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NO. COA14-471
NORTH CAROLINA COURT OF APPEALS
Filed: 2 December 2014

ASHLEY MORGAN,
Plaintiff

v.

Iredell County
No. 12-CVD-2937

DANY MORGAN,
Defendant

Appeal by plaintiff from order entered 21 October 2013 by Judge H. Thomas Church in Iredell County District Court. Heard in the Court of Appeals 24 September 2014.

Sodoma Law, P.C., by Edward S. Garrett and Penelope L. Hefner, for Plaintiff.

Horn, Pack & Brown, P.A., by Carol J. Walsburger, for Defendant.

ERVIN, Judge.

Plaintiff Ashley Morgan appeals from an order awarding primary custody of the parties' minor children to Defendant Dany Morgan subject to Plaintiff's right to engage in visitation with the children. On appeal, Plaintiff argues that the trial court erred by failing to make sufficient findings of fact to support an award of permanent custody. After careful consideration of Plaintiff's challenges to the trial court's order in light of the record and the applicable law, we conclude that the trial

court's order should be reversed and that this case should be remanded to the Iredell County District Court for further proceedings not inconsistent with this opinion, including the entry of a new order containing sufficient findings of fact and conclusions of law.

I. Factual Background

A. Substantive Facts

Plaintiff and Defendant were married on 12 September 2003, separated on 10 October 2010, and divorced on 27 February 2013. The parties are the parents of two minor children, Helen and James.¹ On 27 September 2011, the parties entered into a separation agreement that provided that they were to have joint legal and physical custody of the children, with Defendant having primary physical custody and Plaintiff having secondary physical custody in the form of visitation on alternate weekends from 6:00 p.m. on Thursday until 6:00 p.m. on Sunday and for overnight periods on Wednesdays and Thursdays during the weeks in which she did not have weekend visitation and with Defendant paying child support to Plaintiff in the amount of \$220.27 each month. In November 2012, Defendant notified Plaintiff that he had been promoted by his employer and intended to relocate, along with the children, from Iredell County to Cleveland

¹"Helen" and "James" are pseudonyms used for ease of reading and to protect the children's privacy.

County. As a result of this decision, Plaintiff commenced the action that led to the entry of the order that is before us in this case.

B. Procedural History

On 10 December 2012, Plaintiff filed a complaint in which she sought an absolute divorce, temporary and permanent custody, child support, the entry of a temporary restraining order barring Defendant from moving the children from their existing school district, and attorney fees. On 31 December 2012, Defendant filed a responsive pleading in which he denied the material allegations of Plaintiff's complaint and asserted counterclaims for absolute divorce, temporary and permanent custody, and attorney fees.

On 31 December 2012, Plaintiff's claims for temporary custody and support and her motion for a temporary restraining order came on for hearing before Judge Christine Underwood in the Iredell County District Court. On the same date, the parties consented to the entry of a handwritten memorandum of judgment that provided that the parties would share temporary joint legal and physical custody of the children, that the children would remain enrolled in the Iredell County Schools until the entry of a permanent custody order, and that the child support provisions of the parties' separation agreement would

remain in effect pending further order of the court. A formal memorandum of judgment and order reflecting these terms was entered 12 February 2013. On 27 February 2013, a judgment granting the parties an absolute divorce was entered.

The parties' claims for permanent custody came on for hearing before the trial court in the Iredell County District Court in July and September 2013. On 21 October 2013, the trial court entered an order awarding primary legal and physical custody of the children to Defendant subject to Plaintiff's right to visit with the children on alternate weekends from the end of the school day on Friday until 7:00 p.m. on Sunday, on alternate weeks during the summer, and on specified portions of certain specifically delineated holidays. Plaintiff noted an appeal to this Court from the trial court's order.

II. Substantive Legal Analysis

In her sole challenge to the trial court's order, Plaintiff contends that the trial court erred by failing to make sufficient findings of fact to support an award of permanent custody to Defendant. More specifically, Plaintiff argues that the trial court's findings of fact fail to support its determination that the best interests of the children would be served by the entry of an order awarding primary custody to Defendant. Plaintiff's argument has merit.

A. Standard of Review

"In a child custody case, the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings." *Peters v. Pennington*, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011). "'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* at 13, 707 S.E.2d at 733 (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). "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." *Shipman v. Shipman*, 357 N.C. 471, 475, 586 S.E.2d 250, 254 (2003). Among other things, this inquiry requires us to ascertain if the trial court's findings of fact are sufficiently detailed to permit us to determine if the resulting judgment has sufficient evidentiary support. *Green v. Green*, 54 N.C. App. 571, 573, 284 S.E.2d 171, 173 (1981). The extent to which the trial court's findings of fact are sufficient to support its conclusions of law is subject to *de novo* review. *Carpenter v. Carpenter*, ___ N.C. App. ___, ___, 737 S.E.2d 783, 785 (2013) (citing *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 904 (2008)). On the other hand, a

trial court's custody decision will not be reversed on appeal absent a clear showing of abuse of discretion. *Pulliam v. Smith*, 348 N.C. 616, 624-25, 501 S.E.2d 898, 902 (1998). "Under this standard of review, the trial court's ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Ludlam v. Miller*, __ N.C. App. __, __, 739 S.E.2d 555, 558 (2013) (quoting *Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005)).

B. Relevant Legal Principles

According to N.C. Gen. Stat. § 50-13.2, the court "shall award the custody of [a minor] child to such person, agency, organization or institution as will best promote the interest and welfare of the child." N.C. Gen. Stat. § 50-13.2(a). An order "awarding permanent custody must contain findings of fact in support of the required conclusion of law that custody has been awarded to the person who will best promote the interest and welfare of the child." *McRoy v. Hodges*, 160 N.C. App. 381, 386, 585 S.E.2d 441, 445 (2003); N.C. Gen. Stat. § 50-13.2(a). "[A] custody order is fatally defective where it fails to make detailed findings of fact from which an appellate court can determine that the order is in the best interest of the child[.]" *Dixon v. Dixon*, 67 N.C. App. 73, 76-77, 312 S.E.2d

669, 672 (1984). As a result, "when the [trial] court fails to find facts so that this Court can determine that the order is adequately supported by competent evidence and the welfare of the child subserved, then the order entered thereon must be vacated and the case remanded for detailed findings of fact." *Crosby v. Crosby*, 272 N.C. 235, 238-39, 158 S.E.2d 77, 80 (1967). "Although a custody order need not, and should not, include findings as to each piece of evidence presented at trial, it must resolve the material, disputed issues raised by the evidence." *Carpenter*, ___ N.C. App. at ___, 737 S.E.2d at 787.

C. Sufficiency of Trial Court's Findings

In this case, the parties disagreed about several issues regarding the children's best interests, including the effect that Defendant's proposed relocation from Iredell County to Cleveland County would have upon the children and upon their relationship with their mother. In addition, the parties disagreed about the extent to which enrolling the children in a new school would affect the children's academic performance and peer relationships, with Plaintiff having argued that moving Helen to a different school would adversely affect her educational progress and with Defendant having argued that the children's best interests would be served by a change in schools

given that they would have more friends at a new school and, for that reason, have a more "normal childhood". Moreover, the parties disagreed about a number of issues related to Helen's weight, including the reason that she weighed more than she should and the steps that should be taken to bring Helen's weight to a more appropriate level, with Defendant having placed blame for Helen's weight on Plaintiff's failure to provide Helen with a proper diet and with Plaintiff having argued that Helen should be encouraged to become more physically active through involvement in sports despite Defendant's insistence that Helen's long-term interests would be better served by encouraging her to focus on her studies. Finally, Defendant contended that Plaintiff spent too much time with her friends rather than making the children her principal priority. As a result, the record clearly reflects that there were many factual issues in dispute between the parties that had a bearing on the required "best interests" analysis.

In its order, the trial court found as a fact that:

6. The Plaintiff attended Gardner Webb University where she received a Bachelor of Arts degree in Religious Education. She presently works for the Lowe's YMCA in Mooresville, North Carolina, where she serves as the Family Service Director in charge of afterschool programs for children. She also works part-time at Chili's Restaurant in Mooresville.

7. Plaintiff presently lives in a three bedroom, two-bath apartment in Mooresville. The minor children each have a separate bedroom at this home.

8. The Defendant has had some college. He presently works as a service technician for AT&T where he has been employed for thirteen and one-half years. He has recently been transferred to Shelby, North Carolina where he was born and raised. He currently lives in the former marital home in Mooresville when the children are in his custody. He is engaged and lives in Shelby with his fiancé when the children are in the Plaintiff's custody. If the children are placed in his primary custody he intends to move to Casar, North Carolina, which is near Shelby, and live in a house on three acres that belong to his aunt and uncle.

9. Both sets of grandparents are very active in the minor children's lives. The Court finds that both sets are wonderful grandparents and the Plaintiff and Defendant are very lucky to have their parents and their brothers and sisters in their lives.

10. Problems arose in the parties' lives before their separation that centered around the Defendant's belief that the Plaintiff was spending an inordinate amount of time with her female friends and devoting too much of her time to her work at the YMCA. These problems eventually led to the parties' separation. Since their separation and divorce the parties communicate only through emails.

11. The minor child, [Helen], has had a problem controlling her weight, which according to her therapist, Wendie Lloyd, has been significant in her lack of self-confidence and has created problems between [Helen] and her peers.

12. Both children now attend schools in Iredell County. If the Court places primary custody with the Defendant the children would transfer to schools in Cleveland County, North Carolina. Both parties presented evidence that showed that Iredell and Cleveland County Schools are fairly similar in their rankings.

13. Both parents love the minor children and are both fit persons to have joint custody of the minor children. The Court, after considering all the evidence presented, and hearing the arguments of counsel, finds that it would be in the best interest of the minor children to be placed in the primary custody and control of the Defendant with the Plaintiff having secondary custody in the form of visitation as set forth below.

We do not believe that these findings of fact are sufficient to support the trial court's custody decision.

A careful review of the trial court's order indicates that, while the findings of fact recite the evidence relating to the disputed issues in considerable detail, they fail to resolve any of the disputed issues bearing on the best interests of the children. Instead, after reciting the evidence, the trial court simply concludes that "it would be in the best interest of the minor children to be placed in the primary custody and control of the Defendant." In *Carpenter*, we reversed a custody order and remanded the case for additional findings of fact on the grounds that, even though the record reflected the existence of a number of disputed issues of fact that were relevant to the

"best interests" determination, the trial court failed to resolve these issues in its findings of fact. *Carpenter*, ___ N.C. App. at ___, 737 S.E.2d at 787 (stating that "many of the findings of fact are actually recitations of evidence which do not resolve the disputed issues" and that "[t]he findings also fail to resolve the primary issues raised by the evidence which bear directly upon the child's welfare"). We are unable to distinguish the situation before us in this case from the situation that was before us in *Carpenter*, given that the trial court failed in this case to resolve a number of disputed issues of fact that have a direct bearing upon the children's welfare. As a result, we have no choice except to reverse the trial court's order and to remand this case to the Iredell County District Court for the entry of a new order that contains sufficient findings of fact and conclusions of law.

In attempting to persuade us to reach a different result, Defendant argues that the trial court's failure to resolve various disputed factual issues compels the conclusion that the trial court did not deem these disputes to be material. Although the trial court is not, of course, required to making findings of fact resolving immaterial factual issues, *Green*, 54 N.C. App. at 575, 284 S.E.2d at 174 (stating that "the trial judge is not required to find all the facts shown by the

evidence, but only enough *material* facts to support the judgment") (emphasis in the original) (citing *In re Custody of Stancil*, 10 N.C. App. 545, 549, 179 S.E.2d 844, 847 (1971)), we do not find Defendant's argument persuasive given that, in this case, the trial court failed to provide any explanation for its decision that awarding primary custody of the children to Defendant would be in the children's best interests. As was the case in *Carpenter*, the findings of fact contained in the trial court's order simply "do not shed any light upon the rationale for the trial court's ultimate conclusion of what is in [the children's] best interest." *Carpenter*, __ N.C. App. at __, 737 S.E.2d at 789. As a result, given that "a custody order is fatally defective where it fails to make detailed findings of fact from which an appellate court can determine that the order is in the best interest of the child," *Dixon*, 67 N.C. App. at 76-77, 312 S.E.2d at 672, we are unable to uphold the trial court's order on the basis suggested by Defendant.

III. Conclusion

Thus, for the reasons set forth above, we conclude that Plaintiff's challenge to the sufficiency of the trial court's findings of fact has merit. As a result, the trial court's order should be, and hereby is, reversed and this case should be, and hereby is, remanded to the Iredell County District Court

for further proceedings not inconsistent with this opinion, including the entry of a new order containing sufficient findings of fact and conclusions of law.²

REVERSED AND REMANDED.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).

²In their briefs, the parties have discussed the extent to which the trial court should or should not receive additional evidence on remand. According to well-established North Carolina law, the extent to which "a trial court receives new evidence or relies on previous evidence submitted" in the event of a "remand for additional findings" "is a matter within the [sound] discretion of the trial court." *Alford v. Hicks*, 156 N.C. App. 384, 389, 576 S.E.2d 410, 413 (2003) (citations omitted).