IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-193

Filed: 15 October 2019

Watauga County, No. 15-CVD-132

ELLEN CLAIRE LAMONT, Plaintiff,

v.

BENNETT EDWARD LARSEN, Defendant.

Appeal by defendant from order entered 7 November 2018 by Judge Larry B. Leake in District Court, Watauga County. Heard in the Court of Appeals 7 August 2019.

No brief filed for plaintiff-appellee.

Anne C. Wright for defendant-appellant.

STROUD, Judge.

Defendant appeals order granting plaintiff's motion to dismiss his motion to modify custody. For purposes of Rule of Civil Procedure 12(b)(6), defendant's verified motion for modification of custody stated a claim upon which relief could be granted by sufficiently pleading a substantial change of circumstances affecting the welfare

of the minor child. We reverse and remand for further proceedings consistent with this opinion.

I. Background

In May of 2015, plaintiff-mother and defendant-father were divorced. The parties' separation agreement was incorporated into the judgment for divorce and set out the custody arrangements for plaintiff and defendant's minor child born in 2009. The agreement provided for joint legal custody with Mother having primary physical custody and Father having visitation from after school on Tuesdays until Wednesday mornings, after school on Fridays until 3:30pm on Saturdays, and portions of holidays and school breaks.

On 3 October 2018, Father filed a verified motion to modify custody alleging,

> Since the entry of the current Order, the circumstances surrounding and affecting the minor child have changed substantially, including but not limited to the following examples:
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> > a) The Defendant's visitation with the minor child has changed by agreement of the parties. Rather than having the minor child each Friday and Tuesday night, the Defendant now has the minor child each Sunday and Tuesday night. As a result, there is now a one-overnight interruption between his two overnights with the minor child each week, making the child's time with Defendant feel more unsettled.
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> > b) Defendant filed a Motion in this matter on or about June 22, 2018. Prior to his filing

that Motion, Defendant had been seeing the minor child for about an hour each Monday and Thursday after school, by agreement of the parties. However, in response to Defendant's filing the Motion in June, Plaintiff unilaterally terminated these visitation periods. Defendant had arranged his work schedule such that Monday afternoons he would be available for these visitation periods.

c) Defendant is now engaged to Ashley Hutchens, his girlfriend of approximately 4 years. Ashley and the minor child have developed a healthy relationship and get along well. Defendant and Ms. Hutchens will be married on October 29, 2018.

d) At the time of entry of the current Order, Defendant lived in a small, one-bedroom apartment in Foscoe, Watauga County, North Carolina. Defendant now resides with his fiancé in a four-bedroom home in Blowing Rock, Watauga County, North Carolina. This change in residence has substantially affected the minor child as follows:

i) The minor child now has his own bedroom at Defendant's residence, as well as a separate play-room.

ii) Defendant's residence now has substantially easier access to parks and playgrounds than Defendant had at his Foscoe apartment. Defendant and the minor child have frequented since the entry of the current Order the Blowing Rock Elementary School playground, the Greenway Trial, and other parks in the Blowing Rock area.

iii) Defendant's house now has a

> large back yard where the minor child frequently plays. The Defendant and the minor child are currently building a campground and a fire-pit in the back yard.
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> iv) At his apartment in Foscoe, Defendant was living right off of a major highway, and had little area for which to take walks with the minor child. At his new residence, Defendant lives on a quiet, safe, long road. Defendant and the minor child frequently take walks and visit the pond at the front of the neighborhood.
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> v) Defendant and the minor child have easier to access to both Boone and Blowing Rock, and more frequently visit both now that he lives at this residence in Blowing Rock. They have gone camping a couple of times, have taken inflatable kayaks to Price Lake multiple times, and they have enrolled the minor child in an art class.
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> vi) Defendant's new residence is also in close proximity to his fiancé's parents' house in the Firethorne neighborhood between Boone and Blowing Rock. Defendant's fiancé's parents' home has a private pond where Defendant will be able to take the minor child fishing.
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> e) Defendant is no longer working nights. As such, Defendant is available for overnights with the minor child more frequently.

On 17 October 2018, Wife filed a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure "to state a claim for which relief can be granted." On 7 November 2018, the trial court entered an order granting

Wife's motion to dismiss and dismissing Husband's motion to modify custody. Husband appeals.

II. Motion to Dismiss

Husband argues the trial court erred in allowing Wife's motion to dismiss his motion to modify custody under North Carolina Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. At the hearing on the motion to dismiss, Mother's attorney contended the changes alleged had "affected the defendant, not the minor child[,]" and argued, based upon *Shipman v. Shipman*, 357 N.C. 471, 586 S.E.2d 250 (2003), that Husband's allegations must show that the changes "have to have affected the minor child; not maybe, possibly, perhaps somehow in the future, but *has affected the minor child*." (Emphasis added.) The trial court agreed, stating that "an order of the Court or a separation agreement have a meaning. And it does not grant one the right to come back to court and relitigate, an absurd example, because they had a new piano in their home."

A. Standard of Review

Wife's motion to dismiss Husband's motion to modify was based solely on Rule 12(b)(6) and Husband's motion to modify. The trial court did not consider any other documents or evidence.[1]

[1] We also note that the "ORDER ON PLAINTIFF'S MOTION TO DISMISS PURSUANT TO RULE 12(B)(6) OF THE NORTH CAROLINA RULES OF CIVIL PROCEDURE" dismissing Husband's motion for modification states that "[t]he Court, having reviewed and considered the Court's file,

> 19. The Court, in deciding a Rule 12(b)(6) motion, treats the well-pleaded allegations of the complaint as true and admitted. However, conclusions of law or unwarranted deductions of fact are not deemed admitted. The facts and permissible inferences set forth in the complaint are to be treated in a light most favorable to the nonmoving party. As our Court of Appeals has noted, the essential question raised by a Rule 12(b)(6) motion is whether the complaint, when liberally construed, states a claim upon which relief can be granted on any theory.
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> 20. Our appellate courts frequently reaffirm that North Carolina is a notice pleading state. Under notice pleading, a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial, to allow for the application of the res judicata, and to show the type of case brought. Accordingly, a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.
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> 21. A Rule 12(b)(6) motion should be granted when the complaint, on its face, reveals (a) that no law supports the plaintiff's claim, (b) the absence of facts sufficient to form a viable claim, or (c) some fact which necessarily defeats the plaintiff's claim.

Wells Fargo Ins. Servs. USA, Inc. v. Link, ___ N.C. ___, ___, 827 S.E.2d 458, 465 (2019) (citations and quotation marks omitted).

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considered the arguments of the parties' attorneys, and *after hearing the evidence* offered finds that the defendant failed to state a claim for which relief can be granted." (Emphasis added.) Where the trial court considers other evidence outside the pleadings, we may be required to review the trial court's ruling under standards for a summary judgment motion. *See generally Blackburn v. Carbone*, 208 N.C. App. 519, 523, 703 S.E.2d 788, 792 (2010). But despite the reference to "hearing the evidence" in the trial court's order, it is clear from the remainder of the order and from the transcript of the hearing this matter was considered only as a motion to dismiss under Rule 12(b)(6), based upon the Husband's motion for modification.

On appeal, we must consider whether

> as a matter of law, the allegations of the [motion], treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. The [motion] must be liberally construed, and the court should not dismiss the [motion] unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.

Cabaniss v. Deutsche Bank Secs., Inc., 170 N.C. App. 180, 182, 611 S.E.2d 878, 880 (2005) (citation omitted).

B. Sufficiency of Pleading for Motion to Modify Custody

To state a claim for modification of a prior custody order, a movant must allege a substantial change of circumstances which has an effect on the welfare of the minor child. *See Shell v. Shell*, ___ N.C. App. ___, ___, 819 S.E.2d 566, 570 (2018) ("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 change in custody."). Contrary to Wife's argument, the alleged changes need not have already occurred; a motion to modify may be based upon anticipated likely benefits to a child from a substantial change in circumstances. *Id.* ("[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." (emphasis added)). In *Pulliam v. Smith*, our Supreme Court specifically rejected the holding of *Rothman v. Rothman*, 6 N.C.

App. 401, 170 S.E.2d 140 (1969), that a modification of custody requires "that circumstances have so changed that the welfare of the child will be adversely affected unless the custody provision is modified." 348 N.C. 616, 619-20, 501 S.E.2d 898, 900 (1998) (citation and quotation marks omitted). The Supreme Court explained that

> [w]e emphasize that an adverse effect upon a child as the result of a change in circumstances is and remains an acceptable factor for the courts to consider and will support a modification of a prior custody order. However, 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*.

Id. at 620, 501 S.E.2d at 900 (emphasis added).

For purposes of Rule 12(b)(6), the trial court must take Husband's allegations of the changed circumstances and the ways in which those would benefit the child as true. *See Cabaniss*, 170 N.C. App. at 182, 611 S.E.2d at 880. The trial court's role in ruling on a motion to dismiss under Rule 12(b)(6) is not the same as its role in a bench trial, where it may determine the credibility and weight of the evidence:

> The trial court can dismiss a motion under Rule 12(b)(6) *only if the motion to modify has not stated any facts or law which could support the claim*[.] . . . The trial court may ultimately determine that other factors outweigh the change in Father's availability, but this factual issue cannot be decided on a motion to dismiss under the standards set by Rule 12(b)(6).

Stern v. Stern, ___ N.C. App. ___, ___, 826 S.E.2d 490, 497 (2019) (emphasis added).

As noted, Wife argued to the trial court, and the trial court agreed, based upon *Shipman* Husband had failed to allege a sufficient nexus between the changes in Husband's living circumstances and the welfare of the child. But the trial court's reliance upon *Shipman* overlooks the fact that *Shipman* was an appeal from a custody order entered after a trial, and this Court was evaluating the sufficiency of the trial court's findings of fact to support its ruling. *See Shipman*, 357 N.C. 471, 586 S.E.2d 250. This Court was not evaluating a motion to dismiss for failure to state a claim for modification of custody. *See generally id.*

Shipman does address the types of evidence which may be used to show the effect of certain types of changes in circumstances upon a child's welfare:

> [i]n situations where the substantial change involves a discrete set of circumstances such as a move on the part of a parent, a parent's cohabitation, or a change in a parent's sexual orientation, the effects of the change on the welfare of the child are not self-evident and therefore necessitate a showing of evidence directly linking the change to the welfare of the child. Other such situations may include a remarriage by a parent or a parent's improved financial status. Evidence linking these and other circumstances to the child's welfare might consist of assessments of the minor child's mental well-being by a qualified mental health professional, school records, or testimony from the child or the parent.

357 N.C. at 478, 586 S.E.2d at 256 (citations omitted). Thus, *Shipman* notes that the effects on a child of some changes in circumstances, such as remarriage or a change of residence of a parent, "are not self-evident," so "a showing of evidence directly

linking the change to the welfare of the child" is necessary, and the trial court must necessarily make adequate findings on the effects on the welfare of the child. *Id.* at 478-79, 586 S.E.2d at 256. Yet *Shipman* does not suggest that the *allegations of a motion to modify* must be nearly as detailed or extensive as the actual evidence which may be used to prove the effects on the child. *See generally id.*, 357 N.C. 471, 586 S.E.2d 250.

Husband's motion made allegations of the changes in circumstances and anticipated beneficial effects of the changes on the child. Taking his allegations as true, as we must for purposes of a motion to dismiss, *see Cabaniss*, 170 N.C. App. at 182, 611 S.E.2d at 880, his new home offered increased opportunities for activities which benefit the child, including walking, camping, kayaking, and more frequent contact with nearby future extended family members, and Husband's new work schedule offered the opportunity for Husband to spend more time with the child. Evidence regarding the details of these changes and potential effects on the child's welfare would be presented more fully at a hearing on the motion for modification, but Husband was not required to allege all of these facts in a motion to modify. *See generally Wells Fargo Ins. Servs. USA, Inc.*, ___ N.C. at ___, 827 S.E.2d at 465. Our rules require only notice pleading, and the motion to modify gave notice of the alleged changes and effects on the child. *See generally id.*

Husband's motion also alleged one adverse change in circumstances.

Husband's motion to modify custody was his second motion. As alleged in Husband's motion and as noted by the trial court at the beginning of the hearing on 7 November 2018, the trial court had already once dismissed Husband's prior motion to modify, without prejudice, also for "failure to sufficiently plead facts to support a significant change in circumstances affecting the child." Husband's new motion to modify included more factual details because of this prior dismissal and also alleged adverse changes in circumstances based upon Wife's apparent retaliation against Husband for filing the prior motion to modify:

> Defendant filed a Motion in this matter on or about June 22, 2018. Prior to his filing that Motion, Defendant had been seeing the minor child for about an hour each Monday and Thursday after school, by agreement of the parties. However, in response to Defendant's filing the Motion in June, Plaintiff unilaterally terminated these visitation periods. Defendant had arranged his work schedule such that Monday afternoons he would be available for these visitation periods.

Taking the allegations of the motion as true, Husband and Wife had by agreement established additional visitation, and Husband had modified his work schedule to accommodate this time, but because Husband filed a motion to modify, Wife "unilaterally terminated these visitation periods." We recognize that Wife had no specific legal obligation under the prior order to allow this visitation time, although the agreement did provide for additional visitation "[a]t such other times as mutually agreed between the parties." But Wife had previously agreed to the

additional visitation and Husband had changed his work schedule to accommodate the visitation, so her unilateral termination of the additional visitation in retaliation against Husband does implicate the welfare of the child. This sort of retaliatory conduct which decreases time with a parent is the type of change for which the detrimental effect on the child is more "self-evident[,]" as stated in *Shipman*. 357 N.C. at 478, 586 S.E.2d at 256. Further, although the circumstances in *Shipman* were quite different, one of the factors noted was the "plaintiff's deceitful denial of visitation to defendant." *Id.* at 479, 586 S.E.2d at 256. The denial of increased visitation alleged here was not "deceitful[,]" but it was, at least as alleged by Husband, retaliatory since Wife was punishing Husband for filing a motion to modify custody.[2]

Here, the trial court's standards for sufficiency of allegations of a substantial change and related effects on the child were not in accord with our case law. Again, we are addressing allegations, taken as true, for purposes of a motion to dismiss under Rule 12(b)(6), based only upon the pleadings, not a trial court's ruling on a motion to modify after full consideration of the evidence presented by both parties. The trial court was correct that certain changes do create "self-evident" effects on the child. During the hearing, on one end of the spectrum, the trial court gave the

[2] We recognize there may have been other valid reasons for Wife's denial of this visitation time, but for purposes of a motion to dismiss under Rule 12(b)(6), we must take Husband's allegations as true. We express no opinion on whether Wife's actions were actually retaliatory or detrimental to the child.

example of an allegation "that one parent had shot the other parent[.]" Wife's counsel agreed the effect on the child's best interests of "murder" of a parent would be self-evident, but contended the effect on the child of changes such as a change of residence, remarriage, or a change in financial status are not self-evident. On the other end of the spectrum, the trial court gave the "absurd" example of a new piano in the home. While we agree having a "new piano" may not be a substantial change in circumstances affecting the welfare of a child, with no other facts or circumstances appearing, the law requires the trial court to consider each child in his own specific circumstances to determine if the alleged change is substantial and if it would likely be beneficial for that particular child. It would not be absurd for the parent of a musical prodigy to claim that his acquisition of a new piano is a substantial change of circumstances affecting the best interests of that particular child, if he previously had no instrument at all and the new piano would aid in encouraging the development of his musical talent.

In summary, the motion to modify in this case included allegations far beyond the standard of "any facts or law which could support the claim" as needed to overcome a 12(b)(6) motion regarding motions to modify as noted in *Stern*. *Stern*, ___ N.C. App. at ___, 826 S.E.2d at 497. While we express no opinion as to whether Father should ultimately prevail in his motion to modify, he pled substantial changes affecting the welfare of the child sufficient to withstand a 12(b)(6) motion to dismiss.

III. Conclusion

We reverse the order granting Mother's motion to dismiss and dismissing Father's motion to modify custody and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

Judges BRYANT and DIETZ concur.

Report per Rule 30(e).