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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-293

No. COA20-682

Filed 15 June 2021

Stanly County, No. 19 CVD 244

GARY and ANDREA WILSON, Plaintiffs,

v.

KAYLA SWEELY and KENNY TALLEY, Defendants.

Appeal by Plaintiffs from order entered on 30 March 2020 by Judge John R. Nance in Stanly County District Court. Heard in the Court of Appeals 28 April 2021.

Bowling Law Firm, PLLC, by Kirk L. Bowling and Renee C. Burriss, for Plaintiff-Appellants.

The Currie Law Offices, by Patrick W. Currie, for Defendant-Appellees.

JACKSON, Judge.

¶ 1 Gary and Andrea Wilson (“Plaintiffs”) appeal from the trial court’s order granting Kenny Talley’s (“Defendant Talley”) motion to dismiss. Plaintiffs contend that the trial court erred in granting Defendant’s motion to dismiss and in concluding that Plaintiffs lacked standing to institute this custody action. We agree, and vacate the order of the trial court, remanding the matter for further proceedings.

I. Factual and Procedural Background

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¶ 2 Kayla Sweely (“Defendant Sweely”) and Defendant Talley (collectively, “Defendants”) are the parents of a minor child, a girl, born 7 March 2014. Plaintiffs are the maternal aunt and uncle of the child. On 20 March 2019, Plaintiffs filed an emergency ex parte custody complaint in Stanly County District Court seeking custody of the child. At the time of the complaint, the child was five years old.

¶ 3 In the complaint, Plaintiffs alleged that Defendant Sweely dropped the child off at Plaintiffs’ home in June 2014, when the child was only three months old, and that the child has primarily remained with Plaintiffs since that time. Plaintiffs alleged further that Defendant Sweely executed a notarized writing sometime before 16 January 2018, granting her sister, Plaintiff Andrea, temporary custody of the child; that Plaintiffs have been providing for the minor child, without receiving support from either Defendant, for nearly five years; that both Defendants have a history of drug addiction and incarceration; and that Defendants have problems managing their anger. Plaintiffs also asserted that they are fit and proper people to have custody of the minor child, and that it is in the best interest of the minor child that Plaintiffs be awarded primary custody.

¶ 4 On the same day Plaintiffs filed the complaint, the trial court entered an emergency custody order. In the custody order, the court found that Plaintiffs were fit and proper people to have custody of the minor child; that “Defendants are presently unfit . . . to have visitation”; that an emergency order “is necessary to

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protect the child's physical safety as there currently exists substantial risk of physical or sexual abuse of the minor child if the biological parents have physical custody"; that Defendants are convicted felons and Plaintiffs have alleged sufficient facts that Defendants are actively abusing drugs; and that it is in the best interest of the minor child that she be placed with Plaintiffs pending a testimonial hearing.

¶ 5 On 18 April 2019, the parties appeared before the trial court to review the ex parte custody order. Following the hearing, the trial court entered a temporary consent order granting Plaintiffs temporary primary custody of the minor child and allowing Defendants supervised visitation. Defendants and Plaintiff Gary were also ordered to undergo a hair follicle drug test within 14 days. On 14 June 2019, Plaintiffs filed a motion for an order to show cause and emergency motion to modify the temporary consent order, as a result of Defendant Sweely's failure to comply with the court's order for a hair follicle drug test.

¶ 6 On 12 September 2019, Defendant Talley filed a Motion to Dismiss Plaintiffs' Complaint, arguing that Plaintiffs failed to state a claim upon which relief may be granted, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). The motion came on for hearing on 6 March 2020 before the Honorable John R. Nance in Stanly County District Court. Following the hearing, the trial court entered an order dismissing Plaintiffs' claims for lack of standing. Specifically, the court found that Plaintiffs failed to make sufficient allegations to support a conclusion that Defendants had

acted inconsistently with their constitutionally protected status as parents.

¶ 7 Plaintiffs timely filed a notice of appeal.

II. Analysis

¶ 8 Plaintiffs contend that the trial court erred in granting Defendant’s motion to dismiss for lack of standing. We agree.

A. Standard of Review

¶ 9 “Standing is properly challenged by a . . . 12(b)(6) motion to dismiss for a failure to state a claim upon which relief may be granted.” *Fairfield Harbour Prop. Owners Ass’n, Inc. v. Midsouth Golf, LLC*, 215 N.C. App. 66, 72, 715 S.E.2d 273, 280 (2011). “If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim.” *Est. of Apple ex rel. v. Com. Courier Exp., Inc.*, 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005). Because standing is a prerequisite to subject matter jurisdiction, the scope of review on appeal from a dismissal for lack of standing includes matters outside the pleadings. *Tart v. Walker*, 38 N.C. App. 500, 502, 248 S.E.2d 736, 737 (1978). North Carolina courts “have repeatedly held that standing is measured at the time the pleadings are filed.” *Quesinberry v. Quesinberry*, 196 N.C. App. 118, 123, 674 S.E.2d 775, 778 (2009). We review the dismissal of a case for lack of standing de novo. *Chávez v. Wadlington*, 261 N.C. App. 541, 544, 821 S.E.2d 289, 292 (2018) (citation omitted). “Under this review, we consider the matter anew and freely substitute our own judgment for that of the lower

tribunal.” *Weideman v. Shelton*, 247 N.C. App. 875, 880, 787 S.E.2d 412, 417 (2016) (internal marks and citation omitted).

B. Non-Parent Standing in Child Custody Matters

¶ 10 “Standing for an individual to bring an action for child custody is governed by N.C.G.S. § 50-13.1(a), which provides in pertinent part that “[a]ny parent, relative, or other person . . . claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child[.]” *Yurek v. Shaffer*, 198 N.C. App. 67, 75, 678 S.E.2d 738, 744 (2009) (quoting N.C. Gen. Stat. § 50-13.1(a)). However, “[d]espite the broad language of N.C. Gen. Stat. § 50-13.1, non-parents do not have standing to seek custody against a parent unless they overcome the presumption that the parent has the superior right to the care, custody, and control of the minor child.” *Perdue v. Fuqua*, 195 N.C. App. 583, 586, 673 S.E.2d 145, 148 (2009). The reason is that “[a] natural parent’s constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child.” *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997).

¶ 11 Our Supreme Court has held that “[u]nfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents [] enjoy.” *Id.* Parental unfitness includes (i) the inability of a parent to provide safe and suitable

housing; (ii) the lack of any contribution of child support by a parent; (iii) a lack of involvement by a parent in the upbringing of the child; and (iv) any situation where a child is “at ‘substantial risk of harm’ from the parents.” *Wellons v. White*, 229 N.C. App. 164, 176, 748 S.E.2d 709, 719 (2013).

¶ 12 The standing of a non-parent to seek custody does not require that the parent have engaged in “conduct rising to the statutory level warranting termination of parental rights[.]” *Boseman v. Jarrell*, 364 N.C. 537, 549-50, 704 S.E.2d 494, 503 (2010) (internal marks and citation omitted). In other words, other conduct can be considered “inconsistent with the protected status of natural parents.” *Price*, 346 N.C. at 79, 484 S.E.2d at 534-35. While “[s]uch conduct . . . [must] be viewed on a case-by-case basis, [it] may include [the] failure to maintain personal contact with the child[,] or [the] failure to resume custody when able.” *Id.* at 83-84, 484 S.E.2d at 537.

¶ 13 Accordingly, “[i]t has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child.” *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962). Similarly, “if a parent cedes paramount decision-making authority [over the child], then, so long as he or she creates no expectation that the arrangement is for only a temporary period, th[e] parent has acted inconsistently with his or her paramount parental

status.” *Boseman*, 364 N.C. at 552, 704 S.E.2d at 504. Voluntarily giving a non-parent custody of a “child for an indefinite period of time with no notice that such relinquishment of custody” is temporary constitutes conduct inconsistent with the parent’s constitutionally protected status because it creates a family unit that does not include the parent and induces the non-parent “to allow that family unit to flourish in a relationship of love and duty with no expectations that it w[ill] be terminated.” *Price*, 346 N.C. at 83, 484 S.E.2d at 537. “[T]he gravamen of ‘inconsistent acts’ is the volitional acts of the legal parent that relinquish otherwise exclusive parental authority to a third party.” *Mason v. Dwinell*, 190 N.C. App. 209, 228, 660 S.E.2d 58, 70 (2008).

C. Allegations and Evidence of Acts Inconsistent with Parental Status

¶ 14 Plaintiffs made the following allegations in their complaint relevant to the issue of standing:

4. Kayla J. Sweely is the sister of Andrea Wilson.

...

10. Pursuant to N.C.G.S. 15-13.5, at the current time, there exists a substantial risk of bodily injury or sexual abuse if the child’s parents are allowed to assume custody of the minor child.

....

8. Pursuant to N.C.G.S. § 50-13.1 et. seq., the Plaintiffs respectfully contend they have the right to seek custody in that they have maintained the actual care, control, and

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custody of the minor child since June of 2014 when Kayla Sweely dropped the child off with Plaintiffs and the child has lived primarily in their homes since that time. Plaintiffs have a strong familial bond with the child . . . [and have] assisted with the care and nurturing of the minor since coming into the Plaintiffs' home. Plaintiffs are not only related to the child but have maintained the status of locus parentis since 2014 providing all financial, emotional, educations [sic], medical and any other needs for the child.

9. Kayla Sweely signed a hand-written document giving Andrea Wilson temporary custody of the minor child after she had been living with Plaintiffs for some time. . . .

10. Upon information and belief, the Defendant[s], Kayla Sweely and Kenny Talley, have serious long-term drug addictions. Further, both parents are convicted felons on probation or parole.

11. Upon information and belief, Kayla Sweely was convicted of a violation of controlled substances in a penal institution and Class H felony [sic]. It appears she was convicted sometime in 2018 of that offense.

12. Upon information and belief, Kayla's main drug of choice is heroin and Plaintiff, Andrea Wilson[,] has observed track marks and bruises in and around Kayla Sweely's throat area from where Kayla Sweely was injecting heroin.

13. There is a repeated pattern of Kayla Sweely demanding to have the child back and threats to take the child away. Upon information and belief, Kayla Sweely is still actively using drugs including heroin. Both Kayla Sweely and Kenny Talley have recently been released from prison and upon information and belief, both are actively engaged in using illegal drugs.

14. Upon information and belief, Karyn Mento, Plaintiffs'

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adult daughter, found a syringe and rope in Kayla Sweely's drawer on or about March 12, 2019, when she was looking for a pair of socks. When Kayla left later that day, Karyn checked the drawer and both the syringe and rope were gone. Kayla returned approximately 35 minutes later and appeared highly intoxicated. . . .

15. Upon information and belief, the Defendant Kenny Talley has previously requested Plaintiffs' daughter to pee in a cup for him and has bragged to [Plaintiff] Gary Wilson that [] he has paid other people to pee in a cup for him to pass his drug tests. . . .

16. Upon information and belief, as recently as this week, both Kenny Talley and Kayla Sweely were impaired by drugs.

17. Upon information and belief, both Defendants have problems managing their anger. Upon information and belief[,] Kenny Talley has been convicted of assault on a female.

18. Defendant Kayla Sweely has threatened to throw a brick through [] Andrea Wilson's car windshield while the minor child was in the car with her.

Plaintiffs verified this complaint on 19 March 2019.

¶ 15 Plaintiffs attached exhibits to the complaint in support of the allegations it contains. These exhibits included a copy of a notarized writing giving Plaintiff Andrea temporary custody of the child, which appears to be signed by Defendant Sweely, affidavits by Plaintiff Andrea's daughter and Plaintiffs, and photographs of the syringe and rope referenced in the allegations in the complaint and of Defendant Sweely. These exhibits supported the allegations in the complaint.

¶ 16 The allegations in the complaint and exhibits thereto show that Plaintiffs are “relatives” of the child within the meaning of N.C. Gen. Stat. § 50-13.1(a) and Defendant Sweely ceded decision-making authority over the child to Plaintiffs in 2014. Since that time, Plaintiffs have retained custody of the minor child—acting in *loco parentis* to the child and providing “*all*” financial, emotional, educational, and medical needs of the child. Defendants have provided no support in these areas in the past five years. While the writing granting Plaintiffs custody of the minor child did not contain a specific time period for relinquishment—but instead, only signified that custody would be temporary—according to the averments in the accompanying affidavits, during the over four-year period in which the child remained out of Defendants’ care, Defendants visited her only occasionally. Thus, the allegations in the complaint and exhibits thereto adequately allege and evince that Defendants have engaged in acts inconsistent with their constitutionally protected status as parents in that they have not been involved in the child’s upbringing, withholding their presence, love, care, and support for the child over the course of five years.

¶ 17 The allegations in the complaint and exhibits thereto also contain sufficient allegations and evidentiary support thereof that Defendants are unfit parents and Plaintiffs have standing to seek custody on this ground alone. Plaintiff Andrea avers in her affidavit that Defendants have failed to maintain steady employment for any length of time since the minor child’s birth five years ago, suggesting an

unwillingness, on the part of Defendants, to make the efforts necessary to resume custody. *See Yurek*, 198 N.C. App. at 77-78, 678 S.E.2d at 745 (holding that the trial court's findings were sufficient to support a conclusion that the parent acted inconsistently with her protected status when the complaint alleged that both parents were unemployed, dealing with substance abuse issues, and not able to provide proper care for the minor child); *see also Grindstaff v. Byers*, 152 N.C. App. 288, 292, 567 S.E.2d 429, 432 (2002) (finding that the grandmother had standing to bring a custody action when the minor children had lived with the grandparent for approximately ten months, and she alleged that the parents did not visit regularly and had not shown that they were capable of meeting the needs of the children for care and supervision). Plaintiff Andrea also recalled an incident in her affidavit in which she arrived at Defendants' home and Defendant Talley was passed out. "There were pills lying around, marijuana and a black substance [Plaintiff Andrea] believe[d] was heroin." During the incident, the minor child was at the home and "walking around freely in the house alone." Altogether, the record here contains sufficient allegations and evidence that Defendants were unfit and acted inconsistently with their protected interest in the custody of the minor child and would be unable to provide a safe home for the child or provide her with basic necessities.

III. Conclusion

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standing because Plaintiffs are relatives of the child who made sufficient allegations and submitted evidence in support thereof that Defendants were unfit parents and had acted inconsistently with their constitutionally protected status as parents. Accordingly, we vacate the trial court's order dismissing Plaintiffs' complaint for lack of subject matter jurisdiction, and remand the case for further proceedings.

VACATED AND REMANDED.

Judges DIETZ and COLLINS concur.

Report per Rule 30(e).