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NO. COA02-320

NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2002

KEITH GEORGE YOUNG,
Plaintiff,

v.

Mecklenburg County
No. 99 CVD 17284

CHRISTY YOUNG (now TOWERY),
Defendant.

Appeal by defendant from order entered 7 September 2001 by Judge Regan A. Miller in Mecklenburg County District Court. Heard in the Court of Appeals 14 November 2002.

Dolly B. Manion for plaintiff appellee.

Thomas R. Cannon and Kary C. Watson for defendant appellant.

McCULLOUGH, Judge.

This case arises out of a divorce and child custody proceeding in Mecklenburg County, North Carolina, the pertinent facts of which are as follows: Plaintiff Keith Young and defendant Christy Young (now Towery) were married on 25 February 1995. The couple's only child, Ashley Nicole Young, was born on 24 September 1995. The parties separated on 16 July 1999. On 16 November 1999, plaintiff filed a complaint and brought forth issues of child custody, child support, and equitable distribution. Plaintiff requested that the trial court grant him both temporary and permanent full custody of

Ashley. On 9 February 2000, defendant filed an answer and counterclaim requesting temporary and permanent full custody of Ashley, as well as an order requiring plaintiff to pay child support. Defendant further requested a temporary restraining order and preliminary injunction to prevent plaintiff from disposing of any real or personal property pending equitable distribution.

The parties' divorce became final on 7 March 2001. The issue of child custody was tried at the 14 August 2001 Civil Session of Mecklenburg County District Court. The evidence at the bench trial showed that during the marriage, plaintiff and defendant lived in a two-bedroom house which belonged to defendant's grandmother. By agreement of the parties, plaintiff worked outside the home and defendant remained at home with their daughter. Early in the marriage, plaintiff worked at Pizza Hut and came home around midnight each night. He later got a job at Microtron, where his workday lasted from 5:00 a.m. until 4:00 p.m. According to defendant, plaintiff often went out after work and did not come home until 9:30 p.m. When he was at home, he spent little time with her or Ashley. Defendant testified that she was Ashley's primary caregiver -- she took care of Ashley, home schooled her for a short time, played with her, and regularly took her to the library and to a children's reading group.

Plaintiff testified that he was the primary breadwinner for the family and worked a great deal. He also acknowledged that he and defendant argued when he was at home. He stated that approximately one and one-half weeks before he and defendant

separated, defendant's current husband, Benjamin Towery, began visiting defendant in the marital home. Mr. Towery lived across the street from the Youngs' home, and he and defendant had known each other for a number of years. The visits took place while plaintiff was asleep, from 10:00 p.m. to 4:00 a.m. Plaintiff stated he awoke on several mornings to the sound of the front door closing and saw Mr. Towery walking off the front porch. Plaintiff also caught Mr. Towery and defendant sitting very close to each other on the sofa on two separate occasions. Ashley was in the same room with defendant and Mr. Towery both times. On another occasion, defendant and Mr. Towery took a walk with Ashley for approximately 45 minutes. When defendant returned, she told plaintiff she was taking Ashley to McDonald's and left around 8:30 p.m. Plaintiff saw her pick up Mr. Towery at his house on the way down the street. Defendant did not return with Ashley until 2:00 a.m.

Plaintiff and defendant had a turbulent marriage and often argued in front of family members, including their daughter. Following the separation in July 1999, plaintiff spent two weekends with Ashley. Defendant testified that after the second visit, Ashley became increasingly aggressive and did not want to stay with plaintiff. She took the child to the doctor, where the child allegedly stated, "My daddy is mean to me and he touches me in my private parts." In response, defendant resisted further weekend visits, but allowed limited interaction between plaintiff and Ashley when plaintiff dropped off his weekly child support payment.

During the same time period, plaintiff testified defendant told him he could not see Ashley until he signed separation papers. Soon thereafter, defendant changed her home phone number and made it difficult for plaintiff to see Ashley. Defendant frequently stopped by plaintiff's workplace and called him in an attempt to get him to sign the separation papers. Plaintiff stated Mr. Towery accompanied defendant on some occasions and was hostile toward him on one of those visits. Plaintiff saw Ashley briefly when he delivered the weekly child support payments to defendant and had only a few phone conversations with his daughter. Additionally, defendant refused to allow plaintiff to see Ashley on the child's fourth birthday. Plaintiff did not see Ashley for the remainder of 1999.

In February 2000, the trial court conducted a hearing regarding visitation. Defendant conveyed her allegations that plaintiff had abused Ashley. The trial court ordered supervised visitation through the Connections program. Thereafter, plaintiff saw Ashley on four separate occasions for one hour each time. He did not see the child again until 9 July 2000, when a two-hour visitation between plaintiff, Ashley, and defendant's grandmother was arranged at Carolina Place Mall. Plaintiff saw Ashley again on 22 December 2000 for two hours; his mother was present at the time. Four days later, plaintiff learned Ashley had been taken to the hospital with a high fever; when he arrived, defendant refused to allow him to see Ashley and he was forced to leave the premises.

On 5 January 2001, the parties appeared in court after plaintiff issued a "show cause" order upon defendant. The trial court ordered defendant to allow plaintiff visitation every Sunday from 9:00 a.m. to 7:00 p.m. In early March 2001, defendant decided to allow plaintiff additional visitation on Tuesdays and Thursdays from 5:30 p.m. until 8:00 p.m. at his parents' home.

Plaintiff presented testimony from a number of witnesses, including Mr. Towery's former in-laws, who testified as to Mr. Towery's violent behavior toward their daughter. Plaintiff's parents testified that their son had a positive relationship with Ashley and that the child seemed reluctant to return to her mother following visitation and got angry with plaintiff for taking her back. They testified that their home life is stable and that they have a strong bond with Ashley. Plaintiff also presented the testimony of Dr. Wade Williams, a court-appointed psychologist who met with Ashley and opined that defendant fabricated the allegation of sexual abuse and irreparably damaged plaintiff's relationship with Ashley. Dr. Williams also stated that when he asked Ashley if plaintiff had touched her private parts, the child responded, "No."

At the conclusion of the evidence, the trial court made the following pertinent findings of fact:

4. Immediately prior to the separation of the parties, who then resided with the minor child at 410 Cone Avenue, Pineville, North Carolina, the Defendant began having an extra-marital affair with Benjamin Eugene Towery, her current husband. On several occasions after the Plaintiff went to bed, the Defendant would invite Mr. Towery into the marital residence between the

hours of 10:00 p.m. and 3:00 a.m. On at least one occasion, Plaintiff observed the Defendant and Mr. Towery sitting very close together on the sofa. The minor child was present during Mr. Towery's nocturnal visits. On at least one occasion the Defendant, in an effort to conceal her extra-marital affair, left the marital home in the evening with the minor child to meet Mr. Towery and did not return until approximately 2:00 a.m. the following morning. Her conduct showed disrespect for Plaintiff and jeopardized the health and welfare of the minor child.

5. Following the parties' separation, on or about July 16, 1999, the minor child resided in the marital home with Defendant. Immediately thereafter Plaintiff was allowed approximately two (2) weekend visitations and several weekday visitations with the minor child. Subsequently, the Defendant refused to allow Plaintiff visitation with the minor child except for the brief interaction Plaintiff had with the minor child at the Defendant's home when Plaintiff delivered the weekly child support.
6. On or about February 7, 2000, the Defendant filed an Answer and Counterclaim to the Complaint which was filed November 16, 1999. In her answer she alleged that following the parties' separation, the minor child was asked by her pediatrician "if she had ever been touched in the private parts by her father and the minor child responded "yes"." [sic]
7. At no time after the date of separation did Defendant ever communicate to Plaintiff or discuss with him her concerns regarding sexual abuse by Plaintiff. Furthermore, the Court's review of medical records of the minor child between April, 1999, through December, 1999, nowhere state or give any indication that the minor child was sexually abused. The Defendant presented no credible evidence that the minor child ever made such an allegation against Plaintiff. The Court concurs with the opinion of court-appointed psychologist, Dr. Wade Williams, that the Defendant's

allegations of sexual abuse were manufactured.

8. Because of the manufactured allegations Defendant had this Court participate in her efforts to limit the Plaintiff's contact with the minor child, and consequently, Defendant was given temporary, exclusive custody of the parties' minor child on or about February 18, 2001.
9. The Court finds that because of the Defendant's negative influence on the child and manufactured allegations against the Plaintiff, she has caused irreparable damage to the relationship between the Plaintiff and the minor child.
10. Between on or about August 16, 1999 and January 5, 2001, the Plaintiff was allowed visitation with the minor child on the following occasions:
 - a. July 9, 2000 at Carolina Place Mall, Pineville, North Carolina for two (2) hours in the presence of his mother, Patricia Young, and the Defendant's maternal grandmother, Stella Turner.
 - b. Approximately three (3) one-hour visits in November, 2000, under the supervision of Connections.
 - c. On December 22, 2000, a two-hour visit with the minor child under the supervision of Patricia Young at Carolina Place Mall, Pineville, North Carolina.
11. Additionally, Plaintiff's communication with the minor child was further restricted when the Defendant changed her home phone number around the end of July, 1999, or first of August, 1999, and did not provide that number to Plaintiff.

Thereafter, Plaintiff was required to contact Defendant by pager, however, Defendant's pager was no longer in service after March, 2000. Plaintiff was unable to contact the minor child by telephone until the Defendant was ordered to give the Plaintiff her phone number in open court on January 5, 2001. Defendant testified that Plaintiff was not welcome to drop by to see the minor child unannounced.

12. Mr. Young is currently living with his parents, Charles and Patricia Young, who have an established relationship with Ashley. The Court feels that this is a stable environment for the child. Despite the absence of substantial visitation over the last two years, the Court finds that Mr. Young does have a loving relationship with the minor child.
13. It is in the child's best interest that her exclusive care, custody and control be vested with the Plaintiff and the Defendant be given limited visitation.
14. Mr. Young's obligation to pay child support is terminated as of August 17, 2001.
15. It is absolutely not in Ashley's best interest that Benjamin Towery be allowed to bathe or dress her.

Thereafter, the trial court granted exclusive custody of Ashley to plaintiff and granted defendant limited visitation. Plaintiff was also relieved of his obligation to pay child support. Defendant appealed.

On appeal, defendant argues the trial court erred by (I) failing to make sufficient findings of fact to support its order; and (II) abusing its discretion in awarding full custody of Ashley

to plaintiff. For the reasons stated herein, we disagree with defendant's arguments and affirm the order of the trial court.

N.C. Gen. Stat. § 50-13.2(a) (2001) requires that an order for custody of a minor child "shall award the custody of such child to such person . . . as will best promote the interest and welfare of the child."

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.

While the welfare of the child is always to be treated as the paramount consideration, wide discretionary power is vested in the trial judge. The normal rule in regard to the custody of children is that where there is competent evidence to support a judge's finding of fact, a judgment supported by such findings will not be disturbed on appeal. The facts found must be adequate for the appellate court to determine that the judgment is substantiated by competent evidence, however.

Green v. Green, 54 N.C. App. 571, 572-73, 284 S.E.2d 171, 173 (1981) (citations omitted).

In the present case, defendant argues the trial court's order does not contain any findings of fact regarding her relationship with Ashley during the parties' marriage or following their separation, even though she presented testimony from at least three different witnesses, including herself. She argues the lack of such findings indicates that the trial court failed to consider the characteristics of the competing parties as it is required to do in custody cases.

Findings of fact as to the characteristics of the competing parties must be made to support the necessary conclusion of law. These findings may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child.

Steele v. Steele, 36 N.C. App. 601, 604, 244 S.E.2d 466, 468 (1978). Defendant further points out that the trial court made findings about plaintiff's living situation and his relationship with Ashley, but failed to make similar findings for her.

"[T]he findings bearing on the party's fitness to have care, custody, and control of the child and the findings as to the best interests of the child must resolve all questions raised by the evidence pertaining thereto." *In re Kowalzek*, 37 N.C. App. 364, 370, 246 S.E.2d 45, 48, *appeal dismissed, disc. review denied*, 295 N.C. 734, 248 S.E.2d 863 (1978). If a trial court's order fails to address all the critical issues, it may be deemed fatally defective. See *Dixon v. Dixon*, 67 N.C. App. 73, 312 S.E.2d 669 (1984).

Defendant's argument fails to consider that the trial court did make findings regarding her relationship with her daughter. The trial court made several findings of fact regarding the extramarital affair defendant conducted with her current husband while married to plaintiff and noted that Ashley was present when defendant and Mr. Towery were together. The trial court also heard evidence regarding defendant's allegation of sexual abuse against plaintiff, and subsequent testimony from Dr. Williams that defendant fabricated the sexual abuse story. Furthermore, the

trial court made findings regarding defendant's interference with plaintiff's visitation and her refusal to allow plaintiff to see the child for months at a time. While these findings are not set out in the same manner as those regarding plaintiff and are certainly not favorable to defendant, they nonetheless indicate that the trial court considered the evidence before it and made findings of fact that were supported by the evidence.

Defendant also attacks a number of the trial court's findings of fact (Nos. 4 and 9) because she believes them to be conclusory statements expressing the opinion of the trial court. We disagree. Finding of Fact No. 4 summarized the evidence regarding defendant's extramarital affair and concluded with the sentence, "Her conduct showed disrespect for plaintiff and jeopardized the health and welfare of the minor child." This finding of fact is supported by the evidence. Even if the final sentence of Finding of Fact No. 4 was eliminated, the remainder of the finding is supported by the evidence and ultimately supports the trial court's order granting exclusive custody of Ashley to plaintiff. Finding of Fact No. 9 discusses defendant's "negative influence" on the child and the "manufactured allegations" of abuse, which "irreparably damaged" plaintiff's relationship with Ashley. Again, we believe the evidence supported this finding of fact. Finally, defendant argues Finding of Fact No. 15 stating, "It is absolutely not in Ashley's best interest that Benjamin Towery be allowed to bathe or dress her[]" is unsupported by the evidence. We do not agree. Evidence of Mr. Towery's violent and aggressive behavior was presented by

both plaintiff and Mr. Towery's former in-laws. Also, Ashley was badly bruised once and told plaintiff that Mr. Towery caused her bruises. There was also evidence that Mr. Towery used vulgar language and engaged in vulgar behavior in front of Ashley. We believe the trial court's finding of fact is supported by the evidence.

Upon review, the trial court's findings of fact are all supported by the evidence of record and were sufficient to support the order granting custody of Ashley to plaintiff. Accordingly, defendant's first assignment of error is overruled.

By her second assignment of error, defendant argues the trial court abused its discretion by awarding exclusive custody of Ashley to plaintiff. Specifically, defendant contends the trial court lost sight of Ashley's best interests, unduly focused on plaintiff's "character assassination" of Mr. Towery, and took Ashley away from the only home she has ever known. Again, we do not agree.

"Our trial courts have broad discretionary powers in domestic law cases. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason, or that its ruling could not have been the result of a reasoned decision." *Nix v. Nix*, 80 N.C. App. 110, 112, 341 S.E.2d 116, 118 (1986). "The trial judge, who has the opportunity to see and hear the parties and the witnesses, is vested with broad discretion in cases involving custody of children." *Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974). "A trial

court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason, or that its ruling could not have been the result of a reasoned decision." *Nix*, 80 N.C. App. at 112, 341 S.E.2d at 118.

Upon careful review, we conclude the trial court did not abuse its discretion. There was evidence that plaintiff's home (with his parents) was stable and loving, that his family cared for Ashley, and that he had a loving relationship with his daughter. Both defendant's and Mr. Towery's prior behavior were entirely relevant to the custody proceeding and were duly considered by the trial court. Upon review of the transcript and record, we cannot say the trial court abused its discretion in awarding exclusive custody of Ashley to plaintiff. Accordingly, defendant's final assignment of error is overruled.

After examining the order in its entirety, we believe the trial court properly applied the law to the facts before it. Upon careful review of the record and the arguments of the parties, we conclude the trial court's order was supported by the evidence and was reasonable in all respects. The order of the trial court is hereby

Affirmed.

Judge TYSON concurs.

Judge WALKER concurs with separate opinion.

Report per Rule 30(e).

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Plaintiff

v.

Mecklenburg County
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CHRISTY YOUNG (now TOWERY),
Defendant

WALKER, Judge, concurring.

While I concur in this opinion, I write separately to express my concern about the punitive tone of the trial court's order. For example, the order awards plaintiff "exclusive" and "permanent" custody of the child. The "exclusive" feature of the order is manifested in the extremely limited visitation granted to the defendant mother in that she is limited to six hours on Christmas Day, no other holidays and no summer vacation visits. A court order awarding child custody to a party is not "permanent." I would hope our courts would keep in the forefront the best interests of the child, rather than trying to "even the score" between the parents.