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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-835

Filed: 15 March 2016

Person County, No. 08 CVD 556

NESBIT AUSBURN KING, JR., Plaintiff,

v.

WENDY GIANNINI-KING, Defendant.

Appeal by defendant from order entered 16 December 2014 by Judge Mike Gentry in Person County District Court. Heard in the Court of Appeals 12 January 2016.

Woodruff Law Firm, P.A., by Carolyn J. Woodruff and Jessica Snowberger Bullock, for plaintiff-appellee.

The Lea/Schultz Law Firm, P.C., by James W. Lea, III, for defendant-appellant.

ZACHARY, Judge.

Where unchallenged findings support the trial court's conclusions of law, the trial court did not err in entering a permanent custody order. Where the temporary custody order is not properly before us, we decline to hear any collateral attacks on the temporary custody order.

I. Factual and Procedural History

KING V. GIANNINI-KING

Opinion of the Court

Nesbit King (plaintiff) and Wendy Giannini-King (defendant) were married on 31 October 2001, and lived as husband and wife until their separation on 2 June 2008. Two minor children were born to the marriage, on 17 November 2002 and on 5 July 2005. The parties separated from one another on 2 June 2008, at which time defendant moved to Wilmington, North Carolina with the minor children. On 27 June 2008, plaintiff brought an action for divorce from bed and board, child custody, and equitable distribution. On 12 September 2008, defendant filed a motion to dismiss and strike, as well as an answer and counterclaim seeking custody, child support, equitable distribution, post-separation support, alimony, and attorney's fees.

On 9 December 2008, the trial court entered a temporary custody order, awarding joint legal and physical custody of the minor children to the parties. On 14 August 2009, the trial court entered a permanent custody order, granting primary physical custody of the minor children to defendant, as well as permission for defendant to relocate with the children to Wilmington.¹ Pursuant to this order, plaintiff was granted visitation rights that permitted him to have physical custody of the minor children for two weekends per month, together with visitation rights whenever he was in the Wilmington area, with advance notice to defendant.

Plaintiff subsequently relocated to Southport, North Carolina, whereupon the parties voluntarily modified their custody schedule. However, this modification was

¹ At the time of the initial hearings, both parties resided in Person County, North Carolina.

never reduced to a written order. In July of 2010, plaintiff remarried, and thereafter returned to Person County. Plaintiff filed two motions to modify custody, on 8 August 2011 and 6 February 2012, each alleging a substantial change in circumstance. On 21 August 2012, the trial court entered a temporary custody order transferring primary physical custody to plaintiff, and allowing him to relocate to Person County with the children.

On 26 September 2012, defendant filed a motion for new trial, or alternatively to set aside the temporary order. On 20 December 2012, the trial court denied these motions.

On 8 March 2013, defendant filed notice of appeal of the temporary order to this Court. On 2 August 2013, defendant filed a motion to continue the trial proceedings pending the appeal. On 27 February 2014, this Court dismissed defendant's appeal as interlocutory.

On 16 December 2014, the trial court entered a permanent order, granting joint legal and physical custody of the minor children to the parties.

From the 16 December 2014 order, defendant appeals.

II. Standard of Review

“When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by

substantial evidence.” *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003). “In addition to evaluating whether a trial court’s findings of fact are supported by substantial evidence, this Court must determine if the trial court’s factual findings support its conclusions of law.” *Id.* at 475, 586 S.E.2d at 254.

“Absent an abuse of discretion, the trial court’s decision in matters of child custody should not be upset on appeal.” *Everette v. Collins*, 176 N.C. App. 168, 171, 625 S.E.2d 796, 798 (2006).

III. Permanent Custody Order

In her first argument, defendant asserts that the trial court erred in entering the permanent custody order. We disagree.

Defendant’s burden on appeal is to demonstrate that the trial court’s findings are not supported by the evidence, or that the findings do not support the court’s conclusions of law. However, defendant’s argument appears to consist primarily of highlighting what she calls “inconsistencies” in the findings, and alleging that “only minimal findings reference a substantial change in circumstances[.]” Defendant offers blanket challenges to various findings of fact, not because the facts are allegedly unsupported by the evidence, but because “the Order fails to tie any findings with any substantial changes in circumstances.” Because defendant does not actually suggest that the findings of fact are unsupported, we deem this argument abandoned, and hold that these findings are unchallenged and therefore binding upon this Court.

Opinion of the Court

See Koufman v. Koufman, 330 N.C. 93, 97-98, 408 S.E.2d 729, 731 (1991); *see also* N.C. R. App. P. 28(b)(6).

Assuming, *arguendo*, that the findings were properly challenged, plaintiff notes that the trial court made in excess of fifty findings of fact regarding defendant's relocation to Wilmington, and the impact of the move on the minor children. The trial court's initial approval of defendant taking the children to Wilmington was predicated upon the accrual of certain benefits to the children. For example, in its 14 August 2009 order, the trial court noted that the minor children had friends and family in Wilmington, that defendant's schedule would require the minor children to spend less time in day care than would plaintiff's schedule, and that defendant would ensure plaintiff's ability to visit the minor children frequently. In its subsequent order, however, the trial court found that "[t]he minor children have not realized the benefits of the Defendant/Mother's plan to move to Wilmington, N.C. that she presented to the Court[,]” and that “it is in the best interest of the minor children to relocate them to Person County with the Plaintiff/Father.” Plaintiff contends, and we agree, that the failure of defendant's move to result in the anticipated benefits constitutes a substantial change in circumstances.

The trial court also found that plaintiff would offer “a stable, two-parent home in Person County in close proximity to the children's school, family and friends[,]” that the children would benefit from the move to Person County “by enjoying the

Opinion of the Court

benefits of a smaller sized school with smaller class sizes and relatives working and attending their school[.]” and that the relocation would “allow[] them to be in the immediate area of nine relatives[.]”

The trial court found that, by contrast, the children “have not received the benefits from Defendant/Mother’s relocation plan because that plan simply has not taken place.” The trial court noted that “Defendant/Mother was [sic] not been honest with the Court . . . and has, in effect, sold the Court a ‘bill of goods’ regarding her relocation plan.” The trial court even went so far as to observe that “Defendant/Mother has attempted to strain the children’s relationship with the [plaintiff’s] family, including their relationship with the Plaintiff/Father and their Stepmother[.]” The trial court found that, while defendant’s conduct was designed to have a negative impact on the relationship of plaintiff and the minor children, plaintiff’s remarriage has had a positive impact; the trial court explicitly noted this remarriage as a substantial change of circumstance, citing the positive relationship of the minor children with their stepmother.

On review of the record, we hold that these findings were supported by substantial evidence.

With respect to the trial court’s conclusions of law, defendant contends broadly that “the Plaintiff failed to meet his burden in showing a substantial change in circumstances warranting a modification of an existing custody schedule.” However,

Opinion of the Court

the findings of fact noted above are only a few examples of the trial court's observations of substantial changes in circumstance. Several other substantial changes are immediately visible on the face of the record: that several years have passed, that plaintiff has remarried, that plaintiff has returned to Person County, and that defendant's proposed plan did not work out to the benefit of the minor children. The trial court made findings on the changes in circumstance, which we have held were supported by evidence, and such findings would support any conclusions that circumstances have substantially changed, meriting a new order.

The only conclusions of law that defendant specifically maintains are unsupported are Conclusions Nos. 3, 4, 6, and 7. In those, the trial court concluded that:

3. Both parties are fit and proper persons to have joint legal custody of the minor children and it is in the best interest of the children for their legal custody to be jointly vested in the parties as outlined herein.

4. The Court concludes that there have been material and substantial changes in circumstances since the August 2009 Custody Order of this Court.

...

6. The Court concludes that it would be in the best interest of the minor children that custody be shared equally between Plaintiff Father and Defendant Mother, and that the minor children attend school in Person County, North Carolina.

7. This order is not granting custodial rights to any

Opinion of the Court

person other than Plaintiff/Father and Defendant/Mother and should not be interpreted as doing so. This Order does not give any rights to any extended family members.

Notably, defendant does not challenge Conclusions Nos. 9 and 10 of that same order, wherein the trial court concluded that:

9. It is in the best interests of the children for them to be in the joint legal custody of the parties.

10. There has been a substantial change of circumstance affecting the minor children and the Court finds that there has been a substantial change of circumstance affecting the minor children.

We further note that the unchallenged findings of fact, binding upon this Court, support those unchallenged conclusions of law. Even assuming, *arguendo*, that defendant's challenge to some conclusions of law is meritorious, the unchallenged conclusions are supported by findings, and sufficiently support the trial court's order.

This argument is without merit.

IV. Temporary Order

In her second argument, defendant maintains that the trial court erred in entering a temporary order. Because the temporary order is not properly before us, we dismiss this argument. *See Smithwick v. Frame*, 62 N.C. App. 387, 391, 303 S.E.2d 217, 220 (1983) (refusing to review an interlocutory temporary custody order that had been rendered moot by the entry of a permanent custody order).

Defendant's second argument is less of a legal argument, and more of a denunciation of the practice of trial courts entering temporary orders in lieu of permanent orders. She observes that the practice of entering temporary orders and refusing to enter permanent orders robs parties of appellate review. This argument ignores the fact that, subsequent to the temporary order dated 21 August 2012, the trial court entered a permanent order on 16 December 2014. Although defendant asserts that she is not attempting to challenge the temporary order, she appears to do precisely that.

North Carolina statutes permit the trial court to enter a temporary custody order at any time. N.C. Gen. Stat. § 50-13.5(d)(2) (2013). And while defendant contends that the time that elapsed between the entry of the temporary order and the permanent order was significant, we note that a portion of this delay was attributable to defendant's attempt to appeal the interlocutory temporary order.

Ultimately, defendant's arguments constitute a collateral challenge to the temporary order specifically, and a challenge to the interlocutory nature of temporary orders generally. These issues are not properly before us, and we decline to address them.

V. Conclusion

The trial court's findings of fact were supported by substantial evidence, and in turn support the trial court's determination of a substantial change in

KING V. GIANNINI-KING

Opinion of the Court

circumstances. Further, the trial court's unchallenged conclusions of law support the trial court's determination that it was in the best interests of the minor children to modify the custody arrangement between the parties. We dismiss plaintiff's argument concerning the temporary custody order, as this order was rendered moot by the subsequent entry of a permanent custody order.

AFFIRMED IN PART, DISMISSED IN PART.

Judges BRYANT and DILLON concur.

Report per Rule 30(e).