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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-152

Filed: 19 November 2019

Onslow County, No. 14 CvD 2729

ROY LEON MORRISON, JR., Plaintiff,

v.

LIZETTE GONZALEZ, Defendant.

Appeal by defendant from order entered 1 June 2018 by Judge Henry L. Stevens, IV, in District Court, Onslow County. Heard in the Court of Appeals 2 October 2019.

No brief filed for plaintiff-appellant.

Ryan McKaig, for defendant-appellant.

STROUD, Judge.

Defendant appeals an order modifying child custody. The trial court properly considered circumstances which occurred after the last permanent custody hearing for purposes of finding a substantial change of circumstances affecting the welfare of the child. The trial court's findings regarding the escalating animosity between the parents and its harmful effects on the child support the modification of custody. We affirm.

I. Background

On 13 January 2010 Ann¹ was born to plaintiff-father and defendant-mother; the parties were never married. On 25 July 2014, Father filed a verified complaint and sought custody of Ann.² In September of 2014, Mother filed a verified answer and counterclaim for custody. Also in September of 2014, the parties entered in a memorandum of order addressing temporary visitation until June 2015. In October of 2014, Father married Laura (“stepmother”) with whom he had been residing since 2012. In April of 2015, the trial court entered another order addressing temporary custody and visitation. The order noted that the prior memorandum order was about to expire and there had not been court time available for the custody hearing so the temporary schedule needed to be extended. Under the temporary order, Mother and Father had joint custody of Ann, with Mother having primary physical custody. On 10 March 2016, the trial court entered a permanent order for joint legal custody, with Mother having primary physical custody. In the 10 March 2016 order, the trial court found “the parties are clearly at odds with each other and have not shown an attitude to co-parent in the child’s best interest” and “the continuing disputes between the parties harm[] the child.” The March 2016 order noted that Mother “is on active duty

¹ We will use a pseudonym to protect the identity of the minor child.

² Father also sought custody of another child born to Mother in 2006, but that child is not his biological child and is not at issue on appeal.

in the military and subject to the terms of the SCRA.” The order included a detailed visitation schedule and required the parties to meet halfway between Mother’s home in Onslow County and Father’s home in Forsyth County at a particular Sheetz station to exchange the child for visitation. The order also included a provision regarding custody in the event of Mother’s deployment:

DEPLOYMENT: In the event the Mother goes on deployment or temporary duty, as defined by Article 3 of N.C.G.S. § 50A, for a period in excess of 90 continuous days, the parties shall comply with the Uniformed Deployed Parents Custody and Visitation Act. For periods of less than 90 days that the Mother will be in training or otherwise unavailable due to military duties during the academic school year, she shall provide the Father with a copy of her military Family Care Plan and relevant contact information of the designated care provider.

On 28 April 2016, Father filed a motion to modify custody alleging a substantial change in circumstances affecting the best interests of Ann. Father alleged that on 3 April 2016, Mother and her boyfriend, Eric³ met Father at a Sheetz to pick up Ann from Father. Mother cursed at Father, and then Eric pointed a handgun in Father’s face and threatened to kill him. Father contacted the police department, and the department confirmed the incident after reviewing surveillance footage. Eric was arrested and charged with the offenses of communicating a threat, assault by pointing a gun, and assault with a deadly weapon; he was also ordered not

³ A pseudonym is used.

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to have contact with Father as a condition of his bond. Nonetheless, on 21 April 2016, while Eric was still under court order to have no contact with Father, Mother notified Father that she would be going to Japan until 9 May 2016 and Eric would be bringing Ann to Sheetz to have her visitation with Father. Father requested a modification of custody, including an order that Eric not be allowed to reside with or provide care for Ann, immediate temporary physical custody until Mother returned from Japan, and permanent primary physical custody. On 28 April 2016, the trial court entered an *ex parte* temporary child custody order granting Father immediate physical custody until Mother returned from Japan, at which point the normal custodial schedule set out in the 10 March 2016 custody judgment would resume.

On 29 June 2016, Mother filed a response to Father's motion to modify, her own motion to modify custody to grant her sole custody, and a motion for contempt claiming that Father has been hostile and failed to comply with the 10 March 2016 judgment by refusing to return Ann to Eric while Mother was in Japan.

The trial court held a hearing on the motions regarding custody during the 30 October 2017 term of court, and on 1 June 2018, the trial court entered a permanent custody order maintaining joint legal custody, but changing the schedule for physical custody to alternating school years, with Mother having primary physical custody in the 2017-2018 school year, then Father the following school year, and alternating thereafter.

Regarding the “substantial and material change of circumstances which warrants modification of the existing Judgment[,]” the trial court made the following findings:

a. The parties were co-parenting the minor child reasonably well after the previous trial in this matter on June 12, 2015 until an argument took place between the Plaintiff and the Defendant over the telephone on Saturday, April 2, 2016.

b. The minor child was present in the Plaintiff's vehicle on April 2, 2016 and heard Plaintiff and Defendant exchange harsh and probably vulgar words during the argument.

c. That on Sunday April 3, 2016, the Plaintiff and his wife Laura Morrison met the Defendant and her boyfriend [Eric] . . . at the Sheetz Restaurant at 600 Corporate Drive, Raleigh, North Carolina to exchange the minor child after the Plaintiff had exercised his spring break visitation.

d. That after the minor child exited the Plaintiff's car and entered the Defendant's car, the Defendant asked to speak with the Plaintiff without the Plaintiff's wife being present.

e. That the Defendant then proceeded to curse at the Plaintiff and the Plaintiff responded by cursing back at the Defendant.

f. That the Plaintiff told the Defendant she only acts this brazen towards him when her “pussy boyfriend” was present.

g. That . . . [Eric] exited the vehicle now occupied by the minor child and moved to confront the Plaintiff in the Sheetz parking lot.

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h. That [Eric] pulled a handgun out of his waistband and pointed it at the Plaintiffs face and told the Plaintiff he was going to kill the Plaintiff.

i. That Laura Morrison interposed herself between the Plaintiff and Edrick Villareal.

j. That during the confrontation . . . [Eric] pointed his handgun at the Plaintiff on two separate occasions.

k. That despite . . . [Eric] brandishing a handgun and Laura Morrison standing between . . . [Eric] and the Plaintiff, the Plaintiff attempted to push past his wife and tackle [Eric]; but he tripped and fell. That Edrick Villareal did not react with violence and the Plaintiff got up and ran into the parking lot yelling “he’s got a gun”.

l. That the Plaintiff showed poor judgment in confronting . . . [Eric] after he had pointed a gun at the Plaintiff and with his minor child, Wife, and the Defendant all present.

m. That the Defendant subsequently exited her car and told . . . [Eric] to get in her car and they drove away from the Sheetz Restaurant with the minor child.

n. That as the Defendant, . . . [Eric] and the minor child drove away, the Plaintiff again showed extremely poor judgment by attempting to give chase.

o. That the minor child was present during the entire encounter between the Plaintiff and . . . [Eric].

p. That . . . [Eric] was subsequently charged and arrested for committing the offenses of misdemeanor communicating a threat, misdemeanor assault by pointing a gun, and misdemeanor assault with a deadly weapon with minor present, in Wake County File Number 16 CR 206614; that he was convicted of the offenses of

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misdemeanor communicating a threat and misdemeanor assault by pointing a gun in Wake County District Criminal Court; he subsequently appealed his convictions to Wake County Superior Criminal Court and entered a plea of guilty to misdemeanor communicating a threat.

q. That . . . [Eric] was ordered to have no contact with the Plaintiff as a condition of his bond in the aforesaid criminal cases and said no contact order was entered on or about April 21, 2016.

r. That shortly thereafter the Defendant left the United States on a deployment to Japan and left the minor child in the physical care and control of . . . [Eric] while she was out of the country.

s. That after picking up the minor child on April 22, 2016 for his weekend visitation, the Plaintiff refused to return the minor child to . . . [Eric] and the minor child remained in his physical care, custody and control until the Defendant returned from Japan.

t. That the minor child missed four (4) days of class in the first grade due to the Plaintiff's actions; the Plaintiff's wife contacted the minor child's teacher and ensured that the minor child did all of her schoolwork while she missed the said four days of school.

u. That since the April 3, 2016 incident at Sheetz, the parties' relationship had deteriorated, to Ann's between the Plaintiff and Defendant has continued to deteriorate to the detriment.

v. That the Defendant monitors all of the Plaintiff's phone calls with the minor child.

w. That the Defendant does not allow the Plaintiff's wife to speak to the minor child on the telephone.

x. That the Defendant only allowed the Plaintiff and his wife to visit with the minor child for a few minutes

prior to the child's first day of school, despite having advance knowledge that the Plaintiff was travelling over four hours to see the minor child.

y. That the minor child was seen by therapist Judith Kettner for eight sessions between March 10, 2017 and June 2, 2017; that Plaintiff did not participate in said therapy; that Defendant did not list Plaintiff as an emergency contact for said therapist.

z. That Judith Kettner testified that the minor child related an incident to her at the child's last therapy session wherein the child stated that Defendant had hit the minor child in the face and pulled her off the bed and had hit Natasha with a belt.

aa. That Judith Kettner specifically directed the Defendant to a new therapist for the minor child on July 9, 2017, and the Defendant has failed to follow up with any therapist.

bb. That Defendant testified that the minor child is often disruptive and disrespectful in her home; that she has tantrums and yells at the Defendant and at her older sister.

cc. That the minor child does not have behavior issues at the Plaintiff's home; she does not have tantrums or yell at the Plaintiff's home.

dd. That Plaintiff did not allow the Defendant to speak to the minor child three times a week during the summer visitation of 2017 because that was not specifically delineated in the prior court order.

ee. That the Defendant lied to the Plaintiff prior to the weekend visitation beginning October 13, 2017, stating that her older daughter had a soccer tournament in Myrtle Beach that weekend that would necessitate the Plaintiff being responsible for driving the entire way to

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Jacksonville to pick up the minor child and driving to the Magnolia exit off 1-40 to drop off the minor child if he wanted to exercise his visitation; in fact, the Defendant had been to a soccer tournament in Myrtle Beach the previous week on October 6, 2017; the Defendant's older daughter actually had soccer games scheduled for October 14th in Jacksonville and October 15th in Greenville, North Carolina.

ff. That both Plaintiff and Defendant use vulgar and inappropriate language in front of the minor child.

gg. That both Plaintiff and Defendant speak disparagingly of the other parent in front of the minor child.

hh. That the Plaintiff and the Defendant have engaged in "tit for tat" behavior towards each other which undermines both parents in the eyes of the minor child.

ii. That the minor child loves both Plaintiff and Defendant and wants to spend time with both parties.

Mother appeals.

II. Substantial Change of Circumstances

Mother makes two arguments contending the trial court erred in concluding there was a substantial change of circumstances justifying a modification of child custody.

A. Standard of Review

It is well established in this jurisdiction that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a substantial change of circumstances affecting the welfare of the child warrants a

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change in custody. The party seeking to modify a custody order need not allege that the change in circumstances had an adverse effect on the child. While allegations concerning adversity are acceptable factors for the trial court to consider and will support modification, a showing of a change in circumstances that is, or is likely to be, beneficial to the child may also warrant a change in custody.

....

The trial court's examination of whether to modify an existing child custody order is twofold. The trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child. If the trial court concludes either that a substantial change has not occurred or that a substantial change did occur but that it did not affect the minor child's welfare, the court's examination ends, and no modification can be ordered. If, however, the trial court determines that there has been a substantial change in circumstances and that the change affected the welfare of the child, the court must then examine whether a change in custody is in the child's best interests. If the trial court concludes that modification is in the child's best interests, only then may the court order a modification of the original custody order.

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. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

....

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. With regard to the trial court's conclusions of law, our case law indicates that the trial court must determine whether there has been a substantial change in circumstances and whether that

change affected the minor child. Upon concluding that such a change affects the child's welfare, the trial court must then decide whether a modification of custody was in the child's best interests. If we determine that the trial court has properly concluded that the facts show that a substantial change of circumstances has affected the welfare of the minor child and that modification was in the child's best interests, we will defer to the trial court's judgment and not disturb its decision to modify an existing custody agreement.

Shipman v. Shipman, 357 N.C. 471, 473–75, 586 S.E.2d 250, 253–54 (2003) (citations, quotation marks, and brackets omitted).

B. Date from which Change of Circumstances is Measured

Mother first contends that the trial court erred in considering events that had already occurred at the time of the 28 April 2016 temporary custody order to determine whether a substantial change of circumstances occurred. Mother does not challenge the findings noted above as unsupported by the evidence.⁴ Mother argues instead that the trial court made findings regarding the incident at Sheetz in the 28 April 2016 order and thus should consider only events after that date for purposes of modification of custody. Mother is correct that there were findings as to the event at Sheetz in a prior order, but that was an emergency temporary *ex parte* order, entered while Mother was in Japan, which gave temporary physical custody to Father while she was gone. Mother then filed her motion to modify custody in June 2016. The

⁴ Mother's brief states, "It is conceded that a number of the trial court's findings are supported by some evidence contained in the record and court transcript."

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trial court correctly considered changes in circumstances which occurred after the last permanent custody hearing held during the June 2015 term, as memorialized in the last permanent custody order of 10 March 2016.

Mother's argument overlooks the difference between temporary orders and permanent orders. "When considering a modification of custody, courts must look to the latest permanent custody order, because a new order for custody modifies or supersedes the old order. *See, e.g.*, N.C. Gen. Stat. § 50-13.7(b) (2011)." *Woodring v. Woodring*, 227 N.C. App. 638, 645, 745 S.E.2d 13, 19 (2013) (quotation marks and ellipses omitted). The prior permanent custody order was entered on 10 March 2016 and was based upon evidence presented during the June 2015 term of the trial court; as noted by the trial court's order in the findings of fact: "The parties were co-parenting the minor child reasonably well after the previous trial in this matter on June 12, 2015[.]" The circumstances addressed in the March 2016 permanent custody order were based upon evidence of events up to June of 2015. *See Stern v. Stern*, ___ N.C. App. ___, ___, 826 S.E.2d 490, 496 (2019) ("It is unfortunately not unusual for there to be a substantial delay between a hearing and the entry of a written order based on that hearing. Since the trial court can consider only the evidence presented at the hearing, it is impossible for the trial court to consider changes in circumstances after the close of the hearing but before the entry of the written order. *Crews v. Paysour*, ___ N.C. App. ___, ___, 821 S.E.2d 469, 472 (2018)

(“The order . . . can address only the facts as of the last date of the evidentiary hearing because that is the only evidence in the record.”.)” All of the trial court’s findings of fact noted as to a substantial change of circumstances affecting the welfare of Ann arose after the hearing during the June 2015 term and after the March 2016 order was entered. This argument is overruled.

C. No Substantial Change of Circumstances

Mother next contends that the trial court erred as a matter of law in concluding the findings of fact constituted a substantial change of circumstances because she and Father have always had a high level of conflict. Mother argues that “the existence of animosity between the parties is nothing new. It has existed for years and through multiple court orders. The fact that it has continued does not give rise to a substantial change of circumstances, but rather demonstrates only that the status quo has not changed.”

But Mother does not challenge the trial court’s findings of fact regarding their disputes or the trial court’s finding that “the continuing disputes between the parties harm[] the child.” The findings of fact demonstrate that the animosity between the parties had escalated to the point that Mother’s boyfriend threatened Father with a gun in front of the child. The trial court also found Mother had failed to get a new therapist for the child, despite being directed to do so, and that Ann was having behavioral problems in Mother’s home. As noted in prior cases, conflict between

parents may affect a child differently as she becomes older and involved in more activities and more aware of the conflicts:

It is beyond obvious that a parent's unwillingness or inability to communicate in a reasonable manner with the other parent regarding their child's needs may adversely affect a child, and the trial court's findings abundantly demonstrate these communication problems and the child's resulting anxiety from her father's actions. While father is correct that this case overall demonstrates a woeful refusal or inability of both parties to communicate with one another as reasonable adults on many occasions, we can find no reason to question the trial court's finding that these communication problems are presently having a negative impact on Reagan's welfare that constitutes a change of circumstances. In fact, it is foreseeable the communication problems are likely to affect Reagan more and more as she becomes older and is engaged in more activities which require parental cooperation and as she is more aware of the conflict between her parents. Therefore, we conclude that the binding findings of fact support the conclusion that there was a substantial change of circumstances justifying modification of custody. This argument is overruled.

Laprade v. Barry, ___ N.C. App. ___, ___, 800 S.E.2d 112, 117 (2017) (citation omitted); *see also Shell v. Shell*, ___ N.C. App. ___, ___, 819 S.E.2d 566, 572 (2018) ("Here, the trial court specifically noted the changes in communication and cooperation since the 2012 order. Although the parties had always had trouble communicating, Father had become even less willing to cooperate with Mother."). Here, conflict between Mother and Father has escalated to the point the trial court determined this is a high conflict case and ordered appointment of parenting

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coordinator under North Carolina General Statute § 5-91. Mother did not challenge any of the trial court's findings of fact regarding the conflict between the parents or its appointment of a parenting coordinator.

The trial court is not required to ignore "tit for tat" behavior which is harmful to a child and to allow the parties to continue just because the behavior, as Mother argues, is the "status quo" between them. The trial court has made it clear the "status quo" animosity between the parents is harming the child, and it needs to improve to prevent further harm to the child. This argument is overruled.

III. Conclusion

We affirm the order of the trial court's order modifying child custody.

AFFIRMED.

Judges DILLON and YOUNG concur.

Report per Rule 30(e).