IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-412

Filed: 17 November 2015

Mecklenburg County, No. 06 CVD 1898

CHRISTY READY, Plaintiff,

v.

PATRICK READY, Defendant.

Appeal by defendant from order entered 6 November 2014 by Judge Christy T. Mann in Mecklenburg County District Court. Heard in the Court of Appeals 6 October 2015.

No brief for plaintiff-appellee.

Church Watson Law, PLLC, by Kary C. Watson, for defendant-appellant.

ZACHARY, Judge.

Patrick Ready (defendant) appeals from a modified order for child custody and support that awarded Christy Ready (plaintiff) and defendant joint legal custody of their minor child, Sam,[1] provided primary physical custody of Sam to plaintiff and visitation privileges with Sam to defendant, granted plaintiff the final decision making power regarding Sam, and increased the amount of child support to be paid

[1] To protect the child's privacy and for ease of reading, in this opinion we refer to the parties' minor child by the pseudonym "Sam."

by defendant. On appeal, defendant argues that the trial court violated his right to due process under the federal and state constitutions and abused its discretion "by failing to fulfill its duty to be fair and impartial[.]" Defendant also argues that the trial court's modified child custody and support order should be vacated because the order includes findings of fact that are not supported by the evidence; that the trial court's findings of fact do not support its conclusions of law; that the trial court abused its discretion; and that reversal of the provisions of the trial court's order pertaining to child custody requires reversal of the order for child support. We hold that defendant did not preserve for appellate review his argument that the trial court was biased against him; that the challenged findings of fact are supported by the evidence; that the court's findings support its conclusions of law; that the trial court did not abuse its discretion in the court's determination of the best interest of the child; and that we need not reach defendant's argument concerning the child support provisions of the order.

I. Factual and Procedural Background

Plaintiff and defendant were married in 1994, and Sam was born in August 2002. The parties separated in 2004 and were divorced in 2007. On 27 January 2006 plaintiff filed a complaint seeking child custody and support, post-separation support and alimony, and equitable distribution of the marital estate. On 11 July 2006 District Court Judge Rebecca Tin entered an order approving a parenting agreement

executed by the parties. The agreement gave the parties joint legal custody of Sam, with plaintiff to have primary physical custody and defendant to have visitation rights, and provided that the parties would make decisions jointly about issues of significance in Sam's life, including his educational and medical needs. On 1 November 2006 Judge Tin entered a consent order resolving the other issues raised by plaintiff's complaint, including a provision that defendant pay $859 a month in child support. At that time defendant was in the National Guard, and between 2009 and 2012 defendant was deployed for a year in Iraq and a year in Afghanistan. Defendant returned from Afghanistan in January 2012 and was then stationed at Fort Bragg until he retired from the military in April 2013. On 14 May 2013 defendant filed a motion for modification of the parenting agreement in which he asked for primary physical and legal custody of Sam. Defendant's motion alleged that plaintiff was emotionally and financially unstable, had failed to communicate with defendant regarding Sam, and had behaved irrationally in regards to Sam's medical care. The Mecklenburg County Child Support Enforcement Agency filed a motion to enforce, redirect, establish arrears and modify defendant's child support obligation on 6 April 2013. On 15 October 2013 plaintiff filed her motion for attorneys' fees and response to defendant's motion to modify child custody and visitation.

Hearings were conducted on defendant's motion on 29 September and 10 October 2014. The uncontradicted evidence tended to show that Sam had a substantial history of medical treatment. Sam was born prematurely in 2002, and shortly after his birth he required surgery to treat a pericystic abscess. Between 2003 and 2007, Sam had four sets of tubes placed in his ears and was treated for a double hernia. In 2007 Sam had his appendix removed, requiring additional surgery in 2008. In 2008 Sam also had his tonsils removed, had an MRI, a seizure review, and an EEG. In 2011 Sam was injured in a car accident and was treated with physical therapy, occupational therapy, speech therapy, and the use of a hyperbaric chamber. In 2012 the parties learned that Sam had been sexually molested several years earlier, for which Sam received counseling therapy.

In addition to his medical issues, Sam has experienced academic and psychological challenges. Sam had to repeat the first grade and has had an Individualized Educational Plan (IEP) since that time. He attended several elementary schools and has received tutoring. Sam was evaluated by several mental health professionals between 2007 and 2010, including psychologists Dr. Jill Gottlieb and Dr. Susan Crawley, and psychiatrist Dr. Brent Sunderland. The mental health professionals who examined Sam were in agreement that Sam had attention deficit hyperactivity disorder (ADHD), for which he has been treated with medication, and that Sam's language and social skills were delayed. They also agreed that Sam

exhibited a variety of traits associated with an autism spectrum disorder. For example, Dr. Gottlieb noted that Sam was socially immature, had difficulty describing an event in sequence or conducting an age appropriate conversation, and lacked an understanding of certain emotional concepts. Dr. Crawley observed that Sam asked repetitive questions, would not make eye contact, and had difficulty with normal conversations. Dr. Sunderland found Sam to have "quantitative impairment of social reasoning and interaction, and a preoccupation and restriction of interests, and/or worries." Thus, all of the mental health professionals who examined Sam observed that he had traits characteristic of an autism spectrum disorder. Their diagnoses varied, however, as to whether Sam's constellation of symptoms corresponded to a clinical diagnosis of autism. Dr. Gottlieb concluded that Sam exhibited the symptoms of an autism spectrum disorder, but that he did not meet the criteria for a diagnosis of autism. Dr. Crawley diagnosed Sam with "Asperger's Syndrome" and concluded that he fell within the "mild to moderate range of autism spectrum disorder." Dr. Sunderland found that Sam showed characteristics of a mild autism spectrum disorder but that he did not "exactly fit all the criteria."

At the hearing, defendant testified to his opinion that plaintiff had sought a diagnosis for Sam of Asperger's Syndrome as part of her "attention seeking habits," and in his appellate brief defendant focuses attention on the fact that the experts reached varying conclusions as to the specific diagnosis that best described Sam's

autism spectrum symptoms. However, defendant fails to identify any medical or legal significance of this issue, beyond its possible support for defendant's opinion about plaintiff's emotional stability, and we conclude that this issue has little bearing on our review of the trial court's order.

Evidence adduced at the hearing also showed that plaintiff had experienced periods of unemployment and financial instability after 2006, that plaintiff had held numerous jobs during this time, and that defendant had provided plaintiff with financial contributions to Sam's care in addition to the amount required by the consent judgment. Defendant testified that his deployment overseas had limited defendant's ability to exercise his visitation rights or to participate in Sam's activities.

In addition to the factual evidence summarized above, each party offered evidence tending to cast the other party in an unflattering light. For example, plaintiff testified that she had tried unsuccessfully to interest defendant in various parenting decisions, and that she had facilitated defendant's communication with Sam; on the other hand, defendant testified that plaintiff had withheld information from him about Sam's academic and medical situation, and that plaintiff had interfered with defendant's ability to send emails to Sam. As discussed above, however, the evidence was largely undisputed regarding the important events in Sam's life.

On 6 November 2014 the trial court entered an order that awarded defendant additional visitation with Sam, continued the parties' joint legal custody of Sam, and modified the parties' decision making authority as follows:

> The parties shall share joint legal custody. The parent who the minor child is with has the right to make day-to-day decisions for the minor child. In matters of more consequence or lasting significance, issues shall be discussed between parents to resolve them by mutual agreement. These issues include . . . educational matters, medical health treatment (not including emergency care), and religious decisions. In the event that the parties are unable to agree, Mother shall have final decision making power.

Defendant appeals from the trial court's modified child custody and support order.

II. Standard of Review

N.C. Gen. Stat. § 50-13.2(a) provides that a trial court should award custody "to such person, agency, organization or institution as will best promote the interest and welfare of the child." Defendant appeals from an order modifying child custody. "It is well established in this jurisdiction that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a 'substantial change of circumstances affecting the welfare of the child' warrants a change in custody." *Shipman v. Shipman*, 357 N.C. 471, 473, 586 S.E.2d 250, 253 (2003) (quoting *Pulliam v. Smith*, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998) (internal quotation omitted).

> The trial court's examination of whether to modify an existing child custody order is twofold. The trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child. . . . [If] the trial court determines that there has been a substantial change in circumstances and that the change affected the welfare of the child, the court must then examine whether a change in custody is in the child's best interests. If the trial court concludes that modification is in the child's best interests, only then may the court order a modification of the original custody order.

Shipman, 357 N.C. at 474, 586 S.E.2d at 253. In this case, defendant does not dispute that there was a substantial change of circumstances between 2006 and 2014, and instead challenges the trial court's findings and conclusions. The standard of review "when the trial court sits without a jury is 'whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.' " *Barker v. Barker*, __ N.C. App. __, __, 745 S.E.2d 910, 912 (2013) (quoting *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992)). "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) (citation omitted). "Whether [the trial court's] findings of fact support [its] conclusions of law is reviewable *de novo*." *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 904 (2008) (citation omitted). In addition:

> It is a long-standing rule that the trial court is vested with broad discretion in cases involving child custody. . . . "The trial court] has the opportunity to see the parties in person

> and to hear the witnesses, and [its] decision ought not be upset on appeal absent a clear showing of abuse of discretion." "[The trial court] can detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges."

Pulliam, 348 N.C. at 624-25, 501 S.E.2d at 902-903 (quoting *Surles v. Surles*, 113 N.C. App. 32, 36-37, 437 S.E.2d 661, 663 (1993) (internal quotations omitted)) (other citation omitted). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [its order] was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citation omitted).

III. Judicial Bias

Defendant argues first that the trial court committed reversible error by "failing to fulfill its duty to be fair and impartial[.]" Defendant contends that the trial court's comments and questions to witnesses demonstrated that "[t]he trial court was not an impartial fact finder" and that the trial court's bias was both an abuse of its discretion and also a violation of defendant's right to due process under the United States and North Carolina Constitutions. We dismiss this argument.

As regards defendant's constitutional argument, "we note that defendant did not raise such an objection or argument at trial. Defendant is raising [his] constitutional argument for the first time on appeal. 'A constitutional issue not raised at trial will generally not be considered for the first time on appeal.' " *Cox v. Cox*, __

N.C. App. __, __, 768 S.E.2d 308, 311 (2014) (quoting *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (per curiam) (citations omitted)). Accordingly defendant's constitutional claim will not be addressed in this Court.

Regarding defendant's argument that the trial court abused its discretion by failing to be impartial, it appears that "[d]efendant's argument confuses the trial court's duty to weigh the credibility of the evidence and to resolve the disputes raised by the evidence with improper judicial bias." *Cox*, __ N.C. App. at __, 768 S.E.2d at 316 (citing *Carpenter v. Carpenter*, 225 N.C. App. 269, 279, 737 S.E.2d 783, 790 (2013)). "The type of judicial bias which is considered to be improper is bias based upon the judge's 'personal bias or prejudice concerning a party.' " *Id*. (quoting *Sood v. Sood*, 222 N.C. App. 807, 812, 732 S.E.2d 603, 608, *cert. denied, appeal dismissed*, 366 N.C. 417, 735 S.E.2d 336 (2012)). *See, e.g., In re Badgett*, 362 N.C. 482, 666 S.E.2d 743 (2008) (judge's comments gave the appearance of a bias against persons of Mexican descent). We need not, however, reach a definitive conclusion on this issue, as defendant failed to preserve it for our review. It is long established

> that an alleged failure to recuse is not considered an error automatically preserved under N.C. R. App. P. 10(a)(1). . . . Where appellant failed to move that the trial judge recuse himself, [he] cannot later raise on appeal the judge's alleged bias based on an undesired outcome.

Sood, 222 N.C. App. at 812, 732 S.E.2d at 608. Defendant "did not move for the trial court's recusal prior to the entry of the permanent child custody . . . order. Defendant has failed to preserve [his] argument of judicial bias. Accordingly, this argument is

dismissed." *Cox* at __, 768 S.E.2d at 317. Because defendant did not move for the trial court's recusal at the trial level or seek a ruling on the trial court's alleged bias, we do not reach this issue on appeal.

IV. Evidentiary Support for the Trial Court's Findings of Fact

Defendant argues next that the trial court's order should be vacated on the grounds that "many of the findings of fact are not supported by the evidence presented at trial, and the court's findings do not support the conclusions of law." This argument is without merit.

Our examination of defendant's arguments reveals that his challenges to the evidentiary support for the trial court's findings of fact are, in most instances, arguments that the trial court should have assigned more credibility and weight to other evidence. Determination of the credibility of witnesses and the weight of evidence is in the exclusive purview of the trial court:

> A trial judge "passes upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom." . . . "It is clear beyond the need for multiple citation that the trial judge, sitting without a jury, has discretion as finder of fact with respect to the weight and credibility that attaches to the evidence." "The trial court must itself determine what pertinent facts are actually established by the evidence before it, and it is not for an appellate court to determine *de novo* the weight and credibility to be given to evidence disclosed by the record on appeal."

Phelps v. Phelps, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994) (quoting *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968); *Smithwick v. Frame*, 62 N.C.

App. 387, 392, 303 S.E.2d 217, 221 (1983); and *Coble v. Coble*, 300 N.C. 708, 712-13, 268 S.E.2d 185, 189 (1980)). We also emphasize that " '[t]he well-established rule is that findings of fact by the trial court supported by competent evidence are binding on the appellate courts even if the evidence would support a contrary finding.' " *Mussa v. Palmer-Mussa*, 366 N.C. 185, 191, 731 S.E.2d 404, 408-09 (2012) (quoting *Scott v. Scott*, 336 N.C. 284, 291, 442 S.E.2d 493, 497 (1994) (internal citation omitted)).

Defendant first argues that Finding of Fact No. 15 is more properly classified as a conclusion of law. Finding No. 15 states that:

> 15. Despite said substantial changes in circumstances, it is in the best interests and general welfare of the minor child to remain in the primary physical care, custody and control of the Mother with Father receiving one more overnight every other weekend based on the facts and as ordered herein below. Further, it is in the best interests and general welfare of the minor child that the parties joint legal custody be modified so that Mother has final decision making power based on the facts set forth herein below.

" 'Findings of fact are statements of what happened in space and time.' " *Zimmerman v. Appalachian State Univ.*, 149 N.C. App. 121, 130, 560 S.E.2d 374, 380 (2002) (quoting *State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 352, 358 S.E.2d 339, 346 (1987)). In contrast, " '[a] conclusion of law' is a statement of the law arising on the specific facts of a case which determines the issues between the parties. . . . As a general rule[,] . . . any determination requiring the exercise of judgment, or the application of legal principles, is more properly classified a conclusion of law.' "

Puckett v. Norandal USA, Inc., 211 N.C. App. 565, 569-70, 710 S.E.2d 356, 359-60 (2011) (quoting *Wiseman Mortuary, Inc. v. Burrell*, 185 N.C. App. 693, 697, 649 S.E.2d 439, 442 (2007) (internal quotation omitted)). We agree that this finding is actually a conclusion of law but disagree with defendant's contention that "there are no properly supported findings to support" this conclusion, and find that this conclusion is supported by the trial court's findings of fact, including the findings discussed in the remainder of this opinion.

Defendant next challenges Finding No. 17, which states that:

> 17. The minor child also has a good and close relationship with his Mother and his Mother's boyfriend, Karl Roe. The minor child is especially close to his Mother and she is his security blanket.

This finding is supported by plaintiff's testimony about her attention to Sam's needs and her testimony that Sam was close to her boyfriend, who had "been his only father figure in his life." Defendant does not dispute the existence of this evidence, but simply points out other testimony that might have supported a contrary finding.

Defendant also challenges Findings No. 19 and 29, which state that:

> 19. Father has traditionally been the means of financial support for the minor child. Mother has been primarily responsible for addressing and making decisions regarding the minor child's medical, psychological and educational needs.
>
> 29. Mother has also been primarily responsible for addressing the minor child's educational needs. The minor child has an individualized educational program (IEP) and

> Mother has attended all meetings for the same. Father has attended some meetings.

The only aspect of these findings that defendant challenges is the trial court's finding that plaintiff was "primarily responsible for" addressing Sam's medical and educational needs. Defendant concedes on appeal that "there was evidence that [plaintiff] has made all decisions regarding [Sam's] medical, psychological and educational needs." Defendant maintains that plaintiff made these decisions "unilaterally," and appears to posit a semantic distinction between "was responsible for" and "had responsibility for," an argument which does not undercut the existence of evidence supporting these findings. This argument lacks merit.

Defendant next argues that "Findings of Fact Nos. 20, 22, 25 and 26 are also unsupported by the evidence presented." These findings state that:

> 20. Father expressed concern that Mother has taken the minor child to an excessive amount of doctor's appointments and has a need to diagnose the minor child. The Court finds this concern to be unfounded based on the records stipulated to by the parties as evidence during a pretrial conference. Instead, Mother went on a quest to identify and address the minor child's social, academic, and behavioral issues, which was in the best interests and general welfare of the minor child.
>
> 22. Mother did take the minor child to several different therapists for evaluations . . . for clarification because Mother received competing diagnoses for the minor child.
>
> 25. Father also expressed concern that the minor child has been overly medicated since the entry of the Parenting Agreement Order. The Court finds this allegation to be unfounded. Instead, the Mother has made sure that issues

> regarding the minor child's medication were addressed as exemplified by Mother's many visits to the minor child's physician for medication checkups.
>
> 26. Medications for the minor child were necessary in order to enable the minor child to compete in an academic environment. Mother's efforts with regard to regulating the minor child's medications have resulted in the minor child doing better academically.

These findings are supported by plaintiff's testimony regarding the reasons why Sam had changed schools, her attention to Sam's daily routine, and the referrals from Sam's primary care physicians to specialists who reached varying conclusions concerning Sam's symptoms of an autism spectrum disorder. On appeal, defendant does not dispute the existence of this evidence, but instead urges review of other evidence which defendant contends would have supported a different finding regarding plaintiff's motivation for seeking medical treatment for Sam. As discussed above, findings of fact supported by competent evidence are binding on appeal, notwithstanding the presence of contrary evidence.

Defendant also questions the sufficiency of the evidence supporting Finding No. 27, which states that the "Court has great concern that Father only perused the minor child's medical records." When questioned about his review of Sam's medical records, defendant responded as follows:

> Q. And now, in reference to the Medical Records Binder, okay? You've had the opportunity, I guess, to review all of these records; correct?
>
> A. Cursory review; yes.

Defendant's admission that he gave his son's medical records only a "cursory review" supports the trial court's finding of fact. This argument is without merit.

Defendant further challenges Finding No. 31, which states that:

> 31. Father expressed concern that the minor child has attended too many schools. The Court finds this concern to be unfounded. In fact, Father testified he said "fine, fine, fine" to Mother in response to discussions concerning transferring the minor child from Cabarrus Charter School to Langtree Charter Academy.

The trial court's finding that defendant's concern about Sam's school transfers was "unfounded" represents the trial court's evaluation of the evidence, and is reflected in the trial court's other findings that plaintiff's attention to Sam's educational needs had been beneficial to the child. Defendant disputes the accuracy of the trial court's quoting him as saying "Fine, fine, fine" in response to a specific proposed school transfer. We conclude that even assuming, *arguendo*, that this quotation was inaccurate, it would not require reversal of the court's order.

In addition, defendant contends that Findings Nos. 33, 34, 35, and 36 "are not supported by the evidence presented at trial and are clear reflections of [the trial court's] overt bias." These findings state that:

> 33. The minor child has not lived in an intact family since he was two years old. Since their separation, the parties have had a division of labor. Mother has had the time to take the minor child to all of his doctors' and therapy appointments. Father has not been able and available to do this because of his service in the military but also because of his personality. Father has allowed Mother to take control and the minor child has benefitted from it. It

> is in the best interests of the minor child that these roles continue.
>
> 34. The minor child does not do well with transitions based on his medical history and testimony. Therefore, it is not in the minor child's best interests and general welfare that the custodial schedule be changed to week-on/week-off as Father requested. Instead, it is in the minor child's best interests that the Mother retains primary custody and Father's visitation is increased slightly so he might become more involved in the minor child's progress than he has traditionally been involved.
>
> 35. Mother is a fit and proper person to have the primary physical care, custody and control of the minor child and to share joint legal custody with Father. Mother is also a fit and proper person to have final decision making power with regard to joint legal custody.
>
> 36. Father is a fit and proper person to have reasonable visitation with the minor child and to share joint legal custody with Mother of the minor child.

As discussed above, defendant failed to preserve for appellate review the issue of the trial court's alleged bias against him. Accordingly, we do not address defendant's contention that the trial court "decided to punish Appellant for his service to this country." As regards the factual support for these findings, defendant directs our attention to evidence that plaintiff had "virtually ignored" defendant in making decisions about Sam. This evidence was directly contradicted by plaintiff's testimony that, when she tried to involve defendant in decision making, he told her "that's what I pay you child support and alimony for; that's your job." The trial court is charged with resolving such contradictions in the evidence. Moreover, defendant objects to

the trial court's reference to defendant's "personality" as being part of the reason, in addition to defendant's military service, that defendant had very limited involvement in the decision making regarding Sam's educational and medical needs. As discussed above, defendant testified that he had given Sam's extensive medical record only a "cursory" review. In addition, defendant conceded at the hearing that he had not attended any of Sam's medical appointments since 2006, had not contacted Sam's health care providers to express his concerns, did not know who Sam's teachers currently were, and had not visited the school Sam attended. Given that the hearing was conducted more than a year and a half after defendant returned from overseas, this evidence provides support for the trial court's finding that defendant's lack of involvement was at least in part a function of his "personality."

Defendant makes a generalized assertion that the trial court's order contains "no properly supported findings" to support its conclusions of law, but his only support for this contention consists of the arguments, discussed above, that various findings of fact were not supported by the evidence. We have rejected these arguments, and hold that defendant has failed to show that the trial court's conclusions of law were not supported by its findings of fact.

V. Abuse of Discretion

Defendant argues next that the trial court abused its discretion in its child custody order. Defendant does not support this position with new arguments, but

contends that for the "reasons set forth above" the trial court abused its discretion. We have held that the arguments to which defendant refers lack merit. Accordingly, we hold that defendant has failed to show that the trial court abused its discretion.

VI. Order for Child Support

Finally, defendant argues that "[i]f this Court determines that the child custody portion of the Order should be vacated and remanded for new trial, the child support provisions must necessarily be vacated as well." We have not held that the custody provisions of the order must be vacated; thus, we have no need to address defendant's argument that such a ruling would also require reversal of the child support provisions of the trial court's order.

For the reasons discussed above, we hold that the trial court did not err in its modified order for child custody and support and that its order should be

AFFIRMED.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).