NO. COA13-459
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

EMANUEL K. SMITH, III,
Plaintiff,

v. Craven County
No. 12 CVD 620

RACHAEL ANNE-MARIE SMITH,
Defendant.

Appeal by defendant from order entered 14 November 2012 by Judge Kirby H. Smith, III, in Craven County District Court. Heard in the Court of Appeals 25 September 2013.

Ward and Smith, P.A., by Lauren Taylor Arnette, for plaintiff.

Greene & Wilson, P.A., by Kelly L. Greene, for defendant.

Elmore, Judge.

Rachael Ann-Marie Smith (defendant) and Mr. Emanuel K. Smith (plaintiff) were married on 19 September 1998 and had three minor children (the children) through marriage. The parties separated on 1 January 2008, while living in Virginia. Thereafter, the parties executed a Marital Separation and Property Settlement Agreement (the Agreement) that provided for

joint custody of the children with defendant as the primary custodian. Visitation was to be determined by agreement of the parties. Defendant and the children then moved to Havelock, North Carolina in August 2010. Three months later, plaintiff relocated to Greenville, North Carolina in order to be closer to the children, and in November 2011, he moved to Austin, Texas because of employment. After moving to Texas, plaintiff married Stacey Schock in July 2012.

On 22 June 2011, a Final Decree of Divorce (Virginia Order) was entered, which also incorporated the terms of the Agreement. Subsequently, plaintiff filed a Motion to Modify Custody in Craven County District Court on 12 June 2012 requesting summer visitation and alleging a substantial change in circumstances affecting the welfare of the children since entry of the Virginia Order. The trial court addressed the issue of summer visitation on 26 June 2012 and entered an amended order that granted plaintiff visitation rights for the summer of 2012. Shortly after that hearing, defendant and the children relocated to Waterloo, Wisconsin. On 14 November 2012, the trial court heard evidence relating to the custody matter and entered an order that modified the Virginia Order and awarded plaintiff

sole custody of the children. Defendant appealed the trial court's 14 November 2012 order.

II. Analysis

a.) Jurisdiction

Defendant's first argument on appeal is that the trial court lacked jurisdiction to modify the Virginia Order under N.C. Gen. Stat. § 50A-201(a)(1) because plaintiff failed to establish that at the time he filed the motion to modify custody: 1.) his children were absent from North Carolina; and 2.) neither parent continued to live in North Carolina. We disagree.

"Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). "The question of subject matter jurisdiction may be raised at any time, even in the Supreme Court." *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986). "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010).

Under N.C. Gen. Stat. § 50A-203, the trial court has jurisdiction to modify a child custody order from another state

once a two-step inquiry is satisfied. *See* N.C. Gen. Stat. § 50A-203 (2012). First, the trial court must "have jurisdiction to make an initial determination under G.S. 50A-201(a)(1)[.]" *Id.* Such jurisdiction can exist in two distinct ways when North Carolina

> (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six months before commencement of the proceeding and the child is absent from this State because of the child's removal or retention by a person claiming the child's custody or for other reasons, and a parent or person acting as parent continues to live in this State[.]

Hart v. Hart, 74 N.C. App. 1, 6, 327 S.E.2d 631, 635 (1985). "[H]ome state is defined as a state where the child lived with a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding." *In re T.J.D.W.*, 182 N.C. App. 394, 396-97, 642 S.E.2d 471, 473, *aff'd*, 362 N.C. 84, 653 S.E.2d 143 (2007) (citation and quotations omitted). The second requirement is fulfilled when a trial court also "determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state, with presently referring to the time of the proceeding." *Id.* at 397, 642 S.E.2d at 473 (citations and quotations omitted).

Distilled to its essence, the two-pronged jurisdictional requirement to modify a child custody order is satisfied when "the child and a parent (not necessarily *both* parents) lived in North Carolina for the six months immediately preceding the commencement of the proceeding . . . and that the child and both parents had left [the other state] at the time of the commencement of the proceeding." *Id.*

In the case *sub judice*, the proceeding at issue was plaintiff's motion to modify custody, which was filed on 12 June 2012. On that date, defendant and her children lived in Havelock, North Carolina and had resided there since 2010. Additionally, at the time the motion to modify custody was filed, plaintiff was a citizen and resident of Austin, Texas. Thus, prior to 12 June 2012, defendant lived in North Carolina with the children for at least six months and plaintiff left Virginia. Accordingly, the trial court had jurisdiction to modify the Virginia Order.

b.) Findings of Fact

Next, defendant argues that there was not substantial evidence from the record to support the trial court's findings of fact that there had been a substantial change in

circumstances affecting the welfare of the children. We disagree.

"When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, 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). "In addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, this Court must determine if the trial court's factual findings support its conclusions of law." *Id.* at 475, 586 S.E.2d at 254. "Conclusions of law are reviewed *de novo* and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011); *see also Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) ("Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal.").

Trial courts possess broad discretion in deciding child custody matters. *Pulliam v. Smith*, 348 N.C. 616, 624, 501 S.E.2d 898, 902 (1998) (citation omitted). This discretion originates from the trial court's ability to view the parties, listen to the witnesses, and to "detect tenors, tones and

flavors that are lost in the bare printed record read months later by appellate judges." *Newsome v. Newsome*, 42 N.C. App. 416, 426, 256 S.E.2d 849, 855 (1979). Thus, a trial court's decision in a custody case "should not be reversed in the absence of a clear showing of abuse of discretion." *Id.* (citation omitted).

Here, the trial court made numerous findings of fact, 13 of which support its legal conclusion that "[a] substantial change in circumstances affecting the minor children has occurred since the entry of the Virginia Order regarding custody and visitation." These relevant findings of fact by the trial court are as follows:

> 18. Plaintiff relocated to Texas in November 2011 and Defendant's obstinate behavior has increased causing additional visitation issues and limiting Plaintiff's relationship with the minor children. Since that time, the parties have had numerous visitation issues related to Defendant's refusal to agree to dates, location and exchange times including, but not limited to, Defendant's refusal to provide any transportation to and from visitation exchanges.
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> 29. On July 5, 2012 an Amended Order was entered ordering Defendant to allow Plaintiff summer visitation with the minor children from July 8, 2012 through and including August 26, 2012. The Amended Order further set forth the pick-up and drop-off locations for the visitation exchange and required Defendant to provide transportation

to and from the airport for the visitation exchanges.

30. Even after entry of the Amended Order, Defendant has continued to engage in conduct evidencing an intent to dictate all visitation and attempt to obstruct Plaintiff's relationship with the minor children. Defendant has further engaged in actions which reflect that she is no longer acting in the best interest of the minor children.

36. Since Plaintiff and Stacey began dating in 2011, Plaintiff and Stacey have worked towards establishing a relationship between Stacey and the minor children. Stacey has been able to visit with the children during Plaintiff's visitation in October 2011, Thanksgiving 2011 and the eight-week summer visitation in 2012. Stacey also talks with the minor children by telephone when Plaintiff has visitation with the children and she is unable to accompany Plaintiff.

37. During the summer visitation, Plaintiff and Stacey both participated in parenting the minor children.

38. When the children arrived in Texas, they appeared to have problems relating with each other due to the confrontational environment they were exposed to under Defendant's care, lacked proper nutrition, lacked any structure or schedule and lacked the ability to understand supervision and authority.

39. During the summer visitation, Plaintiff and Stacey established nurturing and constructive relationships between the children and between the children and adults, introduced proper nutrition and vegetables to the children, established a schedule for the children and developed a

bond and relationship between each of the children and Stacey.

40. Plaintiff and Stacey provided a stable and loving household which allowed the children to thrive and flourish.

42. Since July 2012, excluding the summer visitation with Plaintiff the minor children have resided in Waterloo, Wisconsin in a home with Defendant, Defendant's brother and Defendant's mother and father. There are not sufficient bedrooms for the minor children and they are required to share beds with others, sleep on the couch and sleep in common living areas.

43. The environment in the home where the children reside is confrontational. Defendant and her mother argue and scream in front of the minor children and these behaviors have negatively impacted the behavior of the minor children.

50. Plaintiff immediately contacted Defendant about the immunization issues. Defendant failed to even respond to the communication regarding the immunizations until approximately 18 days later. At that time, the school was still trying to communicate with Defendant without success and Defendant had failed to obtain the necessary immunizations for the children. Despite Plaintiff immediately informing Defendant and additional contact by the school about the gravity of the situation and impact on the children, Defendant did not obtain the proper immunizations until 22 days after Plaintiff contacted Defendant raising the immunization concerns.

59. Since Defendant relocated with the minor children to Wisconsin, Defendant has continued to attempt to estrange the minor

> children from Plaintiff and has caused extreme difficulties in arranging visitation and exchanges.
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> 63. The Defendant has engaged in constant confrontational and obstructive communication with Plaintiff regarding his requests for visitation.

Our analysis of the record shows that substantial evidence supports each of the trial court's findings of fact related to its conclusion of law. First, it is undisputed that Schock and plaintiff attempted to build relationships with the children, and that during the children's summer visitation in Texas, the children excelled in plaintiff's home (Findings #36, 37, 40). Plaintiff instituted chores, schedules, structured activities, and healthy meals for the children. By summer's end, the children "were completely different people when they left and when they got there. It was just -- we were all able to, you know, have a cohesive unit. Everybody knew their roles and responsibilities." (Findings #38, 39). Furthermore, defendant does not contest that she obtained immunizations for the children more than 20 days after plaintiff expressed his concerns about her lack of communication to the school (Finding #50), and e-mail correspondences between the two parties also support this finding.

Evidence in the record also sheds light on defendant's attempt to "obstruct" visitation, block communication, and "estrange" the children from plaintiff (Findings #18, 59, 63). On 18 July 2011, plaintiff sent defendant an e-mail with a proposed visitation schedule, which included an extended visit in August, two weekends in September, and two weekends in October. In a reply e-mail, defendant responded by listing different days plaintiff could see the children and stated, "if you cannot have them on that weekend, then tough . . . see them when you see them."

Plaintiff testified that when he moved to Texas in November 2011, he attempted to arrange visitation with defendant. Plaintiff was required to pay for numerous flights to visit the children in North Carolina and even fly the children from North Carolina back to Texas. The record contains a receipt of payment for at least one airline ticket for plaintiff and the children from New Bern to Austin, Texas. At no point did defendant contribute financially to any of these visitations. In an e-mail dated 28 September 2011, defendant responded to plaintiff's request for visitation by stating, "get them on ur [sic] every other weekend or not at all."

On 2 November 2011, plaintiff attempted to make arrangements to see the children during their spring break vacation to which defendant wrote "nope, spring break is mine. [X]mas is mine. Thanksgiving is mine next yr [sic] and xmas is yours next yr [sic]."

Additionally, the trial court entered an order on 5 July 2012 allowing plaintiff to "have the minor children for summer visitation from July 8, 2012, through and including August 26, 2012." Plaintiff stated that after the judge's order, "[defendant] was disagreeable from the start. She said she wasn't going to Chicago and she wasn't doing this. So yeah, it was pretty difficult[.]" When plaintiff returned the children to defendant at the end of the summer visitation, e-mail correspondence and testimony shows that defendant picked up the children on 26 August 2012, even though defendant did not object to plaintiff's request a month earlier to pick up the children on 25 August. Defendant's actions caused plaintiff to almost miss his flight. Plaintiff testified that when defendant arrived to take the children on the morning of 26 August, defendant stated she "was out all night."

Plaintiff also said that he bought the children a phone because "there were times when weeks would go by and [he]

wouldn't hear from them" partly because defendant's phone was often disconnected. When plaintiff was unable to reach the children on their phone, he would "reach out to [defendant]." Despite plaintiff's attempts, defendant would not call him back. Furthermore, in an e-mail exchange dated 17 August 2011, defendant told plaintiff, "dont [sic] call or txt [sic] my phone to talk to ur [sic] children. if [sic] they dont [sic] answer their phone, tough[.]"

Plaintiff further told the trial court that he received text messages from the children's phone such as "[h]ey, Daddy, I'm doing this," followed by "[o]h, I hate you or you 'expletive.' You're this or this or this[.]" Based on these messages, it was plaintiff's belief that defendant also used the children's phone for improper purposes. Schock testified that when she attempted to speak with the children on the phone, "[i]t's a little more difficult . . . because often [the children are] on speakerphone and their mother is right there and they're very guarded speaking to me when she's around."

On 27 September 2012, plaintiff provided one month's notice of a request to see the children in North Carolina. Defendant told plaintiff that it was not a good weekend for him to visit because the children had a Halloween party to attend.

However, plaintiff testified that he later discovered that there "was no Halloween [p]arty."

Moreover, evidence in the record supports the trial court's findings as to defendant not acting in the "best interests" of the children as well as their insufficient living conditions in Wisconsin (Findings #29, 30, 38, 42, 43). Plaintiff testified that the children told him about the living environment in Wisconsin. They indicated that defendant "keeps the basement flooded with clothes and old toys and newspapers and they can't even walk down in the basement; it's so cluttered." Plaintiff further testified that based on information provided by the children, one of them sleeps in the family room on the floor, another sleeps in the living room on a couch, and the third sleeps with her mom in the bed. Plaintiff said that the children's home environment is "just . . . negative. They just holler and scream at each other." Plaintiff also testified about a specific example given to him by one of the children when "one night from 3:00 to 5:00 a.m. [defendant and her mother] had a real screaming match . . . about [defendant] not paying the rent and [defendant] living here and bringing four people into the house and not doing enough."

Plaintiff indicated that this unstable home environment was reflected in the children's behavior when they visited him in Texas during the summer of 2012. When plaintiff and Schock spoke to each other in the children's presence, one of the children told them, "[i]t's okay, you can cuss." The children also "holler[ed] at each other . . . scream[ed] at each other and . . . [were] really quick to anger [sic] with each other and hit each other[.]" The children also told plaintiff that the oldest child "cooks 75 percent and Mommy cooks 25 percent." Plaintiff testified that when the children first arrived in Texas, they initially only ate Ramen noodles, refused to eat vegetables, and had white marks on their nails that indicated poor nutrition.

In sum, the record is replete with substantial evidence that support each of the trial court's findings of fact pertaining to whether a substantial change in circumstances affected the welfare of the children. Accordingly, the trial court's findings are binding on appeal.

c.) Conclusion of Law

In her last issue on appeal, defendant avers that the trial court's findings of fact do not support its legal conclusion

that there was a substantial change of circumstances affecting the welfare of the children. We disagree.

A trial court properly amends an existing child custody order when: 1.) a substantial change of circumstances affects the welfare of a child; and 2.) modification of that order serves the child's best interests. *Shipman*, 357 N.C. at 475, 586 S.E.2d at 253 (citation omitted). The change in circumstances must be of the kind that "normally or usually affect[s] a child's well-being—not a change that either does not affect the child or only tangentially affects the child's welfare." *Stephens v. Stephens*, ___ N.C. App. ___, ___, 715 S.E.2d 168, 171 (2011) (citation and quotations omitted). The relocation of a custodial parent to a new residence that is detrimental to the child's welfare is a substantial change of circumstances that supports custody modification. *Id.* at ___, 715 S.E.2d at 173 (citations omitted). Although findings relating to circumstances that may have adverse effects on the child are factors a trial court may consider in support of modification, "a change in circumstances that is, or is likely to be, beneficial to the child may also warrant a change in custody." *Pulliam*, 348 N.C. at 620, 501 S.E.2d at 900.

We first note that defendant does not argue on appeal that the trial court erred in concluding that modification of the Virginia Order was in the children's best interests. Thus, our inquiry is limited to whether the trial court erred in its conclusion that there was a substantial change of circumstances affecting the welfare of the children.

As discussed above, the trial court found that since the entry of the Virginia Order it was evident that the children's welfare had been adversely impacted by a substantial change of circumstances, in part, because defendant: 1.) continually obstructed reasonable visitation efforts by plaintiff to such an extent that denied the children opportunities to maintain consistent contact with their father; 2.) failed to provide the children with a stable residence in Wisconsin and instead provided an environment that included a volatile home environment, lack of supervision, improper sleeping arrangements, poor nutrition, and deficiency of structure which affected the children's behavior; 3.) placed the children in harm's way by not responding to their school or plaintiff's request to obtain immunizations for the children in a reasonable amount of time; and 4.) attempted to estrange the children from plaintiff.

These enumerated findings of fact by the trial court support its conclusion of law that that a substantial change in circumstances "negatively impacted the minor children and warrant[ed] modifying custody." *See Woncik v. Woncik*, 82 N.C. App. 244, 249, 346 S.E.2d 277, 280 (1986) (holding that "interference with visitation of the noncustodial parent which has a negative impact on the welfare of the child can constitute a substantial change of circumstances sufficient to warrant a change of custody."); *see also Shipman*, 357 N.C. at 480, 586 S.E.2d at 257 (finding that a substantial change of circumstances affected a minor child where plaintiff failed to: 1.) provide the child with a stable home environment; 2.) allow defendant reasonable visitation opportunities to see the minor child; and 3.) maintain contact with defendant's family, which prevented the minor child from seeing his extended family).

Additionally, the trial court appropriately considered circumstances that were likely to be beneficial to the children's welfare. *See Pulliam, supra*. In finding #72, the trial court found that "[p]laintiff and [Schock] live in a 3800 square foot home with separate bedrooms for each of the minor children. Each of the rooms has been decorated and furnished for the minor children." The record contains photographs of

plaintiff's house with rooms for each of the children. Finding #40 states that during summer visitation, "[p]laintiff and [Schock] provided a stable and loving household which allowed the children to thrive and flourish." Finally, findings #74 and #75 explain that both plaintiff and Schock's work schedule would allow them to take proper care of the children. Each of these findings are supported by the record, uncontested by defendant, describe changes that occurred after entry of the Virginia Order, and provided a change in circumstances that was likely to benefit the welfare of the children.

Accordingly, the trial court did not err in concluding that there was a substantial change of circumstances affecting the welfare of the children.

III. Conclusion

In sum, the trial court had jurisdiction to modify the Virginia Order, its findings of fact were supported by substantial evidence, and it correctly concluded that a substantial change of circumstances affected the welfare of the children. Thus, we affirm the trial court's order modifying custody.

Affirmed.

Judges CALABRIA and STEPHENS concur.

Report per Rule 30(e).