IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1194

Filed: 20 September 2016

Orange County, No. 11 CVD 1515

KIM F. SATTERFIELD, Plaintiff

v.

HENRY C. SATTERFIELD, Defendant

Appeal by defendant from order entered 16 January 2015 by Judge Beverly Scarlett in Orange County District Court. Heard in the Court of Appeals 11 May 2016.

Lewis & Anderson, PLLC, by Susan H. Lewis, for plaintiff-appellee.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for defendant-appellant.

CALABRIA, Judge.

Henry C. Satterfield ("Father") appeals from an order granting Kim F. Satterfield ("Mother") primary physical and legal custody of the parties' two minor children. We affirm.

I. Background

Father and Mother were married on 3 February 2003 and separated on 18 July 2011. Two children, Tommy and Willy,[1] were born during their marriage. When the parties initially separated, Mother took the children with her. On 19 July 2011, Mother filed a complaint for child custody, child support, and equitable distribution. Subsequently, Father filed a motion for ex-parte custody, which was heard on 21 July 2011. At this temporary, emergency custody hearing, Father was present and represented by counsel, and Mother was not present but was represented by counsel. After the hearing, the trial court granted temporary sole legal custody of the children to Father, granted Mother daily visitation from 5:00-7:00 p.m., and ordered that the parties return for a review hearing.

After the review hearing, the trial court entered an order on 22 November 2011, *nunc pro tunc,* 5 August 2011, entitled "Temporary Custody Order" ("2011 Order"). The 2011 Order granted Defendant primary legal custody and Mother secondary legal custody of the children, finding that "it is in the best interest of the minor children that primary legal custody be vested in [Father] until such time as [Mother] has demonstrated progress with coping with the emotional issues related to the dissolution of her marriage as well as progress towards personal growth." The 2011 Order included that Mother and Father shared joint physical custody of Tommy and Willy, alternating every week, and exchanging the children on Fridays; that it

[1] Pseudonyms are used to protect the minors' identities.

was "temporary and non-prejudicial;" and provided for a subsequent hearing in November 2011 to review "[Mother's] progress and the ongoing legal custody of the minor children." After a brief custody hearing on 22 November 2011, the judge indicated that she would revisit the issue of legal custody at the next hearing and entered the 2011 Order.

From approximately 25 November 2011 until 13 January 2012, Father made several unilateral decisions affecting the children, including Father informing Mother in November 2011 that, although Tommy had been enrolled in Triangle Day School, he intended to remove Tommy from Triangle Day School and enroll him in Cameron Park Elementary School. Mother wrote a letter objecting to his decision to move Tommy to a different school in the middle of the year. Nonetheless, in December 2011, Father unilaterally enrolled Tommy in Cameron Park Elementary School beginning in January. Mother subsequently filed motions for injunctive relief, an expedited hearing, and an order to show cause. On 19 December 2011, the trial court entered an order for Father to appear for a hearing to show cause why he should not be held in contempt for violating lawful orders of the court. Father filed a motion to continue the hearing that was granted by an order entered on 22 December 2012.

After a hearing, the trial court entered an order on 8 February 2012, entitled "Temporary Custody Order" ("2012 Order"), requiring, *inter alia*, Tommy's reenrollment at Triangle Day School, Father becoming the primary decision maker

for Tommy's extracurricular activities, and the appointment of a parenting coordinator. The 2012 Order included a finding that "[t]his is a high conflict case[,]" and stated that it was "temporary and non-prejudicial."

On 27 April 2012, Mother hired a new attorney and conducted additional discovery. On 23 May 2012, Father was deposed regarding, *inter alia*, his financial status and debt, stated that he was "going in the hole," and admitted that he was "bankrupt." On 16 June 2012, Mother served Father a request for production of documents. On 26 June 2012, Father obtained an extension of time for Mother's discovery request. On 3 December 2012, at another deposition regarding, *inter alia*, Father's financial status and debt, he stated again that he was "going in the hole," that he "had been in a fog for 18 months," and that he had "nine therapist visits with two different therapists."

On 16 April 2013, Mother filed a notice of hearing on the issue of permanent custody, and hearings were held on 28 June 2013, 4 September 2013, 16 June 2014, 18 July 2014, and 16 September 2014. In the trial judge's order on 16 January 2015 entitled, "Order on Permanent Custody" ("2015 Order"), Mother was granted primary physical and legal custody and Father secondary physical and legal custody of the children. According to the 2015 Order, the children were to reside primarily with Mother and with Father every other weekend. The 2015 Order also provided a holiday and summer break schedule for the custody of the children. In addition, the

2015 Order provided for the children to continue in therapy as well as their continued enrollment at Durham Academy. The 2015 Order modifying the 2011 Order did not include findings regarding whether a "substantial change in circumstances" had occurred. Rather, the 2015 Order concluded that modifying the existing custody order was in the "best interests of the child[ren]." Father appeals.

II. Analysis

Father contends that the trial court erred by failing to find that a substantial change in circumstances affecting the welfare of the children occurred prior to modifying the 2011 Order, on the grounds that the 2011 Order was permanent when entered or became permanent by operation of law. We disagree.

As an initial matter, the trial court must determine whether an existing custody order is temporary or permanent. "If a child custody or visitation order is permanent, a court may not modify that order unless it finds there has been a substantial change in circumstances affecting the welfare of the child." *Peters v. Pennington*, 210 N.C. App. 1, 13, 707 S.E.2d 724, 734 (2011) (citation omitted). "If a prior order is temporary, the trial court can proceed directly to the best-interests analysis." *Id.* (citation omitted). "[W]hether an order is temporary or permanent in nature is a question of law, reviewed on appeal de novo." *Smith v. Barbour*, 195 N.C. App. 244, 249, 671 S.E.2d 578, 582 (2009) (citation omitted).

A. Permanent When Entered

Father argues the 2011 Order was permanent when entered. We disagree.

Although the trial court designated its 2011 Order as "temporary," "the trial court's designation of an order as 'temporary' or 'permanent' is not binding on an appellate court." *Smith,* 195 N.C. App. at 249, 671 S.E.2d at 582 (citation omitted). A custody order is temporary "if *either* (1) it is entered without prejudice to either party[;] (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues." *Woodring v. Woodring*, 227 N.C. App. 638, 643, 745 S.E.2d 13, 18 (2013) (emphasis added) (citations and quotation marks omitted).

In the instant case, the 2011 Order satisfied all three criteria. First, the 2011 Order clearly stated that it was "non-prejudicial," satisfying the criterion that it be entered without prejudice to either party. *See LaValley v. LaValley*, 151 N.C. App. 290, 292, 564 S.E.2d 913, 915 (2002) (noting that "[t]he inclusion of the language 'without prejudice' is sufficient to support a determination the Order was temporary."). Second, the 2011 Order included a "clear and specific reconvening time" by stating that "this matter shall be placed on the October calendar call for scheduling of a hearing in November 2011 for the Court to review the Plaintiff's progress and the ongoing legal custody of the minor children." The review hearing was scheduled to be held three months later, which was a reasonably brief time. *See File v. File*, 195 N.C. App. 562, 568, 673 S.E.2d 405, 410 (2009) (determining that approximately five

months before holding a reconvening hearing was reasonably brief). Third, the 2011 Order did not determine all the issues. Legal custody was not determined indefinitely, but granted Father primary legal custody only "until such time as [Mother] has demonstrated progress with coping with the emotional issues related to the dissolution of her marriage as well as progress towards personal growth" and provided for a subsequent hearing to review "[Mother's] progress and the *ongoing legal custody* of the minor children." (emphasis added). In addition, the 2011 Order did not include an ongoing custodial or visitation schedule or the children's schedule regarding summer vacation, holidays, or where they would attend school beyond the current school year. Therefore, we conclude that the 2011 Order was not permanent.

B. Permanent by Operation of Law

Alternatively, Father contends that even if the 2011 Order was temporary when entered, it was converted into a permanent order by operation of law. We disagree.

"[W]here neither party sets the matter for a hearing within a reasonable time, the 'temporary' order is converted into a final order." *Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003) (citations omitted). "Whether a request for the calendaring of the matter is done within a reasonable period of time must be addressed on a case-by-case basis." *LaValley*, 151 N.C. App. at 293 n.6, 564 S.E.2d at 915 n.6.

In *Woodring*, this Court held that twelve months was not unreasonable when, *inter alia*, the temporary custody order did not resolve all of the issues, such as ongoing visitation, and "the parties were before the Court at least three times in the interim period between the entry of the temporary order and the scheduled permanent custody hearing." 227 N.C. App. at 644, 745 S.E.2d at 19. In *Senner*, this Court held that twenty months between entry of the order and a motion for modification of custody was not unreasonable when, "during that period of time, the parties were negotiating a new arrangement where [the mother] would move to Texas and the parties would share joint custody of the children on an alternating two-week basis" and "[w]hen those negotiations broke down, defendant sought a modification of the temporary custody order." 161 N.C. App. at 81, 587 S.E.2d at 677. In *Miller v. Miller*, this Court held that nearly two years was not unreasonable, when the case did not lie dormant during this period, because the parties continued to pursue claims for custody by filing complaints and motions, and the court entered other orders in the interim. 201 N.C. App. 577, 580-81, 686 S.E.2d 909, 912 (2009).

In the instant case, Mother filed a request to calendar a hearing on 16 April 2013, nearly seventeen months after the 2011 Order was entered. However, during the interim period, the parties appeared in court multiple times to dispute child custody issues. After the trial court held two custody hearings and a show cause hearing, another temporary custody order, the 2012 Order, was entered. In the 2012

Order, the trial court found that "[t]he parties [were] unable to agree on how to communicate about major issues regarding the minor children. The court is hesitant to make further decisions about joint legal custody with continuing communication problems." Additionally, the trial court appointed a parenting coordinator because "[t]his [wa]s a high conflict case." Furthermore, during this interim period, Father sought various continuances related to the proceedings. Mother changed attorneys and engaged in additional discovery that related in part to custody, requesting documents from Father and deposing him twice about financial matters. After discovery was complete, Mother sought a notice of hearing on the issue of permanent custody.

In light of these circumstances, we conclude this case did not lie dormant between hearings, that the parties continued to dispute issues of custody, and that the delay can be attributed, in part, to Father's own conduct. We hold that Father has failed to show that the delay of seventeen months in filing the notice of hearing on the issue of permanent custody was unreasonable. Accordingly, we hold that the 2011 Order was not converted into a permanent order by operation of law.

As a secondary matter, we have considered Father's remaining argument that the trial court erred by failing to adopt in its custody order assertions made by Mother in her initial custody complaint and conclude that it is without merit.

III. Conclusion

Because we hold that the 2011 Order was temporary when entered and was not converted into a permanent order by operation of law, the trial court did not err by proceeding to the best interests of the children standard to determine custody, rather than reviewing the evidence for a substantial change in circumstances. Accordingly, the trial court's order is affirmed.

AFFIRMED.

Judges HUNTER and TYSON concur.

Report per Rule 30(e).