IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-381

Filed: 17 November 2015

Cabarrus County, No. 11 CVD 1534

VALERIE McKEE, Plaintiff,

v.

LORRAINE YVONNE McKEE and ANTHONY CARACCIOLO, Defendants.

Appeal by defendant from Order entered 5 November 2014 by Judge Christy E. Wilhelm in Cabarrus County District Court. Heard in the Court of Appeals 21 September 2015.

FERGUSON, SCARBROUGH, HAYES, HAWKINS & DEMAY, PLLC, by James R. DeMay, for plaintiff.

Seth B. Weinshenker, P.A., by Seth B. Weinshenker, for defendant.

ELMORE, Judge.

Anthony Caracciolo (defendant) filed a motion for modification of child custody on 8 May 2013. On 5 November 2014, the trial court entered an order denying defendant's motion to modify the prior order by awarding him custody of J.M.C.[1] However, the trial court modified the visitation provisions of the prior order,

[1] We employ this pseudonym to protect the confidentiality of the minor in this case.

increasing defendant's visitation times. Defendant appeals. Lorraine McKee does not appeal. After careful consideration, we reverse and remand.

I. Background

J.M.C. was born in May 2006 to defendant and Lorraine McKee. Valerie McKee (plaintiff) is the maternal grandmother of J.M.C. Plaintiff brought an action for custody of J.M.C., and pursuant to the Child Custody Consent Order entered 2 May 2011, the care, custody, and control of J.M.C. was placed with plaintiff.

Two years later, defendant filed a motion for modification of child custody on 8 May 2013. In that motion, defendant stated, "[T]here has been a substantial change in circumstances that affects the welfare of the minor child and [defendant] is therefore seeking primary custody of [J.M.C.], with visitation rights to co-Defendant, Lorraine McKee and to the Plaintiff, Valerie McKee." Defendant listed the following four reasons evidencing the substantial change in circumstances: (1) plaintiff has significantly downsized her residence to a 1,200 square foot, three-bedroom home, and six other people and two dogs live in the home; (2) Lorraine McKee has absented herself from plaintiff's home and her whereabouts are unknown; (3) defendant was living with his parents and earning $14.00 an hour, and now he rents a home and is earning $20.00 an hour, enabling him to better support J.M.C. and provide her with her own room; and (4) defendant resides with his fiancé, Whitney Davis, a registered nurse, with whom he has a child.

In the Order entered 5 November 2014, the trial court made the following findings of fact:

> 13. That since the date of the Prior Order there has been a substantial change in circumstances, as follows:
>
> a. [J.M.C.] was five years old as of the date of the Prior Order, and is now eight years old.
>
> b. The Father married Whitney Caracciolo on September 7, 2013 with whom he has established a safe, stable and loving home.
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> c. There are two other children in the Caracciolo household, to wit Raelynn Caracciolo, two years old, the biological child of the Father and Whitney Caracciolo; Aiden Stephens, six years old, the biological child of Whitney Caracciolo, and thus the step-child of the Father. All three children, [J.M.C.], Aiden and Raelynn, share a very strong bond together as siblings. Whitney Caracciolo shares a very strong bond with [J.M.C.], has served as a good maternal role model for [J.M.C.], and treats [J.M.C.] as her own biological child. Likewise the Father has a very strong bond with [J.M.C.] and treats his step-son, Aiden, as his own child.
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> d. Since the date of the Prior Order, the Father has bettered himself; he has received a promotion earning more money than he did at the time of the Prior Order, he has straightened out his priorities in terms of being a devoted and mature family man to his children, and being a good and constant presence to [J.M.C.] The Father and his wife engage in numerous activities with all three children, [J.M.C.], Aiden and Raelynn, as a family unit. Whitney Caracciolo has also improved herself by obtaining her nursing degree.
>
> e. While the aforementioned change in circumstances has had a positive effect on the welfare of [J.M.C.], the Court

> finds as fact that there has not been a sufficient showing of a negative effect on the welfare of [J.M.C.] to warrant awarding custody of [J.M.C.] to the Father.

The trial court made the following conclusion of law: "2. There has been a change in circumstances since the Prior Order. However, there has not been a sufficient showing of a negative effect on the welfare of the Minor Child to warrant awarding custody of the Minor Child to the Father." Based on the foregoing, it denied defendant's motion to modify the prior order by awarding him custody of J.M.C., but it modified the visitation provisions of the prior order. The trial court increased defendant's weekend, weekly, summer school recess, and holiday visitation time, as well as provided for additional electronic communication. Defendant appeals.

II. Analysis

Defendant argues that the trial court's second conclusion of law is not supported by the trial court's findings of fact, resulting in reversible error. We agree.

"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) (citing *Pulliam v. Smith*, 348 N.C. 616, 625, 501 S.E.2d 898, 903 (1998)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (quoting *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980) (quotation marks omitted)). "We review the trial

court's conclusions of law *de novo*." *Heatzig v. MacLean*, 191 N.C. App. 451, 454, 664 S.E.2d 347, 350 (2008) (citing *Huyck Corp. v. Town of Wake Forest*, 86 N.C. App. 13, 15, 356 S.E.2d 599, 601 (1987)). "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Id.* (quoting *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)).

"It is a long-standing rule that the trial court is vested with broad discretion in cases involving child custody." *Pulliam*, 348 N.C. at 624–25, 501 S.E.2d at 902 (citing *In re Peal*, 305 N.C. 640, 645, 290 S.E.2d 664, 667 (1982)). "Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal." *Everette v. Collins*, 176 N.C. App. 168, 171, 625 S.E.2d 796, 798 (2006) (citing *In re Mason*, 13 N.C. App. 334, 336, 185 S.E.2d 433, 434 (1971)).

"[A]n order of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested." N.C. Gen. Stat. § 50-13.7 (2013). "[T]he trial court must determine whether there has been a substantial change in circumstances and whether that change affected the minor child." *Shipman*, 357 N.C. at 475, 586 S.E.2d at 254. "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." *Id.*

Defendant maintains that because the trial court found that he proved there was a substantial change in circumstances and that such change in circumstances had a positive effect on the welfare of the minor child, the trial court should have engaged in a determination of whether modification would be in the best interests of the child. Defendant contends that the trial court erred in concluding as a matter of law that "there has not been a sufficient showing of a negative effect on the welfare of the Minor Child to warrant awarding custody of the Minor Child to the Father." Defendant states he is unaware of any case holding "relief cannot be granted to movant unless there is *also* an adequate showing of negative consequences to the child on the basis of the change in circumstances."

Plaintiff contends that the trial court properly engaged in the two-step inquiry by, first, determining that a substantial change in circumstances occurred, and, second, that it was in J.M.C.'s best interest to keep primary custody with plaintiff. Plaintiff argues that "the trial court was not mistaken on the law as Defendant contends."

We find our Supreme Court's opinion in *Pulliam v. Smith* instructive. In that case, the trial court granted the mother's motion to modify the custody order, and it awarded the mother exclusive custody. 348 N.C. at 624, 501 S.E.2d at 902. The father appealed, and this Court reversed the trial court's order. *Id.* Our Supreme Court reversed our decision and reinstated the judgment of the trial court. *Id.* The

Supreme Court stated,

> As a preliminary matter, we address that portion of the Court of Appeals' decision which concluded that the party seeking modification of custody must show "that the change [in circumstances] has had an adverse effect on the child or will likely or probably have such an effect unless custody is altered." *Pulliam v. Smith,* 124 N.C. App. 144, 147, 476 S.E.2d 446, 449 (1996) (emphasis added). This Court has never required the party moving for a modification of custody to show that the change in circumstances has had or will have an adverse consequence upon the child's well-being, and we decline to do so now.

Pulliam, 348 N.C. at 618, 501 S.E.2d at 899.

The *Pulliam* Court then discussed its holding in *Blackley v. Blackley*, 285 N.C. 358, 204 S.E.2d 678 (1974), clarifying, "[W]e neither held nor implied that to establish a change of circumstances which would justify a modification of custody, it must always be shown that the change of circumstances adversely affects or will adversely affect the child." *Pulliam*, 348 N.C. at 619, 501 S.E.2d at 899.

The *Pulliam* Court also discussed this Court's holding in *Rothman v. Rothman*, 6 N.C. App. 401, 170 S.E.2d 140 (1969), stating, "The Court of Appeals then incorrectly held, 'It must be shown that circumstances have so changed that the welfare of the child will be adversely affected unless the custody provision is modified.' " *Pulliam*, 348 N.C. at 620, 501 S.E.2d at 900 (quoting *Rothman*, 6 N.C. App. at 406, 170 S.E.2d at 144). The *Pulliam* Court further stated, "We also disapprove of subsequent Court of Appeals cases to the extent they require a showing

of adversity to the child as a result of changed circumstances to justify a change of custody." *Id.* (citing a number of cases).

Lastly, it reiterated, "We emphasize that an adverse effect upon a child as the result of a change in circumstances is and remains an acceptable factor for the courts to consider and will support a modification of a prior custody order. However, a showing of a change in circumstances that is, or is likely to be, beneficial to the child may also warrant a change in custody." *Id.*

Here, the trial court made the following conclusion of law: "There has been a change in circumstances since the Prior Order. However, there has not been a sufficient showing of a negative effect on the welfare of the Minor Child to warrant awarding custody of the Minor Child to the Father." Contrary to plaintiff's assertion that the trial court properly determined it was in J.M.C.'s best interest for plaintiff to retain custody, the trial court's Order fails to even mention "best interest."

Based on *Pulliam v. Smith*, the trial court erred in requiring a showing of an adverse effect on J.M.C. in order to warrant a change of custody. Under N.C. Gen. Stat. § 50-13.7(a), defendant was not required to make a "sufficient showing of a negative effect on the welfare of [J.M.C.]" As our Supreme Court stated, the trial court may *consider*, as a factor, whether a change in custody would have an adverse effect on the child. *Pulliam*, 348 N.C. at 620, 501 S.E.2d at 900. However, it was error for the trial court to *require* such a showing as a prerequisite to modify the

custody order. Because "a showing of a change in circumstances that is, or is likely to be, beneficial to the child may also warrant a change in custody[,]" *id.*, the trial court erred in limiting its inquiry. In *Brewer v. Brewer*, 139 N.C. App. 222, 232–33, 533 S.E.2d 541, 549 (2000), the trial court failed to make sufficient findings regarding the effect that the change of circumstances had on the children in its "best interest" inquiry, and this Court reversed and remanded "to the trial court for findings as to how the relevant change in circumstances affected the children's well-being" in accordance with *Pulliam*. Here, as in *Brewer*, we find it appropriate to reverse and remand to the trial court for further findings.

III. Conclusion

We reverse the trial court's Order and remand so the trial court may determine whether modifying the Child Custody Consent Order would be in J.M.C.'s best interest in light of the foregoing.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge DAVIS concur.

Report per Rule 30(e).