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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-743

Filed: 21 February 2017

Halifax County, No. 11 CVD 1203

JAMES RUSSELL LYNN, Plaintiff,

v.

NANCY ELIZABETH FUTRELL, Defendant.

Appeal by defendant from order entered 7 March 2016 by Judge Brenda G. Branch in Halifax County District Court. Heard in the Court of Appeals 10 January 2017.

*No brief filed for plaintiff-appellee.*

*Pritchett & Burch, PLLC, by Lloyd C. Smith, III, for defendant-appellant.*

DIETZ, Judge.

Defendant Nancy Futrell appeals from the trial court's custody modification order, which awarded primary physical custody of her son to Plaintiff James Lynn, her son's biological father. The parties previously had joint physical and legal custody of their son. Futrell moved to modify custody based on a substantial change in circumstances after she and Lynn were unable to agree on the school in which their son should enroll. Futrell sought to enroll their son in a small private school. Lynn

sought to keep their son in his current public school, which Lynn contended was better able to address his special needs.

After a hearing, the trial court agreed with the parties that there was a substantial change in circumstances and awarded physical custody to Lynn. Futrell appealed. As explained below, we hold that the trial court's order lacks necessary findings to support its best interests determination and therefore vacate the order and remand for further proceedings consistent with this opinion.

### **Facts and Procedural History**

Plaintiff James Lynn and Defendant Nancy Futrell are the parents of a minor son. Though never married, the parties shared joint physical and legal custody of the child.

At some point before the beginning of the 2015-2016 school year, Futrell told Lynn that she wanted to remove their son from the public school he attended and enroll him in small, private elementary school with unconventional teaching methods. Lynn objected.

As a result of this dispute, Futrell moved to modify the existing custody order. Following a hearing, the trial court entered an order awarding Lynn primary physical custody, while maintaining the parties' joint legal custody. Futrell timely appealed.

### **Analysis**

Futrell asserts two arguments on appeal. First, she argues that the trial court's order does not support its determination of a substantial change in circumstances. Second, she argues that the trial court's order does not support its determination that custody modification was in her son's best interests. We address these arguments in turn.

#### **I. Substantial Change in Circumstances**

Futrell first challenges the trial court's determination that there was a substantial change in circumstances. Under controlling precedent from this Court, Futrell's arguments on this ground are waived on appeal. *See Green v. Kelischek*, 234 N.C. App. 1, 759 S.E.2d 106 (2014).

In *Green*, a mother moved to modify custody based on her remarriage and her desire to take her son out-of-state where, she contended, he would have a better quality of life. *Id.* at 6, 759 S.E.2d at 110. She also wanted to homeschool her son. *Id.* at 4, 759 S.E.2d at 109. At the hearing on the mother's motion, the trial court agreed with her argument that there had been a substantial change of circumstances. *Id.* But the trial court's modified custody award did not give the mother what she wanted—it provided that, if the mother moved away from North Carolina, the father would be given custody during the school year. *Id.* at 4–5, 759 S.E.2d at 109.

The mother appealed, arguing that the trial court's order failed to establish a substantial change in circumstances. *Id.* at 6, 759 S.E.2d at 110. We held that this argument was waived because the mother moved to modify the order based on a substantial change in circumstances:

Plaintiff was the movant below and specifically asked the trial court to conclude that a substantial change in circumstances had taken place based on her remarriage and proposed relocation to Oregon. However, because the trial court's subsequent best interests determination did not go as Plaintiff anticipated, Plaintiff now seeks to assert an inconsistent legal position on appeal in order to avoid the modified custody plan set forth in the trial court's order. This she cannot do.

*Id.*

We are unable to distinguish this case from *Green*. Like the plaintiff in *Green*, Futrell moved to modify the parties' custody arrangement and asserted in the trial court that there was a substantial change in circumstances. And, as in *Green*, the trial court agreed that there were changed circumstances, but "the trial court's subsequent best interests determination did not go as [Futrell] anticipated." *Id.* Panels of this Court are bound to follow existing precedent, and thus we are bound to follow *Green*. See *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Under *Green*, Futrell waived her ability to challenge the trial court's substantial change in circumstances determination on appeal.

## **II. Best Interests of the Child**

We next turn to the trial court’s determination concerning the child’s best interests. As explained below, we agree with Futrell that the trial court’s order lacks necessary findings and therefore vacate and remand the order.

We review a trial court’s determination that modification is in a child’s best interests for abuse of discretion. *Metz v. Metz*, 138 N.C. App. 538, 541, 530 S.E.2d 79, 81 (2000). Accordingly, the trial court’s ruling will only be disturbed on appeal upon a showing that it was “manifestly unsupported by reason . . . [or] so arbitrary that it could not have been the result of a reasoned decision.” *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Critically, however, “a lack of specificity of facts underlying the trial court’s decision [as to the child’s best interests can] necessitate a reversal of the modification order.” *Stephens v. Stephens*, 213 N.C. App. 495, 503, 715 S.E.2d 168, 174 (2011).

Here, the crux of the trial court’s best interests determination concerned Futrell’s proposal to enroll her son in a private school. The trial court made a number of evidentiary findings concerning the unconventional nature of that school, including that “[t]his school has approximately eighteen students from second grade to twelfth grade”; that “[a]ll of the students complete their instruction in the same classroom”; that “there are one to two teachers” and those teachers “do not possess four-year degrees”; that the education program is “self-directed” with the teachers “available to

answers questions if necessary”; and that the school has “no team sports or extracurricular activities” and “no school nurse.”

The trial court also made a series of evidentiary findings concerning the special educational needs of Futrell’s son, including that her son “is struggling in reading and math” in his current public school; that he “experienced educational difficulties in prior years”; that he is currently being evaluated for learning disabilities and would be entitled to special tutoring and assistance in his current public school if diagnosed with learning disabilities; and that he suffers from some medical issues, including a “seizure disorder.”

Finally, the trial court found that Lynn and Futrell had an irreconcilable disagreement concerning their son’s schooling, with Futrell insisting that her son attend the private school (which Futrell’s older daughter currently attends) and Lynn insisting that his son remain in his current public school because of concerns that the private school could not address his son’s special needs.

One could certainly infer from these findings that the trial court agreed with Lynn and thus determined that it was in the child’s best interests to award Lynn primary physical custody so that he could remain enrolled in his current public school. But the trial court did not make that finding, and this Court is not permitted to infer critical ultimate findings that the trial court never actually made. *See In re I.R.C.*, 214 N.C. App. 358, 363–64, 714 S.E.2d 495, 499 (2011).

Likewise, this Court repeatedly has held that “[i]t is not sufficient that there may be evidence in the record sufficient to support findings that could have been made.” *Greer v. Greer*, 101 N.C. App. 351, 355, 399 S.E.2d 399, 402 (1991). Because the trial court’s order lacks a finding that the private school in which Futrell intended to enroll her son cannot accommodate his special needs, the trial court’s order lacks findings necessary to support its conclusion of law concerning the child’s best interests. Accordingly, we are constrained to vacate the order and remand for additional findings of fact that support the trial court’s modification of custody. *See Evans v. Evans*, 138 N.C. App. 135, 141–42, 530 S.E.2d 576, 580 (2000).

We emphasize that our holding does not mean the trial court’s ruling, carefully made after a full hearing, lacks support in the record. We hold only that the order lacks findings necessary to support its best interests determination. On remand, the trial court is free to decide, in its discretion, whether an additional hearing is necessary, or whether the order may be supplemented with additional findings concerning the child’s best interests without the need for additional evidence or argument from counsel. *See Hicks v. Alford*, 156 N.C. App. 384, 388–89, 576 S.E.2d 410, 413–14 (2003).

### **Conclusion**

We vacate the trial court’s order and remand for further findings consistent with this opinion.

LYNN V. FUTRELL

*Opinion of the Court*

VACATED AND REMANDED.

Judges BRYANT and HUNTER, JR. concur.

Report per Rule 30(e).