IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-666

No. COA20-387

Filed 7 December 2021

Bladen County, No. 18 CVD 241

JOELLA CAIN, Plaintiff,

v.

CHRISTIAN ANTHONY CAIN, Defendant.

Appeal by defendant from order entered 26 September 2019 by Judge Jason C. Disbrow in District Court, Bladen County. Heard in the Court of Appeals 13 April 2021.

Jackson Family Law, by Jill Schnabel Jackson, for plaintiff-appellee.

James McElroy & Diehl, P.A., by Preston O. Odom, III, by defendant-appellant.

STROUD, Chief Judge.

¶ 1 Because the trial court's findings of fact support the conclusions of law and the trial court did not abuse its discretion by granting joint custody to the parties, with primary physical custody to plaintiff-mother, we affirm the trial court's order.

I. Procedural Background

¶ 2 The parties were married in 2013; had a child, Alex,[1] in 2016; and separated in 2017. On 19 April 2018, plaintiff ("Mother") filed a complaint for absolute divorce, child custody, child support, and attorney fees. On 25 May 2018, defendant ("Father") answered Mother's complaint and counterclaimed for absolute divorce, child custody, and child support. In August of 2018, the trial court entered an order for absolute divorce. Also in August, by a temporary consent order, the parties were granted joint legal and physical custody of Alex. Mother had physical custody of Alex the first Friday of the month for the following 11 overnights and the first three weeks of June, July, and August. Father had physical custody the rest of the time, with other specific provisions regarding school calendar breaks and holidays. In September of 2019, the trial court entered a permanent custody order awarding joint legal custody to both parties with Mother having primary physical custody.

¶ 3 Father appeals from the custody order. This Court has jurisdiction of Father's appeal under North Carolina General Statute § 50-19.1 which allows for review of a permanent custody order even if all other claims in the action are not finalized. *See generally* N.C. Gen. Stat. § 50-19.1 (2019) ("Notwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment adjudicating a claim for absolute divorce, divorce from bed and board, the validity of

[1] A pseudonym is used.

a premarital agreement as defined by G.S. 52B-2(1), child custody, child support, alimony, or equitable distribution if the order or judgment would otherwise be a final order or judgment within the meaning of G.S. 1A-1, Rule 54(b), but for the other pending claims in the same action.").

II. Primary Physical Custody

¶ 4 Father's primary argument on appeal is that "the trial court reversibly erred by replacing Father with Mother as their school-age son's primary physical custodian." (Capitalization altered.)

A. Standard of Review

¶ 5 We review a permanent child custody order for abuse of discretion:

> The standard of review for a child custody proceeding is abuse of discretion. We review the trial court's findings of fact to determine whether there is any evidence to support them. We reverse for an abuse of discretion only upon a showing that the trial court's actions are manifestly unsupported by reason. If the findings are supported by the evidence, they are conclusive on appeal even though the evidence might sustain findings to the contrary.

Velasquez v. Ralls, 192 N.C. App. 505, 506, 665 S.E.2d 825, 826 (2008) (citations omitted).

> Under our standard of review in custody proceedings, the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary.

> Whether those findings of fact support the trial court's conclusions of law is reviewable de novo.
>
> The trial court's entire objective in custody cases is to determine the best environment for the child or children. These decisions are often difficult, but even where parents love their children, a parent's love must yield to another, if, after judicial investigation, it is found that the best interest of the child is subserved thereby. Of necessity in these cases, the trial court is vested with wide discretion. The trial court has the opportunity to see the parties in person and to hear the witnesses, and its decision ought not be upset on appeal absent a clear showing of abuse of discretion. The trial court can detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges.

Reams v. Riggan, 224 N.C. App. 78, 82, 735 S.E.2d 407, 410 (2012) (citations, quotation marks, ellipses, and brackets omitted).

B. Findings of Fact

¶ 6 The trial court made 98 findings of fact, and Father challenges 23 of the findings as not supported by competent evidence. Father contends the trial court made errors in the findings running the gamut from many technical or typographical issues with exact dates ("FF 22 says the Temporary Consent Order was entered in 'July of 2018,' . . . despite 28 August 2018 being the actual entry date.") to more substantive errors ("FF 36 [stated in part] that Father 'admitted' striking Mother with her iPad by throwing it at her. . . . Father did not make such an admission; rather, he testified that he 'might have tossed it at her, tossed it to her, because she

wanted it. But I didn't strike her with an iPad."). Mother acknowledges many of the alleged errors noted by Father but contends none of the technical or typographical errors are material. As to other challenged findings, Mother contends that the findings are supported by the evidence and Father is simply arguing the trial court should have made a finding more in line with his own version of the facts instead of her version. Either way, Mother argues that even if Father was correct regarding his detailed assertions of errors in the findings, the unchallenged findings still support the trial court's conclusions.

1. Dates of Events

¶ 7 We will group the many alleged errors in the findings into two categories: (1) dates of events and (2) details of events or communications.

a. Dates of Filings

¶ 8 Father argues the order finds the complaint was filed by Mother on 19 February 2018; it was actually filed on 19 April 2018. Father argues that the order finds the temporary consent order was entered in July of 2018; it was actually entered on 28 August 2018. Father is correct that the dates in the findings were incorrect, but he has not demonstrated that these dates had any effect whatsoever on the trial court's ruling regarding custody and visitation.

b. Date of Separation

¶ 9 Father challenges many findings regarding the date of the parties' separation. In finding 9, the trial court found that the parties lived together until their separation on April 1, 2017. Father contends the parties *legally* separated on this date, but they *lived together* only until 31 August 2016, when Mother moved to Virginia for her employment. Father also challenges findings 38-43 contending all these findings fail "insofar as they suggest the parties lived together beyond 31 August 2016." Mother contends the evidence indicated that Mother moved to Virginia in 2016 but the parties maintained their relationship after her move to Virginia. Mother is correct.

¶ 10 Mother and Father both alleged in their complaint and answer and counterclaims, respectively, that they "separated" on 1 April 2017. Father alleged in his counterclaim that the parties executed a Separation Agreement "on or about March 2017" and alleged the agreement was attached to the answer and counterclaim as Exhibit A; it was not attached to the answer and counterclaim in our record and is not in our record. Despite Father's allegation of the date of separation as 1 April 2017 in his answer and counterclaim, Father testified that after the separation agreement was "initiated" in April of 2017, Mother and Father continued to act as a family and have sexual intercourse until the "middle of -- end of '17." According to Father, the separation agreement was signed in September of 2017. Thus, while there is conflicting evidence as to date the parties actually ceased their marital relationship, the trial court's finding of 1 April 2017 as the date of separation is supported by the

evidence. And the exact date of the parties' separation, physically or legally, is not material to the trial court's conclusions regarding custody and visitation.

c. Date of Father as Primary Custodian

¶ 11 The trial court found that "[t]he Father has been the primary custodian of the parties' minor child until July of 2018." Father contends this finding, finding 37, is in error as he was the primary custodian until the end of the permanent custody trial on 16 August 2019. Mother argues that Father's claim that he was the "primary custodian" until the permanent custody trial is not supported by the record.

¶ 12 On 24 July 2018, the trial court entered a "Memorandum of Judgment/Order" and thereafter entered a formal "Temporary Order" on 13 August 2018. Under the terms of the Temporary Order, the child was in Mother's physical custody from 24 July 2018 through 10 August 2018 (*i.e.*, 17 days) and then in Father's physical custody from 10 August 2018 through 27 August 2018 (*i.e.*, 17 days). (Capitalization altered.) The trial court entered another "Temporary Consent Order" on 28 August 2018, and under this order the child was in Mother's physical custody for 11 overnights per month for 9 months beginning in September (*i.e.*, 99 days), for 21 overnights per month during the months of June, July and August (*i.e.*, 63 days), Spring Break (approximately 10 days), and with other holidays alternating yearly. (Capitalization altered.) Based upon the temporary orders, the parties exercised shared custody of the minor child with Mother exercising 50% physical custody under the Temporary

Order and approximately 47% physical custody under the Temporary Consent Order with a higher percentage dependent on holidays. The trial court did not err in failing to find Father was the "primary custodian" after July of 2018, as the temporary orders set out the shared arrangement in detail and the other unchallenged findings of fact address the actual residence of the child at the relevant times.

d. Date of Father's Honorable Discharge

¶ 13 The trial court found that Mother and Father were both formerly employed by the United States Army, they met while serving in Texas, and their child was born while they were stationed in Texas. The trial court also found, in finding 18, that Father "was no longer a member of the United States Army and he was honorably discharged" "at the time of the child's birth[.]" Father contends that he was actually discharged a month *after* the child's birth. Father is correct, but again, the exact date of his discharge in relation to the child's birth had absolutely no effect on the trial court's determination of custody or visitation.

e. Date of Father in School

¶ 14 The trial court also found, in finding 28, that "at the time the Summons and Complaint were filed [on 19 April 2018], the [Father] was taking classes at UNCW and online." Father contends that he was enrolled at Bladen County Community College from January to July 2018. Father is correct, but again, this finding has absolutely no effect on the trial court's determination of custody or visitation.

2. Details of Events or Communications

¶ 15 Father also challenges the minute details of many findings of fact.

a. Mother's Medical Records

¶ 16 Finding of fact 33 states, "[a]lthough the [Mother] had medical records introduced into evidence, the [Mother] never disclosed any domestic violence between the [Mother] and [Father], and the [Mother] denied the same in her medical records." Father contends the trial court erroneously found Mother introduced her own medical records into evidence when actually he introduced her records as an exhibit at trial. The identity of the party who introduced Mother's records at trial was entirely irrelevant to the trial court, and it is irrelevant to our analysis. Further, we do not read the finding as stating which party *introduced* the evidence; it simply notes that Mother's records were in evidence.

b. Domestic Violence

¶ 17 The trial court made finding 33 in the context of addressing Mother's contentions of domestic violence by Father. Father challenges only finding 33, which we have already addressed, and a portion of finding 36. We will quote these findings in context:

> 29. An incident occurred between the parties prior to the birth of the minor child in 2015, although it is unclear as to the circumstances surrounding the [Mother's] injuries, the [Mother] reported for duty in the United States Army and her Superior Officers found her to be with a busted lip and a bruise behind her ear.

> 30. The [Mother] reported to her Superior Officers that she and the [Father] had a domestic altercation.
>
> 31. The [Mother's] chain of command directed that the [Mother] report the same to the military police.
>
> 32. As a result of the report, both the [Mother] and [Father] were ordered to be restrained from one another for 72 hours.
>
> 33. Although the [Mother] had medical records introduced into evidence, the [Mother] never disclosed any domestic violence between the [Mother] and [Father], and the [Mother] denied the same in her medical records.
>
> 34. This court finds that it is clear that a domestic altercation occurred between the [Mother] and [Father] while parties were in Texas and while the parties were both on active duty in the United States Army.
>
> 35. An additional incident of domestic violence occurred between the parties in January, 2018, when the [Father] was upset with the [Mother] for coming home late for a period of visitation with the minor child.
>
> 36. The [Father] admitted to throwing the [Father's] iPad at her striking the [Mother] and stated "bye bitch" while holding the minor child.

¶ 18 Father challenges a portion of finding 36, as he contends that he did not *admit* striking Mother with the iPad by throwing it at her. Father notes that he testified that he "might have tossed it at her, tossed it to her, because she wanted it. But I didn't strike her with an iPad." (Quotation marks omitted.) Father was then asked,

> Do you recall the conversation that began with [Mother]

> saying, You threw the iPad at me, said bye, bitch, and took my son. An apology doesn't fix that. Not for me. Your response, I didn't mean to hit you with the iPad, I wasn't aiming. Saying bye bitch was me being petty and an asshole. I shouldn't have just bounced that. We had options if we were trying. Do you recall that?

Father responded without clarification, "I remember that, yes." Finding 36 is supported by the evidence.

c. Medical Care

¶ 19 Father also challenges finding 41, which states that "[t]he [Father], from April 1, 2017 until July of 2018, had ensured that the minor child received proper medical care and dental care, as well as keeping the minor child's immunizations current." Father contends this finding is "misleading to the extent it implies he did not ensure these things for [Alex] earlier and through the permanent custody trial[.]" Considering finding 41 in context with the other unchallenged findings, we do not read this finding as implying the child ever lacked proper medical and dental care.

d. Remaining Findings of Fact

¶ 20 Father challenges several other findings of fact, but all these challenges address minor factual details similar to many we have already addressed, and Father has failed to demonstrate how any of these findings are material to the trial court's ultimate conclusions. We will not address each one of these in detail. Although we would agree that the trial court's order includes errors on dates and minor details,

Father has not demonstrated any prejudice from these errors. None of the challenged evidentiary findings of fact led to ultimate findings of fact relevant to the determination of custody. *See generally Overcash v. North Carolina Dept of Environment and Natural Resources, Div. of Waste Management*, 179 N.C. App. 697, 707–08, 635 S.E.2d 442, 449 (2006) ("There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove ultimate facts. An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts." (citation, quotation marks, and ellipses omitted)).

¶ 21 In fact, the uncontested and thus binding findings of fact, *see In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008) ("Unchallenged findings of fact are presumed correct and are binding on appeal."), establish:

> 54. The [Father's] home is a safe and suitable home for the parties' minor child.
>
> . . . .
>
> 60. The [Mother's] home is a suitable and safe home for the parties' minor child.
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> . . . .
>
> 86. Both the [Mother] and [Father] admitted that the other party is a good parent.

> 87. Neither the [Mother] nor [Father] suffers from any substance abuse issues.
>
> 88. Neither the [Mother] nor [Father] smoke.

Indeed, the trial court concluded "both the [Mother] and [Father] are fit and proper persons to exercise the care, custody, tuition, and control of the above-named child."

3. Substantive Challenges to Findings of Fact

¶ 22 Some of Father's many challenges to the findings of fact address issues which are relevant to the trial court's determination of custody; these findings address potential "risk" posed to the child by Mother and the distance between the parties' homes.

a. Findings about Mother

¶ 23 Only one of the 23 findings of fact Father challenges is specifically about Mother as a parent. In finding 89, the trial court found that "[n]either the [Mother] nor [Father] presents any risks to the minor child whatsoever." Father contends that Mother does present a risk because she threatened to take Alex to Micronesia, where she was born, and where Father could not find them.

¶ 24 The trial court found that Mother "is originally from Micronesia" and "at Christmas 2016 [she] threatened that she would take [Alex] to an island where the Defendant could not find them." Finding 92 was based upon Father's testimony. The evidence showed that prior to the parties' separation, the parties argued frequently,

and Mother made this threat during an argument. The threat occurred almost three years prior to entry of the trial court's order, and there was no evidence Mother ever took any actions to carry out the threat to remove Alex or to hide him from Father. Therefore, the trial court's finding that Mother had threatened in 2016 to remove Alex to Micronesia is not contradicted by the trial court's finding 89 that Mother presents no risk to Alex.

¶ 25 Father further argues that Mother posed a risk to Alex because she had threatened suicide during her pregnancy; she denied ever making such a threat. The trial court did not make a specific finding regarding this alleged suicide threat but did address Mother's mental health in several unchallenged findings:

> 81. From 2014 to 2016 the [Mother] regularly attended counseling on issues primarily relating to her marriage.
>
> 82. The [Mother] disclosed to her therapist that she had anger issue problems and that she was required to take anger management counseling per the military during her time in the United States Army.
>
> 83. The [Mother] successfully completed a parenting course on May 30, 2018.
>
> 84. The [Father] also completed the new parent class prior to the birth of his son that [w]as offered by the United States Army.
>
> 85. During the counseling therapy sessions between the [Mother] and her therapist, she disclosed that she had suffered with depression when dealing with marital issues.

The evidence supports the trial court's finding of ultimate fact that neither Mother nor Father "presents any risk to the minor child[.]"

b. Distance between the Parties

¶ 26 Father's only other challenge to a finding of fact which could be material to the trial court's conclusions on custody is finding 94. By the time of trial in August of 2019, Father had remarried and moved to Georgia; Mother was still residing in Virginia. The trial court found "[t]he parties now reside approximately ten (10) to (11) hours from each other and a shared custody arrangement is no longer a feasible arrangement for the minor child." Father contends the actual driving time between the parties' homes is only about 7.5 hours and that the trial court's overstatement of the travel time had a strong influence on the trial court's decision to change the physical custodial arrangement.

¶ 27 The parties did not present definitive evidence on the actual distance or driving time between their homes. In a 2019 motion in the cause, Father alleged he had moved to "Grovetown Georgia, approximately 7.5 hours from Stafford County, Virginia." Father testified it was "four or five hours" from "where [he lives] and where she lives[,]" but this statement addressed the halfway point between their homes, and it is unclear which home Father was talking about, as he then states when he used to live in Bladenboro, NC it was "[f]our hours." When asked, "And so where you were driving two to two and a half hours to the halfway point, to get to that same halfway

point, it was going to be how many hours?" Father replied, "Six hours to drive from Grovetown[.]"

¶ 28 This Court can and does take judicial notice of the distance between Stafford, Virginia and Grovetown, Georgia; the distance is about 516 miles. *See* N.C. Gen. Stat. § 8C-1, Rule 201 (2019) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. . . . A court may take judicial notice, whether requested or not."); *see generally State v. Brown*, 221 N.C. App. 383, 387, 732 S.E.2d 584, 587 (2012) (taking "judicial notice of the driving distance between White's residence and defendant's girlfriend's apartment as being in excess of 27 miles. In *State v. Saunders*, 245 N.C. 338, 342, 95 S.E.2d 876, 879 (1957), our Supreme Court held that it was appropriate for the trial court to take judicial notice of the distance in miles between cities in Virginia and North Carolina."). A driving time of about 7.5 hours is possible, although this time would not include any stops for meals, gas, or restroom breaks.

¶ 29 Mother contends the evidence supports the trial court's finding, but even if the driving time is less than 10 to 11 hours, even 7.5 hours would be too far to be able to maintain shared physical custody of Alex, particularly as he is older and is beginning to attend school. At the time of the trial, Alex was about three and a half years old.

The trial court's order includes unchallenged findings of fact regarding the schools in Georgia and Virginia each party planned for the child to attend. It is self-evident that a custodial schedule of 11 consecutive overnights with Mother and 19 or 20 consecutive overnights with Father, when the parties reside such a long distance apart, would simply not be feasible for a child who is attending school. Likewise, the trial court could very reasonably determine that frequent back and forth trips of even 7.5 hours each way would not be in the best interest of a young child. *See generally Lang v. Lang*, 197 N.C. App. 746, 750, 678 S.E.2d 395, 398 (2009) ("Where the effects of the substantial changes in circumstances on the minor child are self-evident, there is no need for evidence directly linking the change to the effect on the child. *Shipman*, 357 N.C. at 478–79, 586 S.E.2d at 256." (quotation marks and ellipses omitted)).

¶ 30 None of the challenged findings of fact would change our analysis of the trial court's conclusions as to custody. The ultimate findings of fact indicate that both Mother and Father are good parents who can provide for the minor child, but the trial court had to consider the best interest of the child in deciding the custodial arrangement. *See generally Reams*, 224 N.C. App. at 82, 735 S.E.2d at 410. The unchallenged findings of fact support the trial court's conclusions.

C. Unresolved Disputed Issues of Fact

¶ 31 In a similar vein to the contentions raised in section II, B herein, Father next contends the trial court failed to resolve several disputed issues of material fact.

Citing *Carpenter v. Carpenter*, 225 N.C. App. 269, 737 S.E.2d 783 (2013), Father acknowledges the trial court does not need to make a finding of fact on every piece of evidence but argues it must resolve disputed material facts. Fathers lists 10 factual issues he believes are disputed and material. But all 10 issues were addressed by the trial court, even if the trial court did not make the findings Father desires. For example, Father contends the trial court failed to address "[t]he comparative educational opportunities from which [Alex] could benefit--both presently and in the future—while in the parties' respective custody[.]" But the trial court made findings regarding the schools proposed by both Mother and Father. Father wished to place Alex in a head start program at Westminster School and had been paying $500.00 per month for Alex to attend there even though Alex did not attend there and had instead attended Minnieland Academy for over a year. Minnieland was near Mother's home, cost $238.00 per month, and was associated with a nearby Merritt School. These findings demonstrate the trial court's considerations of educational opportunities with each party. The trial court was not required to make findings regarding the academic benefits of each school program. For example, while Father's proposed school may have more exposure to special programs such as a foreign language or STEM, it is still within the trial court's discretion to find that Minnieland was better for the child because he had already been attending there a year and formed bonds that may be more to his long-term benefit than additional "educational

opportunities," particularly at age three and a half. Ultimately, the trial court found both homes and both school choices appropriate but properly exercised its discretion in considering the options.

¶ 32 Father also contends the trial court failed to resolve "[t]he effect of Mother's choice to move approximately five (5) hours away from [Alex] and Father on or around 31 August 2016[.]" But again, the trial court made many findings of fact regarding Mother's home; her boyfriend who lived there; the layout of the neighborhood which included a playground, the proximity to Minnieland, the size of the home; and the fact that the location of both parties' homes meant that a 50/50 physical custody plan would not be practical. In addition, Father had also moved even further away from Mother's home in Virginia, as he moved to Georgia in 2019. It is unclear what further "issues in controversy" remain from this evidence. Ultimately, the trial court concluded that both homes were suitable.

¶ 33 Father contends the most concerning "issue[] in controversy" is the trial court's failure to "explain why it altered the then-prevailing custodial arrangement—in which the parties' son was thriving—to award Mother primary physical custody." (Capitalization altered.) But the order did in fact explain why the trial court altered the temporary custodial arrangement. The trial court determined that considering the long distance between the parties' homes and the child's age, a 50/50 division of custodial time was no longer practical or in the child's best interest. In addition,

Father cites no law requiring the trial court to explain why it altered a *temporary* consent order's custody and visitation schedule. The temporary order was explicitly "temporary" and put into place so that the parties had a custodial schedule and maintained their relationships with the child pending entry of a permanent custody order. The temporary order was never meant to serve, nor claimed to serve, as a permanent custody order or as the template for the permanent custody order. The trial court was under no requirement to keep any of the schedule from the *temporary* arrangement. As the temporary order notes, it was "entered without prejudice to either party."

D. Best Interests

¶ 34 Lastly, Father contends the trial court erred in so many findings of fact, the erroneous findings tainted the trial court's analysis, and thus the trial court erred in determining it was in the best interests of the child to reside primarily with Mother. But as discussed above, Father did not challenge and prevail on any of the material findings of fact regarding Mother's fitness, and the findings Father challenged are mostly inconsequential. The trial court determined both parents are good parents who could provide a good home for the child, but in its discretion, the trial court determined the child's best interests would be served by placing his primary custody with Mother. The trial court properly exercised its discretion in determining a custodial arrangement to serve the best interests of the child. Father, to prevail on

appeal, would have to show the trial court's decision to have the parties share in joint custody of the child, with Mother as the primary custodian, was "manifestly unsupported by reason." *Velasquez*, 192 N.C. App. at 506, 665 S.E.2d at 826; *see generally Reams*, 224 N.C. App. at 82, 735 S.E.2d at 410. Father has not demonstrated any abuse of discretion. *Velasquez*, 192 N.C. App. at 506–07, 665 S.E.2d at 82.

III. Conclusion

¶ 35 In summary, the binding, uncontested findings of fact support the trial court's conclusion that Mother is a fit and proper parent to have primary physical custody of the child. In addition, the trial court did not abuse its discretion in granting primary physical custody to Mother. We affirm.

AFFIRMED.

Judges ARROWOOD and JACKSON concur.

Report per Rule 30(e).