NO. COA09-1608

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July 2010

CHARLES E. CHERRY,
Plaintiff,

v. Guilford County
No. 02 CVD 11379

DEBORAH VANN THOMAS,
Defendant.

Appeal by defendant from order entered 9 June 2009 by Judge Susan R. Burch in Guilford County District Court. Heard in the Court of Appeals 11 May 2010.

The Law Offices of John W. Kirkman, Jr., by John W. Kirkman, Jr., and Salem M. Thacker, for plaintiff-appellee.

Hill Evans Jordan & Beatty, PLLC, by Michele G. Smith and Robert E. Gray III, for defendant-appellant.

STEELMAN, Judge.

While there was substantial evidence in the record that changes had occurred since the entry of the September 2006 custody order, *i.e.*, the parties' work schedules, defendant's relocation, and the child's participation in certain extracurricular activities, the evidence also supported the trial court's finding that these changes did not affect the welfare of the child. The trial court properly denied defendant's motion to modify the custody order.

I. Factual and Procedural Background

Charles Cherry (plaintiff) and Deborah Thomas (defendant) are the biological parents of a child born on 20 January 2002. Plaintiff and defendant were never married. On 4 April 2003, a consent order was entered and provided that primary custody of the child would be with defendant and established visitation for plaintiff on alternating weekends. During the time period following the entering of the consent order, the parties' relationship became highly contentious.

On 12 September 2006, upon a motion by plaintiff, the trial court entered an order, which concluded that it was in the best interest of the child to spend additional time with plaintiff and modified plaintiff's visitation based upon the parties' work schedules. Both plaintiff and defendant were police officers employed with the City of Greensboro and worked opposite, rotating schedules, having four days on and four days off. The trial court ordered that the child "shall be in the physical custody of the Plaintiff the four days which Defendant is working and every four day shift thereafter while Defendant is working[.]" On 27 June 2008, defendant filed a motion to modify the visitation schedule. Defendant alleged that there had been a substantial change of circumstances based upon: (1) both plaintiff and defendant's work schedule had changed to a traditional Monday through Friday day shift; and (2) defendant had moved and lived 22.61 miles from plaintiff's residence, requiring travel time of approximately one hour per round-trip. Defendant further alleged that the "current irregular visitation schedule" had created disruption and confusion

for the child and resulted in the child not being able to participate in certain extracurricular activities. Defendant requested that visitation be modified to a "more conventional visitation schedule" of alternating weekends and holidays.

Following a hearing, the trial court found that although a number of changes had occurred since the entry of the September 2006 order, the welfare of the child was not affected by these changes. The trial court concluded that defendant had failed to prove that there had been a substantial change in circumstances that affected the welfare of the child, and denied defendant's motion. Defendant appeals.

II. Standard of Review

"When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order[1], the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003).

> Our trial courts are vested with broad discretion in child custody matters. This discretion is based upon the trial courts' 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

[1] "Visitation privileges are but a lesser degree of custody. Thus, . . . the word 'custody' as used in G.S. 50-13.7 was intended to encompass visitation rights as well as general custody." *Clark v. Clark*, 294 N.C. 554, 575-76, 243 S.E.2d 129, 142 (1978).

> of fact, such findings are conclusive on appeal, even if record evidence "'might sustain findings to the contrary.'"

Id. at 474-75, 586 S.E.2d at 253-54 (internal citations and quotation omitted). We must also determine whether the trial court's findings of fact support its conclusions of law. *Id.* at 475, 586 S.E.2d at 254. "When determining whether the findings in an order modifying child custody are adequate to support its conclusions, this Court examines the entire order. The trial court is not constrained to using certain and specific buzz words or phrases in its order." *Lang v. Lang*, ___ N.C. App. ___, ___, 678 S.E.2d 395, 397 (2009) (quotation and alteration omitted). The trial court's conclusions of law are reviewable *de novo*. *Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 98 (2000).

III. Modification of Visitation Schedule

The inquiry the trial court must make in determining whether to modify an existing custody order is well-established:

> The trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child. If the trial court concludes either that a substantial change has not occurred or that a substantial change did occur but that it did not affect the minor child's welfare, the court's examination ends, and no modification can be ordered. If, however, the trial court determines that there has been a substantial change in circumstances and that the change affected the welfare of the child, the court must then examine whether a change in custody is in the child's best interests. If the trial court concludes that modification is in the child's best interests, only then may the court order a modification of the original custody order.

Shipman, 357 N.C. at 474, 586 S.E.2d at 253. The burden of showing a substantial change in circumstances affecting the welfare of the minor child is on the party seeking modification. *Clark*, 294 N.C. at 575, 243 S.E.2d at 142.

Whether there has been a substantial change in circumstances depends upon the specific facts of each case. Some examples of a substantial change are as follows: (1) a move on the part of a parent; (2) a parent's cohabitation; (3) a change in a parent's sexual orientation; (4) the remarriage of a parent; or (5) a change in a parent's financial status. *See Shipman*, 357 N.C. at 478, 586 S.E.2d at 256. We reiterate that there must be a causal nexus between the substantial change in circumstances and a change in the welfare of the minor child. *Id.*

Findings of Fact

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

> 5. That the Court found from the evidence presented:
>
> (a) That a number of changes have occurred since entry of the September, 2006, Order, the largest of which is the change in the parties' work schedules so that both parties are now working day shifts; that there was no evidence before the Court that the welfare of the minor child was affected by the change in the parties' work schedules;
>
> (b) That even though the Plaintiff drives the minor child thirty (30) minutes to get to her school, there was no evidence before the Court that the minor child was negatively impacted by the change in the Defendant's residence; that any positive impact resulting from the Defendant's move does not result in the need

> to limit the time the child has with the Plaintiff;
>
> (c) That there are difficulties in that the two parties do not communicate well, but the minor child is doing well in spite of the parties' failure to communicate;
>
> (d) That even though the minor child has not participated in all the extracurricular activities and events, there is no showing of any negative impact on the minor child; and
>
> (e) That even though the change of residence of the Defendant was positive for the minor child in that the child attends a highly accredited elementary school the move does not warrant a limit on the Plaintiff's time with the minor child.

Defendant first argues that the following findings of fact are contrary to the evidence presented at trial: (1) there was no evidence before the court that the welfare of the minor child was affected by the change in the parties' work schedules; (2) there was no evidence before the court that the minor child was negatively impacted by the change in defendant's residence; and (3) even though the minor child had not participated in all the extracurricular activities and events, there was no showing of any negative impact on the child.

Work Schedule

The evidence at trial established that the current visitation schedule was predicated upon the parties' work schedules at the time the September 2006 order was entered. Both plaintiff and defendant had rotating schedules working four days and then having four days off. The parties worked opposite schedules allowing one parent to care for the child while the other worked. At the time

of the modification hearing, defendant testified that both parties' work schedules had changed. Plaintiff worked primarily Monday through Friday from 8:00 a.m. to 5:00 p.m., while defendant worked Monday through Friday from 8:00 a.m. to 4:00 p.m.

An increase in the flexibility of a parent's work schedule can constitute a substantial change in circumstances. *See Mitchell v. Mitchell*, ___ N.C. App. ___, ___, 681 S.E.2d 520, 530 (2009) ("We . . . conclude that there was substantial evidence upon which the trial court could find and conclude that there had been a substantial change of circumstances due to, *inter alia*, plaintiff's increased flexibility in his work schedule, continued therapy and implementation of what he learned in therapy, and his healthy remarriage."). However, defendant has failed to meet her burden of showing the change in the work schedules affected the welfare of the child.

Defendant contends that the visitation schedule did not provide any consistency as to which parent had custody of the child on the weekends and that it interfered with the planning of social events, such as birthday parties, family outings, and the child's attendance at church. Defendant made a broad assertion that the schedule was "confusing" for the child. Defendant did not articulate how the schedule was confusing to the child nor did she give any specific examples. Furthermore, defendant admitted upon cross-examination that she spent thirty, uninterrupted weekends with the child during 2008 and that she spent quality time with the

child during that time. Defendant also admitted that the child attended church with both plaintiff and defendant.

Defendant also contended that the visitation schedule interfered with the completion of the child's homework assignments, school projects, progress calendars, and other academic information. However, plenary evidence in the record showed that the child was doing well in school. The child's first grade report card showed that she had achieved at least a satisfactory grade in every subject and obtained several outstanding marks, including one in the category of "Completes homework." The child's teacher made the following comments on the report card: "[the child] is a good student. She is very sweet and thoughtful. Read nightly with her. I am enjoying her in my class." Defendant testified that the child was a "good student" and was enrolled in an accelerated reading program.

Substantial evidence supports the trial court's finding of fact that there was a change in the parties' work schedules, but that this change did not affect the welfare of the child.

Defendant's Relocation

The evidence before the trial court showed that at the time the September 2006 order was entered, the parties lived eight miles apart. It took approximately thirty minutes to drive that distance round-trip. Defendant has since moved to a residence located 22.61 miles from plaintiff's residence and it takes approximately an hour to drive the distance round-trip. Defendant testified that the increased travel time causes her concern for the child:

> it's a long way to travel. [The child]'s got to get up early because she has to travel to get to school, so that calls for a long time day at school . . . . And it's a lot of -- it creates a lot of unnecessary driving, and that's expensive. And another concern is bad weather, she's got to travel in bad weather.

On cross-examination, defendant focused on the fact that there was a lot of "unnecessary driving" and that there were costs associated with driving those distances.

This Court has held that "[t]he mere fact that either parent changes his residence is not a substantial change of circumstance. Where a parent changes his residence, the effect on the welfare of the child must be shown in order for the court to modify a custody decree based on change of circumstance." *Gordon v. Gordon*, 46 N.C. App. 495, 500, 265 S.E.2d 425, 428 (1980) (internal citation omitted), *overruled on other grounds by Pulliam v. Smith*, 348 N.C. 616, 620 n.1, 501 S.E.2d 898, 900 n.1 (1998). Defendant failed to present any evidence that *her* voluntary decision to move fourteen miles further away from plaintiff affected the welfare of the child. The relocation merely created an inconvenience for the parties. Substantial evidence supports the trial court's finding of fact that defendant moved and that it took thirty minutes for plaintiff to drive the child to school, but that this relocation did not affect the welfare of the child.

Extracurricular Activities

Defendant testified that the child was not fully participating in her girl scout meetings and cheerleading. At the hearing, defendant testified that she believed plaintiff had failed to take

the child to her girl scout meetings that occurred directly after school when she was in plaintiff's custody, but could not specifically say how many meetings the child had missed. On re-direct, defendant clarified that the child missed approximately 30 percent of the girls scout meetings when she was with plaintiff. Defendant testified that she thought this was detrimental to the child because she missed the activities that were required to earn merit badges and missed group outings. However, defendant could only articulate two events that the child had missed. Defendant's testimony regarding the child's cheerleading participation was that she had been to every game in 2009 and had only missed one game and one practice in 2008. Defendant failed to demonstrate how the lack of full participation in these extracurricular activities affected the child's welfare.

Defendant appears to recognize this deficiency in her evidence at trial and argues in the alternative that the trial court should have implied a detrimental effect from the child's inability to fully participate in these activities because it is "self-evident." Defendant cites *Senner v. Senner*, 161 N.C. App. 78, 587 S.E.2d 675 (2003) in support of this proposition. In *Senner*, this Court held that "[t]he court need not wait for any adverse effects on the child to manifest themselves before the court can alter custody" and implied a detrimental effect where a minor child was living with a person who was sexually abusing the child. *Id.* at 83, 587 S.E.2d at 678 (quotation omitted). The full participation in extracurricular activities does not equate to being free from

sexual abuse. The holding in *Senner* is not applicable in the instant case.

Substantial evidence in the record supports the trial court's findings of fact that there were changes that had occurred since the entry of the September 2006 order, but that these changes did not affect the welfare of the child.

Consistency of Finding of Fact 5(e) and Conclusion of Law 2

Defendant next argues that the trial court's finding of fact 5(e) is contrary to and inconsistent with conclusion of law 2, which states "[d]efendant has failed to prove that circumstances have so changed that the welfare of the minor will be affected, either positively or negatively, unless the Order of September 12, 2006 is modified."

In finding of fact 5(e), the trial court found "the change of residence of the Defendant was positive for the minor child in that the child attends a highly accredited elementary school . . . ." It is well-established that when the trial court sits as the fact finder in a proceeding seeking modification of a child custody order, it is the sole judge of the credibility and weight to be given to the evidence. *Scott v. Scott*, 157 N.C. App. 382, 388, 579 S.E.2d 431, 435 (2003); *see also Shipman*, 357 N.C. at 474-75, 586 S.E.2d 253 ("Our trial courts are vested with broad discretion in child custody matters. This discretion is based upon the trial courts' 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[.]'"

(quotations omitted)). Therefore, it was in the trial court's discretion to weigh both the positive and negative effects of any change of circumstance. In the instant case, the trial court did not find that the positive effect of the child attending a highly accredited school to be a substantial change in circumstances that affected the welfare of the child. Finding of fact 5(e) and conclusion of law 2 are not inconsistent.

IV. Conclusion

The trial court's findings of fact support its conclusion of law that defendant failed to prove that a substantial change in circumstances affected the welfare of the child. *See Shipman*, 357 N.C. at 474, 586 S.E.2d at 253 ("If the trial court concludes either that a substantial change has not occurred or that a substantial change did occur but that it did not affect the minor child's welfare, the court's examination ends, and no modification can be ordered."). The trial court did not err by denying defendant's motion to modify the parties' visitation schedule.

AFFIRMED.

Judges WYNN and CALABRIA concur.

Report per Rule 30(e).