IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-312

Filed: 17 October 2017

Iredell County, No. 06 CVD 3173

KENNETH EURAY BOONE, Plaintiff,

v.

CRYSTAL HAYES-BOONE, Defendant.

Appeal by defendant from order entered 3 October 2016 by Judge H. Thomas Church in Iredell County District Court. Heard in the Court of Appeals 5 September 2017.

No brief filed on behalf of plaintiff-appellee.

Lassiter & Lassiter, P.A., by T. Michael Lassiter, Jr., for defendant-appellant.

DAVIS, Judge.

Crystal Hayes-Boone appeals from the trial court's 3 October 2016 order terminating her rights of visitation with her minor child. After careful review, we affirm the order of the trial court.

Factual and Procedural Background

Ms. Hayes-Boone and Kenneth Euray Boone were married in 1999, and one child, "Michael",[1] was born of the marriage in 2005. The couple separated on 31 October 2006 and divorced on 6 August 2008.

On 31 October 2006, Mr. Boone filed a complaint against Ms. Hayes-Boone in Iredell County District Court asserting claims for divorce, child custody, child support, equitable distribution, and attorneys' fees. A hearing was held on 8 November 2006 before the Honorable Dale Graham. On 12 December 2006, the trial court entered an order granting Mr. Boone exclusive legal and physical custody of Michael and allowing Ms. Hayes-Boone supervised visitation every Saturday from 9:00 a.m. to 2:00 p.m.

On 8 January 2008, the parties entered into a consent order granting Ms. Hayes-Boone visitation with Michael every other weekend with the condition that she submit to drug screening prior to the first four weekends of visitation. Per the terms of the consent order, a failed drug test would require that future visitation be supervised by Stop Child Abuse Now of Iredell County ("SCAN").

From 2008 to 2011, weekly visits were scheduled at SCAN between Ms. Hayes-Boone and Michael lasting one hour per week. In 2011, Ms. Hayes-Boone was convicted of possession of cocaine. That same year, she stopped visiting Michael at SCAN. On one occasion in 2011, Ms. Hayes-Boone and her sister came to Mr. Boone's

[1] A pseudonym is used throughout this opinion to protect the identity of the minor child.

house and offered him money to allow Ms. Hayes-Boone to see Michael. Mr. Boone asked them both to leave and had no further contact with Ms. Hayes-Boone after the incident. Ms. Hayes-Boone later began living with Lester Washington — a registered sex offender who served thirty years in prison for first-degree rape — at some point after his release in 2010.

In June 2012, Mr. Boone married Brandi Lee Boone ("Brandi"), and in June 2013 he moved to Georgia with Brandi and Michael. At that time, Mr. Boone had not communicated with Ms. Hayes-Boone since 2011 and did not inform her of the move. In October 2015, Ms. Hayes-Boone learned of Michael's whereabouts from an employee of his former elementary school.

Ms. Hayes-Boone filed a Motion to Modify Visitation and a Motion to Show Cause on 17 November 2015. On 5 January 2016, Mr. Boone filed a Motion to Cease Visitation and a Motion to Show Cause. A hearing was held on the parties' motions before the Honorable H. Thomas Church on 22 February 2016. On 3 October 2016, the trial court issued an order denying both Motions to Show Cause and terminating Ms. Hayes-Boone's visitation rights. Ms. Hayes-Boone filed a timely notice of appeal.

Analysis

On appeal, Ms. Hayes-Boone argues that the trial court erred in terminating her visitation rights. "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). If so, we "must determine if the trial court's factual findings support its conclusions of law." *Id.* at 475, 586 S.E.2d at 254 (citation omitted).

This Court has held that "[o]ur trial courts are vested with broad discretion in child custody matters." *Id.* at 474, 586 S.E.2d at 253 (citation omitted). "Accordingly, should we conclude that there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, even if record evidence might sustain findings to the contrary." *Id.* at 475, 586 S.E.2d at 253-54 (citation and quotation marks omitted).

"The same standards that apply to changes in custody determinations are also applied to changes in visitation determinations." *Simmons v. Arriola*, 160 N.C. App. 671, 674, 586 S.E.2d 809, 811 (2003) (citation omitted). In reviewing a motion to modify custody, the trial court must conduct a two-pronged inquiry.

> First, the trial court must determine that a substantial change in circumstances affecting the minor child has taken place since entry of the existing custody order. Second, the trial court must determine that modification of the existing custody order is in the child's best interests.

Green v. Kelischek, 234 N.C. App. 1, 6, 759 S.E.2d 106, 110 (2014) (internal citations omitted). Once it is shown that a substantial change in circumstances has occurred,

the trial court must then consider whether modifying the order is in the child's best interests. *Shipman*, 357 N.C. at 481, 586 S.E.2d at 257 (citation omitted).

In its 3 October 2016 order, the trial court made the following pertinent findings of fact:

> 7. The Defendant testified that she submitted to a drug screen, in January 2008 and February 8, 2008, and those results were forwarded to counsel for Plaintiff.
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> 8. The Plaintiff testified that he received two drug screens through his attorney that indicated sample [sic] was out of temperature.
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> 9. That no drug screens were admitted into evidence by this Court.
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> 10. The Plaintiff testified that upon recommendation of his counsel, he required the Defendant to exercise her visitation supervised at SCAN in Iredell County due to the Defendant failing to provide the drug screens as provided by the Consent Order.
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> 11. The Defendant visited with the minor child at SCAN between 2008 and 2011. Visits were arranged on a weekly basis for one hour. The Plaintiff testified that the Defendant was frequently late for her visits and the Defendant said the Plaintiff often cancelled visits. Plaintiff acknowledged that he did cancel some visits due to work commitments and the Defendant acknowledged that she was late on some occasions due to traffic and the distance she traveled from Wilkes County.
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> . . . .

13. In 2011, the Defendant ceased visiting the child at SCAN. The Plaintiff related that during this time, the Defendant and her sister came to his house in an attempt to arrange visits between the Defendant and the minor child and even offered him money to do so, but he asked her to leave.

14. After this visit at the Plaintiff's home, the Plaintiff never heard from the Defendant again requesting visitation. He testified that he has had the same telephone number since this time and the Defendant has never contacted him.

15. In 2011, the Defendant was convicted of possession of cocaine. This was around the same period of time in which the Defendant ceased visiting with the minor child at SCAN.

16. The Plaintiff, his wife, and the minor child and the minor child's step-siblings, moved to Floyd County, Georgia in June 2013 upon relocation by the Plaintiff's employer, Lowes Distribution, for whom he worked for [sic] while in Iredell County, North Carolina.

17. The Plaintiff had the exclusive legal and physical custody of the minor child and he had not heard from the Defendant in years, and therefore moved to Georgia without notice to the Defendant. The Plaintiff testified he did not even know the whereabouts of the Defendant at that time.

18. The Defendant related that in October 2015, she was able to determine the minor child's whereabouts from an employee at Cool Springs Elementary [S]chool, a school where the minor child attended prior to moving to Georgia.

19. The Defendant testified that she has a history of substance abuse, specifically crack cocaine. She

> stated she has successfully completed the requirement of her probation from the 2011 Possession of Cocaine conviction and maintains she has been sober for the last four and half (4 ½) years.
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> 20. When questioned about why she took so long to seek visitation with her son, the Defendant stated she chose to go to college and get things in order financially. The Defendant acknowledged, however, that this length in time the minor child has not seen her would have a substantial impact on the minor child.
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> 21. The Defendant currently resides in Wilkes County, North Carolina with Lester Washington. Mr. Washington was convicted of First Degree Rape in 1979. He served thirty (30) years in prison, having been released in 2010. Defendant testified that she was aware that Mr. Washington was a registered sex offender, but stated she has no concerns with the minor child visiting her home wherein a registered sex offender resides.
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> . . . .
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> 28. Both parties stipulated that there has been a substantial change of circumstances affecting the welfare of the minor child since the last Order in this matter.
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> . . . .
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> 30. This Order is in the best interest of the minor child.

Based upon these findings, the trial court then made the following pertinent conclusions of law:

> 2. That there has been a substantial change of circumstances affecting the welfare of the minor

child since the entry of the last order in this matter.

3. This Order is in the best interests of the minor child.

On appeal, Ms. Hayes-Boone argues that the trial court erred in terminating her visitation rights because (1) it did not make any findings of fact that Ms. Hayes-Boone was an unfit parent or had behaved in a manner inconsistent with her protected parental status; (2) it made insufficient findings of fact to justify terminating her visitation rights; and (3) there was insufficient evidence in the record to justify the termination of her visitation rights.

I. Substantial Change in Circumstances

As an initial matter, we note that although Ms. Hayes-Boone does not challenge on appeal the trial court's determination that a substantial change in circumstances affecting Michael's welfare occurred since the entry of the 8 January 2008 consent order, such a determination was required before the trial court could modify the consent order. *See Green*, 234 N.C. App. at 6, 759 S.E.2d at 110 (citation omitted). Here, the trial court determined that a substantial change in circumstances affecting Michael's welfare had occurred, and the parties stipulated that such a change had, in fact, occurred. The record fully supports this conclusion.

Following the 8 January 2008 consent order, although Ms. Hayes-Boone visited Michael at SCAN sporadically, she stopped contacting Mr. Boone completely after 2011 and ceased visits with her son. In addition, Ms. Hayes-Boone was also convicted

of cocaine possession in 2011 around the time she stopped visiting Michael. Furthermore, since the entry of the 2008 consent order, Ms. Hayes-Boone began living with Lester Washington, a registered sex offender. Finally, Mr. Boone remarried in 2013, and that same year he moved to Georgia with Brandi and Michael. These events clearly demonstrate a substantial change in circumstances.

II. Conduct Inconsistent with Parental Status

Ms. Hayes-Boone argues that before the trial court could terminate her visitation rights, it was first required to make a finding either that she was an unfit parent or had engaged in conduct inconsistent with her protected status as a parent.

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

> In any case in which an award of child custody is made in 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).

In making this argument, Ms. Hayes-Boone relies primarily on this Court's decision in *Moore v. Moore*, 160 N.C. App. 569, 587 S.E.2d 74 (2003), which held that "[a]bsent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail." *Moore*, 160 N.C. App. at 572, 587 S.E.2d at 76 (citation and quotation marks omitted).

Our holding in *Moore* was based on *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994), a case concerning a custody dispute between adoptive and biological parents. *See id.* at 399, 445 S.E.2d at 902. In *Owenby v. Young*, 357 N.C. 142, 579 S.E.2d 264 (2003), our Supreme Court expressly held that the *Petersen* standard has no bearing on custody disputes between two biological parents. *See id.* at 145, 579 S.E.2d at 267 ("[T]he protected right is irrelevant in a custody proceeding between two natural parents . . . or between two parties who are not natural parents. In such instances, the trial court must determine custody using the 'best interest of the child' test." (internal citations omitted)).

Thus, *Moore* incorrectly "directed trial courts to apply to a custody dispute between a child's parents the standard applicable to a dispute between a parent and a non-parent." *Respess v. Respess*, 232 N.C. App. 611, 625, 754 S.E.2d 691, 701 (2014). As this Court noted in *Respess*:

> Prior to the decision in *Moore*, binding precedent consistently held that (1) the standard in a custody dispute between a child's parents is the best interest of the child . . . (3) the principles that govern a custody dispute between a parent and a non-parent are irrelevant to a custody action between parents; and (4) a trial court complies with N.C. Gen. Stat. § 50-13.5(i) if it makes the finding set out in the statute. *Moore* does not acknowledge these cases or articulate a basis on which to distinguish it from earlier cases.

Id. at 627, 754 S.E.2d at 702.

Therefore, we reject Ms. Hayes-Boone's argument that the trial court erred in terminating her visitation without first making findings of fact showing either her lack of fitness as a parent or that her conduct was inconsistent with her protected parental status. Instead, the trial court properly applied the "best interests" test. *See Adams v. Tessener*, 354 N.C. 57, 61, 550 S.E.2d 499, 502 (2001) ("In a custody proceeding between two natural parents . . . the trial court must determine custody based on the 'best interest of the child' test." (citation omitted)).

III. Sufficiency of Findings of Fact

Ms. Hayes-Boone next argues that the findings of fact entered by the trial court are inadequate to justify the termination of her visitation rights. Specifically, she contends that a number of the trial court's findings merely contain recitations of testimony.

Generally, "verbatim recitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented." *In re Green*, 67 N.C. App. 501, 505 n.1, 313 S.E.2d 193, 195 n.1 (1984). Recitations of witness testimony are particularly problematic "[i]f different inferences may be drawn from the evidence." *In re Gleisner*, 141 N.C. App. 475, 480, 539 S.E.2d 362, 365-66 (citation omitted). In such situations, "the trial

judge must determine which inferences shall be drawn and which shall be rejected." *Id.* at 480, 539 S.E.2d at 366 (citation omitted).

It is true that a number of the trial court's factual findings here merely contain — in whole or in part — recitations of witness testimony by Mr. Boone or Brandi. However, even excluding these portions of the court's findings from our consideration, it is clear that the remaining findings are sufficient to support its conclusion that the cessation of Ms. Hayes-Boone's visitation rights was in Michael's best interests. The trial court made proper findings of fact establishing that Ms. Hayes-Boone was convicted of cocaine possession in 2011, went years without attempting to contact or visit Michael, and currently lives with a registered sex offender.

Additionally, Finding Nos. 19 and 20 recited Ms. Hayes-Boone's own testimony regarding her history of substance abuse and her decision to "go to college and get things in order financially" prior to seeking visitation with her son. Likewise, Finding No. 21 referenced Ms. Hayes-Boone's admission of her awareness that the man with whom she currently lives is a registered sex offender. Ms. Hayes-Boone cannot complain on appeal that her own admissions in her testimony were relied upon by the trial court. Accordingly, we are satisfied that the trial court's findings of fact were sufficient to support its conclusions of law.

IV. Sufficiency of Evidence

Finally, Ms. Hayes-Boone argues the record contained insufficient evidence to justify the trial court's ruling. She first contends that the court's decision was not supported by clear, cogent, and convincing evidence. However, "numerous cases from both this Court and our Supreme Court have long held that issues of child custody and visitation are determined by the best interest of the child, based upon the preponderance of the evidence." *Respess*, 232 N.C. App. at 625, 754 S.E.2d at 701. Thus, the trial court was not required to meet the higher standard of clear, cogent, and convincing evidence.

Ms. Hayes-Boone next asserts that, despite her acknowledged history of substance abuse, no evidence was presented that she is currently abusing controlled substances. She also contends that Mr. Boone offered no evidence of a likelihood that Michael would actually be harmed by Washington if Michael visited Ms. Hayes-Boone. However, neither of these arguments alter the fact that — as shown above — the record contained sufficient evidence to support the trial court's findings of fact.

Conclusion

For the reasons stated above, we affirm the trial court's 3 October 2016 order.

AFFIRMED.

Judges BRYANT and INMAN concur.

Report per Rule 30(e).