IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-925

No. COA22-282

Filed 29 December 2022

Pitt County, No. 20CVD969

MARK P. KOENIG, Plaintiff,

v.

MARIA A. KOENIG, Defendant.

Appeal by Defendant from order entered 25 August 2021 by Judge Lee F. Teague in Pitt County District Court. Heard in the Court of Appeals 1 November 2022.

Miller & Audino, LLP, by Jay Anthony Audino, for Plaintiff-Appellee.

W. Gregory Duke for Defendant-Appellant.

INMAN, Judge.

¶ 1 Maria A. Koenig ("Mother") appeals from an order of the trial court modifying custody and awarding Mark P. Koenig ("Father") primary physical custody of their three daughters. Mother challenges several findings of fact as unsupported by the evidence, contends three of the trial court's conclusions are erroneous, and argues the

trial court abused its discretion in its best interest determination to modify custody. After careful consideration, we affirm the trial court's order.

I. FACTUAL & PROCEDURAL BACKGROUND

¶ 2 The evidence of record discloses the following:

¶ 3 Mother and Father married in 2007 and separated in 2015. They share three daughters—now ages fifteen, twelve, and ten—from the marriage. In January 2016, Mother and Father entered into a separation and custody agreement providing joint legal custody, primary physical custody to Mother, and secondary custody with "liberal visitation" to Father. The couple divorced in October 2016 and the separation and custody agreement was incorporated into the judgment.

¶ 4 Both parents and the children lived in Onslow County, North Carolina and consistently exercised their agreed upon custodial times until Father was transferred by the Marine Corps from his station at Camp Lejuene to Beaufort, South Carolina. In his new post, Father worked seven days a week for three months in a row and lived outside of the 100-mile radius provided for in the custody agreement, but the parents cooperated to coordinate Father's visits during his time off.

¶ 5 Mother moved with the children from Onslow to Pitt County in August 2018. In the Fall of 2019, Father was again transferred to Quantico, Virginia, where he now works typical business hours and lives in Stafford, Virginia.

¶ 6 After Father remarried in the Fall of 2019, communication and cooperation between the parents about their children and visitation deteriorated. Mother omitted Father's name on school documents and listed her boyfriend at the time as the children's "stepfather" and emergency contact. She has used profane language with Father over the phone in the children's presence. Since Father has been in Virginia, he has not been able to see the children regularly other than for scheduled holiday visits and for one month during the summer. Despite calling and texting the children and Mother several times a week, Father was only able to talk with his children once a week for three to ten minutes before these proceedings commenced. Father and his current wife have a young son whom the children from his earlier marriage love.

¶ 7 In 2020, while in Pitt County, Mother and the children temporarily moved in with her boyfriend, who had been convicted of and incarcerated for drug-related charges. Mother routinely brought the children from school to her boyfriend's vape shop, where she worked, and kept them there until 8:00 to 9:00 p.m., three or four days a week. At other times, Mother's boyfriend and his father, who also had a criminal record, looked after the children.

¶ 8 The children do not interact with any friends outside of school. They spend their time either at school, home, or the vape shop. They are not involved in any extra-curricular activities, except when Father enrolled them in Taekwondo one summer while they visited him in Virginia.

¶ 9 Mother failed to take the children to the doctor or dentist for wellness visits for at least three years because she believed they only needed to go when they were ill. Because Mother has lived in three separate residences in Pitt County since 2018, the two youngest children have attended three different schools. The middle daughter was required to repeat the second grade, and generally, the children have struggled academically, though their grades are improving. Father has become more involved in his daughters' education since late 2019 and early 2020. Mother does not have a driver's license or vehicle.

¶ 10 Following these changed circumstances and because the original custody agreement was no longer practicable, on 14 April 2020 Father filed a motion to modify custody along with a motion for an order to show cause why Mother should not be held in contempt of court for her willful violation of the custody order. He filed an amended motion for contempt and a motion for attorney's fees, which came before the trial court in August 2021. Mother and Father testified consistent with the above recitation of circumstances. Father also testified that, at the time the parties executed the custody agreement in January 2016, he had no concerns about Mother's ability to care for the children.

¶ 11 At the close of Father's evidence and again at the close of all evidence, Mother moved to dismiss Father's motion to modify, arguing he had failed to satisfy his burden of establishing a substantial change in circumstances affecting the children's

welfare; the trial court denied both motions. On 25 August 2021, the trial court entered an order modifying custody, awarding primary physical custody to Father, and denying the motion for contempt. Mother filed written notice of appeal.

II. ANALYSIS

¶ 12 Mother presents three challenges to the trial court's order modifying custody: (1) several findings of fact are unsupported by the evidence; (2) three of the trial court's conclusions are erroneous; and (3) the trial court abused its discretion in its best interest determination. Each of Mother's arguments is without merit.

A. Standard of Review

¶ 13 Our General Statutes provide: "An order of a court of this State for support of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested subject to the limitations of G.S. 50-13.10." N.C. Gen. Stat. § 50-13.7(a) (2021). The party moving for custody modification bears the burden of proving a "nexus" between the changed circumstances and the child's welfare. *Warner v. Brickhouse*, 189 N.C. App. 445, 454, 658 S.E.2d 313, 319 (2008). "While allegations concerning adversity are 'acceptable factors' for the trial court to consider and will support modification, 'a showing of a change in circumstances that is, or is likely to be, beneficial to the child may also warrant a change in custody.'" *Shipman v. Shipman*, 357 N.C. 471, 473-74, 586 S.E.2d 250, 253 (2003) (quoting *Pulliam v. Smith*, 348 N.C. 616, 620, 501 S.E.2d

898, 900 (1998)) (cleaned up). "The trial court's examination of whether to modify an existing child custody order is twofold. The trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child." *Id.* at 474, 586 S.E.2d at 253. "The trial court commits reversible error by modifying child custody absent any finding of substantial change of circumstances affecting the welfare of the child." *Hibshman v. Hibshman*, 212 N.C. App. 113, 121, 710 S.E.2d 438, 443 (2011) (citations and quotation marks omitted) (cleaned up).

¶ 14 Findings of fact are conclusive on appeal if supported by substantial evidence, even if evidence might sustain findings to the contrary. *Everette v. Collins*, 176 N.C. App. 168, 170, 625 S.E.2d 796, 798 (2006). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citation omitted).

¶ 15 Unchallenged findings of fact are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). The trial court's findings of fact must support its conclusions of law, and we review the conclusions of law *de novo*. *Stephens v. Stephens*, 213 N.C. App. 495, 498, 715 S.E.2d 168, 171 (2011).

¶ 16 Because the trial court is vested with broad discretion in child custody matters, we will not disturb a trial court's decision to modify custody absent an abuse of discretion. *Id.* A trial court abuses its discretion in its best interest determination

where "a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Id.* at 503, 715 S.E.2d at 174.

B. Findings of Fact Supported by Substantial Evidence

¶ 17 Mother contends the following findings in the trial court's order modifying custody are unsupported by the evidence:

> 12. In 2018, Plaintiff was transferred again by the Marine Corp[s] to Quantico[,] Virginia. While living in Virginia, it has been hard for Plaintiff to see the children on a regular basis. When the parties live more than 100 miles from each other, the current order requires cooperation between the parties as to visitation.
>
> . . . .
>
> 16. Defendant has continuously badmouthed Plaintiff's new wife to Plaintiff and to the children.
>
> . . . .
>
> 18. She has made it very difficult for the Plaintiff to call and talk to the children unless it was good for her schedule.
>
> . . . .
>
> 22. While in the Mother's care, the children's grades went down, and one child had to repeat the second grade. Plaintiff had no knowledge of this.
>
> . . . .
>
> 31. The parties live more than 100 miles from each other and the current order is not practical because it does not provide for any regular visitation schedule. The children would benefit from regular schedule [sic] and anticipated visitation with both parents.

> . . . .
>
> 34. Since the Plaintiff's marriage, Defendant has attempted to alienate the girls from the Plaintiff. Since the marriage, the girls stopped saying 'I love you' to their father.
>
> 35. Defendant has interfered with the communication between the girls and Plaintiff.

¶ 18 We must uphold each finding which is supported by substantial evidence, even if Mother's testimony, on its own, would support a contrary finding. *See Everette*, 176 N.C. App. at 170, 625 S.E.2d at 798. Father testified about his difficulty reaching the children for weekly calls beginning in early 2020, his children's change in affection toward him since he initiated proceedings to modify custody, and Mother's interference in his communication with his daughters. For example, Father was only able to talk with his children once a week for three to ten minutes before these proceedings commenced. Text messages between Mother and Father reveal Mother disparaged Father and Father's wife, and Father testified Mother did the same in front of the children in person one Halloween and over the phone on other occasions. Report cards from the children's schools demonstrate failing and below grade level marks in some courses, and one daughter had to repeat the second grade, while in Mother's care. Finally, it is undisputed that the parents now live more than 100 miles apart, and the original custody agreement does not otherwise provide for regularly

scheduled visits except by consent of the parties. The trial court's findings are supported by substantial evidence. *See id.*

C. Findings Support Conclusions to Modify Custody

¶ 19 Mother challenges the following conclusions of law in the trial court's order:

> 3. There has been a substantial change of circumstances that *impacts the well-being of the minor children*.
>
> 4. The *best interests and welfare of the minor children would be served* if the October 19, 2016 Custody Order was modified.
>
> 5. Plaintiff's Motion to Modify Custody should be allowed.

(Emphasis added). In particular, Mother argues the trial court failed to enter any findings regarding the effect on the children's welfare of any changed circumstances to support its conclusion to modify custody.

¶ 20 "In situations where the substantial change involves a discrete set of circumstances . . . , 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." *Shipman*, 357 N.C. at 478, 586 S.E.2d at 256 (citations omitted) (emphasis in original). However, Mother concedes, and our precedent reflects, some effects of changed circumstances are self-evident and do not require separate findings. *See id.* at 479, 586 S.E.2d at 256 ("[T]he effects of the substantial changes in circumstances on the minor child in the present case are self-evident,

given the nature and cumulative effect of those changes as characterized by the trial court in its findings of fact.").

¶ 21 Mother points to evidence that the children are currently performing well in school and have more frequent and regular visitation with Father than before to demonstrate net positive effects of the changed circumstances. And she highlights the absence of findings about any negative effects on the children because she neglected to take the children to wellness exams, left the children in her boyfriend's and his father's care, and has not provided opportunities for the children's socialization. By contrast, Father argues the effects of the changed circumstances are self-evident: (1) Mother's treatment of Father and his wife negatively impacted the children's emotional well-being and their relationship with Father; (2) their living arrangement with Mother and two convicted felons adversely affected their "safety and sensibilities;" (3) the children's poor grades impacted their educational development; (4) lack of wellness visits harmed the children's health; and (5) the children's dearth of involvement in extracurricular or social activities stunted their social growth. We agree with Father that the consequences of the changed circumstances on the children in this case are self-evident.

¶ 22 The effects of the changed circumstances in this case are more similar to those deemed self-evident in *Shipman*—"deceitful denial of visitation" to the noncustodial parent—than those *Shipman* concluded were discrete and required further findings

directly linking the change to the welfare of the child—a parent's move, a parent's cohabitation, a change in a parent's sexual orientation, a parent's remarriage, or a change in a parent's financial status.[1] 357 N.C. at 478-79, 586 S.E.2d at 256. Further, the trial court's conclusions of law demonstrate the trial court expressly considered how the changed circumstances impacted the well-being and welfare of the children and how modification served the children's best interests.

¶ 23 We hold the trial court's conclusions are supported by its findings, including those unchallenged on appeal, *Koufman*, 330 N.C. at 97, 408 S.E.2d at 731, and sound as a matter of law, *Stephens*, 213 N.C. App. at 498, 715 S.E.2d at 171.

D. No Abuse of Discretion in Award of Primary Physical Custody to Father

¶ 24 Mother further argues the trial court abused its discretion in its best interest determination by failing to consider she had been the primary caregiver since the parties' separation in the summer of 2015 or the importance of continuity for the children. We disagree.

¶ 25 The factors Mother cites are appropriate for the trial court's consideration. *See, e.g., Blackley v. Blackley*, 285 N.C. 358, 364, 204 S.E.2d 678, 682 (1974) (holding

[1] Our application of *Shipman* should not be construed to mean "the effects of the change on the welfare of the child" of denial of visitation with the noncustodial parent, absence of socialization, living with a convicted felon, academic challenges, lack of medical care, etc., are always *per se* self-evident and therefore do not "necessitate a showing of evidence directly linking the change to the welfare of the child." 357 N.C. at 478, 586 S.E.2d at 256.

insufficient evidence of change in circumstances to modify custody in favor of the father where the record "pictures two well-adjusted children who have been well cared for by a loving mother who is deeply interested in their total welfare"); *Gordon v. Gordon*, 46 N.C. App. 495, 500, 265 S.E.2d 425, 428 (1980) ("Where a parent changes his residence, the effect on the welfare of the child must be shown in order for the court to modify a custody decree based on change of circumstance."). But "[t]rial courts are permitted to consider an *array of factors* in order to determine what is in the best interest of the child." *Phelps v. Phelps*, 337 N.C. 344, 352, 446 S.E.2d 17, 22 (1994) (emphasis added).

¶ 26 The trial court considered many factors in its best interest determination—the children's academic challenges, their lack of socialization and extra-curricular opportunities, the safety of the children's alternative caregivers, their neglected medical care, Mother's employment and ability to care for the children, and Father's change in predictable, flexible work and home life. While the trial court may have also considered the importance of continuity for the children and Mother's sole parenting, we cannot conclude the trial court abused its discretion in its best interest determination to modify custody. *Shipman*, 357 N.C. at 475, 586 S.E.2d at 254 ("If we determine that the trial court has properly concluded that the facts show that a substantial change of circumstances has affected the welfare of the minor child and that modification was in the child's best interests, we will defer to the trial court's

judgment and not disturb its decision to modify an existing custody agreement." (citation omitted)).

III. CONCLUSION

¶ 27 For the reasons set forth above, we affirm the trial court's order modifying custody.

AFFIRMED.

Judges DILLON and DIETZ concur.

Report per Rule 30(e).