IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-1274

Filed: 20 September 2016

Catawba County, No. 13 CVD 471

ROBIN LEANN MCNEELY, Plaintiff

v.

BYRON RICO HART, Defendant.

Appeal by plaintiff from order entered 8 April 2015 by Judge Robert A. Mullinax, Jr., in Catawba County District Court. Heard in the Court of Appeals 11 May 2016.

FleetLaw, PLLC, by Jennifer L. Fleet, for plaintiff-appellant.

Byron Rico Hart, pro se.

McCULLOUGH, Judge.

Robin Leann McNeely ("plaintiff") appeals from a permanent custody order entered in favor of Byron Rico Hart ("defendant"). For the following reasons, we vacate and remand the order of the trial court.

I. Background

On 20 February 2013, plaintiff filed a "Complaint for Visitation" against defendant. Plaintiff and defendant have never been married but are parents to a

child (the "minor child"), born 23 November 2008. Plaintiff sought temporary and permanent visitation of the juvenile in the complaint.

Defendant responded by filing an "Answer & Counterclaim" on 5 June 2013. In it, defendant denied that plaintiff was a fit and proper person to have custody or visitation and sought "sole temporary and permanent care, custody and control of the minor child" and temporary and permanent child support.

The matter came on for hearing on 11 December 2014 in Catawba County District Court, the Honorable Robert A. Mullinax, Jr. presiding.

Terry Miller ("Mr. Miller") testified that he hired plaintiff to take care of his two young children in October of 2013. He later learned that she was working as an escort. Mr. Miller never saw any indication of drug or alcohol abuse by plaintiff. Plaintiff worked for Mr. Miller until "spring, early summer of 2014." Mr. Miller testified that he believed plaintiff was a fit and proper person to take care of children and that plaintiff "took excellent care of mine. I don't see why she couldn't take care of her own."

Rhonda Taylor ("Ms. Taylor") testified that she responded to an ad for in-home childcare services placed by Mr. Miller. She was interviewed by plaintiff and Mr. Miller and was hired. Plaintiff trained Ms. Taylor by showing her the children's schedule. Ms. Taylor testified that she had previously engaged in the escort business and that she counseled plaintiff on leaving the escort business. Ms. Taylor had

opportunities to observe plaintiff interact with Mr. Miller's children and testified that plaintiff was a fit and proper person to have visitation with the minor child.

Maria Perez ("Ms. Perez") testified that she knew plaintiff through Mr. Miller. Ms. Perez used to help Mr. Miller with childcare and was called to assist plaintiff. She observed plaintiff interact with Mr. Miller's children and testified that plaintiff "is awesome" and "takes great care of them." Plaintiff had also assisted Ms. Perez with her children. Ms. Perez testified that she believed plaintiff was a fit and proper person to take care of Ms. Perez's children as well as Mr. Miller's children. She also believed that plaintiff would be a fit and proper person to have visitation with the minor child.

Joshua Bauza ("Mr. Bauza") testified that he hired plaintiff to provide housekeeping and childcare services. Mr. Bauza was aware that plaintiff occasionally worked as an escort. Mr. Bauza observed his child interacting with plaintiff and described plaintiff as "very attentive with my little boy and, you know, joking around, tickling, you know, chasing him around the house, you know, all – all the fun stuff that a little kid looks for." Mr. Bauza testified that he believed plaintiff to be a fit and proper person to take care of his child and a fit and proper person to have visitation with the minor child.

Plaintiff testified that she began to work for Mr. Miller as a live-in nanny in October of 2013. Plaintiff received her certified nursing assistant degree in March of

2014 and began seeking other employment. After having some trouble finding employment, plaintiff returned to work for Mr. Miller at the end of May 2014. She found a part-time job at a tanning salon in August 2014 that paid $7.25 an hour. Plaintiff had her appendix removed in September and also returned to working for Mr. Miller while still working at the tanning salon. Eventually, plaintiff was terminated from the tanning salon because she "couldn't work the hours they needed me[.]" She discontinued working for Mr. Miller in mid-November 2014 when Mr. Miller hired Ms. Taylor.

Plaintiff further testified that she had the minor child and also a son whom she relinquished to the son's father. She was living with defendant when the minor child was born. Plaintiff and defendant broke up in April 2009. For three and a half months, plaintiff lived with the minor child without defendant being present. During this time, defendant would "come pick up [the minor child] every now and then. It wasn't anything court ordered." In July 2009, plaintiff was evicted from her residence and the minor child went to live with defendant. Plaintiff would visit with the minor child. In April 2010, plaintiff and defendant began sharing the minor child "50-50[.]" This arrangement lasted until July 2011 when plaintiff was again evicted from her residence. During this period of time, plaintiff began working for an escort service. Defendant became aware of this fact three months after plaintiff began working. From July 2011 until December 2012, plaintiff had visitation with the minor child

every Saturday. In December 2012, defendant and defendant's wife told plaintiff that she could not see the minor "until I was in a house."

Plaintiff testified that she never exposed the minor child to the escort business. She does not consume alcohol or take any illegal drugs. At the time of the hearing, plaintiff was not employed and was trying to get out of the escort business. Plaintiff was making $4,000.00 to $5,000.00 a month in income. She intended to get a "regular job" and acknowledged that she knew she would make significantly less money starting out. Plaintiff believed she was fit and proper to be able to visit the minor child.

Defendant testified that he was the minor child's father and had no current relationship with plaintiff. He lived with his wife and his 2 year old son. He worked two jobs and during the school week, he only saw his kids in the morning. The last time he had allowed plaintiff to have visitation with the minor child was Christmas of 2012. Defendant testified that he decided to stop visitation with plaintiff because "[t]hings were starting to get a little sketchy." He became aware that plaintiff was working as a prostitute in March or April of 2012. Defendant testified that he was troubled that plaintiff would kiss the minor child on the mouth "[b]ecause of the nature of what she does outside of seeing my child." He did not believe that plaintiff was able to co-parent the minor child with him. Under a temporary order, plaintiff was ordered to pay $250 a month in child support but defendant testified that "she

started paying it later and later each month" and that she had yet to pay for November. Defendant did not believe the minor child would benefit from visitation with plaintiff.

On 8 April 2015, the trial court filed a "Permanent Custody Order" in which it ordered as follows:

> 1. The sole legal and physical custody, care and control of [the minor child], born November 21, 2008, is hereby awarded to [defendant]. Plaintiff . . . is prohibited from exercising visitation with [the] minor child.
>
> 2. It is further ordered that beginning on the first day of January, 2015, and from then on the first of every month thereafter, [p]laintiff is to provide [d]efendant with $50 per month for the support and maintenance of the minor child.

Plaintiff filed notice of appeal on 5 May 2015.

II. Discussion

On appeal, plaintiff argues that the trial court erred by denying her visitation with the minor child where (A) the trial court's findings of fact were insufficient to support its decision to prohibit visitation; (B) the trial court's findings of fact unfairly represented the evidence or were mere recitations of testimony; and (C) she was denied her constitutional right to substantial due process.

A. Findings of Fact

Plaintiff contends that the trial court's findings of fact were insufficient to support its decision to prohibit plaintiff from exercising visitation with the minor child. We agree.

"Under our standard of review in custody proceedings, 'the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary.' Whether those findings of fact support the trial court's conclusions of law is reviewable *de novo*." *Respess v. Respess*, 232 N.C. App. 611, 614, 754 S.E.2d 691, 695 (2014) (citation omitted).

It is well-established that:

> The right of visitation is an important, natural and legal right, although it is not an absolute right, but is one which must yield to the good of the child. A parent's right of access to his or her child will ordinarily be decreed unless the parent has forfeited the privilege by his conduct or unless the exercise of the privilege would injuriously affect the welfare of the child, for it is only in exceptional cases that this right should be denied. But when it is clearly shown to be best for the welfare of the child, either parent may be denied the right of access to his or her own child.

In re Stancil, 10 N.C. App. 545, 550, 179 S.E.2d 844, 848 (1971) (citation omitted).

First, plaintiff argues that the trial court failed to make the statutorily required findings that plaintiff was unfit or that visitation with plaintiff was not in the best interest of the minor child. She directs our attention to N.C. Gen. Stat. § 50-13.5(i).

N.C. Gen. Stat. § 50-13.5(i) provides as follows:

> In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, *shall* make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child *or* that such visitation rights are not in the best interest of the child.

N.C. Gen. Stat. § 50-13.5(i) (2015) (emphasis added).

> The statutory language is straightforward and unambiguous and requires 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."

Respess, 232 N.C. App. at 616, 754 S.E.2d at 696 (emphasis in original).

In the present case, although plaintiff initially argues that the trial court failed to make the required findings pursuant to N.C. Gen. Stat. § 50-13.5(i), she later acknowledges that the trial court issued finding of fact number 49, which provides as follows: "It is contrary to the best interests of the Minor Child that Plaintiff be awarded visitation privileges with the minor child." As such, it appears that the trial court entered an ultimate finding of fact that complied with N.C. Gen. Stat. § 50-13.5(i).

However, plaintiff further argues that finding of fact number 49 is not supported by the other findings of fact and is based on a prejudicial and biased view of the testimony presented at the 11 December 2014 hearing. Specifically, plaintiff

contends that the trial court's breach of its duty of impartiality, as evidenced in findings of fact numbers 47 and 48, which are not supported by the evidence.

Findings of fact numbers 47 and 48 provide as follows:

> 47. The Court finds that the act of p[er]forming sexual favors for individuals in the exchange for money is illegal, immoral, and unhealthy for an individual's physical, mental, and spiritual well-being.
>
> 48. Children must look to their parents for guidance and direction. This court cannot and will not place its signature on an order which exposes to a minor child to an individual who engages in such behavior.

After carefully reviewing the 8 April 2015 "Permanent Custody Order" and the evidence presented at the 11 December 2014 hearing, it appears that the trial court determined that visitation with plaintiff was not in the minor child's best interest solely based on the fact that plaintiff engaged in prostitution. The trial court's finding that prostitution was "illegal, immoral, and unhealthy for an individual's physical, mental, and spiritual well-being" is merely a reflection of the trial court's personal opinion. The trial court failed to make any findings of fact regarding what effect, if any, the plaintiff's prostitution had on the minor child and summarily refused to sign "an order which exposes to a minor child to [sic] an individual who engages in such behavior." In fact, there was evidence presented that the minor child was never exposed to any aspect of the escort business, because "[s]he was unaware."

As written, the trial court's findings of fact in this case do not support its order that plaintiff should be prohibited from exercising visitation with the minor child. Accordingly, we vacate and remand to the trial court for further findings of fact. *See Green v. Green*, 54 N.C. App. 571, 573, 284 S.E.2d 171, 173 (1981) ("[W]hen the court fails to find facts so that this court can determine that the order is adequately supported by competent evidence and the welfare of the child subserved, then the order entered thereon must be vacated and the case remanded for detailed findings of fact.") (citation omitted). Because we are vacating the order, we need not reach plaintiff's remaining arguments.

III. Conclusion

We vacate the 8 April 2015 order of the trial court and remand for further findings.

VACATED AND REMANDED.

Judges ELMORE and INMAN concur.

Report per Rule 30(e).