IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-52

Filed: 17 September 2019

Gaston County, No. 15 CVD 2395

DANIEL ERIC HOLMBERG, Plaintiff,

v.

HOLLY LYNN HOLMBERG, Defendant.

Appeal by plaintiff from order entered 6 June 2018 by Judge Craig R. Collins in Gaston County District Court. Heard in the Court of Appeals 5 June 2019.

Epperson Law Group, PLLC, by Amber R. Morris and James L. Epperson, for plaintiff-appellant.

No appellee brief filed.

DIETZ, Judge.

Daniel Eric Holmberg and Holly Lynn Holmberg divorced after roughly seven years of marriage. They have four minor children. After finding that Mr. Holmberg physically abused Ms. Holmberg and failed to adequately care for the children, the trial court entered a permanent custody order awarding custody to Ms. Holmberg and limiting Mr. Holmberg to occasional supervised visitation.

Mr. Holmberg challenges evidence admitted at the custody hearing and challenges the sufficiency of the court's findings in its order. As explained below, we reject the bulk of Mr. Holmberg's arguments as meritless. But we agree with Mr. Holmberg that the trial court failed to make a finding required by statute before limiting his access to his children solely to supervised visitation. We therefore vacate the order and remand for further findings. On remand, the trial court, in its discretion, may enter a new order on the existing record or conduct any further proceedings the court deems necessary in the interests of justice.

Facts and Procedural History

Daniel Eric Holmberg married Holly Lynn Holmberg in 2008. During the marriage, the couple had four children. The Holmbergs separated in 2015 and are now divorced.

The parties litigated issues of child custody for several years. In 2018, the court held a permanent custody hearing. The court heard evidence that Mr. Holmberg had physically abused and threatened Ms. Holmberg. For example, Mr. Holmberg was convicted of resisting arrest in 2015 after breaking Ms. Holmberg's leg. In 2016, he was convicted of communicating threats to Ms. Holmberg and violating a Chapter 50B domestic violence protective order. That protective order was based on earlier court findings that Mr. Holmberg had broken Ms. Holmberg's leg, "inflicted multiple

bruises" on her body, and placed a picture of Ms. Holmberg in her mailbox with her eyes poked out and the words "last chance" written on it.

Mr. Holmberg also sent a threatening email to Ms. Holmberg stating, "[y]ou can't protect the kids from me I am their father. I know my rights you f***. You start doing what I tell you. The only thing I miss you for is karate practice well I have the kids for that now . . . . So be a good girl Holly or pay."

The court also heard evidence that Mr. Holmberg had issues caring for his children during a brief period when he had temporary custody. For example, one child had excessive absences from kindergarten. In another instance, Mr. Holmberg failed to pick up prescription medicine for another child with a serious illness. Finally, Mr. Holmberg asked his cousin and his father to babysit the children on various occasions, despite knowing that his cousin was a heroin addict and that his father suffered from schizophrenia and had provided him and Ms. Holmberg with illegal drugs in the past.

After the hearing, the trial court entered a detailed order with findings of fact and conclusions of law. The order awarded physical and legal custody of the children to Ms. Holmberg and limited Mr. Holmberg's access to the children to occasional supervised visitation. Mr. Holmberg appealed.

Analysis

I. Admission of purported expert testimony

Mr. Holmberg first challenges testimony by a therapist at the custody hearing.

Ms. Holmberg called Dr. Ashley McKinney, a psychotherapist and clinical psychologist, to testify regarding allegations that Mr. Holmberg sexually molested one of the parties' children. Dr. McKinney had met with the child seventeen times over the course of four months to treat her for symptoms of post-traumatic stress disorder. Ms. Holmberg called Dr. McKinney to testify as a lay witness.

When asked on direct examination whether her job included treating trauma symptoms "even if it came from coaching," Dr. McKinney replied "my view is that symptoms that a young child displays don't typically come from coaching . . . . The symptoms come from an experience that they've had or feelings that they're experiencing."

Mr. Holmberg argues that this was impermissible expert testimony. But the transcript reveals that Mr. Holmberg did not object to this testimony at the hearing; rather, he objected to an earlier question from opposing counsel, on a different issue, as seeking an expert opinion. That earlier objection did not preserve a challenge to this testimony, which occurred later in the examination. Because Mr. Holmberg did not object to the challenged statement at the hearing, his argument on appeal is waived. *Lambros v. Zrakas*, 234 N.C. 287, 289, 66 S.E.2d 895, 896 (1951).

In any event, even if Mr. Holmberg's argument had been preserved for appellate review, we would have rejected it. The trial court's lengthy order provides ample support for its conclusions of law even without considering the allegations of

sexual molestation. Accordingly, Mr. Holmberg failed to show that there is a reasonable possibility that, but for the challenged testimony, the trial court would have reached a different result. *Crenshaw v. Williams*, 211 N.C. App. 136, 144, 710 S.E.2d 227, 233 (2011). Accordingly, any error in the admission of this testimony was harmless.

II. Challenges to the findings of fact

Next, Mr. Holmberg challenges multiple findings of fact in the custody order on varying grounds. "In a child custody case, the trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings." *Cox v. Cox*, 238 N.C. App. 22, 26, 768 S.E.2d 308, 311 (2014) (citations omitted). Any unchallenged findings are binding on appeal. *Koufman v. Koufman,* 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

Mr. Holmberg challenges findings concerning the sexual abuse allegations against him, arguing that those findings either lack sufficient evidentiary support or that the court improperly ignored contrary evidence. He also contends that a number of findings—most of which described alleged instances of Mr. Holmberg abusing his children—amounted to mere recitations of the evidence rather than true findings of fact. *See Moore v. Moore*, 160 N.C. App. 569, 571–72, 587 S.E.2d 74, 75 (2003).

We reject these arguments for two reasons. First, it is well-settled "that the trial judge, sitting without a jury, has discretion as finder of fact with respect to the

weight and credibility that attaches to the evidence." *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994) (citations omitted). Here, there was at least some evidence supporting the trial court's findings, although Mr. Holmberg offered competing or conflicting evidence. The decision of what weight and credibility to give to this competing evidence is a task left to the trial court. *Id.*

Second, even if we were to ignore the challenged findings, there are other unchallenged findings that fully support the trial court's conclusions. For example, the trial court found that Mr. Holmberg allowed relatives with known mental health and drug abuse issues to babysit his children. He broke Ms. Holmberg's leg and physically abused her in other ways. He sent threatening communications to her. He violated a domestic violence protective order by emailing Ms. Holmberg that "[y]ou can't protect the kids from me . . . [t]he only thing I miss you for is karate practice well I have the kids for that now." All of these findings readily support the trial court's conclusions. Accordingly, Mr. Holmberg again fails to show a reasonable possibility that, but for the challenged findings, the trial court would have reached a different result. *Crenshaw*, 211 N.C. App. at 144, 710 S.E.2d at 233.

III. Required statutory finding for supervised visitation

Finally, Mr. Holmberg argues that the trial court failed to make the findings required by statute before limiting him to supervised visitation with his children.

By statute, a trial court "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). This Court has held that the sort of limited, supervised visitation imposed in this case is effectively a denial of the right to reasonable visitation and thus requires these statutory findings. *Hinkle v. Hartsell*, 131 N.C. App. 833, 838, 509 S.E.2d 455, 459 (1998).

Here, the trial court included a finding that appears aimed at this statutory requirement. But that finding fails to satisfy the statute's mandate: "It is in the best interest of the minor children to be awarded supervised visitation with the minor children as set forth hereinbelow."

This finding fails to identify the person to whom it is addressed. To be sure, in light of the court's conclusions and disposition, one could infer that the trial court was referring to Mr. Holmberg—that is, that the trial court meant to find "it is in the best interests of the minor children *for Daniel Eric Holmberg* to be awarded supervised visitation with the minor children as set forth hereinbelow." But the court did not make that finding.

This omission compels us to vacate and remand the court's order for further findings. The General Assembly enacted N.C. Gen. Stat. § 50-13.5(i) because denying a parent reasonable visitation rights with a child is an extreme step. *Johnson v. Johnson*, 45 N.C. App. 644, 647, 263 S.E.2d 822, 824 (1980). Requiring these

particular, statutory findings before depriving a parent of reasonable visitation protects the rights of both parents and children in these cases, and permits appellate courts to engage in meaningful review of these consequential rulings. Thus, insisting that trial court orders contain the specific findings required by the statute is not placing form over substance; it is honoring a legislative command to treat these rulings differently from other findings by the trial court in family law cases.

Accordingly, because the trial court failed to make the necessary findings required by N.C. Gen. Stat. § 50-13.5(i), we vacate the court's order and remand for further findings. On remand, the trial court, in its discretion, may enter a new order on the existing record or conduct any further proceedings the court deems necessary in the interests of justice.

Conclusion

We vacate the trial court's order and remand the matter to the trial court.

VACATED AND REMANDED.

Judge BERGER concurs.

Judge HAMPSON concurs with separate opinion.

Report per Rule 30(e).

HAMPSON, Judge, concurring.

As noted by the majority, Finding of Fact 42 by the trial court states: "It is in the best interest of the minor children to be awarded supervised visitation with the minor children as set forth hereinbelow." It seems apparent this Finding is the result of a drafting error; therefore, it is appropriate to vacate and remand this matter for correction of that error.

I write separately to underscore that the remainder of the trial court's Findings support its Conclusions of Law and ultimate custody award, including that Mr. Holmberg's visitation with the children be supervised. In addition to the Findings identified by the majority opinion, I also highlight Finding of Fact 38, which is unchallenged on appeal: "Plaintiff Father testified that he would agree to supervised visitation in order to protect himself and the minor children."