IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-632

No. COA21-105

Filed 16 November 2021

Davie County, No. 20 CVD 66

BETH MULL JONES, Plaintiff

v.

MARC ANTHONY JONES, Defendant

Appeal by Plaintiff from Order entered 1 September 2020 by Judge Carlton Terry in Davie County District Court. Heard in the Court of Appeals 11 August 2021.

Clemmons Family Law, by Kyla Sipprell, for plaintiff-appellant.

No brief was filed on behalf of defendant-appellee.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Beth Mull Jones (Plaintiff) appeals from an Initial Child Custody Order granting joint legal and physical custody of the minor child to the parties. The Record before us tends to reflect the following:

¶ 2 Plaintiff and Marc Anthony Jones (Defendant) married on 3 July 2015 and separated on 23 December 2018. In May 2019, the parties reconciled their marriage

but separated again on 18 October 2019. The parties have remained separated since that date. The parties have one minor child together—Rachel[1]. On 17 February 2020, Plaintiff filed a civil action seeking, among other things, child custody, child support, and equitable distribution. Plaintiff's Complaint included the following concerns: (1) Defendant's excessive consumption of alcohol; (2) Defendant's failure to maintain a suitable home for Rachel; (3) Rachel's safety while in Defendant's care; and (4) Rachel's defiant behavior. On 5 March 2020, Defendant filed his Answer and Counterclaim. Defendant's Counterclaim included claims for child custody, child support, and equitable distribution, among other things. In Plaintiff's Reply to Defendant's Counterclaims, Plaintiff expressed concern about the people Rachel is exposed to during Defendant's custodial time.

¶ 3 A permanent child custody trial began on 24 August 2020 and continued through 26 August 2020. At trial, the court heard testimony from both parties.

Plaintiff's Testimony

¶ 4 Plaintiff testified on 24 August 2020, since the parties' separation in October 2019, the parties kept a "2-2-5-5" custody schedule. As such, Rachel is in Defendant's custody on Monday and Tuesday, with Plaintiff on Wednesday and Thursday, and the parties alternate Friday, Saturday, and Sunday. In January 2020, this schedule

[1] A pseudonym.

briefly ceased, and Rachel primarily stayed with Plaintiff while Defendant cared for his mother. Plaintiff explained, during this time, when Rachel stayed with her continually, Rachel's behavioral issues stopped. However, when the parties resumed the joint custody schedule—after Defendant returned from caring for his mother, the behavioral issues returned. Plaintiff testified she communicated to Defendant that the current 2-2-5-5 schedule "was not working."

¶ 5 Plaintiff also testified, in addition to her concerns for Rachel's behavioral issues, she is concerned about Defendant's alcohol consumption. Namely, Plaintiff expressed concern for Defendant's behavior in front of Rachel. Plaintiff testified she is requesting primary custody because she has "concerns about [Defendant] not putting [Rachel] first[.]" Plaintiff testified she does not believe Defendant's camper, where Defendant exercises his custodial time, "is a proper living environment for a three-year-old child." She testified, "there's a distinct smell in [Rachel's] clothes and . . . hair when she comes back [from Defendant's camper] and I believe that there is some mold or mildew issues in [the camper]."

¶ 6 Plaintiff explained she is also concerned Defendant will not maintain a suitable learning environment or routine for Rachel. Further, Plaintiff testified she is concerned with the individuals Rachel is exposed to during Defendant's custodial time. According to Plaintiff, Defendant's best friend, Brian Nutter, has been accused of engaging in inappropriate, sexual behavior with a minor.

Defendant's Testimony

¶ 7 Defendant testified he believed the joint custody schedule is "working good" and Plaintiff agreed. Defendant explained, in January 2020, Plaintiff told him the 2-2-5-5 schedule was working, and she did not want to change it. Defendant testified he was "surprised" when Plaintiff filed a lawsuit for primary custody. When asked about his living arrangement, Defendant testified he does not plan to permanently live in his camper and has plans to build a house on "the farm," where he exercises his custodial time. Defendant testified he does not consume alcohol when Rachel is in his care. When asked about Rachel's behavioral issues, Defendant testified Rachel has hit him on one occasion.

¶ 8 According to Defendant's testimony, Plaintiff has used derogatory language in front of Rachel and calls her ex-husband "D H" which stands for "dick head." Defendant testified Plaintiff told him she thought "the sexual allegation issues against [Brian Nutter] were BS[.]" Defendant also testified he believes Plaintiff "denied [Rachel] the chance to say goodbye to her grandfather"—Defendant's father—by not attending his funeral.

Initial Child Custody Order

¶ 9 At the conclusion of trial, the court entered its Initial Child Custody Order on 1 September 2020, making the relevant Findings:

20. There is no evidence that [Defendant's] camper is in poor repair or that the heat or air-conditioning does not work. Photographs introduced show it to be clean inside and out. [Rachel] has her own room in the camper.

. . . .

22. Plaintiff is concerned about Defendant's consumption of alcohol. Defendant consumes beer on a regular basis. Notably, since he transports [Rachel], Defendant has often driven after consuming alcohol. The Plaintiff, many times during the marriage felt compelled to ask the Defendant to stop drinking as he had too much. Plaintiff's family all describe [D]efendant as a heavy drinker, when he drinks. Though they all agree that he does not drive after doing so, Plaintiff drives.

a. On one particular occasion in October 2018, Defendant had been at The Farm. Plaintiff had a Commissioners' meeting that night. When it was over, she went to pick up [Rachel] from her Parents' home. She called and asked the Defendant if he was able to pick up the Plaintiff's two, older children from their father's home. Defendant agreed. One of Plaintiff's older daughters texted the Plaintiff that she needed to speak to her about the ride home. The girls felt that Defendant had consumed too much alcohol, that he was impaired, and that he had an open container of alcohol in the car from which he would drink as he was driving. When Plaintiff got home, she confronted [ ] Defendant. He denied that he had consumed too much and denied that there was an open beer in the car. But that, if there was an open can, he used it to spit his dip into. Plaintiff retrieved the can and poured out the little bit of liquid left in it. It was colored like a beer and did not contain any dip spit.

b. Defendant reacted to this incident and the Plaintiff's displeasure by refusing to drive the older girls anywhere, any more.

c. Eventually, after the parties reconciled from the first separation, Defendant would transport the minor children.

d. All of these incidents took place before the Plaintiff agreed to the 50/50 shared custody during both separations.

. . . .

25. Plaintiff is concerned about the lack of structure provided to [Rachel] when she is with Defendant. Plaintiff maintains a regular evening routine with a bedtime that, at most, might be extended by half an hour depending on if she had napped earlier in the day. [Rachel] has been up significantly past this bedtime, when with Defendant. When with Defendant, [Rachel] plays outside with him and/or with some of the animals on The Farm. . . . There is no evidence [Rachel] has ever been injured at The Farm.

26. Plaintiff is concerned about the people [Rachel] is exposed to at The Farm:

a. Dwight "Nightmare" Baxter rents the house at The Farm. . . . He has a Facebook Live show called "Nightmare's Ride" wherein he discusses Biking and has branched into Racing as well. Defendant has been a guest on the show. Mr. Baxter has a website that contains much misogynistic content. Though available to view on the internet, there is no evidence that any has been shown to [Rachel] or that it may have affected her in any way. Groups of Bikers do not come to The Farm. The Baxters watched [Rachel] on one occasion while the parties were in mediation. There is no evidence that [Rachel] was negatively affected in any way.

b. Defendant has a "Best Friend" named Brian Nutter. Mr. Nutter used to visit, even during the marriage, and continues to do so. Mr. Nutter was at The Farm and around [Rachel] as recently as two weeks before the date of this hearing. There is an ongoing Court matter in West Virginia regarding allegations that Mr. Nutter sexually perpetrated on a child. Defendant does not believe Mr. Nutter did anything inappropriate. Plaintiff told Defendant she did not believe the allegations either. Whether

> true or not, Defendant will continue to expose [Rachel] to Mr. Nutter over Plaintiff's wishes because, as he told her once, if asked to make a choice between Plaintiff and Mr. Nutter, Defendant would choose Mr. Nutter every time.
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> . . . .
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> 33. In and around December 2019, plaintiff noticed [Rachel] having behavior problems. This included a "Meltdown" when she refused to get out of the bathtub. During that occasion, [Rachel] lashed out at and hit and/or kicked Plaintiff's parents. She exhibited defiant behavior toward Plaintiff, as well. She [k]icked Defendant on at least one occasion. In January 2020, Defendant took some time to care for his Mother (as he should) when her husband, Defendant's stepfather, passed away. During that time, [Rachel] was with the Plaintiff every night. Her defiant behavior lessened and she behaved much better during this time. Plaintiff brought this to Defendant's attention and suggested a different schedule. Defendant refused and Plaintiff filed this action as a result. [Rachel]'s behaviors have gotten worse again after a resumption of the 50/50 schedule, but there is no evidence of any other "Meltdowns" since the 50/50 resumed.

¶ 10 Based on its Findings, the trial court concluded: "It is in the best interest of the minor child that this Court establish a Child Custody Order." Additionally, the trial court also imposed numerous conditions on the Order, including the following:

> 6. When the minor child is with Defendant, he shall ensure that she follows the same bedtime schedule as at Plaintiff's home.
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> 7. Each party will ensure that the minor child is appropriately supervised during any of her activities.
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> . . . .
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> 9. The minor child shall not be exposed to "Nightmare's" Ride, webpages, or memes.

> 10. The minor child may not be in the presence of any person, including Brian Nutter, who is under investigation, indictment, or other Court proceeding or for an[y] child assaults, sexual or otherwise. Nor in the presence of any registered sex offenders or other persons under Orders to not be around minor children.
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> . . . .
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> 15. All parties shall keep the minor child in a clean (including mold-free), wholesome environment at all times. The minor child shall not be exposed to the use of controlled substances, use of alcohol, or any condition hazardous to the health and welfare of the minor children.
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> 16. Neither party will consume any alcohol or any illegal substances, nor any legal, controlled substances without a valid prescription and in the prescribed dosage during the party's custodial time.

The Order also provided the parties will continue the current 2-2-5-5 schedule "with the minor child in Defendant's custody on Monday and Tuesday nights and the Plaintiff's custody on Wednesday and Thursday and the parties alternating weekends." On 9 September 2020, Plaintiff timely filed Notice of Appeal from the trial court's Initial Child Custody Order pursuant to N.C.R. App. P. 3(c).

Appellate Jurisdiction

¶ 11 The trial court's 1 September 2020 Order constitutes a final resolution of the parties' child custody claims, and this appeal is properly before us notwithstanding the remaining child support or equitable distribution claims. *See* 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 . . . child custody . . . 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."). Thus, Plaintiff's appeal is properly before us under N.C. Gen. Stat. § 7A-27(b)(3)(e) (2019).

Issues

¶ 12 The issues on appeal are whether: (I) certain of the trial court's Findings of Fact are supported by evidence in the Record; and (II) the trial court's Findings and Conclusions of Law are adequate to support the award of joint legal and physical custody to Plaintiff and Defendant.

Analysis

¶ 13 "An order for custody of a minor child entered pursuant to this section shall award the custody of such 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). In fulfilling this directive, "trial courts are vested with broad discretion in child custody matters. This discretion is based upon the trial courts' 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[.]" *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (citations and quotation marks omitted).

> "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. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Unchallenged findings of fact are binding on appeal. The trial court's conclusions of law must be supported by adequate findings of fact. . . . Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal."

Carpenter v. Carpenter, 225 N.C. App. 269, 270, 737 S.E.2d 783, 785 (2013) (alteration in original) (quoting *Peters v. Pennington*, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011)). Whether the trial court's findings of fact support its conclusions of law is reviewed de novo. *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 904 (2008).

> Although a custody order need not, and should not, include findings as to each piece of evidence presented at trial, it must resolve the material, disputed issues raised by the evidence. "[A] custody order is fatally defective where it fails to make detailed findings of fact from which an appellate court can determine that the order is in the best interest of the child, and custody orders are routinely vacated where the "findings of fact" consist of mere conclusory statements that the party being awarded custody is a fit and proper person to have custody and that it will be in the best interest of the child to award custody to that person. A custody order will also be vacated where the findings of fact are too meager to support the award."

Carpenter, 225 N.C. App. at 273, 737 S.E.2d at 787 (alteration in original) (quoting *Dixon v. Dixon*, 67 N.C. App. 73, 76-77, 312 S.E.2d 669, 672 (1984) (citations omitted)).

I. Findings of Fact

¶ 14 Plaintiff first challenges two of the trial court's Findings of Fact, Findings 24 and 28, as not supported by competent evidence:

> 24. Plaintiff, in speaking to the defendant and/or the children, refers to her ex-husband . . . as "DH" which stands for Dickhead. This is disparaging . . . [a]nd is inappropriate.
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> . . . .
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> 28. Defendant's father passed away in the spring of 2020. Plaintiff refused to let [Rachel] attend her grandfather's funeral; ostensibly because Brian Nutter was going to be part of the trip, though she had already stated to Defendant in January 2020, that the case against Mr. Nutter has been "BS" from day one.

These Findings are supported by the evidence presented at trial, and the trial court properly exercised its inherent discretion in weighing and considering all competent evidence before making its Findings of Fact. Defendant testified as to facts found in both Findings 24 and 28, and while Plaintiff contends Defendant's testimony is not credible evidence to support the challenged Findings, it is not the duty of this Court to reweigh the credibility of Defendant's testimony. *See In re J.T.C.*, 273 N.C. App. 66, 70, 847 S.E.2d 452, 456 (2020) (quoting *Smith v. Smith*, 89 N.C. App. 232, 235, 365 S.E.2d 688, 691 (1988) (citation omitted)) (" '[C]redibility, contradictions, and discrepancies in the evidence are matters to be resolved by the trier of fact, here the trial judge, and the trier of fact may accept or reject the testimony of any witness.' "). Thus, because the Findings are supported by competent evidence, the trial court did not err in making Findings 24 and 28.

II. Best Interest Determination

¶ 15 "In a proceeding for custody . . . of a minor child, the trial court is required to 'find the facts specially and state separately its conclusions of law thereon and direct the entry of appropriate judgment.' " *Montgomery v. Montgomery*, 32 N.C. App. 154, 156, 231 S.E.2d 26, 28 (1977) (quoting N.C. Gen. Stat. § 1A-1, Rule 52(a)(1)). "The trial court is required to find specific ultimate facts to support the judgment, and the facts found must be sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence." *Id.* at 156-57, 231 S.E.2d at 28 (citations omitted). "A 'conclusion of law' is the court's statement of the law which is determinative of the matter at issue between the parties." *Id.* at 157, 231 S.E.2d at 28-29 (quoting *Peoples v. Peoples*, 10 N.C. App. 402, 408, 179 S.E.2d 138, 141 (1971)). "A conclusion of law must be based on the facts found by the court and must be stated separately. The conclusions of law necessary to be stated are the conclusions which, under the facts found, are required by the law and from which the judgment is to result." *Id.* at 157, 231 S.E.2d at 29 (citations omitted). As such, "[t]o support an award of custody, the judgment of the trial court should contain findings of fact which sustain the conclusion of law that custody of the child is awarded to the person who will 'best promote the interest and welfare of the child.' " *Id.* (citing N.C. Gen. Stat. § 50-13.2) (other citations omitted).

¶ 16 Plaintiff contends the trial court erred in "making only one vague conclusion of law" regarding the best interest of the child. We agree. Conclusion of Law 4 states: "It is in the best interest of the minor child that this Court establish a Child Custody Order." The trial court's Conclusion merely states "a Child Custody Order" is in Rachel's best interest—not that joint legal and physical custody is in Rachel's best interest. Thus, this Conclusion is insufficient to support such an award. *See Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E.2d 466, 468 (1978) ("Before awarding custody of a child to a particular party, the trial court must conclude as a matter of law that the award of custody to the particular party will 'best promote the interest and welfare of the child.' " (quoting N.C. Gen. Stat. § 50-13.2(a))). Indeed, the trial court makes no ultimate findings of whether Plaintiff or Defendant are fit and proper persons to exercise legal or physical custody over the child based on its evidentiary findings. We acknowledge the trial court's extensive evidentiary Findings may well support such ultimate findings and conclusion along with its custody award including numerous conditions imposed on the parties' custodial time clearly designed in substantial part to address Plaintiff's concerns. However, the trial court's Order fails to resolve the legal issue disputed by the parties: whether an award of custody to Plaintiff and/or Defendant will best promote the interest and welfare of the child.

¶ 17 Thus, the trial court's Findings and Conclusions are insufficient to establish its award of custody is such as to best promote the interest and welfare of the child

as required by statute for the award of joint physical and legal custody. Therefore, without this ultimate determination and conclusion of law, the trial court erred in awarding joint legal and physical custody to the parties. Consequently, we vacate the trial court's Initial Child Custody Order and remand this matter to the trial court to make any additional findings it deems necessary to support its conclusions and to make a conclusion as to what award of custody will best promote Rachel's interest and welfare.

Conclusion

¶ 18 Accordingly, for the foregoing reasons, we vacate the trial court's Initial Order of Child Custody and remand this case to the trial court for additional findings of fact and conclusions of law to support an award of custody designed to best promote the interest and welfare of the child.

VACATED AND REMANDED .

Judges ZACHARY and GRIFFIN concur.

Report per Rule 30(e).