IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-812

Filed: 2 February 2016

Lincoln County, No. 08 CVD 1549

KRISTIE LEA WILLIAMS, Plaintiff,

v.

JAMES MARION CHANEY, JR., Defendant.

Appeal by plaintiff from order entered 18 May 2015 by Chief District Court Judge Larry J. Wilson in Lincoln County District Court. Heard in the Court of Appeals 2 December 2015.

Kristie Lea Williams, pro se, for plaintiff-appellant.

James M. Chaney, Jr., pro se, for defendant-appellee.

ZACHARY, Judge.

Kristie Williams (plaintiff) and James Chaney, Jr., (defendant) were married in 2000 and were divorced in 2001. One child was born of the marriage, a son born 30 August 2001 ("the child"). This appeal arises from the parties' litigation over child custody and visitation. Plaintiff appeals from a child custody order entered on 18 May 2015. On appeal, plaintiff argues, *inter alia*, that the trial court entered a permanent child custody order, and that the trial court committed reversible error by (1) modifying visitation without finding that there had been a substantial change of

circumstances; (2) denying plaintiff visitation with the child in the absence of findings that plaintiff was an unfit person to visit the child or that visitation was not in the best interest of the child; and (3) failing to enter conclusions of law. We agree with plaintiff's arguments on these issues, and therefore find it unnecessary to reach plaintiff's other arguments.

I. Background

The parties' son was born in August 2001, and on 2 October 2001 plaintiff filed a "Motion in the Cause" seeking custody of the child. On 11 June 2002, a consent order was entered, giving plaintiff primary physical and legal custody of the child. On 27 January 2006, Judge Ben S. Thalheimer entered a temporary child custody order placing the child in the legal and physical custody of defendant. On 3 December 2007, Judge Thalheimer entered an order for permanent child custody *nunc pro tunc* 9 May 2007, which stated that the parties consented to defendant having primary physical and legal custody of the child. Further litigation ensued:

> On 20 November 2009, [Judge Meredith Shuford] entered an order entitled "Order Modifying Child Support (Temporary Order)." On 16 December 2009, plaintiff filed a motion seeking relief from the 20 November 2009 order[.] . . . On 21 January 2010, defendant filed a reply to plaintiff's motions for relief, a motion for sanctions, a motion for a psychological exam of plaintiff, and a motion for modification of plaintiff's visitation. Plaintiff's and defendant's motions were calendared to be heard before Judge Anna Foster, but due to Judge Foster's unexpected illness, were in fact heard by Judge Shuford[, who] entered an order on 18 March 2010 . . . [that] continued the hearing

> on defendant's motion for a psychological exam[, and] . . . specified that these modifications were entered "[o]n a temporary basis." Plaintiff appealed from the 18 March 2010 order to this Court.

Williams v. Chaney, __ N.C. App. __, 718 S.E.2d 737, 2011 N.C. App. LEXIS 1246 (2011) (unpublished) (*Williams I*). In *Williams I*, we dismissed plaintiff's appeal as interlocutory. On 18 August 2010, Judge Anna Foster entered a permanent child custody order placing legal and physical custody of the child with defendant, and allowing plaintiff to exercise visitation privileges with the child. On 19 July 2011, this Court upheld Judge Foster's order in *Williams v. Chaney*, __ N.C. App. __, __, S.E.2d __, 2011 N.C. App. Lexis 1522 (2011) (unpublished) (*Williams II*). On 11 January 2011, between the time that Judge Foster entered a permanent custody order and the filing of this Court's opinion affirming Judge Foster's order, Judge Shuford entered an order temporarily suspending plaintiff's visitation with the child. The order found that plaintiff had been evasive about her address and suspended plaintiff's visitation until plaintiff appeared before the court and presented "satisfactory evidence" regarding her living situation and her compliance with prior orders to obtain counseling.

On 30 January 2013, Judge Foster entered a permanent child custody order reestablishing visitation between plaintiff and the child on a gradually increasing basis and directing plaintiff to participate in counseling. On 10 October 2013, Judge Shuford entered an order modifying Judge Foster's order on the grounds that that

there had been a substantial change of circumstances warranting an adjustment in plaintiff's visitation privileges. Judge Shuford found that plaintiff had failed to cooperate with the terms of Judge Foster's order of 30 January 2013, and therefore ordered plaintiff to obtain a psychological evaluation and ordered that plaintiff's visitation with the child be suspended "pending a review of the psychological examination," except as follows:

> a. The Plaintiff/Mother shall be allowed telephone contact with the minor child, two times per week on Monday and Thursday evenings[.] . . . This provision supersedes provision (2)(g) in the January 2013 order.
>
> b. The Plaintiff/Mother may attend one extracurricular activity per week of her choosing. The Plaintiff/Mother may attend school functions, including parent-teacher conferences. The Plaintiff/Mother shall not intimidate the child or make any derogatory statements about the child or any of the child's family members. This provision supersedes provisions (2)(h) and (18) of the January 2013 order.

On 19 November 2013, Judge Shuford entered a supplemental order directing the parties and the child to participate in counseling, and providing that after "the parties have participated in therapy for a minimum of four months" Judge Shuford would review the "progress of the therapeutic treatment."

On 13 February 2015, the trial court entered an "Order for Peremptory Setting" stating that plaintiff had "filed a notice of hearing for review of this Court's 11/19/13 and 5/20/14 Orders regarding restoration of the mother/child relationship

and a Motion for Peremptory Setting." Following a hearing in March, 2015, the trial court entered the following order on 18 May 2015:

> THIS MATTER coming on to be heard during the March 18, 2015, term of domestic Court in Lincoln County to review the prior Orders in this matter. . . . Based upon the sworn testimony, the evidence admitted, the arguments of counsel, and a review of the file, the Court makes the following Findings of Fact:
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> 1. This Court adopts and incorporates by reference all Findings of Fact set forth in the October 10, 2013 Order of the Honorable Judge Meredith A. Shuford.
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> 2. This issue of custody/visitation has been on-going since 2008.
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> 3. There have been numerous prior orders entered in this matter, with the most recent being October 10, 2013, November 19, 2013, and May 20, 2014. Plaintiff's visitation with the minor child, Blaine Chaney, was suspended from December 2010 until December, 2012.
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> 4. In January and February, 2013, the Plaintiff had several day-time visits with the minor child.
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> 5. In March, as the visits were to progress to overnight, the minor child refused to take part in further visits, either becoming physically sick, or just flat refusing to go with the Plaintiff, expressing fear.
>
> 6. The Plaintiff made several attempts to have law enforcement enforce the visitations, attempting to intimidate or coerce the minor child into compliance.
>
> 7. Mr. Justin Feasel, counselor for the minor child, testified that Blaine's reactions and fears were sincerely held and not easily overcome.

> 8. Mr. Feasel testified that he would refuse to be part of any further counseling sessions between the Plaintiff and the minor child working toward reunification because of the harm he feared it would cause the minor child.
>
> 9. The Plaintiff is responsible for the fractured relationship between herself and the minor child due to her actions with and around the minor child, and her actions led to the previous two-year suspension of her visitation.
>
> 10. The Defendant has cooperated and made reasonable efforts to encourage the minor child to visit with the Plaintiff, and has taken the minor child to counseling to try to work toward repairing the mother-child relationship.
>
> 11. The minor child will not benefit from forcing, or attempting to force, further visitation with the Plaintiff at this time.
>
> IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows: The Plaintiff/Mother's visitation with the minor child is suspended, except as follows:
>
> 1. The Plaintiff/Mother shall be allowed telephone contact with the minor child, two times per week on Monday and Thursday evenings between the hours of 6:30 p.m. and 8:30 p.m. . . .
>
> 2. The Plaintiff/Mother may attend one extracurricular activity per week of her choosing. The Plaintiff/Mother may attend school functions, including parent-teacher conferences. The Plaintiff/Mother shall not intimidate the child or make any derogatory statements about the child or any of the child's family members.

Plaintiff has appealed from this order.

II. Nature of Trial Court's Order

We first address the parties' disagreement about the type of order entered by the trial court. Plaintiff argues that the trial court's order was a permanent custody order, while defendant contends that the trial court did not enter a permanent custody order, but was instead only modifying temporary orders. We conclude that the order entered on 18 May 2015 was a permanent child custody order.

"There is no absolute test for determining whether a custody order is temporary or final. A temporary order is not designed to remain in effect for extensive periods of time or indefinitely[.]" *Miller v. Miller*, 201 N.C. App. 577, 579, 686 S.E.2d 909, 911 (2009) (internal quotation omitted).

> Permanent child custody or visitation orders may not be modified unless the trial court finds there has been a substantial change in circumstances affecting the welfare of the child. . . . [T]emporary orders may be modified by proceeding directly to the best-interests analysis. . . . "[A]n 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."

Woodring v. Woodring, 227 N.C. App. 638, 643, 745 S.E.2d 13, 18 (2013) (citing *Simmons v. Arriola*, 160 N.C. App. 671, 674, 586 S.E.2d 809, 811 (2003), and quoting *Peters v. Pennington*, 210 N.C. App. 1, 13-14, 707 S.E.2d 724, 734 (2011) (internal quotation omitted)). The order from which plaintiff appeals does not set a time for review or reconvening. Regarding a child custody order that is "entered without prejudice to either party" we have noted that:

> When a temporary order is entered without prejudice in a custody proceeding, the trial court is required to ascertain the child's best interests at a subsequent hearing based only on the state of events that existed prior to the date of the temporary order. . . . This serves to facilitate the entry of temporary custody orders between parties, as the parties will know that neither party will be advantaged by events occurring between the date of the temporary order and the hearing on the merits.

Lavalley v. Lavalley, 151 N.C. App. 290, 292 n.4, 564 S.E.2d 913, 915 n.4 (2002) (citation omitted). The trial court's order of 18 May 2015 was neither an interim order entered without prejudice pending an initial child custody determination, nor a temporary order setting a time for further review in the relatively near future. As a result, the order was a permanent child custody order.

III. Substantial Change of Circumstances

Plaintiff argues next that the trial court erred by modifying an earlier permanent child custody order without first finding that there had been a substantial change of circumstances affecting the child's welfare. We agree.

Judge Foster entered a permanent child custody order on 30 January 2013 that provided for gradually increasing visitation time between plaintiff and the child. On 10 October 2013, Judge Shuford entered an order modifying Judge Foster's order on the basis of a substantial change of circumstances. The order entered by the trial court in May 2015 modified the order of 10 October 2013 as well as Judge Shuford's supplemental order of 19 November 2013, in that it changed the temporary suspension of visitation pending review of psychological examination results to a

permanent feature of the custody arrangement, and eliminated the provision for review of the suspension after several months of counseling.

Pursuant to N.C. Gen. Stat. § 50-13.7(a), "an 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." "A 'change of circumstances,' as applied to N.C. Gen. Stat. § 50-13.7 'means such a change as affects the welfare of the child.' " *Balawejder v. Balawejder*, 216 N.C. App. 301, 308, 721 S.E.2d 679, 684 (2011) (quoting *In re Harrell*, 11 N.C. App. 351, 354, 181 S.E.2d 188, 189 (1971)). "[T]he trial court commits reversible error by modifying child custody . . . absent any finding of substantial change of circumstances affecting the welfare of the child. A determination of whether there has been a substantial change of circumstances is a legal conclusion, which must be supported by adequate findings of fact." *Hibshman v. Hibshman*, 212 N.C. App. 113, 121, 710 S.E.2d 438, 443-44 (2011) (internal quotations omitted). " '[B]efore a child custody order may be modified, the evidence must demonstrate a connection between the substantial change in circumstances and the welfare of the child, and flowing from that prerequisite is the requirement that the trial court make findings of fact regarding that connection.' " *Hibshman*, 212 N.C. App. at 121, 710 S.E.2d at 444 (quoting *Shipman v. Shipman*, 357 N.C. 471, 478, 586 S.E.2d 250, 255-56 (2003)).

In this case, the trial court entered a permanent order for child custody on 18 May 2015, modifying the prior custody order without making a specific finding that there had been a substantial change of circumstances affecting the welfare of the child. This was reversible error. Moreover, despite the trial court's careful and extended attention to this child's well-being,

> "Conclusory statements regarding parental behavior" and "bare observations of plaintiff's or defendant's actions" are by themselves insufficient to support the modification of an existing custody order. . . . "It is not sufficient that there may be evidence in the record sufficient to support findings that could have been made. The trial court is required to make specific findings of fact[.]"

Davis v. Davis, 229 N.C. App. 494, 499, 748 S.E.2d 594, 599 (2013) (quoting *Garrett v. Garrett*, 121 N.C. App. 192, 196-97, 464 S.E.2d 716, 719 (1995), *disapproved on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998)), and *Greer v. Greer*, 101 N.C. App. 351, 355, 399 S.E.2d 399, 402 (1991) (internal citations omitted)). The trial court's order must be vacated and remanded for entry of an order containing appropriate findings of fact to support any modification of custody or visitation.

IV. Denial of Visitation

Plaintiff next argues that the trial court erred by suspending her visitation with the child without making the required findings. It is well established that "[a]lthough courts seldom deny visitation rights to a noncustodial parent, a trial court may do so if it is in the best interests of the child[.]" *Respess v. Respess*, __ N.C. App.

__, __, 754 S.E.2d 691, 696 (2014). " '[T]he welfare of a child is always to be treated as the paramount consideration[.] . . . Courts are generally reluctant to deny all visitation rights to the divorced parent of a child of tender age, but it is generally agreed that visitation rights should not be permitted to jeopardize a child's welfare.' " *Id*. (quoting *Swicegood v. Swicegood*, 270 N.C. 278, 282, 154 S.E.2d 324, 327 (1967)). This principle is codified in N.C. Gen. Stat. § 50-13.5(i) (2013), which provides that:

> 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.

"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*. In this case, the trial court ordered plaintiff's visitation suspended indefinitely, without making the required findings. On remand, the trial court should not deny plaintiff all visitation unless its evidentiary findings support the required finding that plaintiff is either unfit to have visitation or that visitation is not in the child's best interest. *Id*.

III. Failure to Enter Conclusions of Law

Plaintiff also argues that the trial court erred by failing to enter conclusions of law. We agree. N.C. Gen. Stat. § 1A-1 Rule 52(a)(1) provides that "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." On remand the trial court should make findings that are supported by the preponderance of the evidence and enter conclusions of law that are supported by its findings of fact.

In sum, the trial court's custody order must be vacated because (1) the trial court failed to make conclusions of law; (2) the order modified custody without first finding that there has been a substantial change of circumstances, and (3) the order denied plaintiff any visitation with the child without the findings required to support such an order. Because we are vacating the order from which plaintiff appeals and remanding the case, we find it unnecessary to address plaintiff's other issues.

For the reasons discussed above, we conclude that the trial court's custody order must be vacated and remanded. On remand, the trial court should enter findings based on the preponderance of the evidence and conclusions of law supported by its findings. If the trial court modifies the custody order of 10 October 2013 or its associated supplemental order of 19 November 2013, its findings must support an ultimate finding that there has been a substantial change of circumstances that affects the welfare of the child. If the trial court denies plaintiff reasonable visitation

its evidentiary findings should support an ultimate finding that plaintiff is either unfit to visit with the child or that visitation with plaintiff is not in the child's best interest.

VACATED AND REMANDED.

Judges CALABRIA and ELMORE concur.

Report per Rule 30(e).