's findings of fact were insufficient to support the conclusions of law and where the trial court did not properly apply the best interest of the child standard." Defendant's argument that the trial court abused its discretion in failing to grant a new trial is based on assignments of error that we have previously overruled. Accordingly, this assignment of error is likewise overruled.

Defendant has failed to argue her remaining assignment of error on appeal, and we deem it abandoned pursuant to N.C. R. App. P. 28(b)(6) (2006). Additionally, defendant's remaining arguments

are beyond the scope of appeal since they have not been properly assigned as error in accordance with N.C. R. App. P. 10(a) (2006) ("Except as otherwise provided herein, the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with Rule 10").

Affirmed.

Judges MCGEE and GEER concur.

Report per Rule 30(e).