IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-121

Filed: 6 September 2016

Carteret County, No. 11 CVD 1543

JOSHUA ALLEN ELDER, Plaintiff,

v.

AMBER WILLIAMS, Defendant,

v.

SCOTT M. JOHNSON, Third-Party Intervenor,

v.

JOHN ALLEN ELDER and wife ELIZABETH ELDER, Third-Party Intervenors,

v.

SCOTT ALAN JOHNSON, Third-Party Intervenor.

Appeal by John Allen Elder and wife, Elizabeth Elder, Third-Party Intervenors, from order entered 17 August 2015 by Judge W. David McFadyen, III in Carteret County District Court. Heard in the Court of Appeals 24 August 2016.

Bell, Davis & Pitt, P.A., by Robin J. Stinson, for third-party intervenor-appellants, John Elder and Elizabeth Elder.

Valentine & McFayden, P.C., by Stephen M. Valentine, for third-party intervenor-appellee, Scott Alan Johnson.

TYSON, Judge.

John Allen Elder and wife, Elizabeth Elder, ("Elders") appeal from order granting custody of the minor child, D.A.J., to Scott Alan Johnson. The trial court's order is interlocutory, contains no Rule 54(b) certification, and the Elders do not assert a substantial right, which will be lost if the appeal is not reviewed now. The appeal is dismissed.

I. Factual Background

D.A.J. was born on 19 November 2011 to Amber Williams ("Defendant"), who was eighteen years old at that time. Defendant claimed Joshua Allen Elder ("Plaintiff") was the child's biological father. Plaintiff was originally listed as the child's father on the birth certificate and D.A.J. carried the Plaintiff's last name. Shortly after D.A.J.'s birth, Defendant and D.A.J. were living with Plaintiff in the home of the Plaintiff's parents, the Elders, Third-Party Intervenors.

Defendant left Plaintiff's home on or about 1 December 2011. On 2 December 2011, with D.A.J. less than two weeks old, Plaintiff filed the current custody action and temporary custody was granted to Plaintiff. According to this order, while Plaintiff was at work, his parents, the Elders, would care for D.A.J.. On 12 December 2011, Defendant filed her Motions to Dismiss, Answer, and Counterclaims and alleged that Plaintiff may not be D.A.J.'s father.

On 15 December 2011, the trial court dissolved the 2 December 2011 order and issued a new order. The new order awarded Defendant temporary custody of D.A.J., provided that Plaintiff be awarded temporary overnight visitation exercised at the Elders' home, and ordered Plaintiff, Defendant, and D.A.J. to submit to paternity testing. On 16 January 2012, DNA testing excluded Plaintiff as D.A.J.'s biological father.

In January 2012, Defendant indicated to the Carteret County Department of Social Services ("DSS") that Scott M. Johnson was D.A.J.'s father. Scott M. Johnson was present with Defendant at a DSS family meeting at her mother's house in January 2012. Even though Defendant alleged Plaintiff was not D.A.J.'s father, Plaintiff and the Elders saw D.A.J. regularly for the first two months of his life. From December 2011 to May 2012, Defendant and D.A.J. primarily lived with Defendant's mother and had little contact with either Plaintiff or the Elders.

In May 2012, Defendant resumed her relationship with Plaintiff and Defendant's mother told her "she needed to leave." Around that time, DSS received a second report, which alleged Defendant was living in her car and was unable to provide for D.A.J.'s needs. On 17 May 2012, DSS made a home visit to the Elders' home at which Plaintiff, Defendant, and Mr. Elder were present. At that time, Defendant stated to DSS that Scott M. Johnson was not D.A.J.'s father. The Elders

offered to help Defendant and D.A.J. and to allow D.A.J. to stay with the Elders "as long as needed."

On 31 May 2012, DSS held follow-up a meeting at which Plaintiff, Defendant, the Elders, and Scott M. Johnson were all present. The record does not indicate whether Scott M. Johnson's father, Third-Party Intervenor Scott A. Johnson, was present at this meeting. DSS recommended that D.A.J. remain within the Elders' home and for Defendant and Scott M. Johnson to have supervised visitation.

On 26 July 2012, the Elders filed a separate complaint and sought custody of D.A.J.. Based on the verified complaint, the Elders obtained an *ex parte* custody order, without notifying Defendant or her attorney. This lawsuit was filed during the time D.A.J. was staying with the Elders. On 3 August 2012, the Elders dismissed this improperly filed action. On 7 August 2012, they moved to intervene in the existing custody action, and again sought custody of D.A.J..

Although Defendant alleged that Scott M. Johnson may be D.A.J.'s father as early as December 2011, he did not file his motion to intervene, motion for determination of paternity, and complaint for custody until 8 August 2012. The trial court granted both the Elders and Scott M. Johnson's motions to intervene on 25 September 2012. Also on that day, the Elders and Defendant consented to a visitation arrangement wherein Defendant was allowed supervised visitation every Tuesday

evening and every other Saturday morning and Sunday afternoon. Defendant agreed that Scott M. Johnson would not be present during these visits.

On 10 October 2012, a paternity test determined Scott M. Johnson was D.A.J.'s biological father. On 20 November 2012, the trial court entered a temporary consent order, which set up visitation between D.A.J. and Scott M. Johnson, so long as the visitation was supervised by his father, Third-Party Intervenor, Scott A. Johnson. A formal order reflecting these terms was entered on 10 December 2012. The order clarified that its purpose was to modify the original custody order entered on 15 December 2011.

On 17 January 2013, Scott M. Johnson filed a motion to show cause claiming that the Elders violated the 20 November 2012 visitation order by interfering with visitation between D.A.J., Scott M. Johnson, and Scott A. Johnson. The Elders had refused to allow Scott A. Johnson to pick up D.A.J. without Scott M. Johnson being present on at least two occasions. On 5 February 2013, the Elders and Scott M. Johnson consented to an order clarifying Scott A. Johnson's ability to pick up D.A.J. for visitation without Scott M. Johnson being present.

In May 2013, Scott M. Johnson filed his petition for legitimation. Following his petition, D.A.J.'s birth certificate and last name were changed to reflect that Scott M. Johnson was his father. In October 2013, Scott A. Johnson, D.A.J.'s paternal

grandfather, filed motions to intervene in the original custody action and for custody. The trial court granted Scott A. Johnson's motion to intervene on 19 December 2013.

Due to several unexpected delays, the custody hearing did not take place until nearly a year and a half later during April 2015. From May 2012 to April 2015, D.A.J. had resided in the primary physical custody of the Elders.

At the hearing, Plaintiff was present in court, but was not represented by counsel. Defendant and Scott M. Johnson were present for portions of the hearing, but also were not represented by counsel. The Elders and Scott A. Johnson were present for the hearing and represented by counsel.

Ultimately, the trial court concluded both Defendant and Scott M. Johnson, D.A.J.'s biological parents, were unfit to have custody of D.A.J.. The court concluded it was in D.A.J.'s best interests to award custody to Scott A. Johnson and to grant the Elders visitation, due to their previous care for D.A.J..

Due to the "unusual circumstances" of this case, the trial judge provided he would "review this order during the first term after 1 August 2016 when the undersigned holds domestic court in Carteret County *to determine whether continued involvement by the Elders in [D.A.J.'s] life is in the best interests of [D.A.J.].*" (emphasis supplied).

Scott A. Johnson's attorney requested this review date because it "allows [the trial court] to make adjustments as may be necessary for the best interests of that

child without putting somebody to the test of creating a substantial change in circumstances." Although the Elders' attorney asked that the trial court remove the review provision from the child custody order, the trial court granted it stating, "I don't think that either party should have to jump through its own hoops to come back into the Court to have the situation reviewed." The Elders appeal.

II. Issues

The Elders allege the trial court erred by: (1) awarding custody to Scott A. Johnson by incorrectly applying a presumption of kinship preference, (2) failing to make sufficient findings of fact reflecting the best interests of the child, and (3) not admitting D.A.J.'s medical records into evidence.

III. Interlocutory Appeal

The order from which the Elders appeal is interlocutory, contains no Rule 54(b) certification, and the Elders do not assert a substantial right that will be lost if their appeal is not reviewed now.

A. Standard of Review

Parties may appeal as a matter of right "[f]rom any final judgment of a district court in a civil action." N.C. Gen. Stat. § 7A-27(b)(2) (2015). "Generally, there is no right to appeal from an interlocutory order." *Flitt v. Flitt*, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002) (citations omitted). There are two exceptions to this rule:

> First, an interlocutory order is immediately appealable "when the trial court enters 'a final judgment as to one or

> more but fewer than all of the claims or parties' and the trial court certifies in the judgment that there is no just reason to delay the appeal." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (quoting Rule 54(b)). Secondly, an interlocutory order may be immediately appealed if "the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Southern Uniform Rentals v. Iowa Nat'l Mutual Ins. Co.*, 90 N.C. App. 738, 740, 370 S.E.2d 76, 78 (1988); N.C.G.S. § 1–277(a) (2001); N.C.G.S. § 7A–27(d) (2001).

Evans v. Evans, 158 N.C. App. 533, 535, 581 S.E.2d 464, 465 (2003).

"Ordinarily, 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 of the entire controversy on the merits." *Cox v. Cox*, 133 N.C. App. 221, 232, 515 S.E.2d 61, 69 (1999) (internal quotations and citation omitted); *see Hausle v. Hausle*, 226 N.C. App. 241, 244-45, 739 S.E.2d 203, 206 (2013) ("A review of North Carolina case law reveals that this Court has never held that a child custody order affects a substantial right except for when the physical well-being of a child is at stake." (citation omitted)).

"[T]he trial court's designation of an order as 'temporary' or 'permanent' is not binding on an appellate court. Instead, whether 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 (citations omitted), *disc. review denied*, 363 N.C. 375, 678 S.E.2d 670 (2009).

B. Temporary Custody Order

A custody order is temporary if: "(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." *Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003) (citing *LaValley v. LaValley*, 151 N.C. App. 290, 292, 564 S.E.2d 913, 915 (2002), *Lamond v. Mahoney*, 159 N.C. App. 400, 403-04, 583 S.E.2d 656, 659 (2003)); *see Dunlap v. Dunlap*, 81 N.C. App. 675, 676, 344 S.E.2d 806, 807 ("An interlocutory order is one that does not determine the issues, but directs some further proceeding preliminary to a final decree." (citation omitted)), *disc. review denied*, 318 N.C. 505, 349 S.E.2d 859 (1986).

An order will be considered temporary if it "states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief." *Senner*, 161 N.C. App. at 81, 587 S.E.2d at 677 (citations omitted). "[T]he reasonableness of the time must be addressed on a case-by-case basis[.]" *Id.* (internal quotations and citation omitted) (holding that the twenty-month period between the original order and filing for modification was reasonable under the circumstances); *see also Lamond,* 159 N.C. App. at 404, 583 S.E.2d at 659 (holding that an order explicitly providing for further proceedings, including a review hearing to occur after a three-month period, was reasonably brief).

In *Brewer v. Brewer*, 139 N.C. App. 222, 227, 533 S.E.2d 541, 546 (2000), the trial court entered a "temporary" custody order and set a reconvening date to review the order approximately one year later. This Court held that a year between hearings was too long and stated:

> [T]his is not a case where the trial court has not yet decided all issues. Indeed, the court resolved every issue dealing with custody . . . . The court did not leave any question open for further review when it concluded that it was in the children's best interests to remain with their mother.

Id. at 228, 533 S.E.2d at 546.

"Our appellate decisions have consistently considered whether a custody 'order' as a whole was temporary or final rather than breaking down the parts of that order." *Barbour*, 195 N.C. App. at 250, 671 S.E.2d at 583 (citing *Simmons v. Arriola,* 160 N.C. App. 671, 675, 586 S.E.2d 809, 811 (2003)). This Court emphasized that adopting the position, "that an order may be permanent as to some issues and temporary as to others would render meaningless the *Senner* holding that an order should be deemed temporary if 'the order does not determine all the issues.'" *Id.* (quoting *Senner*, 161 N.C. App. at 81, 587 S.E.2d at 677).

C. Custody Order at Bar

Here, the custody order entered on 17 August 2015 awarded custody of D.A.J. to Scott A. Johnson, D.A.J.'s paternal grandfather, and granted the Elders visitation rights every other weekend. However, the trial court specified that it would "review

this order during the first term after 1 August 2016 . . . to determine whether continued involvement by the Elders in [D.A.J.'s] life is in the best interests of [D.A.J.]."

Although we are not bound by the trial court's determination of whether a custody order is temporary or permanent, the evidence tends to show that the trial court intended the order to be revisited for a "best interests" review at a time certain in the future. *See Barbour*, 133 N.C. App. at 249, 671 S.E.2d. at 582. The trial court recognized the complexity of this case and included this provision to make it easier for either party to seek modification of the order at a later date. The trial court also did not certify its order as immediately appealable under Rule 54(b). N.C. Gen. Stat. § 1A-1, Rule 54(b) (2015).

If a custody order is deemed "permanent," it can only be modified through a showing of substantial change in circumstances. *See Barbour*, 133 N.C. App. at 250, 671 S.E.2d at 583. Whereas, a custody order deemed "temporary" can be modified based on the more lenient "best interests" of the child standard. *Id*. Because of the "unusual circumstances" of this case, the trial court included the review provision to prevent either party from having "to jump through its own hoops to come back into the Court to have the situation reviewed."

The language of the review provision further clarifies the trial court's statement by stating the review was "to determine whether continued involvement .

. . is in the *best interests* of [D.A.J.]." (emphasis supplied). The trial court's statement and the language of the review provision, along with the trial court's failure to certify the order under Rule 54(b) as immediately appealable, tend to show the trial court's intention to make this a temporary order that could be modified based on the "best interests" of the child standard.

Although this Court in *Brewer* held a year between review hearings is too long, the facts in this case are distinguishable from those. *See Brewer*, 139 N.C. App. at 228, 533 S.E.2d at 546. Here, the custody order did not "determine all the issues" since the Elders' future visitation rights were to be determined at the subsequent hearing. *See Senner*, 161 N.C. App. at 81, 587 S.E.2d at 677. The subsequent hearing was set to determine the "best interests of [D.A.J.]" and whether the Elders would have "continued involvement" in D.A.J.'s life, one of the key issues addressed in the court's custody order.

IV. Conclusion

Since *Barbour,* this Court looks at the custody order as a whole to determine whether it is permanent or temporary. *Barbour*, 195 N.C. App. at 250, 671 S.E.2d at 583. We cannot separate those portions of the order regarding the award of D.A.J.'s custody to Scott A. Johnson from those portions of the order regarding the Elders' visitation rights on appellate review. *See id.* Because the Elders' continued visitation rights have not been fully resolved with "the best interests of [D.A.J.]" and the order

sets a time certain for review, their appeal is interlocutory. The order contains no Rule 54(b) certification and the Elders do not assert a substantial right that will be lost if the appeal is not reviewed now. This appeal is interlocutory and dismissed.

DISMISSED.

Judges CALABRIA and DAVIS concur.

Report per Rule 30(e).