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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-47

Filed: 16 July 2019

New Hanover County, No. 17 CVD 3920

BRYAN THOMAS PAUL, Plaintiff,

v.

DINA FATTAH, Defendant,

v.

PETER PAUL and COLEEN PAUL, Third-Party Defendants and Paternal Grandparents.

Appeal by defendant from order entered 25 July 2018 by Judge Melinda H. Crouch in New Hanover County District Court. Heard in the Court of Appeals 5 June 2019.

*Rice Law, PLLC, by Richard Forrest Kern, Mark Spencer Williams and Christine M. Sprow, for defendant-appellant.*

*No brief for plaintiff-appellee.*

*No brief for third-party defendants.*

TYSON, Judge.

Dina Fattah (“Defendant”) appeals from a permanent custody order, which granted Bryan Thomas Paul (“Plaintiff”) primary physical custody of minor child (“R.P.”) and allowed Peter and Coleen Paul (“Paternal Grandparents”) grandparents’ visitation. We vacate the trial court’s custody order and remand for further proceedings.

### I. Background

Plaintiff and Defendant were never married, but engaged in a relationship that resulted in the birth of one minor child, R.P., in June 2015. The parties lived together in Wilmington, North Carolina, until R.P. was almost two years old. In June 2017, Plaintiff moved out of the shared apartment to return to Delaware to live with his parents. Six months later, Defendant and R.P. moved in with Defendant’s mother and step-father in December 2017.

Plaintiff initiated this custody action in October 2017. Defendant did not file an answer or counterclaim. A temporary custody order was entered on 17 November 2017. The order awarded the parties joint legal custody of R.P., with Defendant having primary physical custody and Plaintiff having supervised visitation. Paternal Grandparents were included as approved supervisors for Plaintiff’s visitation.

The order required both parties to obtain mental health evaluations and follow all recommendations. Plaintiff was evaluated by a psychiatrist, was diagnosed with paranoid schizophrenia, and was prescribed medication. Plaintiff has subsequently

remained on his medication, which has stabilized his condition, and has regularly scheduled follow-up appointments.

Defendant made an appointment with a psychiatrist, but did not attend the appointment due to a lapse in her Medicaid coverage. She later completed a Comprehensive Clinical Assessment (“CCA”) at RHA Health Services. The CCA’s findings did not recommend any mental health treatment for Defendant. However, the evaluation was based on Defendant’s self-reported information. Defendant failed to provide relevant information during her evaluation, including her previous diagnosis and treatment for anxiety following the birth of R.P.

On 26 February 2018, Paternal Grandparents filed a motion to intervene, and sought visitation with R.P. Defendant filed a motion to dismiss, but the trial court entered an order allowing Paternal Grandparents to intervene as third-party defendants in this action.

A hearing for a permanent custody determination was held in June 2018. At the close of arguments, the trial court orally ruled the parties were to have joint custody of R.P., with Plaintiff having primary physical custody as long as he resides with his parents and he complies with treatment. Defendant was granted custody of R.P. “the majority of the summer,” as well as visitation in Delaware on long weekends and school breaks. The parties were to alternate major holidays, with custody exchange of R.P. occurring half-way between Wilmington and Delaware. Paternal

Grandparents' visitation with R.P. was "subsumed in any custodial arrangement with the plaintiff." A written order reflecting this determination was entered on 25 July 2018.

Defendant filed a motion for a new hearing, amendment of judgment, or for relief from judgment on 27 July 2018. The trial court denied the motion. Defendant filed timely notice of appeal.

## II. Jurisdiction

An appeal of right lies to this Court from a child custody order entered in a district court pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2017).

## III. Issues

Defendant argues the trial court's findings of fact 21, 38, and 51 were not supported by competent evidence. She also argues the trial court erred in conditioning Plaintiff's primary physical custody of R.P. upon Plaintiff living with Parental Grandparents, as it conflicts with the parents' constitutional rights. Alternatively, Defendant asserts N.C. Gen. Stat. § 50-13.2(b1) and/or § 50-13.5(j) are unconstitutional, both facially and as-applied to the facts in this case.

## IV. Conditional Custody Order

We are precluded from deciding the substantive issues brought forth on appeal due to the conditional nature of the order. *Hagedorn v. Hagedorn*, 210 N.C. 164, 165, 185 S.E. 768, 768-69 (1936). "A conditional judgment is one whose force depends upon

the performance or nonperformance of certain acts to be done in the future by one of the parties[.]” *Id.* at 165, 185 S.E. at 769 (citations omitted). “Alternative or conditional judgments are void.” *Lloyd v. Swansboro Land & Lumber Co.*, 167 N.C. 97, 97, 83 S.E. 248, 248 (1914).

The plaintiff in *Hagedorn* obtained an order for spousal support from her husband. *Hagedorn*, 210 N.C. at 165, 185 S.E. at 768. Due to his noncompliance with the order, the plaintiff obtained an order requiring her husband to appear. *Id.* After his failure to appear, a second order was issued, authorizing the defendant’s answer to be stricken, effective approximately one month later, but “if the defendant . . . shall appear before the clerk [prior to the effective date of the order] . . . then the order striking out the pleadings of the defendant shall be and the same is hereby rescinded; otherwise, it shall remain in full force and effect.” *Id.*

Our Supreme Court explained “the effectiveness of the order” was “made dependent upon the failure” of the defendant to appear for questioning, and concluded this conditional order was void. *Id.* at 165, 185 S.E. at 769; *see also Cassidy v. Cheek*, 308 N.C. 670, 673-74, 303 S.E.2d 792, 795 (1983). Similarly, in *Cassidy*, our Supreme Court found an order dismissing a plaintiff’s claim if the plaintiff failed to comply with discovery within a specified time period to be conditional and void. *Cassidy*, 308 N.C. at 673, 303 S.E.2d at 794.

This Court vacated in part an order requiring a defendant to provide health insurance for his child. *Buncombe Cty. v. Rogers*, 148 N.C. App. 401, 559 S.E.2d 227 (2002). The child support order required the defendant “to maintain insurance *when available through employment.*” *Id.* at 404, 559 S.E.2d at 229 (emphasis supplied). The trial court made no findings of fact concerning “whether insurance was available to [d]efendant, and, if so, at what cost.” *Id.* This Court concluded:

This is a conditional order: if the [d]efendant has access to insurance through his employment, then he is ordered to obtain insurance for [the child]. It leaves it to the parties to make the determination whether [d]efendant has access to insurance through his employment.

*Id.* This Court remanded the matter for the trial court to determine whether the defendant had access to insurance through his employment, and if not, whether he could obtain insurance elsewhere at a reasonable cost. *Id.*

The custody order in this case contains two conditions for Plaintiff to maintain primary physical custody of R.P.:

1. Plaintiff and Defendant shall share joint legal and physical custody of the child, with Plaintiff having primary physical custody *for so long as he lives with Paternal Grandparents and complies with his medical treatment.* (Emphasis supplied).

The trial court’s grant of primary physical custody to Plaintiff is conditional and wholly dependent upon, “the performance or nonperformance of certain acts to be done in the future” by Plaintiff. *Hagedorn*, 210 N.C. at 165, 185 S.E. at 769. While findings of fact relate to Plaintiff’s mental health treatment and compliance, there

are no findings or conclusions concerning the alternatives of what happens if Plaintiff fails to abide by this conditional order. *See Rogers*, 148 N.C. App. at 404, 559 S.E.2d at 229. The order appealed from is conditional and void.

V. Conclusion

While both parents are ordered to share joint legal and physical custody of R.P., the conclusion assigning primary physical custody to Plaintiff is conditional and is void. *See id.* at 404, 559 S.E.2d at 229; *Lloyd*, 167 N.C. at 97, 83 S.E. at 248. We vacate the trial court's order for conditional primary physical custody with Plaintiff and remand for further proceedings. *It is so ordered.*

VACATED AND REMANDED.

Judges MURPHY and YOUNG concur.

Report per Rule 30(e).