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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-332

Filed: 6 February 2018

Rockingham County, No. 12 CVD 1455

KEELIA M. FAIRCLOTH, Plaintiff,

v.

SANDY W. FAIRCLOTH, Defendant.

Appeal by plaintiff from order entered 27 September 2016 by Judge James A. Grogan in Rockingham County District Court. Heard in the Court of Appeals 19 September 2017.

Law Office of Cathy R. Stroupe, P.A., by Cathy R. Stroupe, for plaintiff-appellant.

No brief was filed on behalf of defendant.

BRYANT, Judge.

Where the trial court's unchallenged findings of fact support its conclusion of law that there had not been a substantial change in circumstances affecting the welfare of the minor child, we affirm the trial court order denying plaintiff's motion to modify the prior child custody order.

Plaintiff Keelia M. Faircloth and defendant Sandy W. Faircloth were married on 16 September 2000 and separated on 3 June 2012. Their marriage produced two children, Cara (born September 2001) and Kevin (born June 2006).[1] Both children were born prematurely and exhibited a number of health issues. From their birth until 2010, the children resided in the marital home. From 2010 until the first child custody hearing, the children resided primarily with plaintiff in the residence of plaintiff's mother, which was next door to the marital home. The child custody hearing was held in Rockingham County District Court before the Honorable James A. Grogan. In an order entered 25 August 2014, Judge Grogan awarded defendant primary custody and plaintiff visitation.[2]

The issue of custody was again brought before Judge Grogan. In an order entered on 13 April 2016 *nunc pro tunc* 25 August 2014 (hereinafter the "13 April 2016 order") the court found that both Cara and Kevin had individualized education plans and that plaintiff had obtained training in special education. However, both children were behind in school and both missed more than twenty days of school in the previous school year (some absences due to medical appointments). In 2010, plaintiff and the children moved into the residence of plaintiff's mother, a two

[1] Pursuant to Rule 3.1(b), pseudonyms have been used to protect the identity of the minor children.

[2] Plaintiff appealed the 25 August 2014 order to this Court, and this Court vacated the order and remanded the matter per opinion, *Faircloth v. Faircloth*, No. COA15-179, 2015 WL 5825566 (N.C. Ct. App. Oct. 6, 2015) (unpublished).

bedroom, one bathroom home. One of the bedrooms was not usable due to clutter. Plaintiff and one child slept in the living room: the child slept on the floor, and plaintiff slept in a recliner. The second child slept in a bedroom with her maternal grandmother. The court found that the residence also housed three dogs, one cat, and at least one bird. "There [was] often feces and urine from these animals on the floor of the home. The home [was] full of clutter and poorly kept." Plaintiff collected disability as did her mother.

As to defendant, the court found that he would help with the care of the children when he was not working. Defendant accepted a new, better job and moved from Rockingham County to Carteret County in August 2010; plaintiff did not relocate with him. Meanwhile, defendant remarried and at the time of the 2016 court hearing, lived with his wife and four-month-old daughter in a three-bedroom home in Beaufort. Defendant's home was clean and well kept, and both Cara and Kevin had their own room. When they stayed with defendant, both children slept by themselves. Defendant also identified schools the children would attend if they were in his custody. Defendant met with some of the minor children's teachers and helped the children with their homework when they visited him. Defendant also gave the children their medication when they were with him. Defendant arranged a pediatrician for the children in Morehead City and had made appointments for the children with the doctor. Defendant has been through the firefighter academy and is

a trained paramedic. The court found that when with defendant, the children did not exhibit behavioral issues to the extent they did when with plaintiff.

Defendant called on a nearly daily basis, but plaintiff only answered defendant's calls three or four times a month. At the time of the hearing, defendant did not know the extent of the medical and behavioral services the children were receiving due to plaintiff's lack of communication, such that defendant did not know who the children's current medical and behavioral providers were. The court found that defendant was willing and able to address the children's medical and mental health needs. Based on the findings of fact set out in its 13 April 2016 order, the court concluded that defendant was "a fit and proper person to exercise primary care custody and control of the minor children and such an award of custody [wa]s in the best interest of the minor children."

On 4 May 2016, plaintiff filed a motion for an expedited modification of the 13 April custody order. Plaintiff asserted that following the court's award of custody to defendant, defendant became dismissive of plaintiff's concerns about the children's medical issues/care, telling her "there is nothing wrong with them." Plaintiff asserted that defendant had taken the children off their medication without medical guidance. Plaintiff quoted defendant as saying, "[A]ll the issues [plaintiff] stated in court that both children had, they no longer have. . . . [O]ur kids . . . [a]re no longer on any of the 9 medications that they were on since I took custody." Plaintiff's motion also

asserted that on 3 April 2015, the children came to visit plaintiff. Two days later, Cara was seen at Morehead Hospital and then transferred to Brenner's Children's Hospital, a part of Wake Forest Baptist Health. After five days in the hospital, she was diagnosed with a small bowel obstruction and SAP virus. Plaintiff asserted that when she informed defendant that Cara was in the hospital, he replied, "[s]ap virus [i]s a gastrointestinal virus," and did not come to visit Cara in the hospital. Cara was discharged on 10 April 2015. On 13 April 2015, Cara suffered a relapse. Plaintiff again took her to Morehead Hospital, where she was airlifted to Brenner's Children's Hospital. She was nonresponsive and immediately taken into surgery for intestinal perforation. Cara died from septic shock due to intestinal perforation. Plaintiff asserted that defendant ignored Cara's lifelong conditions and, as a result, ignored the conditions that caused Cara's death. Plaintiff further asserted that Kevin was devastated by Cara's death and "has expressed fear of his father." Plaintiff moved for a modification of the custody order in order to acquire primary legal and physical custody of Kevin.

A hearing on plaintiff's motion for modification was held before Judge Grogan during which both plaintiff and defendant were present and each represented by counsel. In an order entered 27 September 2016, the court found that plaintiff's accusations that defendant had been dismissive of plaintiff's concerns regarding the children's medical care were unfounded. "Plaintiff did not attempt to communicate

with . . . [d]efendant about medical issues because she did not believe . . . [d]efendant would be agreeable to discuss such issues based upon her prior knowledge and encounters with [d]efendant . . . ." The court further found that defendant did not remove medications from the children's medication regimen without consulting a medical professional. Defendant reduced the children's medication regimen with the assistance and guidance of a pediatric physician, who testified at trial as an expert in the field of pediatrics. "Defendant sought the aid[] of medical professionals during his custodial time and made no unilateral or summary decisions without first seeking professional advice and opinions concerning the course of care required for the minor children." The court found that removing the children from their medication regimen would not have caused any long term and/or detrimental effects to the children's welfare. Moreover, the court found there was nothing that either defendant or plaintiff could have done to prevent Cara's death. As to the accusation that defendant did not visit Cara during her five-day hospital stay ending 10 April 2015, the court found that defendant was not contacted about Cara's hospital admission until the child had been discharged. The court found that as to Kevin, "[d]efendant has not ignored or acted with indifference to [his] . . . medical needs . . . ." The court found that plaintiff unilaterally denied defendant access to Kevin after 3 April 2015 (when Kevin came to visit plaintiff during his school's spring break), by blocking defendant's phone number, refusing to allow defendant to communicate with Kevin, making

statements that defendant was responsible for Cara's death, and interfering with communication between defendant and Kevin's teacher. Plaintiff conceded in open court that she hindered defendant's communication with the children. The court also found that plaintiff did not take Kevin to attend school from 3 April 2015 until commencement of the August 2015 school term. As of the entry of the court's order, the children were substantially behind in their educational functionality. The court found that while in defendant's care, the children remained behind in their educational performance but had made great strides. "Defendant took extraordinary care to address any educational and/or health care needs of both minor children." Teachers for the minor children characterized both defendant and his wife as loving and attentive to the minor children. Based on these findings, the trial court concluded that there was "no substantial change of circumstances that affect[ed] the welfare of the minor child [Kevin]." Accordingly, plaintiff's motion was denied. Plaintiff appeals.

On appeal, plaintiff argues that the trial court erred by (I) failing to find that there had been a substantial change of circumstances that affected the welfare of the minor child; and (II) failing to make sufficient findings regarding the best interests of the child.

Standard of Review

"The entry of an Order in a custody matter does not finally determine the rights of parties as to the custody, care and control of a child, and when a substantial change of condition affecting the child's welfare is properly established, the Court may modify prior custody decrees." *Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974) (citations omitted). "A determination of whether there has been a substantial change of circumstances is a legal conclusion, which must be supported by adequate findings of fact." *Hibshman v. Hibshman*, 212 N.C. App. 113, 121, 710 S.E.2d 438, 443–44 (2011) (citation omitted). "[And] if the trial court does indeed determine that a substantial change in circumstances affects the welfare of the child, it may only modify the existing custody order if it further concludes that a change in custody is in the child's best interests." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (citation omitted).

"Our trial courts are vested with broad discretion in child custody matters." *Id.* (citation omitted). "Our review of a trial court's decision to modify an existing child custody order is limited to determining (1) whether the trial court's findings of fact are supported by substantial evidence; and (2) whether those findings of fact support its conclusions of law." *Spoon v. Spoon*, 233 N.C. App. 38, 41, 755 S.E.2d 66, 69 (2014) (citing *Shipman*, 357 N.C. at 474–75, 586 S.E.2d at 253–54). "[T]he 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." *Peters v. Pennington*, 210 N.C. App. 1, 12–13, 707 S.E.2d 724, 733 (2011) (citations omitted). "Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal." *Everette v. Collins*, 176 N.C. App. 168, 171, 625 S.E.2d 796, 798 (2006) (citation omitted).

I

Plaintiff argues that the trial court erred in finding that there had not been a substantial change of circumstances that affected the welfare of the minor child since entry of the trial court's 13 April 2016 child custody order. Plaintiff contends that Kevin had lived with her for all but seven months of his life, and that for a period of sixteen months, Kevin had no contact with defendant. Plaintiff argues that given Kevin's special needs, removing Kevin from his school, his friends, and familiar surroundings following Cara's death, and returning him to defendant would amount to a substantial change for Kevin. We disagree.

"The party moving for modification bears the burden of demonstrating that . . . a [substantial] change has occurred." *Hibshman*, 212 N.C. App. at 120, 710 S.E.2d at 443 (citation omitted).

In its 27 September 2016 order, in which the trial court reviewed the allegations made in plaintiff's motion for an expedited modification of the prior custody order against the evidence presented in support of the motion, the trial court

found multiple instances during which plaintiff deliberately failed to communicate with defendant regarding the welfare of the minor children: plaintiff failed to "attempt to communicate with . . . [d]efendant about medical issues because she did not believe . . . [d]efendant would be agreeable to discuss such issues"; plaintiff failed to notify defendant that his minor child Cara had been admitted to Brenner's Children's Hospital for five days until after her discharge; and plaintiff unilaterally denied defendant access to his minor children after 3 April 2015 by blocking defendant's phone number, refusing to allow defendant to communicate with Kevin, and interfering with communication between defendant and Kevin's school teacher. Moreover, when the minor children came to visit plaintiff during spring break beginning 3 April 2015, plaintiff kept Kevin out of school until the start of the term beginning August 2015. The court found that the minor children were substantially behind in their educational functionality.

As to defendant, the court found that the educational needs of the children were met while in defendant's custody and that "great strides and improvements were made during the custodial time that the minor children spent with . . . [d]efendant." The court found that "[d]efendant took extraordinary care to address any educational and/or health care needs of both minor children." "Defendant sought the aid[] of medical professionals during his custodial time and made no unilateral or summary decisions without first seeking professional advice and opinions concerning

the course of care required for the minor children." In addition, while in defendant's custodial care, "teachers for the minor children characterized and observed that both . . . Defendant and his wife, were very loving and attentive to the minor children."

The trial court's unchallenged findings are binding on appeal, *see Peters*, 210 N.C. App. at 13, 707 S.E.2d at 733, and indicate that plaintiff acted to isolate Kevin from those who cared for and supported him, while defendant consistently provided a supportive relationship and worked with the minor child's physicians and teachers to help him progress. As defendant had been awarded primary custody pursuant to the court's 13 April 2016 custody order, the court's findings in its 27 September 2016 order support its conclusion that there had been no substantial change of circumstances as to the welfare of the minor child, Kevin. Therefore, plaintiff failed to meet her burden of proof, *see Hibshman*, 212 N.C. App. at 120, 710 S.E.2d at 443, and the trial court's order denying plaintiff's motion to modify custody was properly within its discretion. *See Shipman*, 357 N.C. at 474, 586 S.E.2d at 253.

II

Next, plaintiff argues that the trial court erred by failing to make sufficient findings of fact regarding the best interest of the child. However, where plaintiff failed to demonstrate a substantial change of circumstances and we affirm the trial court's conclusion that there has been no substantial change in circumstances which affects the welfare of the minor child, the trial court need not reach the best interests

prong of a modification of child custody analysis. *See id.* at 473, 586 S.E.2d at 253 ("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." (citations omitted)); *see also* N.C.G.S. § 50-13.7(a) (2017) (establishing that "an 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."); *Stephens v. Stephens*, 213 N.C. App. 495, 498, 715 S.E.2d 168, 171 (2011) ("In granting the Motion to Modify Custody, [a] trial court must have first appropriately concluded that there was a substantial change in circumstances and that the change affected the welfare of the minor child or children." (citations omitted)); *id.* at 499, 715 S.E.2d at 171–72 ("When a trial court modifies a custody order, the requisite change in circumstances cannot be 'inconsequential' or 'minor,' but rather must significantly affect the welfare of the children. *Pulliam*, 348 N.C. at 630, 501 S.E.2d at 905 (Orr, J., concurring).").

Accordingly, the 27 September 2016 order is

AFFIRMED.

Judges DAVIS and INMAN concur.

Report per Rule 30(e).