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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-248

Filed: 3 October 2017

New Hanover County, No. 16 CVD 107

EDWIN CLARY BARTLETT, JR., Plaintiff,

v.

CARRIE LYN BARTLETT, Defendant,

v.

EDWIN C. BARTLETT, SR. and SANDRA I. BARTLETT, Paternal Grandparents  
and Third Party Defendants.

Appeal by defendant from order entered 26 August 2016 by Judge Melinda H.  
Crouch in New Hanover County District Court. Heard in the Court of Appeals  
7 September 2017.

*J. Albert Clyburn for plaintiff and third-party defendant-appellees.*

*The Lea/Schultz Law Firm, P.C., by James W. Lea, III, for defendant-appellant.*

ARROWOOD, Judge.

Carrie Lyn Bartlett (“defendant”) appeals from a permanent child custody order, granting joint legal and physical custody of the minor children to Edwin Clary

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Bartlett, Jr. (“plaintiff”) and defendant, and visitation to Edwin C. Bartlett, Sr. and Sandra I. Bartlett (“third-party defendants”). Defendant contends on appeal that the trial court abused its discretion by including a provision that prescribed a week on/week off child custody arrangement in the year 2020. For the reasons stated herein, we affirm the order of the trial court.

I. Background

Plaintiff and defendant were married on 7 September 2007. They had three children: Edie, born in 2009; Wynn, born in 2011; and Walker, born in 2014 (collectively the “minor children”). On 28 September 2015, plaintiff and defendant separated.

On 11 January 2016, plaintiff filed a complaint against defendant alleging claims for child custody, child support, and equitable distribution. On 21 January 2016, defendant filed an answer and counterclaims for child custody, child support, post-separation support, alimony, equitable distribution, motion to sequester the marital residence and motion for temporary custody schedule, and attorney’s fees.

On 16 February 2016, third-party defendants filed a motion to intervene, seeking grandparent visitation rights pursuant to N.C. Gen. Stat. §§ 1A-1, Rule 24 and 50-13.2.

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A consent order was entered on 29 March 2016 whereby plaintiff and defendant agreed to undergo psychological evaluations given by Dr. Jerry Sloan (“Dr. Sloan”), with the costs advanced by plaintiff. The order provided that Dr. Sloan

shall focus the evaluation on the mental health issues that affect each parent’s ability to appropriately parent the minor children, including the strengths and weaknesses of each parent’s parenting style, the health, safety and welfare of the minor children, each parent’s ability to make decisions regarding healthcare, education and other important issues affecting the children, and other concerns that may arise during the evaluation process.

Dr. Sloan was to send his report to the trial court and each attorney.

On 30 March 2016, the trial court entered an “Order Granting Motion in the Cause for Grandparents to Intervene (N.C. Gen. Stat. §§ 50-13.2 and 50-13.5).” On 6 April 2016, third party defendants filed a “Motion in the Cause for Grandparent Visitation (N.C. Gen. Stat. §§ 50-13.2 and 50-13.5).”

On 14 June 2016, plaintiff filed a “Motion in the Cause (Appoint Parenting Coordinator)[,]” moving the court for an order to appoint a parenting coordinator pursuant to N.C. Gen. Stat. § 50-90 *et seq.* On 20 June 2016, defendant filed a response to plaintiff’s motion and an amended response on 15 July 2016.

On 9 August 2016, defendant filed a “Motion Pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure[,]” moving for an order allowing the minor children to attend Wrightsville Beach Elementary. On 15 August 2016, plaintiff filed a motion to dismiss defendant’s Rule 59 and 60 motion.

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Following a hearing held on 27-29 July 2016, the trial court entered an “Order (Permanent Custody, Grandparent Visitation; Deny Attorney’s Fees Deny Appointment of Parenting Coordinator)” on 26 August 2016. The trial court ordered, *inter alia*, that plaintiff and defendant share joint legal and physical custody of the minor children. The trial court set out a custody schedule that began with the minor children spending more time with defendant and then set out a schedule that gradually increased the amount of time plaintiff had with the minor children until the parties shared custody on a week on/week off basis beginning with the 2020 school year (the “week on/week off provision”). Third party defendants were also awarded visitation with the minor children during plaintiff’s custodial periods as mutually agreed.

Defendant appeals.

## II. Discussion

The sole issue on appeal is whether the trial court abused its discretion by including the week on/week off provision in its permanent custody order.

Chapter 50 of the North Carolina General Statutes provides: “An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child.” N.C. Gen. Stat. § 50-13.2(a) (2015).

In fulfilling this directive, a district court retains significant discretion: The statute expresses the policy of

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the State that the best interest and welfare of the child is the paramount and controlling factor to guide the judge in determining the custody of a child. . . .

In upholding the order of the [district] court we recognize that custody cases generally involve difficult decisions. The [district court] judge has the opportunity to see the parties in person and to hear the witnesses. It is mandatory, in such a situation, that the [district court] judge be given a wide discretion in making his determination, and it is clear that his decision ought not to be upset on appeal absent a clear showing of abuse of discretion.

*Kanellos v. Kanellos*, \_\_ N.C. App. \_\_, \_\_, 795 S.E.2d 225, 231 (2016) (citing *In re Stancil*, 10 N.C. App. 545, 548, 179 S.E.2d 844, 847 (1971)).

“In a child custody case, the trial court’s findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings. . . . Unchallenged findings of fact are binding on appeal. Whether [the trial court’s] findings of fact support [its] conclusions of law is reviewable *de novo*.” *Burger v. Smith*, \_\_ N.C. App. \_\_, \_\_, 776 S.E.2d 886, 889 (2015) (internal citations and quotation marks omitted).

We note that defendant does not challenge any findings of fact and so the trial court’s findings are conclusively established on appeal. Therefore, the issue before this Court is whether the trial court’s findings of fact support its conclusions of law and the week on/week off decree.

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The crux of defendant's argument is that the week on/week off provision should be "null and void" because "the trial court has attempted to predict a future change in circumstances" rather than entering an order based on the circumstances as they existed at the time of the hearing. We disagree.

Defendant relies on *Stanback v. Stanback*, 266 N.C. 72, 145 S.E.2d 332 (1965), for her argument. In *Stanback*, the North Carolina Supreme Court stated that "[a] judgment awarding custody is based upon the conditions found to exist at the time it is entered." *Id.* at 76, 145 S.E.2d at 335. Our Courts have also stated that "[t]he welfare of the child at the time the contest comes on for hearing is the controlling consideration." *In re Bowen*, 7 N.C. App. 236, 242, 172 S.E.2d 62, 65 (1970) (citation omitted). "This requires a prospective outlook by the court." *Smithwick v. Frame*, 62 N.C. App. 387, 393, 303 S.E.2d 217, 221 (1983).

Here, the trial court was not predicting a future change in circumstances. Rather, the record indicates that the trial court fashioned a custody plan that was in accordance with the recommendations provided by Dr. Sloan through his testimony and written report, both of which were submitted at the custody hearing. The unchallenged findings of fact indicate that on 29 March 2016, Dr. Sloan was appointed to evaluate the parenting styles of both plaintiff and defendant and "to determine if any parenting issues exist that impair either Parent's ability to provide consistent, nurturing care for the children." Dr. Sloan had identified some issues for

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plaintiff related to his failure to maintain close supervision over the minor children on a few occasions and his relative inexperience in caring for all three minor children for extended periods of time. Nevertheless, Dr. Sloan stated “that in time he has no doubt that a 50/50 arrangement would be ideal in this situation.” Defendant was found to be a “fairly anxious woman who is a very overprotective parent[]” and had previously restricted plaintiff’s access to the children. Dr. Sloan concluded that for now, the children would benefit from spending more time with defendant, “especially Walker, who is now 2 and ½ years old, with an expansion of time for Plaintiff Father until the physical custody arrangement is 50/50.”

Based on the foregoing findings, the trial court concluded that it was in the best interest of the children for plaintiff and defendant to share joint legal and physical custody as follows:

2. For the next two years, Plaintiff Father shall have the following designated regular custodial periods:
  - a. Week 1. Plaintiff Father shall have custody of Edie Brooke and Wynn from Thursday at 3:00 p.m. (or when school recesses) until Sunday at 1:00 p.m.; and he shall have custody of Walker from Friday when school recesses (or 3:00 p.m. if school is not in session) until Sunday at 1:00 p.m.
  - b. Week 2 (commencing July 31, 2016). Plaintiff Father shall have custody of Walker from the next Thursday at 9:00 a.m. to 5:00 p.m. and Edie Brooke and Wynn from Thursday at 3:00 p.m. (or when school recesses) until Thursday at 5:00 p.m.; and he shall have custody of all three children from Sunday at 9:00 a.m. until 1:00 p.m. If any of the children are not in school on Thursdays, then all of the children

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who are not in school shall be with Plaintiff Father from 9:00 a.m. until 5:00 p.m. on Thursdays.

- c. Unless the parties otherwise agree, Walker will not spend more than two consecutive nights away from Defendant Mother at any time until his fifth birthday on February 28, 2019. From his fifth birthday until he begins first grade, Walker will not spend more than three consecutive nights away from Defendant Mother. When he begins first grade Walker shall be on the same schedule as the older two children. For Plaintiff Father's custodial periods longer than two or three overnights, Walker shall return to Defendant Mother for two overnights and then resume his time with Plaintiff Father. These time limits for Walker apply for all holiday and summer vacation periods until he starts first grade.
- d. Beginning with the 2020 school year, the Parents shall share custody on a week on/week off basis with exchanges on Sunday at 1:00 p.m.

After careful review, we find that the trial court considered the welfare of the minor children based on the circumstances at the time of the hearing and employed a prospective outlook into formulating a custody schedule. The trial court's findings of fact support its conclusion that plaintiff and defendant share joint legal and physical custody and that a custody schedule gradually increasing plaintiff's time with the minor children until the week on/week off provision takes effect in 2020 would serve the minor children's best interests.

Defendant also argues that through the week on/week off provision, the trial court has "forecasted future speculation that the parties and their children will be in a position to maintain an equal custody schedule" in 2020. Defendant also asserts

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that through this provision, the trial court has shifted the burden from plaintiff to defendant to demonstrate that the week on/week off provision is not in the best interests of the children, essentially a “reverse modification.”

In *Stanback*, the Court stated that although a custody order is based upon the conditions found to exist at the time it is entered,

[t]he judgment is subject to such change as is necessary to make it conform to changed conditions when they occur. In a bitter controversy between separated parents over the custody of children, one is usually dissatisfied with the award. The aggrieved party, however, must appeal to the Supreme Court, or must wait for a more favorable factual background in which to demand another hearing by motion in the cause.

266 N.C. at 76, 145 S.E.2d at 335.

If defendant finds that in or about 2020, the week on/week off custody arrangement is not feasible or circumstances have rendered a change in custody advisable, she can seek a modification at that time. *See Shipman v. Shipman*, 357 N.C. 471, 473, 586 S.E.2d 250, 253 (2003) (stating that a party may seek modification of a custody order if there is a substantial change of circumstances affecting the welfare of the child); *see also* N.C. Gen. Stat. § 50-13.7(a) (2015) (“[A]n order of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested.”).

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For the reasons stated above, we hold that the trial court did not abuse its discretion by entering the week on/week off provision in its permanent custody order.

AFFIRMED.

Judges HUNTER, JR. and DILLON concur.

Report per Rule 30(e).