IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-48

Filed: 17 November 2020

Onslow County, No. 14 CVD 109

JOSHUA STEVENS BRADLEY, Plaintiff-Appellant,

v.

ROSE BRADLEY, Defendant-Appellee.

Appeal by plaintiff from order entered 19 July 2019 by Judge Carol Jones in District Court, Onslow County. Heard in the Court of Appeals 6 October 2020.

Fox Rothschild, L.L.P., by Michelle D. Connell, for plaintiff-appellant.

Daphne Edwards Divorce & Family Law, P.C., by Daphne D. Edwards, for defendant-appellee.

McGEE, Chief Judge.

Joshua Stevens Bradley ("Plaintiff") appeals from the trial court's order to modify child custody. Plaintiff contends that the trial court erred by failing to make sufficient findings of fact to support the circumstances existing at the time of the original custody order, and that the findings of fact were insufficient to establish that there was a substantial change of circumstances affecting the welfare of the child

making it in the child's best interest to modify custody. Plaintiff also contends that the trial court erred by leaving the determination of the custody schedule to the discretion of the parties. We hold that the findings of fact were insufficient, and vacate the order modifying custody. Accordingly, we remand for additional findings of fact to establish the circumstances existing at the time of the original custody order, as well as whether there was a substantial change in circumstances affecting the welfare of the child. The trial court must also provide a sufficiently definite visitation schedule for Plaintiff.

I. Factual and Procedural History

Plaintiff and Rose Bradley ("Defendant") were married on 20 May 2006. They had one daughter born 7 March 2011. Plaintiff and Defendant separated on 5 February 2014, and both parties filed an action for child custody. The parties divorced on 15 July 2015.

The original custody order was entered on 25 February 2014 in which the parties agreed to share joint custody of their daughter on a week-on/week-off basis with custodial exchanges every Friday. At the time of the original order, their daughter was nearly three years old. Pursuant to the order, the parties agreed to communicate with one another when a parent could not care for the child during that parent's custodial time to allow the other parent the first opportunity to care for the

child. They also agreed to allow each other reasonable telephone contact with the child.

Defendant filed a motion to modify custody on 13 July 2017, seeking primary physical custody of their daughter and permission from the court to relocate with their daughter to Alabama to reside with Defendant and her fiancé. Defendant remarried on 13 November 2018, and began traveling between Alabama and North Carolina on a weekly basis to exercise custody with her daughter.

Defendant's motion to modify custody was heard on 27 March 2019. Defendant testified that their daughter was developing behavioral issues at school. Defendant also testified that communication between the two parents could be "hit or miss." According to Defendant's testimony, these difficulties were centered on disagreements over appropriate childcare, Christmas holidays, the right of first refusal, and recreational activities. Defendant further testified that she was primarily responsible for attending to their daughter's needs with respect to doctors' appointments and dental hygiene, as well as her educational needs.

Plaintiff testified that he continued to live in the home that their daughter had lived in since she was born, that he was involved in communicating with her teachers regarding behavioral issues, and that he helped maintain a consistent schedule for their daughter during his custody weeks.

The trial court entered judgment on 19 July 2019, awarding the parties joint legal custody, with Defendant having primary physical custody, and Plaintiff having secondary physical custody consisting of visitation. The trial court made, *inter alia*, the following findings of fact:

> 8. Since the entry of the Temporary Order there has been a substantial change in circumstances affecting the welfare and best interest of the minor child including the following:
>
> a) The child has aged five years from 3 years old to 8 years old presently.
> b) The parties have issues communicating and do not effectively co-parent.
> c) The minor child experiences difficulties adjusting with the week on/week off schedule.
> d) The parties have had disputes over holiday custody and recreational activities for the child resulting in seeking the assistance of their lawyers to resolve the dispute. The parties are no longer able to work together for the benefit of the minor child.
> e) The defendant remarried on November 13, 2018 and her spouse is a member of the Coast Guard stationed in the state of Alabama; the defendant has travelled from Mobile, Alabama to Jacksonville, North Carolina since her marriage to exercise custody with the minor child.
> f) The defendant handles most of the daily responsibility of caring for the minor child's education and medical needs. Prior to the filing of the motion to modify, the minor child got off the school bus daily at the defendant's residence; the child has behavioral issues at school and the

> teacher calls the defendant to assist in resolving the behavioral issues; the defendant takes the child to her doctor's appointments.
>
> g) The minor child no longer has the defendant living in Onslow county everyday to continue providing the care the defendant previously provided.
>
> 9. The defendant is willing to jeopardize her marriage in order to stay in North Carolina to exercise weekly visitation/custody of the child if this Court determines the Order should not be modified. . . .

Based on these findings of fact, the trial court concluded that there had been a substantial change of circumstances affecting the best interest and welfare of the daughter, and that it was in her best interest for Defendant to have primary physical custody and for Plaintiff to have secondary physical custody. The trial court also concluded that it was in the child's best interest for Plaintiff and Defendant to have joint legal custody.

The judgment sets out a specific custodial schedule for Plaintiff's secondary physical custody, including every spring break, half of each summer break, the first half of Christmas break in odd-numbered years, the second half of Christmas break in even-numbered years, and Thanksgiving break in even-numbered years. Additionally, the judgment allows for visitation "[a]nytime Plaintiff is able to travel to the minor child's hometown with three (3) weeks notice given to Defendant. . . . [and] [a]ny other times that the parties mutually agree."

Plaintiff appeals.

II. Analysis

Plaintiff contends that the trial court erred by failing to make findings of fact to support the circumstances existing at the time of the original custody order, and by failing to make sufficient findings of fact to support a modification of custody due to a substantial change of circumstances affecting the welfare of the child. Plaintiff also argues that the trial court erred by leaving the custody schedule in the discretion of the parties. We discuss each issue in turn.

A. Findings of Fact, Substantial Change of Circumstances

An order for custody of a minor child entered pursuant to [N.C. Gen. Stat. § 50-13.2(a)] shall award the custody of the child to such person, agency, organization or institution as will best promote the interest and welfare of the child. N.C. Gen. Stat. § 50-13.2(a) (2019). An order for custody must include written findings of fact that reflect the consideration of each of these factors and that support the determination of what is in the best interest of the child. *Id.*

"When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, this Court 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) (citing *Pulliam v. Smith*, 348 N.C. 616, 625, 501 S.E.2d 898, 903 (1998)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to

support a conclusion." *Id.* (citing *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)). 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. *Pulliam*, 348 N.C. at 628, 501 S.E.2d at 904.

Our trial courts are vested with broad discretion in child custody matters. *Pulliam,* 348 N.C. at 624, 501 S.E.2d at 902. This discretion is based upon the trial court's opportunity to see the parties; to hear the witnesses; and to "detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges." *Surles v. Surles,* 113 N.C. App. 32, 37, 437 S.E.2d 661, 663 (1993) (quoting *Newsome v. Newsome,* 42 N.C. App. 416, 426, 256 S.E.2d 849, 855 (1979)). 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." *Pulliam,* 348 N.C. at 625, 501 S.E.2d at 903 (quoting *Williams v. Pilot Life Ins. Co.,* 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975)).

The trial court must determine whether there has been a substantial change in circumstances since the original consent order, and whether that change affected the minor child. *Shipman*, 357 N.C. at 475, 586 S.E.2d at 254. "[B]efore a child custody order may be modified, the evidence must demonstrate a connection between

the substantial change in circumstances and the welfare of the child, and flowing from that prerequisite is the requirement that the trial court make findings of fact regarding that connection." *Id.* at 478, 586 S.E.2d at 255. "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." *Id.* at 475, 586 S.E.2d at 254. "In situations where the substantial change involves a discrete set of circumstances such as a move on the part of a parent . . . 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." *Id.* at 478, 586 S.E.2d at 256 (citations omitted). Additionally, as this Court has previously held, the trial court's findings of fact must resolve the primary disputes between the parties and must explain *why* awarding primary physical custody of the minor child to one party is in the child's best interest. *Carpenter v. Carpenter*, 225 N.C. App. 269, 278, 737 S.E.2d 783, 790 (2013).

In *Shipman*, our Supreme Court held that the trial court made sufficient findings of fact regarding the circumstances existing at the time of the original custody order, as well as how those circumstances had substantially changed. *Shipman*, 357 N.C. at 479, 586 S.E.2d at 256. The trial court made several findings that specifically referenced the original custody order, including that the plaintiff had moved frequently since the time of the original custody order, violated the original

custody order by moving in with her boyfriend and actively working to prevent the defendant from visiting with the minor child. *Id.* at 476, 586 S.E.2d at 254. Although the Court acknowledged that even though the findings did not "present a level of desired specificity," they were sufficient given the circumstances of the case, and because the effects of the changes in circumstance on the minor child were self-evident. *Id.* at 479, 586 S.E.2d at 256.

In this case, the trial court failed to make specific findings regarding the circumstances existing at the time of the original custody order. The findings of fact include no specifics about the circumstances regarding the communications between the parties at the time of the original custody order, nor are there any findings of fact describing how the daughter originally adjusted to the week on/week off schedule. The only finding of fact that directly addresses the circumstances at the time of the original custody order simply states that the minor child aged from three years old to eight years old, which is insufficient to establish a substantial change in circumstances.

In addition to the lack of findings regarding circumstances at the time of the prior order, the trial court failed to address the potential effects of relocation on the minor child or to compare the relative advantages or disadvantages to the child of residing in North Carolina or Alambama. One of the primary issues in this case was Defendant's relocation to Alabama. In cases addressing the relocation of a parent,

the trial court "must make a comparison between the two applicants considering all factors that indicate which of the two is 'best-fitted to give the child the home-life, care, and supervision that will be most conducive to its well-being.'" *Evans v. Evans*, 138 N.C. App. 135, 142, 530 S.E.2d 576, 580 (2000) (quoting *Griffith v. Griffith*, 240 N.C. 271, 275, 81 S.E.2d 918, 921 (1954)). In evaluating the best interests of a child in a proposed relocation, the trial court may appropriately consider several factors including:

> [T]he advantages of the relocation in terms of its capacity to improve the life of the child; the motives of the custodial parent in seeking the move; the likelihood that the custodial parent will comply with visitation orders when he or she is no longer subject to the jurisdiction of the courts of North Carolina; the integrity of the noncustodial parent in resisting the relocation; and the likelihood that a realistic visitation schedule can be arranged which will preserve and foster the parental relationship with the noncustodial parent.

Id. (citation omitted). Accordingly, "a court may determine either (1) that custody should remain with a parent who has relocated or (2) that it is in the child's best interest to switch custody to the parent who has not relocated." *Kanellos v. Kanellos*, 251 N.C. App. 149, 159, 795 S.E.2d 225, 233 (2016) (citations omitted).

The trial court's order did not address any potential advantages or disadvantages of the relocation to Alabama for the minor child, nor did the order address "the likelihood that the custodial parent will comply with visitation orders

when he or she is no longer subject to the jurisdiction of the courts of North Carolina; the integrity of the noncustodial parent in resisting the relocation; [or] the likelihood that a realistic visitation schedule can be arranged which will preserve and foster the parental relationship with the noncustodial parent." Id. At best, the order addressed only "the motives of the custodial parent in seeking the move," since the trial court found Defendant had remarried and her husband resided in Alabama.

Furthermore, the remaining findings of fact regarding the change in circumstances are not sufficiently specific, and the effects of any changes in circumstances on the daughter are not self-evident. Although there was some evidence presented to the trial court that there was a change in circumstances, the trial court failed to sufficiently demonstrate the connection between these changes and the child's best interest, and did not sufficiently explain *why* awarding primary physical custody to Defendant was in the child's best interest.

Accordingly, we conclude that the trial court's findings of fact are insufficient, and remand for proper findings of fact regarding the circumstances at the time of the original custody order, whether a substantial change of circumstances occurred, and a comparison between the two applicants considering all factors that indicate which of the two is best-fitted to give the child the home-life, care, and supervision that will be most conducive to the child's well-being.

B. Decretal Statement

Plaintiff argues that the trial court erred by leaving the determination of the custody schedule to the discretion of the parties. We agree.

The award of visitation rights is a judicial function. *In re Custody of Stancil,* 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971). As a general rule, a trial court should hesitate in delegating decision-making authority. *Peters v. Pennington*, 210 N.C. App. 1, 20, 707 S.E.2d 724, 738 (2011). This Court has held that a trial court abdicated its role by allowing visitation "at such times as the parties may agree" because this allowed the custodian to deny visitation by withholding consent. *Brewington v. Serrato,* 77 N.C. App. 726, 733, 336 S.E.2d 444, 449 (1985) (citing *In re Custody of Stancil,* 10 N.C. App. at 552, 179 S.E.2d at 849).

"While our caselaw recognizes that some decision-making authority may be ceded to the parties with respect to visitation, it also reveals that an order is less likely to be sustained as judicially-imposed structure decreases and the decision-making party's unfettered discretion increases." *Pennington*, 210 N.C. App. at 20, 707 S.E.2d at 738. A custody order may not award exclusive control over the terms of visitation to the custodian. *Brewington,* 77 N.C. App. at 733, 336 S.E.2d at 449.

In this case, unlike in *Brewington*, the custody order does specify actual visitation periods during seasonal breaks. But the custody order also provides the decision-making party—here, Defendant—with a significant degree of unfettered discretion. Like in *Brewington*, the trial court permitted visitation at "[a]ny other

times that the parties mutually agree[,]" as well as whenever Plaintiff was able to travel to the location of the daughter at the Defendant's home, as long as three weeks' notice was given to Defendant. This presents the potential for significant constraints on Plaintiff's ability to exercise visitation, either through significant travel distance, or by Defendant withholding consent. In addition, the trial court found that "[t]he parties have issues communicating and do not effectively co-parent" and that "[t]he parties have had disputes over holiday custody and recreational activities for the child resulting in seeking the assistance of their lawyers to resolve the dispute. The parties are no longer able to work together for the benefit of the minor child." Leaving details of visitation in the discretion of the parties is not likely to benefit the child, particularly where the trial court has determined the parents are unable to work together for the child's benefit. Accordingly, we hold that the decretal statement ceded excessive discretion to the custodial parent, and upon remand the trial court must provide a sufficiently definite visitation schedule for the non-custodial parent.

III. Conclusion

For the foregoing reasons, we remand to the trial court for proper findings of fact regarding the original circumstances, whether a substantial change in circumstances occurred, and a comparison between the two applicants considering all factors that indicate which of the two is best-fitted to give the child the home-life, care, and supervision that will be most conducive to the child's well-being. The trial

court must also provide a sufficiently definite visitation schedule for the non-custodial parent.

REMANDED.

Judges STROUD and ARROWOOD concur.

Report per Rule 30(e).