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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-869

Filed: 17 February 2015

NATHAN CLAY CURRY

v.

Nash County

No. 03 CVD 2117

KIMBERLY DAWN TAYLOR (GANAS)

Appeal by plaintiff from order entered 30 April 2014 by Judge John Covolo in Nash County District Court. Heard in the Court of Appeals 7 January 2015.

Narron & Holdford, P.A., by I. Joe Ivey, for plaintiff-appellant.

No brief filed for defendant-appellee.

INMAN, Judge.

Nathan Clay Curry (“plaintiff”) appeals from an order placing joint legal and primary physical custody of his biological son, J.C.¹, with J.C.’s mother, Kimberly Dawn Ganas (“defendant”). On appeal, plaintiff argues that the trial court’s findings of fact are insufficient to support its legal conclusions that: (1) there was a substantial change in circumstances affecting the welfare of the child; and (2) the best interests of the child would be served by modifying the prior custody arrangement.

¹ To protect the privacy of the minor child, his initials are used in this opinion.

After careful review, we vacate the trial court's order and remand for additional findings of fact and conclusions of law consistent with this opinion.

Background

Plaintiff and defendant are the biological parents of J.C., who was born 14 July 2002. Initially, defendant and plaintiff shared joint legal custody over J.C., with defendant having primary physical custody. However, by order entered 31 October 2008 ("the 2008 order"), the trial court modified the previous custody arrangement and awarded sole legal and physical custody of J.C. to plaintiff.

The following factual background is taken from uncontested findings of fact in the trial court's previous orders²: As early as 2003, defendant resided with Chris Ganas ("Mr. Ganas"), and the two married sometime before 2007. In October 2003, plaintiff had to pick J.C. up from defendant's home after defendant called 911 and told police that J.C. was not safe in a home with Mr. Ganas. Defendant reported to the Department of Social Services that Mr. Ganas had kicked her in the stomach and banged her head against a wall; however, defendant later denied these allegations before the trial court during a custody hearing. In January 2007, the police were called twice regarding domestic violence allegedly perpetrated against defendant by Mr. Ganas. On three occasions, defendant sought housing from DSS or similar

² We note that many of the orders in the record have dark lines drawn over the trial court's findings, making these findings difficult to read and thereby impeding our review. "It is the duty of the appellant to see that the record is properly prepared and transmitted." *Matheson v. City of Asheville*, 102 N.C. App. 156, 171, 402 S.E.2d 140, 149 (1991).

organizations due to domestic violence allegedly perpetrated by Mr. Ganas. Defendant also violated previous court orders by refusing to share J.C.'s health and education records with plaintiff and by attempting to remove plaintiff's daughter by a previous marriage from plaintiff's home, resulting in a felony warrant for defendant's arrest in May 2005.

The trial court also found in 2008 that defendant had failed to provide adequately for J.C.'s education and health. J.C. was diagnosed as having developmental delays which required special treatment and schooling. J.C. was absent or tardy on 59 out of 150 school days while in the primary physical custody of defendant, and his lack of progress in school caused his teachers to advise repeating kindergarten before advancing him to first grade. While defendant had primary physical custody over J.C., the child developed three cavities in his teeth which required a root canal.

The trial court found in 2008 that plaintiff could provide J.C. with a "loving environment, rich in resources and distinguished by attentiveness to the needs of the child." At that time, plaintiff was on active duty as a Major in the United States Army; he was living with his wife and two minor children in a spacious home with a bedroom specifically for J.C. While on summer vacation with plaintiff, J.C. completed developmental speech programs and had perfect attendance. Due to plaintiff's military status, he had "exceptional" medical services, schooling facilities, and special

programs for speech therapy and developmental stimulation at his disposal to help J.C. progress in a healthy way.

Based on the foregoing findings of fact, the trial court in the 2008 order modified custody and granted plaintiff sole legal and physical custody.

On 26 April 2013, plaintiff filed a motion seeking authorization from the trial court to modify visitation after he received orders from the United States Army to relocate his family to Japan. Defendant filed a motion in response, requesting in part that the trial court modify the 2008 custody order because a substantial change in circumstances had occurred and J.C.'s best interests would be served by placing custody with defendant. On 10 September 2013, plaintiff voluntarily dismissed his motion to modify visitation because the Army granted his request to remain with his family in the United States. The trial court set a hearing date for defendant's custody modification request. After considering arguments from both parties on 17 February 2014, the trial court entered an order revoking sole legal and primary physical custody of J.C. from plaintiff and granting joint legal and primary physical custody to defendant. Plaintiff filed timely notice of appeal.

Standard of Review

The trial court's findings in a child custody case are reviewed by the "substantial evidence" standard, explained below. The trial court's conclusions are reviewed *de novo*.

In *Shipman v. Shipman*, 357 N.C. 471, 586 S.E.2d 250 (2003), our Supreme Court explained the method by which our appellate courts review modifications to existing child custody orders:

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. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

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

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. With regard to the trial court's conclusions of law, our case law indicates that the trial court must determine whether there has been a substantial change in circumstances and whether that change affected the minor child. Upon concluding that such a change affects the child's welfare, the trial court must then decide whether a modification of custody was in the child's best interests. If we determine that the trial court has properly concluded that the facts show that a substantial change of circumstances has affected the welfare of the minor child and that modification was in the child's best interests, we will defer to the trial court's judgment and not disturb its decision to modify an existing custody agreement.

Id. at 474-75, 586 S.E.2d at 253-54 (quotations and citations omitted). Thus, “before a child custody order may be modified, the evidence must demonstrate a connection between the substantial change in circumstances and the welfare of the child, and flowing from that prerequisite is the requirement that the trial court make findings of fact regarding that connection.” *Id.* at 478, 586 S.E.2d at 255. The trial court’s determinations regarding the existence of a substantial change in circumstances and the best interests of the child are both legal conclusions, which this Court reviews *de novo*. *Lamm v. Lamm*, 210 N.C. App. 181, 185-86, 707 S.E.2d 685, 689 (2011); *Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 98 (2000).

Discussion

Plaintiff argues on appeal that the trial court’s findings of fact are insufficient to support its legal conclusions that: (1) a substantial change in circumstances affected J.C.’s welfare; and (2) J.C.’s best interests would be served by custody modification. We agree.

Here, the trial court’s order included the following relevant findings of fact:

2. Since November 2008, Defendant and her husband worked with the Nash County Department of Social Services, a local church, and other resource providers to address the issue of domestic violence. The last instance of domestic violence between the parties occurred in November 2009.

...

4. The minor child was six years old when this matter was heard in 2008. The child is now eleven years old. The court finds the child to be mature for his age. He is quite intelligent and articulate. He has expressed a clear desire formed over an extended period to have the opportunity to live with his mother. The child has siblings in both the home of his mother and father. He has had extended visitation in his mother's home, especially during summer vacation. There have been no incidents during these visits that would adversely affect his welfare.

...

6. The conditions that led to the change of custody from Defendant mother to Plaintiff father have been remedied. Both parents are fit and proper persons to have custody of [J.C.].

7. [J.C.] has learning disabilities that have been addressed by an Individual Education Plan provided through the school that he currently attends. Any change of custody requiring a change in schools requires that he continue to have his needs addressed by appropriate plans and services.

[J.C.] has been identified as having a Specific Learning Disability as set out in Plaintiff's Exhibit H which is an Individual Education Program developed by the Prince William County Virginia Public Schools. This Individual Education Plan addresses and accommodates the educational needs of [J.C.] who is now enrolled in the fifth grade. [J.C.] is identified as a student to receive special education services due to his learning disability in the areas of written expression, work habits, reading comprehension, fluency and phonics.

8. Defendant talked to persons in the Harris County, Spring Texas public school system and determined that they will work with her and [J.C.] to develop and [sic.] Individual Education Plan for [J.C.]. However, the Defendant did not offer any evidence to show how the

Harris County, Spring, Texas public school system will address and/or accommodate [J.C.]’s Specific Learning Disability.

9. Since the entry of the prior Order on November 6, 2008 awarding sole custody of [J.C.] to the Plaintiff, Plaintiff has provided a home environment for [J.C.] which is safe, loving and attentive to the child’s educational needs.

10. There has been a substantial change of circumstances affecting [J.C.’s] welfare since entry of the court’s prior order in November 2008. The court finds that [J.C.’s] best interest and welfare would be served at this time by placing his primary physical custody with Defendant mother.

On appeal, plaintiff does not challenge the evidentiary support for the trial court’s findings of fact; thus, they are presumed to be supported by competent evidence and are binding on appeal. *See In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008) (“Unchallenged findings of fact are presumed correct and are binding on appeal.”). However, plaintiff contends that the findings of fact do not support the trial court’s legal conclusions that: (1) a substantial change in circumstances affecting J.C.’s welfare occurred, and (2) that J.C.’s best interests are served by modification of the 2008 custody award. Although the trial court included these determinations in its findings of fact, they are conclusions of law subject to *de novo* review. *See Lamm*, 210 N.C. App. at 186, 707 S.E.2d at 689; *see also Westmoreland v. High Point Healthcare, Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012) (“The labels ‘findings of fact’ and ‘conclusions of law’ employed by the trial court in a written order do not determine the nature of our review.”); *In re Everette*,

133 N.C. App. 84, 85, 514 S.E.2d 523, 525 (1999) (noting that where determinations involve the exercise of judgment or application of legal principles, they are more appropriately classified as conclusions of law).

This Court's decision in *Frey v. Best*, 189 N.C. App. 622, 659 S.E.2d 60 (2008), is controlling. In *Frey*, an initial consent order vested the plaintiff mother with primary physical custody over her three minor children, with the defendant father being allowed visitation on specified days. *Id.* at 623-24, 659 S.E.2d at 63-64. Approximately three years after entry of the consent order, the defendant filed a motion to modify the custody arrangement based on an alleged change in circumstances. *Id.* at 624-25, 659 S.E.2d at 64. In its order granting defendant's motion to modify his visitation schedule with the children, the trial court found that the defendant no longer worked on Friday nights and had moved from a one-bedroom apartment to a three-bedroom townhouse. *Id.* at 638, 659 S.E.2d at 72. Based on these findings, the trial court concluded that a substantial change in circumstances existed sufficient to modify custodial visitation. *Id.* On appeal, this Court cited *Shipman* for the proposition that "[t]he moving party must prove a 'nexus' between the changed circumstances and the welfare of the child' . . . and 'flowing from that prerequisite is the requirement that the trial court make findings of fact regarding that connection.'" *Id.* at 637, 659 S.E.2d at 72 (quoting *Shipman*, 357 N.C. at 478, 586 S.E.2d at 255-56). Because the trial court's determination that there had been a substantial change in circumstances was not accompanied by "findings of fact which

indicate[d] that those changes affected the welfare of the parties' minor children," this Court vacated the portion of the trial court's order modifying the defendant's visitation schedule and remanded for entry of additional findings of fact and conclusions of law. *Id.* at 638-39, 659 S.E.2d at 72.

Here, as in *Frey*, the trial court failed to indicate what effect, if any, the changes in defendant's circumstances had on J.C. Although the trial court did find that there had been no incidents adversely affecting J.C.'s welfare when he visited defendant during the summer, there are no findings regarding what effect the changes in circumstances had on J.C.'s welfare generally. Nor do the findings address issues regarding J.C.'s health care, school attendance, and progress in therapy which the trial court had previously found to affect J.C.'s welfare. Because the trial court's order lacks such findings, we are unable to determine "whether the trial court correctly exercised its function to find the facts and apply the law thereto." *Id.* at 638, 659 S.E.2d at 72 (internal quotation marks omitted). Accordingly, pursuant to *Frey*, we vacate the trial court's order and remand for further findings of fact and conclusions of law explicitly addressing all changes in circumstances and the effect of those changes on J.C. The trial court must incorporate the additional findings into its analysis regarding whether there has been a substantial change in circumstances and whether J.C.'s best interests would be served by custody modification. It will be in the trial court's discretion whether to conduct an additional hearing or consider new evidence. *See Hicks v. Alford*, 156 N.C. App. 384, 389, 576 S.E.2d 410, 413 (2003)

(“Whether on remand for additional findings a trial court receives new evidence or relies on previous evidence submitted is a matter within the discretion of the trial court.”).

Conclusion

Because the trial court’s findings regarding the changed circumstances and their effect on the child’s welfare are insufficient to allow adequate appellate review, we vacate the trial court’s order and remand for entry of additional findings of fact and conclusions of law consistent with this opinion.

VACATED AND REMANDED.

Judges STEELMAN and DIETZ concur.

Report per Rule 30(e).