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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-762

Filed 17 October 2023

Pitt County, No. 18 CVD 3478

CHRISTOPHER B. BRANN, Plaintiff,

v.

CHRISTINA E. BRANN, Defendant.

Appeal by Defendant from Order entered 11 January 2022 by Judge Wendy S. Hazelton in Pitt County District Court. Heard in the Court of Appeals 26 April 2023.

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

W. Gregory Duke for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Christina E. Brann (Defendant) appeals from a Custody Order awarding Christopher B. Brann (Plaintiff) primary physical custody of the parties' minor children thereby modifying the custodial terms of a Separation and Child Custody Agreement, which had been incorporated into an earlier Order Granting Summary Judgment and Allowing Absolute Divorce (Divorce Judgment). The Record before us

tends to reflect the following:

Plaintiff and Defendant are the parents of two minor children. The parties married in September 2011 and separated in February 2017. Following their separation, the parties entered into a Separation and Custody Agreement on 18 December 2018.

The Separation and Custody Agreement provided the parties would have joint custody of the two minor children and that “the children shall divide their time between the homes of [the parties] in as equal a manner as possible.” In addition, the Separation and Custody Agreement provided each party, respectively, with “the privilege of spending Father’s Day and Mother’s Day” with the children. Further, the parties agreed to “confer from time to time with respect to the children’s welfare, and particularly as to educational, health and disciplinary matters of a substantial nature[.]”

On 31 December 2018, Plaintiff filed a Complaint for Divorce, which included a request that the Separation and Custody Agreement be incorporated into a final divorce judgment. On 12 March 2019, the trial court entered the Divorce Judgment. The trial court granted the parties’ absolute divorce and incorporated the Separation and Child Custody into the Divorce Judgment.

On 20 May 2021, Plaintiff filed a Motion for Modification of Child Custody Order. The Motion alleged substantial changes in circumstances affecting the

children’s best interests and welfare. Plaintiff’s Motion sought an award of primary legal and physical custody of the children to him.

Plaintiff’s Motion was heard over the course of two separate days—1 November and 16 December 2021—in Pitt County District Court. On 11 January 2022, the trial court entered its Custody Order. The trial court made 38 individual Findings of Fact—some with multiple subparts—extensively detailing its factual determinations. Ultimately, the trial court found:

32. Both parties unquestionably love the minor children, and the minor children love their parents, as well. . . . However, while both parties and their immediate family members provide for the minor children’s relational/emotional needs, they have other needs (academic, developmental, medical, mental health) that are not being adequately provided for at this time due to the current custodial arrangement.”

The trial court further found:

33. Substantial changes in circumstances that have occurred since execution of the Agreement in December 2018 and its incorporation into the Order in March 2019, which have impacted the best interests of the minor children, are, as follows:

a. [The parties’ daughter] has a significant amount of anxiety, which she did not have before, and she has been in therapy since the summer of 2021. [The parties’ daughter] has been significantly stressed about school, especially when she has been forced to make up assignments and do extra homework in the evenings because she does not have time to do her morning work on the mornings Defendant-Mother is taking her to school. [The parties’ daughter] gets overly anxious when Defendant-Mother does not get

her where she's supposed to be on time or when Defendant-Mother is not timely in getting her. Both parties believe therapy has been beneficial to [the parties' daughter], and both have been supportive and involved with that process; however, Defendant-Mother has not corrected or improved any of her actions that cause [the parties' daughter] to be stressed and anxious.

b. [The parties' son] is now cognizant of Defendant-Mother's routine tardiness, and he has been noticeably frustrated with Defendant-Mother not being on time or getting him to where he is supposed to be.

c. The minor children's medical, healthcare, and dental care have been lacking due to Defendant-Mother's insistence to be in charge and failure to thereafter be responsible. [The parties' son] still needs his corrective circumcision and [the parties' daughter] needs her weight to be under control. The minor children need significantly more sleep and a routine bedtime, which they are not getting when with Defendant-Mother; the lack of sleep has negatively impacted the minor children's abilities to perform at school, and [the parties' son]'s teacher is able to discern which parent's house he was at the night before based on his appearance, mood, demeanor, and abilities.

d. [The parties' daughter]'s schoolwork has become significantly more demanding and extensive. The amount of time and attention needed for [the parties' daughter] to complete all of her work and excel in school, as she is able and accustomed to doing, is more than Defendant-Mother is willing and/or able to provide. While [the parties' daughter] is still performing exceptionally well in school in terms of grades, the pressure and stress she is now feeling is not healthy for her and needs to be alleviated.

e. The minor children recognize the substantial differences between their parents' respective households. They are struggling at times to transition from one house to the other, which has caused stress on both. The minor children face transitions in atmospheres within the home, how they interact with the other members of the home, how much interaction there is with their parents, meals, physical activity, routine, sleep, schoolwork, extracurriculars, etc.

f. Defendant-Mother's consumption of various narcotics and prescription drugs appears to be impairing her ability to care for the minor children. Defendant-Mother appears to be a poor historian and has a difficult time truly appreciating what's going on around her and how the children are being impacted. Defendant-Mother is not recognizing the struggles of her children, testifying that "the current schedule has worked" when both parties recognize the back-and-forth has caused several difficulties that have had a negative impact on the minor children. Defendant-Mother appears to be more disorganized now than she was previously, especially considering her not being in work for a year and still being unable to manage the minor children's time, schedules, and academic needs.

g. Starting in August 2022—the next school year—[the parties' daughter] will advance to the middle school[.]¹ Based on the current custodial schedule, this will require Defendant-Mother to drop off [the parties' son] at one school and [the parties' daughter] at another. Defendant-Mother's current struggles to get the minor children to school on-time will expectedly be worse starting in the next school year.

h. Defendant-Mother was admittedly unable to

¹ The trial court's Order identifies the particular middle school the parties' daughter is expected to attend. We omit that specific reference.

adequately provide for the minor children when she had a full-time job, and she really didn't improve during the year she was not working. Plaintiff-Father and his wife have been proactive, supportive, and diligent in meeting the minor children's needs. Plaintiff-Father and his wife enjoy flexibility in their employment that one or both appears to always be readily available for the minor children.

i. The incorporated Agreement has proven to be vague and incomplete to direct the parties to effectively exercise their respective custody of the minor children. Even though, the agreement does not establish a set custodial schedule, nor does it set holiday schedules, the parties were able to cooperate with one another regarding physical custody of the minor children both during the school year and for holiday and summer vacation time, for the most part. Still, there have been several instances where the parties have had to come to some understanding/plan and Defendant-Mother has waited until the last minute to make plans or has altered previously made plans at the last minute. This has caused unnecessary angst and disruption for the minor children on holidays and other times that they should simply be able to enjoy.

34. The minor children need more structure, supervision, and guidance than Defendant-Mother appears to be able to provide and that the current schedule has allowed. The minor children need to be in school, on time, rested and ready to perform daily. They need consistency in their diets, physical activity, sleep patterns, and homework routines. They need to not have to worry about whether they will get to scheduled activities on time, whether they will have supplies that they need, or whether they will have their needs met. Plaintiff-Father has been providing for all of these needs of the minor children and can continue to provide them as the primary custodian.

Based on its Findings of Fact, the trial court concluded there had been a substantial change of circumstances affecting the welfare of the children and that it was further in the best interests of the children to modify custody. The trial court awarded Plaintiff primary physical custody and Defendant secondary physical custody of the children. The trial court maintained joint legal custody of the children, but in the event the parties were unable to agree on major decisions, provided Plaintiff would have final decision-making authority.

On 10 February 2022, Defendant filed written Notice of Appeal from the trial court's 11 January 2022 Custody Order.

Issues

The issues on appeal are whether the trial court: (I) erred in concluding there had been a substantial change of circumstances affecting the welfare of the children justifying a modification of the prior custody order; and (II) abused its discretion by determining the modification of the prior custody order was in the best interests of the children.

Analysis

“Our 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); *see also 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.’ ”).

The trial court’s examination of whether to modify a child custody order occurs in two parts. First, “[t]he trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child.” *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253. “When reviewing a trial court’s decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court’s findings of fact to determine whether they are supported by substantial evidence.” *Id.* Findings of fact supported by substantial evidence “are conclusive on appeal, even if record evidence might sustain findings to the contrary.” *Id.* at 475, 586 S.E.2d at 254 (citation and quotation marks omitted). We then “determine if the trial court’s factual findings support its conclusions of law.” *Id.* (citation omitted).

Second, the trial court must “examine whether a change in custody is in the child’s best interests.” *Id.* at 474, 586 S.E.2d at 253. “As long as there is competent evidence to support the trial court’s findings, its determination as to the child’s best interests cannot be upset absent a manifest abuse of discretion.” *Stephens v. Stephens*, 213 N.C. App. 495, 503, 715 S.E.2d 168, 174 (2011) (citation and quotation

marks omitted)). “Under an abuse of discretion standard, we must determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision.” *Id.* (citation and quotation marks omitted).

I. Substantial Change of Circumstances

Defendant first contends the trial court erred in concluding there had been a substantial change of circumstances affecting the welfare of the children. Specifically, Defendant first argues the trial court’s Findings of Fact are unsupported by evidence in the Record. Defendant, in turn, then contends these Findings do not support the trial court’s Conclusion of Law supporting a modification of child custody based on a substantial change of circumstances.

A. Challenged Findings of Fact

Defendant contends 23 of the trial court’s 38 Findings of Fact are—either in whole or in part—unsupported by evidence in the Record. With some limited exceptions, we disagree.²

² We agree with Defendant there is no evidence to support aspects of Finding 25 that Defendant promised to take the children on a beach trip which never occurred; that Defendant only obtained Halloween costumes in 2020 shortly before trick-or-treating commenced; or in 2022 that Defendant failed to take the children to Raleigh to costume shop or provide Halloween costumes. We further agree there is no evidence in the Record to support the portion of Finding 26 that the parties’ daughter was in tears about school Spirit Week. While there was testimony the daughter was anxious and upset about school Spirit Week, there was no direct testimony she was “in tears”. We also agree with Defendant that there was no evidence to support a portion of the trial court’s Finding 27, where the trial court found Defendant brought the parties’ daughter to a softball game without a proper uniform, requiring Plaintiff’s current wife to run “onto the field to give her the proper shirt”. The evidence

In general, Defendant takes issue less with specific evidentiary facts but more with the credibility of the evidence supporting the Findings, the weight given to testimony by the trial court, and conflicts in the evidence. Indeed, while the trial court made multiple evidentiary Findings including subparts, Findings 32, 33, and 34 are ultimate Findings synthesizing the trial court's reasoning for its decision. In particular, Defendant concedes the facts of her chronic tardiness and prescribed use of medications but disputes that these had any impact on the children—or more to the point that these constituted changed circumstances affecting the children. Defendant also contests the trial court's Findings concerning her ability to adequately provide or care for the children.

It is, however, within the province of the trial court to determine the credibility of the witnesses and the weight to be attached to their testimony, and the inferences legitimately to be drawn therefrom in exactly the same sense that a jury should do in the trial of a case. *Hodges v. Hodges*, 257 N.C. 774, 779, 127 S.E.2d 567, 571 (1962). Our review of the Record and transcript reveals that while there was conflicting evidence, there was sufficient evidence to support the trial court's key Findings—and the inferences drawn from the facts—regarding the impact of Defendant's behavior

reflected the parties' daughter was missing the belt to the uniform when the game started and needed assistance putting it on when it finally arrived. Similarly, there was also no direct evidence to support the piece of the trial court's Finding in Finding 33(g) as to the specific middle school the parties' daughter would be attending the following school year—however, it is evident that the parties' daughter would likely be attending middle school the following year while the parties' son would remain in elementary school. Ultimately, however, these evidentiary discrepancies do not alter the outcome of this matter.

on the children. There was extensive testimony from both Plaintiff and his current wife about Defendant's untimeliness, disorganization, and inability to consistently meet the children's needs whether with respect to school, medical care, extracurricular activities, or the existing custodial schedule. This testimony also included the effect this inability was having on the children—including causing stress, anxiety, negative impacts on their ability to perform at school—and Plaintiff's and his current wife's efforts and ability to remedy many of those impacts and difficulties communicating between the parties. Defendant asserts that the evidence reflects that she has always had an issue with timeliness and this cannot, thus, be a change in circumstance now affecting the children. However, this assertion ignores the evidence that now, because the children are both older and attending school and other activities, circumstances have changed, and her chronic lateness impacts the children to an extent it did not before. Thus, the trial court's key Findings—including its ultimate Findings—are supported by evidence in the Record.

B. Substantial Change of Circumstances

Defendant further contends the trial court's Findings do not support its Conclusion of Law that there had been a substantial change of circumstances affecting the welfare of the children since the entry of the 2018 Separation and Custody Agreement and its incorporation into the 2019 Divorce Judgment. Defendant argues the trial court's Findings are insufficient to establish an adequate

nexus between the changes in circumstances found by the trial court and any impact on the children. We disagree.

“As our appellate case law has previously indicated, before 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.” *Shipman*, 357 N.C. at 478, 586 S.E.2d at 255. The existence of a substantial change of circumstances is reviewed on appeal as a conclusion of law. *See Kolczak v. Johnson*, 260 N.C. App. 208, 223, 817 S.E.2d 861, 870-71 (2018).

In addition to its Conclusion of Law, here, the trial court also included its ultimate Finding of Fact 33, identifying specific changes in circumstances it considered and how those impacted the children. As such, the trial court complied with the prerequisite to make findings regarding the connection—or nexus—between the change of circumstances and how it was affecting the welfare of the children. Indeed, Defendant concedes that both Plaintiff and his current wife presented testimony regarding the stress and anxiety the children were feeling. Defendant contends, however, there was no testimony from a therapist or therapy records introduced to support a conclusion, for example, that the parties’ older daughter’s stress and anxiety was caused by Defendant’s conduct or the existing custody schedule. Defendant cites no caselaw supporting the assertion that this form of

testimony was required to establish that nexus. We conclude the evidence in the Record—including the testimony of Defendant and his current wife—supports the trial court’s ultimate Findings, which in turn, support the Conclusion of Law that there had been a substantial change of circumstances affecting the welfare of the parties’ children justifying a modification of the prior incorporated Separation and Custody Agreement.

II. Best Interests

Finally, Defendant argues the trial court abused its discretion in concluding the best interests of the children would be for Plaintiff to exercise primary physical custody with Defendant having secondary physical custody. Defendant asserts the children were: accustomed to the existing custodial schedule; used to her “issues with punctuality”; and both excellent students, healthy, polite, and well-behaved. Defendant maintains the “constant for the minor children has always been being able to spend equal periods of time with their parents.”

It is fundamental “the ‘paramount consideration’ and ‘polar star,’ which have long governed and guided the discretion of our trial judges in such matters, are the welfare and needs of *the child*, not the persons seeking his or her custody, and even parental love must yield to the promotion of those higher interests.” *Matter of Custody of Peal*, 305 N.C. 640, 645, 290 S.E.2d 664, 667-68 (1982) (emphasis in original). In this case, it is apparent the trial court considered the welfare and needs of the

children and the need for a more structured custodial schedule than the one already in place.

On this Record, we cannot conclude the trial court's decision as to the best interests of the children was either manifestly unsupported by reason or so arbitrary it could not be the result of a reasoned decision. *See Stephens*, 213 N.C. App. at 503, 715 S.E.2d at 174. As such, the trial court did not abuse its discretion in determining it was in the best interests of the children to award Plaintiff primary physical custody.

Thus, the trial court's Findings of Fact support its Conclusion of Law that there had been a substantial change of circumstances affecting the welfare of the children. Therefore, the trial court did not err by modifying the prior incorporated Separation and Custody Agreement. Consequently, the trial court did not abuse its discretion by determining it was in the best interests of the children to award Plaintiff primary physical custody.

Conclusion

Accordingly, for the foregoing reasons, the trial court's 11 January 2022 Custody Order is affirmed.

AFFIRMED.

Judges CARPENTER and STADING concur.

Report per Rule 30(e).