

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e) (3) of the North Carolina Rules of Appellate Procedure.

NO. COA05-496

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

DEBORAH JACKSON NAJJAR,
Plaintiff,

v.

Guilford County
No. 03 CVD 5046

ZIAD HASHEM NAJJAR,
Defendant.

Appeal by defendant from an order entered 3 December 2004 by Judge Wendy M. Enochs in Guilford County District Court. Heard in the Court of Appeals 16 November 2005.

Neill A. Jennings, Jr., P.A. for plaintiff-appellee.

Smith, James, Rowlett & Cohen, LLP, by Seth R. Cohen, for defendant-appellant.

BRYANT, Judge.

Ziad Hashem Najjar (defendant/father) appeals an order entered 3 December 2004 denying his Motion in the Cause For Change of Child Custody and Support filed 4 November 2004. For the reasons below we reverse and remand this case for further findings of fact.

Facts & Procedural History

On 12 March 2003 Deborah Jackson Najjar (plaintiff/mother) filed a Complaint against defendant setting out claims, *inter alia*, for custody, child support, post-separation support, alimony and divorce from bed and board. On 9 May 2003, the parties entered into a Consent Order which provided that they have joint custody of

their three minor children, with plaintiff having primary physical custody and defendant having visitation with the minor children every other weekend. The Consent Order also stated that, "Neither party will take one or all of the minor children out of the territorial jurisdiction of the State of North Carolina or the United States without written permission of the other party." All other claims in the Complaint were dismissed with prejudice.

In the summer of 2004, plaintiff agreed to allow defendant to take their children to Jordan to visit his family. While defendant and the children were in Jordan, plaintiff relocated to Texas to accept a teaching position. Defendant returned from Jordan with the children on 4 August 2004, but refused to return the children to plaintiff's custody. On 5 August 2004, plaintiff filed a Motion for Emergency Custody in attempt to have the children returned to her physical custody. The Motion was denied, and the parties were referred to mediation, which was unsuccessful.

On 4 November 2004, defendant filed a Motion in the Cause For Change of Child Custody and Support. Defendant's motion was heard before the Honorable Wendy M. Enochs in Guilford County District Court on 3 December 2004. On 4 December 2004, Judge Enochs entered an order denying defendant's motion, leaving primary physical custody of the children with plaintiff but modifying the visitation arrangements of the initial Consent Order. Defendant appeals.

The dispositive issue in the case *sub judice* is whether the trial court's order makes sufficient findings to support the change

to the visitation. In its Order, the trial court makes the following findings of fact:

10. A substantial change in circumstances has occurred since the entry of the last Order in that the prior Order is no longer functional since the Plaintiff has relocated to Texas.
11. Both parties are fit and proper to have joint legal custody of their three minor children. It is in the children's best interest that the Mother and Father share joint legal custody.
12. The Mother is a fit and proper person to have primary physical custody of the three minor children. It is in the children's best interest that the Mother continue to have primary physical custody of the three minor children as previously ordered.
13. The Father is a fit and proper person to have visitation with the three minor children. It is in the children's best interest that the Father continue to have visitation with the three minor children.

Based upon its finding of a substantial change in circumstances, the trial court subsequently changed defendant's visitation rights:

5. Beginning 2005, the Defendant is to have visitation with the three minor children as follows:
 - a. SUMMERS: Each summer from 4:00 pm on the third Saturday in June until 4:00 on the second Saturday in August.
 - b. WINTER BREAK: Each holiday recess from 4:00 PM on the Sunday after school is dismissed until 4:00 PM on the Saturday before school resumes.
6. The Plaintiff is responsible for transporting the children to and from the

Defendant's home for the above stated visitation periods.

7. The Defendant may visit with the children during their school Spring break recess of even numbered years, so long as he provides the Plaintiff with 30 days notice. He will be responsible for transportation to and from the Plaintiffs home for these visits.

Under section 50-13.7 of the North Carolina General Statutes, a party is required to demonstrate changed circumstances in order to be granted a modification of an existing custody order. N.C. Gen. Stat. § 50-13.7(a) (2003). "The word custody under the statute also includes visitation." *Savani v. Savani*, 102 N.C. App. 496, 505, 403 S.E.2d 900, 906 (1991); see also, *Clark v. Clark*, 294 N.C. 554, 576, 243 S.E.2d 129, 142 (1978). This statutory requirement has been modified by case law such that:

Once the custody of a minor child is determined by a court, that order cannot be altered until it is determined (1) that there has been a substantial change in circumstances affecting the welfare of the child and (2) a change in custody is in the best interest of the child. A party seeking modification of a child custody order bears the burden of proving the existence of a substantial change in circumstances affecting the welfare of the child.

Evans v. Evans, 138 N.C. App. 135, 139, 530 S.E.2d 576, 578-79 (2000) (citations omitted). "The required change in circumstances need not have adverse effects on the child. 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." *Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 98 (2000) (citations and quotations omitted). "[A] substantial change in circumstances

affecting the welfare of a child must be supported by findings of fact based on competent evidence." *White v. White*, 90 N.C. App. 553, 557, 369 S.E.2d 92, 95 (1988).

In the instant case, the trial court found the prior Order was no longer functional because plaintiff moved to Texas. The trial court held this finding to be the substantial change in circumstances required to modify the prior Order. However, the trial court made no findings as to whether this substantial change in circumstances *affected the welfare* of the minor children. "[A] change in a custodial parent's residence is not itself a substantial change in circumstances justifying a modification of a custody decree." *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 78, 418 S.E.2d 675, 679 (1992), *overruled on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998).

"When the [trial] court fails to find facts so that [an appellate c]ourt can determine that the order is adequately supported by competent evidence and the welfare of the child subserved, then the order entered thereon must be vacated and the case remanded for detailed findings of fact." *Crosby v. Crosby*, 272 N.C. 235, 238-39, 158 S.E.2d 77, 80 (1967) (citation omitted); *see also, Browning*, 136 N.C. App. at 425, 524 S.E.2d at 98-99 (vacating the trial court's order when the court found a change in circumstances occurred but did not find "whether plaintiff had met her burden of showing the effect, if any, of such change upon the welfare of the children"). Accordingly, we vacate the trial court's order and remand for further findings of fact. We leave it

to the trial court's discretion to decide whether to hear additional evidence prior to making new findings of fact.

Vacated and remanded for further findings of fact.

Judges CALABRIA and JACKSON concur.

Report per Rule 30(e).