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NO. COA14-586
NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

TIMOTHY SCOTT BOBBITT, by Sasha DeeAnn
Bobbitt, his attorney-in-fact,
Plaintiff

vs.

Davie County
No. 10 Cvd 13

KELLIE LYNN EIZENGA,
Defendant

vs.

HERMAN BOBBITT and ELLIE JONES BOBBITT,
Interveners

Appeal by plaintiff from order entered 27 January 2014 by
Judge Mary F. Covington in Davie County District Court. Heard
in the Court of Appeals 22 October 2014.

Dummit Fradin, by Barbara E. Cini, for Plaintiff.

*Parker & Parker, by Julie A. Parker, for Defendant (no
brief filed).*

ERVIN, Judge.

Plaintiff Timothy Scott Bobbitt appeals from an order
awarding custody of the parties' daughter to Defendant Kellie
Lynn Eizenga and denying his request for supervised visitation
with his daughter that was entered on remand following a prior

decision by this Court. On appeal, Plaintiff argues that the trial court erred by failing to conduct a new proceeding on remand from this Court's earlier decision, that the trial court's findings of fact lack sufficient evidentiary support, that the trial court's findings of fact do not support its conclusions of law with respect to the issues of both custody and visitation, and that the trial court abused its discretion by denying Plaintiff's request for the establishment of a visitation arrangement involving his minor child. 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 vacated and that this case should be remanded to the Davie County District Court for further proceedings not inconsistent with this opinion.

I. Factual Background

Plaintiff and Defendant are the biological parents of a minor child whom we will call Laura.¹ On 27 October 2009, Plaintiff pled guilty to the attempted statutory rape of Defendant arising from an incident in which Laura was conceived and was sentenced to a term of 94 to 122 months imprisonment. Plaintiff is currently being held in the custody of the North

¹"Laura" is a pseudonym used for ease of reading and to protect the child's privacy.

Carolina Department of Public Safety for the purpose of serving that sentence.

On 12 January 2010, Plaintiff instituted an action seeking joint legal custody of Laura and the establishment of an arrangement under which he could visit with Laura. On 3 March 2010, Defendant filed a motion to dismiss Plaintiff's complaint. On 7 June 2010, Plaintiff's parents, Herman and Ellie Bobbitt, filed a motion to intervene in the child custody action. On 27 August 2010, Judge B. Carlton Terry entered an order granting Defendant's dismissal motion. Plaintiff noted an appeal to this Court from Judge Terry's order. On 6 September 2011, this Court filed an opinion reversing Judge Terry's order and remanding this case to the Davie County District Court for a hearing on the merits.

After a hearing held at the 12 December 2011 civil session of Davie County District Court, the trial court entered an order concluding that, even though Plaintiff was a fit and proper person to exercise visitation, custody should be awarded to Defendant and that Laura's best interests would not be served by authorizing the establishment of a visitation arrangement with Plaintiff during his period of incarceration on the grounds that correctional facilities do not provide suitable environments for visitation between a parent and a minor child. Plaintiff noted

an appeal to this Court from the trial court's order. On 16 October 2012, this Court filed an opinion vacating the trial court's order and remanding this case to the Davie County District Court for the entry of a new order containing appropriate findings of fact and conclusions of law.

On 27 January 2014, the trial court entered an order on remand in which it concluded, in pertinent part, that custody of Laura should be awarded to Defendant, that Plaintiff had abandoned his constitutionally protected parental rights regarding the minor child, and that Laura's best interests would be served by denying Plaintiff's request for the establishment of a visitation arrangement. Once again, Plaintiff noted an appeal to this Court from the trial court's order.

II. Substantive Legal Analysis

In his brief, Plaintiff contends that the trial court erred by failing to make sufficient findings of fact to support its conclusions that custody of Laura should be awarded to Defendant, that Plaintiff had abandoned his constitutionally protected parental rights relating to Laura, and that the establishment of visitation involving Plaintiff and Laura would not be in Laura's best interest. 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), with substantial evidence consisting of "\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)).² "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). A trial court's conclusions of law . . . are reviewable *de novo*. *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992). For that reason, 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*, __

²We utilize the same standards of review that have been deemed appropriate in reviewing custody determinations in the course of reviewing trial court orders that address visitation issues. *Lamond v. Mahoney*, 159 N.C. App. 400, 403, 583 S.E.2d 656, 658 (2003) (citing *Clark v. Clark*, 294 N.C. 554, 575-76, 243 S.E.2d 129, 142 (1978)); N.C. Gen. Stat. § 50-13.1(a) (stating that, "[u]nless a contrary intent is clear, the word custody shall be deemed to include custody or visitation or both").

N.C. App. __, __, 737 S.E.2d 783, 785 (2013) (citing *Hall v. Hall*, 188 S.E.2d 527, 530, 655 S.E.2d 901, 904 (2008)). On the other hand, a trial court's substantive custody decision will not be reversed on appeal absent a clear showing that an abuse of discretion has occurred. *Pulliam v. Smith*, 348 N.C. 616, 624-25, 501 S.E.2d 898, 902 (1998). We will now review Plaintiff's challenges to the trial court's decision in light of the applicable standard of review.

B. Relevant Legal Principles

According to N.C. Gen. Stat. § 50-13.2, a 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). "Before a trial court can de[prive] parents of

their visitation rights, the trial court must first make a written finding of fact that: (1) the parent being denied the right to visitation is unfit; or (2) visitation would not be in the child's best interests." *Maxwell v. Maxwell*, 212 N.C. App. 614, 622, 713 S.E.2d 489, 495 (2011); see also *Respass v. Respass*, ___ N.C. App. ___, ___, 754 S.E.2d 691, 696 (2014) (stating that, "if a trial court does not grant reasonable visitation to a parent, its order must include a finding either that the parent is 'an unfit person to visit the child' or that visitation with the parent is 'not in the best interest of the child'").

C. Analysis of the Trial Court's Order

1. Custody Decision

As an initial matter, Plaintiff argues that the trial court erred by awarding custody of Laura to Defendant. More specifically, Plaintiff contends that the trial court's findings of fact fail to establish that Defendant is a fit and proper person to have custody of Laura and that Laura's best interests would be served by an award of custody in favor of Defendant. Plaintiff's argument has merit.

"[C]ustody orders are routinely vacated where the 'findings of fact' consist of mere conclusory statements that the party being awarded custody is a fit and proper person to have custody

and that it will be in the best interest of the child to award custody to that person." *Dixon*, 67 N.C. App. at 76-77, 312 S.E.2d at 672 (citations omitted). For that reason, "the findings in a custody order 'bearing on the party's fitness to have care, custody, and control of the child and the findings as to the best interests of the child must resolve all questions raised by the evidence pertaining thereto.'" *Id.* at 78, 312 S.E.2d at 672 (quoting *In re Kowalzek*, 37 N.C. App. 364, 370, 246 S.E.2d 45, 48 (1978)).

In addressing Defendant's fitness as a parent and the extent to which an award of custody in favor of Defendant would be in Laura's best interests, the trial court found that:

9. The Defendant is in good health and is a fit and proper person to have the care, custody and control of the minor child. The Defendant has been the primary caretaker of the minor child at all times since the child's birth. The minor child has resided with the Defendant in Davie County at all times since her birth. At the time of the minor child's birth, the Defendant herself was a minor and resided with her own mother, the minor child's maternal grandmother.

. . . .

21. The Defendant has denied the Interveners visits and contact with the minor child and has prohibited Defendant's mother from allowing the Interveners contact with the minor child.

22. The Defendant has been less than truthful, and the Court has counseled the

Defendant concerning the penalties of perjury as a result of the numerous untruths contained in Defendant's testimony.

The trial court's custody-related findings establish little more than that Laura has resided with Defendant since her birth, that Defendant has been Laura's primary caretaker, and that Defendant's conduct has, in certain respects, been less than exemplary. To the extent that the trial court's findings shed any light on Defendant's capabilities as a parent, they actually tend to portray her in a less-than-stellar light. When read in their entirety, the trial court's findings provide no real explanation for the decision to award the custody of Laura to Defendant. As a result, we have no choice except to hold that the custody-related portions of the trial court's order should be vacated and this case should be remanded to the Davie County District Court for the entry of a new order that contains adequate findings of fact and proper conclusions of law addressing the custody issue.

2. Visitation Decision

Secondly, Plaintiff contends that the trial court erred by denying his request to visit with Laura. In challenging the visitation-related provisions of the trial court's order, Plaintiff argues that the trial court's findings of fact lack evidentiary support and that the trial court's conclusions of

law lack sufficient support in the findings of fact and rest on an incorrect understanding of the applicable law. Once again, we conclude that certain of Plaintiff's challenges to the trial court's order have merit.

First, Plaintiff argues that the trial court erred by making and apparently relying upon the following factual finding:

23. The Defendant testified that [she] is concerned about her daughter visiting the Plaintiff in the Department of Corrections for the following reasons:

a. She believes that it is a bad environment, although she admits that she has not been to the prison personally [and] she has not seen any photos or other depictions of the described visitation room;

b. She believes that the minor child is too young for frequent trips of four hours or more, which is her estimated round trip travel time from Davie County to the prison in Marion, North Carolina;

c. She believes that the Plaintiff is in jail, paying for a crime and to reward him with visitation is not really punishment, when he does not demonstrate his understanding of why his actions were criminal in nature and not merely the result of a consensual, intimate relationship between Plaintiff and Defendant;

d. She believes that if the visitation room is too nice and fine, the minor child may grow up thinking

that it is okay to be bad and go[] to jail, where it is fun.

As even a cursory reading clearly reflects, Finding of Fact No. 23 is nothing more than a recitation of Defendant's testimony and does not constitute a valid finding of fact. *In re Bullock*, __ N.C. App. __, __, 748 S.E.2d 27, 30 (2013) (stating that "[r]ecitations of the testimony of each witness do not constitute findings of fact by the trial judge") (citation and quotation marks omitted); *Long v. Long*, 160 N.C. App. 664, 668, 588 S.E.2d 1, 3 (2003) (stating that "findings that merely recapitulate the testimony or recite what witnesses have said" are inadequate). For that reason, the information contained in Finding of Fact No. 23 cannot be utilized in determining whether the trial court's visitation-related conclusions are sufficiently supported by the trial court's findings of fact.

In addition, Plaintiff argues that the trial court erred by making Finding of Fact Nos. 24, 26, 27, and 28, which provide that:

24. The minor child will be too old at the time of the Plaintiff's release to develop a healthy, well-adjusted parent-child relationship and bond with the Plaintiff.

. . . .

26. The Court makes no distinction between different types of rape. The Plaintiff pled guilty to attempted statutory rape in criminal court. It is clear from a

preponderance of the evidence in this civil court, that the Plaintiff did in fact commit the act of statutory rape by having sexual relations with the Defendant, who was fifteen years of age at the time and he was twenty-five years of age, which resulted in the conception and ultimately birth of the minor child who is the subject of this action. Rape is a violent crime, and the Plaintiff's and Interveners' attitude that statutory rape is somehow non-violent or otherwise acceptable is not healthy for the minor child.

27. Telling the minor child the truth about why her biological father is in prison will likely cause negative feelings toward the Defendant, which is not in the minor child's best interests. Telling the minor child anything other than the truth about why her biological father is in prison is equally detrimental to the minor child. It is, therefore, not in the minor child's best interests to visit with the man who raped her mother while he is serving the sentence for that crime.

28. The Plaintiff has had multiple victims of sex offenses, and those charges were dismissed in exchange for a plea to attempted statutory rape. The Plaintiff has not demonstrated that he has received counseling and addressed his own attitude and behavior regarding these young girls.

Although Plaintiff argues that these findings of fact lack adequate evidentiary support, we have not been provided with a transcript or any other information from which we can determine whether Plaintiff's challenge to these findings of fact has merit. In the absence of a transcript or a narration of the evidence received in the trial court, "we must assume that the

trial court's findings of fact are supported by competent evidence and we will not consider [the] plaintiff's [arguments] related thereto." *Baker v. Baker*, 115 N.C. App. 337, 339, 444 S.E.2d 478, 480 (1994); see also *Nunnery v. Baucom*, 135 N.C. App. 556, 561, 521 S.E.2d 479, 484 (1999) (stating that "we must presume the trial judge's findings were based upon competent evidence in that [the] defendants failed to include in the record on appeal either evidence or the verbatim transcript of the hearing"). As a result, Finding of Fact Nos. 24, 26, 27, and 28 are deemed to have adequate record support, are conclusive for purposes of appellate review, and may be utilized in determining if the trial court's conclusions of law are adequately supported by the trial court's findings of fact.

Moreover, Plaintiff argues that Finding of Fact No. 15, which states that "[t]here is no evidence before the Court as to whether [the prison's] visitation room is available to registered sex offenders, as there would, by its very nature, be minor children present," is inconsistent with Finding of Fact No. 16, which states that "[t]he Interveners visit the Plaintiff and bring his two nieces, who are of similar age to the minor child, to visit the Plaintiff." Although either finding could, in theory, have adequate evidentiary support, the fact that the trial court made completely inconsistent findings concerning the

extent to which the visitation facilities contained in the correctional facility in which Plaintiff currently resides accommodate visits between sex offenders and minor children renders us unable to rely on either finding in evaluating the validity of the trial court's conclusions of law.

Furthermore, Plaintiff challenges Finding of Fact. No. 29, in which the trial court found that "[t]he moving party has not shown by a preponderance of the evidence that it is in the best interests of the minor child to allow visitation with the Plaintiff." Although it designated this assertion as a finding of fact, the trial court's determination that Plaintiff has failed to show by a preponderance of the evidence that allowing Laura to visit with Plaintiff would be in her best interests is, in reality, an inference drawn from other facts and is, for that reason, tantamount to a conclusion of law that should be subject to *de novo* review. *In re Everette*, 133 N.C. App. 84, 85, 514 S.E.2d 523, 525 (1999) (stating that "any determination requiring the exercise of judgment, or the application of legal principles, is more properly classified a conclusion of law") (citations and quotations omitted). In examining Finding of Fact No. 29 in light of the applicable standard of review, we note that the trial court erroneously placed the burden of showing that visitation is in Laura's best interests upon

Plaintiff. *Lamond*, 159 N.C. App. at 405, 583 S.E.2d at 659 (stating that, "when a trial court is applying the 'best interests' standard, [neither] party has the burden of proof"); see also *Stephens v. Stephens*, 213 N.C. App. 495, 503, 715 S.E.2d 168, 174 (2011). As a result, instead of determining that Plaintiff failed to prove by a preponderance of the evidence that it is in Laura's best interest to have visitation with Plaintiff, the trial court should have simply reached a decision with respect to the "best interests" determination on the basis of an analysis of the totality of the circumstances. *Regan v. Smith*, 131 N.C. App. 851, 853, 509 S.E.2d 452, 454 (1998).

Finally, Plaintiff challenges Finding of Fact No. 25, in which the trial court found that "[t]he Plaintiff abandoned his constitutionally protected rights with respect to the minor child" and that "[t]o deny that he did so would be contrary to the Motion to Intervene filed by Plaintiff's own counsel and his parents." Once again, given that the determination reflected in this finding is the result of an exercise of judgment concerning the extent to which a legal standard has been met rather than a pure factual determination, Finding of Fact No. 25 is, in reality, a conclusion of law rather than a finding of fact. After carefully reviewing the record, we conclude that the trial

court's findings of fact simply do not support a determination that Plaintiff has abandoned his constitutionally protected right to parent Laura.

The abandonment of one's constitutional right to parent one's child "implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re J.D.L.*, 199 N.C. App. 182, 189, 681 S.E.2d 485, 491 (2009) (quoting *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986)). We are unable to see how the fact that Plaintiff's parents filed a motion to intervene for the obvious purpose of helping to facilitate Plaintiff's visits with his daughter signifies a decision on Plaintiff's part to forgo the right to exercise his parental responsibilities. In addition, by finding that "[t]he Plaintiff sends the minor child holiday cards, letters, notes, drawings, and other such materials" and acknowledging that Plaintiff has requested the right to visit with the child, the trial court's findings of fact demonstrate that Plaintiff has not "manifest[ed] a willful determination to forego all parental duties and relinquish all parental claims to [his] child." *In re J.D.L.*, 199 N.C. App. at 189, 681 S.E.2d at 491. As a result, the trial court's determination, which is reflected in both Finding of Fact No. 25 and a separate

conclusion of law to the effect that "[t]he Plaintiff has abandoned his constitutionally protected rights regarding the minor child," is not supported by and appears to us to be directly contrary to the findings of fact contained in the trial court's order.

The ultimate effect of the trial court's determination that "Plaintiff abandoned his constitutionally protected rights with respect to the minor child" upon its determination that Laura's best interests would not be served by allowing Plaintiff to visit with her is not entirely clear. On the one hand, the "abandonment" determination may serve as an integral part of the basis for the trial court's conclusion that Laura's best interests would be served by denying Plaintiff's request to visit with her. On the other hand, the trial court may have intended the "abandonment" and "best interest" determinations to be distinct justifications for rejecting Plaintiff's request for an award of visitation. However, we need not identify the exact nature of the trial court's basis for rejecting Plaintiff's visitation request given that (1) the trial court's determination that Plaintiff abandoned his constitutional right to parent his child lacks support in, and actually conflicts with, the information contained in the trial court's findings of fact and that (2), in addition to basing its decision upon

conflicting findings concerning the extent to which the correctional facility in which Plaintiff is serving his sentence adequately accommodates visits with children like Laura and a finding of fact that is nothing more than a recitation of Defendant's testimony, the trial court incorrectly required Plaintiff to prove that visitation between himself and Laura would be in the child's best interests. As a result, given that, under any possible reading of the trial court's order, the trial court's determination that Plaintiff's request to visit with his child should be denied is affected by errors of law that may well have affected the outcome that the trial court reached,³ we have no choice except to reverse the visitation-related portions of the trial court's order and to remand this case to the Davie County District Court for further proceedings not inconsistent with this opinion, including the entry of a new order addressing the visitation issue that contains findings of fact that have adequate evidentiary support and that support the

³We reach this conclusion, at least in part, given the trial court's findings that "Plaintiff is functioning well within his facility of incarceration," that Plaintiff "has attained his General Education Diploma" and "a commercial cleaning license," that Plaintiff "hopes [to open] his own cleaning business once he is released," that Plaintiff "has attained a job within the facility in which he is incarcerated and is often commended for his good behavior," and that Plaintiff "sends the minor child holiday cards, letters, notes, drawings, and other such similar materials."

trial court's conclusions of law and the making of conclusions of law that accurately reflect the applicable legal standards.⁴

III. Conclusion

Thus, for the reasons set forth above, we conclude that Plaintiff's challenges to the trial court's order have merit. As a result, the trial court's order should be, and hereby is, vacated, and this case should be, and hereby is, remanded to the Davie County District Court for further proceedings not inconsistent with this opinion, including the entry of a new order containing proper findings of fact and conclusions of law.

VACATED AND REMANDED.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).

⁴As a result of our decision to vacate the trial court's order and to remand this case to the trial court for the entry of a new order containing proper findings of fact and conclusions of law with respect to the custody and visitation issues, we need not address Plaintiff's contentions that the trial court erred by failing to take additional evidence on remand from our most recent previous decision in this case, except to note that the trial court may receive additional evidence on remand from this decision in the event that it determines, in the exercise of its sound discretion, that acting in that manner would be appropriate, *Hicks v. Alford*, 156 N.C. App. 384, 389, 576 S.E.2d 410, 414 (2003), or that the trial court abused its discretion by denying his request to visit with Laura.