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NO. COA06-555

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2007

CARMINE F. ROCCO,
Plaintiff,

v.

Guilford County
No. 02 CVD 4808

CYNTHIA C. ROCCO,
Defendant.

Appeal by plaintiff from order entered 12 August 2005 by Judge Wendy M. Enochs in Guilford County District Court. Heard in the Court of Appeals 16 April 2007.

Wyrick Robbins Yates & Ponton, LLP, by K. Edward Greene and Heidi C. Bloom, for plaintiff-appellant.

Kathryn S. Lindley for defendant-appellee.

GEER, Judge.

Plaintiff Carmine F. Rocco appeals an order entered 12 August 2005 denying his Motion to Modify Custody for lack of a substantial change of circumstances. The order nonetheless set forth a changed visitation schedule designed to address defendant Cynthia C. Rocco's proposed relocation to the State of Oregon. We agree that the district court erred in modifying the visitation schedule when it had previously found no substantial change of circumstances. We, therefore, vacate the order and remand for further proceedings.

Facts

Plaintiff and defendant married on 21 June 1980 and divorced on 1 April 2002. During the marriage, they adopted two children and resided in Guilford County, North Carolina. On 27 October 2003, plaintiff and defendant entered into a Custody Consent Order, in which defendant was granted primary physical custody of the parties' two minor children, and plaintiff was awarded secondary custody, with custodial periods every other weekend, every Wednesday evening, alternate holidays, and for two weeks in the summer.

On 14 February 2005, defendant filed a Motion to Modify plaintiff's visitation schedule on the grounds that she would be moving from North Carolina to Oregon. Pursuant to a stipulation between the parties to bifurcate, the trial court first addressed only whether there had occurred a substantial change of circumstances. On 14 July 2005, at the conclusion of defendant's evidence, the trial court orally dismissed defendant's Motion to Modify. Five days later, on 18 July 2005, plaintiff filed a Motion to Modify Custody, asking that the district court grant him primary custody. On the same day, plaintiff also filed a Motion for Temporary Restraining Order and Preliminary Injunction, seeking an order prohibiting defendant from removing the children from North Carolina pending a hearing on his motion. On 21 July 2005, the trial court rescinded its oral ruling denying defendant's motion to change the visitation schedule and set for hearing the parties' respective motions to modify the Custody Consent Order.

Following a hearing, the district court entered an order on 12 August 2005, finding that defendant, who is a chiropractor, was planning to relocate to Oregon so that she could practice with her brother, limit her work to 30 hours a week so that she could spend more time with the children, and be closer to her brother and his family. The court found that the father had exercised his visitation on a regular and consistent basis and had a "close and loving relationship" with his children. The court found, however, that "[a] substantial change in circumstances adversely affecting the welfare of the minor children has not occurred since the entry of the last Order." Based on its determination that there had been no substantial change of circumstances, the court denied plaintiff's motion to modify custody.

The court, however, further found that "[i]f the Mother and the children relocate to Oregon, the existing Order for visitation will not be operable." Apparently based on this finding, the court included the following in the decretal portion of its order:

3. So long as Cynthia Rocco and the children continue to reside in Greensboro, North Carolina, the Consent Order entered on October 27, 2003 shall remain in full force and effect.
4. If Cynthia Rocco chooses to relocate to Oregon with the minor children, the Father shall have the following visitation periods:
 - a. Every summer, the Father shall have the children with him from the third Saturday in June until the first Saturday in August. . . .
 - b. Every December, the Father shall have the children with him from

December 20th until December 30th. .
. .

- c. Every Spring break, the Father may have the children with him from Saturday to Saturday. . . .

Plaintiff timely appealed from this order.

Discussion

Plaintiff contends the trial court erred in modifying the October 2003 consent order's visitation schedule after the court had already found that there had been no substantial change in circumstances. We agree.

Under N.C. Gen. Stat. § 50-13.7(a) (2005), "an order of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested." "The word custody under the statute also includes visitation." *Savani v. Savani*, 102 N.C. App. 496, 505, 403 S.E.2d 900, 906 (1991).

In applying this statute, this Court has held: "Once the custody of a minor child is determined by a court, that order cannot be altered until 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).¹ The party seeking

¹We note that the trial court's finding of fact, referring to "circumstances adversely affecting the welfare of the minor children" does not state the proper standard. Our Supreme Court has specifically held that "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

modification bears the burden of proving the existence of a substantial change in circumstances affecting the welfare of the child. *Id.*

This Court held in *Sain v. Sain*, 134 N.C. App. 460, 465, 517 S.E.2d 921, 925 (1999), that "[h]aving concluded no changed circumstances justifying modification of the prior custody order had been shown, the trial court was without authority to modify the terms of the prior custody order." Thus, in this case, the trial court lacked authority to modify the visitation schedule established in the existing custody order once it had determined that there had been no substantial change of circumstances. We must, therefore, vacate the trial court's order.

We note that there were two motions pending before the trial court as a result of defendant's proposed relocation: (1) plaintiff's request that primary custody be transferred to him and (2) defendant's request that the visitation schedule be modified. The order specifically rules only upon plaintiff's motion. We, therefore, remand for determination of defendant's motion. Because of the passage of time, we leave it to the trial court's discretion to decide whether to hear additional evidence prior to making new findings of fact.

Vacated and remanded.

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).

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Judges WYNN and ELMORE concur.

Report per Rule 30(e).