

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-611

Filed: 5 January 2016

Catawba County, No. 14 CVD 2473

EDUARDO ANZURES, Plaintiff,

v.

ASHLEIGH KATE WALBECQ, Defendant.

Appeal by defendant from order entered 30 December 2014 by Judge Robert A. Mullinax, Jr., in Catawba County District Court. Heard in the Court of Appeals 17 November 2015.

*Sigmon, Isenhower and Barkley, by C. Randall Isenhower, for plaintiff-appellee.*

*Vogel Law, PLLC, by Kathleen L. Vogel, for defendant-appellant.*

BRYANT, Judge.

Because defendant appeals an interlocutory Order of Temporary Child Custody which does not affect a substantial right, we dismiss defendant's appeal.

The record on appeal reflects that on 2 October 2014, plaintiff Eduardo Anzures filed a Complaint for Child Custody and Immediate Temporary Custody seeking immediate temporary custody of the minor child Ean Eduardo Anzures, born 8 October 2011. Plaintiff alleged *inter alia* that defendant Ashleigh Kate Walbecq took custody of the minor child and "fled" to Michigan. That same day, 2 October

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2014, the Catawba County District Court entered an *ex parte* order granting plaintiff immediate, temporary custody of the minor child and ordered that “any applicable law enforcement officer or agency shall secure possession of the minor child . . . and return the minor child to . . . [p]laintiff[.]” The matter was set for hearing on 25 November 2014 on the temporary custody order.

On 25 November 2014, the Catawba County District Court entered a Memorandum of Judgment/Order that the physical custody of the minor child shall be placed with defendant until the week of 18 December 2014 when the matter was scheduled for hearing. On 30 December 2014, the trial court entered an Order of Temporary Custody to review its previously entered Emergency Order of Child Custody and to address the various motions filed by plaintiff and defendant. The trial court found that plaintiff and defendant were formerly married and were the parents of one minor child, Ean Eduardo Anzures, born 8 October 2011. The parties formerly resided together as husband and wife in the State of Texas. In September 2013, the parties, with the minor child, moved to North Carolina. On 23 September 2014, plaintiff came home to find a note that defendant and the minor child had left to travel to Colorado. Defendant did not travel to Colorado but instead traveled to Michigan to stay with her grandmother. The trial court ordered that plaintiff have temporary legal and physical custody of the minor child, with defendant having visitation every third weekend, as well as from 25 December 2014 until 1 January

2015. Also, as plaintiff's complaint was deemed filed as of 26 November 2014, defendant was allowed to supplement her responsive pleadings within thirty days of the entry of the trial court's 30 December 2014 order.

On 15 January 2015, defendant filed an Answer in which she admitted some of plaintiff's allegations including that plaintiff and defendant participated in a custody action in the state of Texas but denied many of plaintiff's allegations including plaintiff's assertion "[t]hat the Courts of North Carolina have jurisdiction to determine this matter."

On 29 January 2015, defendant filed notice of appeal from the court's 30 December 2014 order of Temporary Custody.

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On appeal, defendant argues that the trial court's 30 December 2014 order was a permanent order and, therefore, appealable. Defendant raises further questions regarding the trial court's ruling; however, because our holding as to the first argument is dispositive, we need not reach defendant's additional questions.

In her argument, defendant contends that the trial court's 30 December 2014 Order of Temporary Child Custody is a permanent order and, therefore, appealable to this Court. We disagree.

"A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey*

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*v. Durham*, 231 N.C. 357, 361–62, 57 S.E.2d 377, 381 (1950) (citations omitted), as quoted in *Hausle v. Hausle*, 226 N.C. App. 241, 243–44, 739 S.E.2d 203, 206 (2013). “An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.” *Id.* at 362, 57 S.E.2d at 381 (citation omitted).

Immediate appeal of an interlocutory order is available in two instances: First, “when the trial court enters a final judgment as to one or more, but fewer than all, claims or parties and certifies there is no just reason for delay”; and second, where an interlocutory order “affects a substantial right.” *In re Will of Johnston*, 157 N.C. App. 258, 260, 261, 578 S.E.2d 635, 638, *aff’d*, 357 N.C. 569, 597 S.E.2d 670 (2003) (per curiam). “An interlocutory order affects a substantial right if the order deprive[s] the appealing party of a substantial right which will be lost if the order is not reviewed before a final judgment is entered.” *Id.* at 261, 578 S.E.2d at 638 (citation and quotations omitted).

Normally, a temporary child custody order is interlocutory and does not affect any substantial right which cannot be protected by timely appeal from the trial court's ultimate disposition on the merits. Temporary custody orders resolve the issue of a party's right to custody pending the resolution of a claim for permanent custody.

*Brewer v. Brewer*, 139 N.C. App. 222, 227–28, 533 S.E.2d 541, 546 (2000) (citations and quotations omitted). However, a trial court’s designation of an order as

temporary or permanent is not controlling. *Peters v. Pennington*, 210 N.C. App. 1, 13, 707 S.E.2d 724, 734 (2011).

“An 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.” If the [ ] order does not meet any of these criteria, it is permanent.

*Id.* at 13–14, 707 S.E.2d 724, 734 (2011) (citation omitted) (quoting *Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003)); *cf.* *Sood v. Sood*, 222 N.C. App. 807, 809, 732 S.E.2d 603, 606 (holding the temporary custody order was interlocutory where the order “was not entered without prejudice to either party and did not include a clear and specific reconvening time[,]” and where the trial court failed to determine all the issues; though it “did specify a custodial schedule for holidays in some detail for the subsequent months (2011 Christmas and 2012 Spring Break), . . . it did not resolve holidays for the indefinite future” (citing *Regan v. Smith*, 131 N.C. App. 851, 852, 509 S.E.2d 452, 454 (1998) (observing that “[a] permanent custody order establishes a party's present right to custody of a child and that party's right to retain custody indefinitely”), *writ denied, review denied, appeal dismissed*, 366 N.C. 417, 735 S.E.2d 336 (2012)).

While defendant states that the trial court’s 30 December 2014 order fails to meet any of the three criteria for a temporary order, defendant fails to provide an argument or any basis for these assertions.

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We note that on 2 October 2014, plaintiff filed a Complaint for Child Custody and Immediate Temporary Custody. On 2 October 2014, acting *ex parte*, the Catawba County District Court entered an Immediate Temporary Custody Order. On 14 November 2014, defendant filed a motion to dismiss plaintiff's complaint. On 25 November 2014, the Catawba County District Court entered a Memorandum of Judgment/Order noting that physical custody of the minor child would be with defendant until the matter was heard during the trial term commencing on 18 December 2014. Following the hearing, the trial court entered an Order of Temporary Child Custody, from which defendant appeals. On this point, it is worth particular note that in its order, the trial court set out that it was reviewing the Emergency Order of Child Custody entered on 2 October 2014, an order entered in response to plaintiff's motion for an "Immediate Temporary Order." Furthermore, the trial court in its 30 December 2014 order set out a visitation schedule for defendant which included only the third weekend of the month beginning Friday, 19 December 2014 and then 25 December 2014 through 1 January 2015.<sup>1</sup>

The trial court's 30 December 2014 order does not indicate whether it was entered without prejudice to either party and does not include a clear and specific reconvening time. *Peters*, 210 N.C. App. at 14, 707 S.E.2d at 734. The posture of this case is one in which the trial court entered an order reviewing an *ex parte* custody

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<sup>1</sup> While the order was dated 30 December 2014, the hearing and oral rendering of visitation occurred on 18 December 2014.

order entered as an “Immediate Temporary Order,” plaintiff’s motions to amend his complaint, and defendant’s motions for dismissal and sanctions, before defendant filed an answer to plaintiff’s Complaint for Child Custody. Furthermore, the trial court’s visitation schedule for defendant covered a very short duration and did not “resolve holidays for an indefinite future.” *Sood*, 222 N.C. App. at 809, 732 S.E.2d at 606 (citing *Regan*, 131 N.C. App. at 852, 509 S.E.2d at 454 (observing that “[a] permanent custody order establishes a party’s present right to custody of a child and that party’s right to retain custody indefinitely”). Thus, we hold the trial court’s 30 December 2014 Order is a temporary child custody order, not a permanent order. Further, defendant has failed to establish that this temporary custody order which is interlocutory affects a substantial right which will be lost if the order is not reviewed before a final judgment is entered. *See In re Will of Johnston*, 157 N.C. App. at 261, 578 S.E.2d at 638. Therefore, defendant’s appeal from the trial court’s 30 December 2014 Order of Temporary Child Custody is not properly before this Court. Accordingly, we dismiss defendant’s appeal.

DISMISSED.

Judges GEER and McCULLOUGH concur.

Report per Rule 30(e).