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NO. COA11-514
NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2011

JENNIFER LYNN WEAVER (now PARKER),
Plaintiff,

v.

Cleveland County
No. 04-CVD-1341

ROBERT CLINTON THOMAS, JR.,
Defendant.

Appeal by Plaintiff from order entered 1 December 2010 by Judge Anna F. Foster in Cleveland County District Court. Heard in the Court of Appeals 26 October 2011.

Jeannette R. Reeves, for Plaintiff-Appellant.

Horn, Pack & Brown, P.A., by Becky J. Brown and Carol J. Walsburger, for Defendant-Appellee.

BEASLEY, Judge.

Jennifer Lynn Weaver (Plaintiff) and Robert Clinton Thomas, Jr. (Defendant) were married on 11 July 1998. During their marriage, two children were born to the parties: Robert Clinton Thomas, III (Clint) born 5 December 1998 and Chloie Catherine Thomas (Chloie) born 11 December 2000. On 4 August 2004 Plaintiff filed a complaint, seeking a divorce, primary custody

of the parties' minor children, and child support. On 13 August 2004, the parties entered into a memorandum of judgment which provided for shared legal custody of the children, with Plaintiff retaining primary physical custody. The consent order was entered 10 September 2004. On 9 February 2005, Defendant filed an answer and counterclaim, requesting primary custody of the children. A permanent custody hearing was held on 11 July 2005. Defendant failed to participate in this hearing. On 15 July 2005, the Honorable Larry J. Wilson awarded joint custody with Plaintiff retaining primary physical custody. On 8 June 2010, Defendant filed a motion in the cause asserting that due to a substantial and material change of circumstances, it was in the best interest of the children that he be granted primary legal and physical custody. On 9 June 2010, Defendant filed an amended motion in the cause. On 15 July 2010, Plaintiff filed a reply to the motion in the cause, and a motion to dismiss. By order entered 1 December 2010, the trial court granted Plaintiff and Defendant joint legal custody, and Defendant primary physical custody beginning 28 December 2010. From this order, Plaintiff now appeals.

I.

Plaintiff first argues that the trial court erred in making findings of fact that were not supported by competent evidence. We disagree.

It is a long-standing rule that the trial court "is vested with *broad* discretion in cases concerning the custody of children." *In re Peal*, 305 N.C. 640, 645, 290 S.E.2d 664, 667 (1982). It is the trial court that "has the opportunity to see the parties in person and to hear the witnesses," and thus "can detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges." *Pulliam v. Smith*, 348 N.C. 616, 625, 501 S.E.2d 898, 902-03 (1998) (citations and internal quotation marks omitted). Thus, "the trial court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." *Id.* at 625, 501 S.E.2d at 903 (internal quotation marks and citations omitted).

Specifically, Plaintiff challenges four of the trial court's findings of fact. We will address each in turn. First, Plaintiff addresses Finding of Fact Number 3, where the trial court found that Defendant has advanced in his career of management recruiting. The evidence showed that in the time

since the 2005 order, Defendant had obtained a job with Management Recruiters International, and later started his own recruiting business. Plaintiff contends that Defendant's yearly salary declined from 2008 to 2009. However, the record, as found in Finding of Fact Number 40, shows that in the other years since the 2005 order was entered, Defendant's earnings increased. Thus we reject Plaintiff's argument. Plaintiff's argument is overruled.

Plaintiff next attacks Finding of Fact Number 11, where the trial court found that Defendant's current wife, the children's stepmother, participates in extracurricular activities with the children. Plaintiff argues that Defendant's wife has not attended any of Chloie's cheerleading competitions. However, Defendant's wife testified that she and Defendant spent time camping, baking, swimming, and boating with the children. This testimony supports the trial court's Finding of Fact Number. 11, and Plaintiff's argument is overruled.

Plaintiff also attacks Finding of Fact Number 14, which states that her current husband, the children's stepfather, used vulgar language in addressing Defendant on the phone while the children were in the house, and that based on the size of the house, the trial court had no doubt that the children heard this

inappropriate language. Plaintiff asserts that this finding was based on mere speculation, but the record shows that the trial court was shown multiple pictures of Plaintiff's home, pictures that Plaintiff herself stated was fair and accurate depictions of the home. Thus there was competent evidence from which the trial court could find that based on the size of the home, the children must have heard the vulgar language their stepfather directed at their father.

The last Finding of Fact that Plaintiff attacks is Number 18, where the trial court found that in August 2010, the stepfather referred to Defendant by a vulgar name in open court, and that there was a significant lack of remorse, or explanation for the inappropriateness of that language. The parties disagree as to whether it was Plaintiff or the stepfather whom the court found was lacking remorse, but there is competent evidence in the record that neither showed any. Plaintiff's husband did not testify at trial, but the record shows that he has referred to Defendant using a particular vulgar name on multiple occasions. Plaintiff testified, and when asked specifically about this incident she did not appear remorseful. Nor did she suggest that her husband was remorseful. Instead, she defended her husband's actions, pointing out that the

children were not in the room when the comment was made, and stating: "I will say that [my husband] does not like Robert and, you know, I don't know."

Finally, Plaintiff alleges that the trial court failed to make any findings of fact specific to Chloie. This argument is without merit. The majority of the findings of fact refer to the best interest of both children.

II.

Plaintiff next argues that the trial court erred in concluding that there had been a substantial change in circumstances affecting the best interests and welfare of the children. We disagree.

"It is well established in this jurisdiction that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a substantial change of circumstances affecting the welfare of the child warrants a change in custody." *Shipman v. Shipman*, 357 N.C. 471, 473, 586 S.E.2d 250, 253 (2003) (internal quotation marks and citations omitted). Appellate courts review a decision to grant a motion to modify an existing custody order by examining the lower court's findings of fact "to determine whether they are

supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 474, 586 S.E.2d at 253 (internal quotation marks and citation omitted). "The decision of the trial judge in child custody proceedings ought not to be upset on appeal absent a clear showing of abuse of discretion." *King v. Demo*, 40 N.C. App. 661, 668, 253 S.E.2d 616, 621 (1979).

The trial court found a number of changed circumstances since the entry of the 11 July 2005 custody order, notably (1) Defendant remarried, and his relationship with his current wife had been a positive relationship for the children, (2) Defendant was an "appropriate disciplinarian" for Clint, and made "significant efforts to address" the angry and undisciplined behavior Clint exhibited while living with Plaintiff in 2008, and (3) Plaintiff neglected to discipline Clint for some of his misbehaviors occurring during 2010. Since 2005 the children have gained, and bonded with their stepmother, and Clint had begun exhibiting misbehaviors at home and at school, that Defendant had significant success in resolving. Given these findings, it is clear that the trial court did not abuse its discretion when it modified the custody order.

III.

Plaintiff's final argument is that the trial court erred in concluding modification of the custody order was in the best interest of the children. In support of this argument, Plaintiff references the two-prong test that the trial court implements to evaluate whether a custody order should be modified: (1) "whether there was a change in circumstances . . . [that] affected the minor child[ren]" and (2) "whether a change in custody is in the child[ren]'s best interests." *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253. Plaintiff then asserts that because the trial court erred in finding a change in circumstances that affected the children, it erred by changing custody. We have already concluded in Section II, *supra*, that the trial court's analysis of the first prong was not in error. Plaintiff does not advance any argument that the change in custody was not in the children's best interests. Plaintiff does note that the order fails to state the reason a modification is in the children's best interest, citing our Supreme Court's opinion in *Shipman* for the proposition that such a statement is needed. *Shipman* does indeed encourage the trial court to include such an explanation, but does not require it. Accordingly, this argument is overruled.

Affirmed.

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Judges STEELMAN and GEER concur.

Report per Rule 30(e).