An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-894

Filed: 6 February 2018

Guilford County, No. 14 CVD 359

LAURA LEIGH LINKER, Plaintiff,

v.

TIMOTHY LYON LINKER, Defendant.

Appeal by plaintiff from order entered 29 March 2017 by Judge Angela B. Fox in Guilford County District Court. Heard in the Court of Appeals 8 January 2018.

Harvey W. Barbee, Jr. and Megan E. Spidell for plaintiff-appellant.

Wyatt Early Harris Wheeler LLP, by Arlene M. Zipp and Aaron R. Davis, for defendant-appellee.

TYSON, Judge.

Laura Linker ("Plaintiff") appeals from a trial court's order, in which it concluded it was without subject matter jurisdiction to modify a permanent child custody order after Plaintiff had failed to file a motion to modify custody. We affirm the trial court's order.

I. Background

Plaintiff and her former husband, Timothy Linker ("Defendant"), were married on 3 June 2006, separated on 6 February 2014, and divorced. The parties had one child, L.L.L., born in 2009. This case arises from a custody dispute over their child.

Plaintiff initially filed a complaint against Defendant on 10 March 2014 and asserted claims of child custody, equitable distribution, an interim distribution of marital assets, a forensic child support evaluation, child support, post-separation support, and attorney's fees. Following a succession of multiple proceedings, investigations, and orders, the trial court entered a custody order on 21 April 2015. After making 77 findings of fact, the trial court made the following relevant conclusions of law:

> 5. There is a substantial risk of bodily injury to the minor child if the minor child is placed in the primary custody of the Plaintiff/Mother.
>
> 6. The Plaintiff/Mother has severely emotionally abused the minor child and has created serious emotional damage to the minor child as described by N.C.G.S. § 7B-101(1)(e).
>
> 7. The Plaintiff/Mother is unfit to have reasonable visitation with the minor child. Reasonable visitation by the Plaintiff/Mother is not in the minor child's best interests.

Following its conclusions of law, the trial court decreed:

> 1. The Defendant/Father shall have sole legal custody of the minor child. The Defendant/Father shall keep the Plaintiff/Mother up to date regarding the minor child's health, well-being, medications, schooling, and other issues

in the minor child's life. Whenever possible, the parties should communicate through Our Family Wizard.

2. The Defendant/Father shall have primary physical custody of the minor child.

3. The Plaintiff/Mother shall have two supervised, one-hour, visits with the minor child at Harmony House per week. The staff at Harmony House is requested to take scrupulous notes regarding the visits. If Harmony House is unavailable, the Plaintiff/Mother shall have supervised visits through the minor child's therapist, Lisa Partin. The Plaintiff/Mother shall have no other contact with the minor child.

. . . .

5. The Defendant/Father shall allow the minor child to maintain reasonable contact with the minor child's maternal grandparents, provided that the maternal grandparents do not allow the Plaintiff/Mother more contact with the minor child than is allowed by this Order, provided that the maternal grandparents do not discuss the litigation, abuse, alleged abuse, provided that the maternal grandparents do not discuss the Defendant/Father in negative or destructive terms, and provided that the maternal grandparents follow the Eighteenth Judicial District Parenting Guidelines.

. . . .

8. The Plaintiff/Mother shall obtain a full psychiatric evaluation by a licensed psychiatrist with the High Point Regional Health System. The Plaintiff/Mother shall obtain and complete all recommended treatment including taking any recommended and prescribed medication.

9. After the Plaintiff/Mother has obtained a full psychiatric evaluation, the parties shall each obtain a parenting assessment through the same individual, agreed upon by

> the parties' attorneys. The Plaintiff/Mother shall provide the results of her psychiatric evaluation and Defendant/Father shall provide the results of his parenting psychological assessment, which has already been completed with Dr. Holm.
>
> 10. This Order shall be temporary. Either party, or the Court, may place this Order on the calendar for review after 6 months.
>
> 11. The Eighteenth Judicial District Parenting Guidelines shall be attached hereto and incorporated herein by reference.

Plaintiff submitted a calendar request for the 16 January 2017 term of the Guilford County District Court on 18 November 2016. On 24 January 2017, the trial court entered an order scheduling the case for hearing on 1 and 2 of March 2017, nearly two years after the custody order had been entered.

At the hearing, Defendant argued the court lacked jurisdiction to modify custody. He asserted the 21 April 2015 custody order was a permanent order and Plaintiff had failed to file a motion to modify custody pursuant to N.C. Gen. Stat. § 50-13.7. The trial court entered an order on 28 March 2017 determining that the 21 April 2015 order was permanent and that it lacked subject matter jurisdiction to proceed with the hearing. The trial court made the following findings of fact in the 28 March 2017 order:

> 1. This matter was specially set for hearing on March 1, 2017, and March 2, 2017, regarding custody.

> 2. The undersigned Judge entered an Order on April 21, 2015, regarding custody of the minor child, [L.L.L.], born[. . .] 2009.
>
> 3. The April 21, 2015, Order referenced that the Order was temporary and either party may calendar the matter for subsequent hearings after six (6) months from the entry of the Order.
>
> 4. The Order did not contain language "without prejudice."
>
> 5. The Order did not set a specific time for review. Although an expert witness, John Warren, was heard on this matter on March 1, 2017, counsel for Defendant/Father raised the issue of whether the Order had become permanent prior to taking evidence. John Warren was heard prior to the arguments on this issue to accommodate his professional calendar.
>
> 6. Plaintiff/Mother, by and through counsel, argued against the Order being permanent.
>
> 7. The April 21, 2015, Order contained 77 findings of fact, and left no issues of custody undetermined.
>
> 8. The Plaintiff/Mother did not file a Motion to Modify Custody.
>
> 9. Based on the foregoing, the Court finds that the April 21, 2015, Order was always permanent, regardless of the language pertaining to "temporary custody."

Based on these findings of fact, the trial court entered the following conclusions of law:

> 1. The Court has jurisdiction over the subject matter and the parties to this action, and this Order may be entered out of session and out of term.

> 2. The April 21, 2015, Order did not contain language indicating that the Order was without prejudice to either party, did not set a specific reconvening date for hearing, and left no issues of custody undetermined.
>
> 3. The April 21, 2015, Order was, therefore, permanent.
>
> 4. The Plaintiff/Mother did not file a Motion to Modify Custody. Therefore, the Court was without subject matter jurisdiction to proceed on a modification of custody after the determination that the Order was permanent.

On 28 March 2017, Plaintiff filed a motion to modify custody pursuant to N.C. Gen. Stat. § 50-13.7, which was subsequently dismissed without prejudice. Plaintiff filed timely notice of appeal on 20 April 2017.

II. Jurisdiction

Jurisdiction lies in this Court over an appeal of a final judgment regarding child custody in a civil district court action pursuant to N.C. Gen. Stat. §§ 7A-27(b)(2) (2017) and 50-19.1 (2017).

III. Issue

Plaintiff argues the trial court erred in determining that the 21 April 2015 custody order was permanent and that it was without subject matter jurisdiction to modify the 21 April 2015 custody order without a filed motion in the cause.

IV. Standard of Review

"Custody orders may either be 'temporary' or 'permanent.'" *Woodring v. Woodring*, 227 N.C. App. 638, 642, 745 S.E.2d 13, 18 (2013). A trial court's

determination that a custody order is temporary or permanent is "neither dispositive nor binding on an appellate court." *Id.* at 643, 745 S.E.2d at 18. "Instead, whether an order is temporary or permanent in nature is a question of law, reviewed on appeal de novo." *Smith v. Barbour*, 195 N.C. App. 244, 249, 671 S.E.2d 578, 582 (2009).

V. Analysis

This Court in *Woodring* laid out a three-part test to determine whether a custody order is temporary or permanent: "'an order is temporary if either (1) it is entered without prejudice to either party[;] (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues.'" *Woodring*, 227 N.C. App. at 643, 745 S.E.2d at 18 (quoting *Peters v. Pennington*, 210 N.C. App. 1, 13-14, 707 S.E.2d 724, 734 (2011)).

" 'A temporary order is not designed to remain in effect for extensive periods of time or indefinitely . . . .' " *Miller v. Miller*, 201 N.C. App. 577, 579, 686 S.E.2d 909, 911 (2009) (quoting *La Valley v. La Valley*, 151 N.C. App. 290, 293 n.5, 564 S.E.2d 913, 915 n.5 (2002)). The purpose of a temporary order is to "resolve the issue of a party's right to custody pending the resolution of a claim for permanent custody." *Brewer v. Brewer*, 139 N.C. App. 222, 228, 533 S.E.2d 541, 546 (2000). "A permanent custody order establishes a party's present right to custody of a child and that party's

right to retain custody indefinitely." *Regan v. Smith*, 131 N.C. App. 851, 852, 509 S.E.2d 452, 454 (1998).

Applying the first factor of *Woodring*, that an order is temporary if it is entered without prejudice to either party, 227 N.C. App. at 643, 745 S.E.2d at 18, the 21 April 2015 order does not contain express language indicating that it was entered without prejudice to either party. Plaintiff and Defendant do not dispute the Order was not entered "without prejudice" to either party.

The second *Woodring* factor is whether a custody order "states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief." *Id.* Plaintiff asserts the 21 April 2015 order states a clear and specific reconvening time under the second *Woodring* factor.

Regarding a potential reconvening time, the order states: "Either party, or the Court, *may* place this Order on the calendar for review after 6 months." (Emphasis supplied). Plaintiff cites this Court's opinion in *Brewer* in support of her assertion that the 21 April 2015 order sets a clear and specific reconvening time. In *Brewer*, the Court determined a custody order labelled as "temporary" was actually a permanent order. *Brewer,* 139 N.C. App. at 228, 533 S.E.2d at 546. The Court based its determination, in part, on the fact the order at issue specified that the trial court "would review the order in the summer of the year 2000." *Id.* at 227, 533 S.E.2d at 546 (internal quotation marks omitted).

Unlike the order in *Brewer,* the order before us does not specify a specific reconvening time, but merely states "[e]ither party, or the Court, may place this Order on the calendar for review after six months." The second *Woodring* factor is not met.

The third factor in *Woodring* states that a custody order is temporary "if the order does not determine all the issues." *Woodring*, 227 N.C. App. at 643, 745 S.E.2d at 18. The 21 April 2015 order contains 77 findings of fact entered by the trial court following a four-day trial. The order provides for primary physical custody, sole legal custody, an ongoing visitation schedule, and a provision providing for contact with L.L.L.'s maternal grandparents.

Plaintiff argues the 21 April 2015 order is a temporary order under the third factor of *Woodring,* because the order does not provide for a holiday and vacation visitation schedule. Plaintiff cites *Sood v. Sood*, 222 N.C. App. 807, 809, 732 S.E.2d 603, 606, *disc. review denied*, 366 N.C. 417, 735 S.E.2d 336 (2012) in support of her argument.

In *Sood,* the custodial schedule provided for a short-term holiday custody schedule with specific dates, but did not provide for visitation and custody during holidays past the 2012 school spring break. *Id.* However, this Court determined the order, in that case, left numerous issues to be resolved, including child support arrearages owed and the parties' mental conditions. *Id.* This Court determined the

order was temporary based, in part, on the order not providing for a complete holiday visitation schedule. *Id.*

Here, the order provides for Plaintiff's visitation schedule for each and every week indefinitely into the future. After laying out the Plaintiff's visitation schedule with L.L.L., the 21 April 2015 order expressly, specifically, and unambiguously states in the decretal section that "Plaintiff/Mother shall have no other contact with the minor child." Unlike the order at issue in *Sood*, in which the trial court provided an incomplete visitation schedule, the custody order before us details Plaintiff's visitation schedule with L.L.L. on an ongoing basis, into the future, until modified. *See id.* Unlike the order at issue in *Sood*, there is no indication the trial court intended to provide a holiday visitation schedule, either on a temporary or permanent basis.

Plaintiff also asserts the 21 April 2015 order does not resolve all issues related to custody, because the trial court ordered her to undergo a full psychiatric evaluation. The order states: "Plaintiff/Mother shall obtain a full psychiatric evaluation by a licensed psychiatrist with the High Point Regional Health System. The Plaintiff/Mother shall obtain and complete all recommended treatment including taking any recommended and prescribed medication."

No condition in the order requires or provides for further review of the custody/visitation schedule upon Plaintiff obtaining a psychiatric evaluation nor does

the order indicate custody of the parties' minor child could or would be revised upon Plaintiff obtaining a favorable psychiatric evaluation.

This Court evaluated a custody order, which required the plaintiff to obtain a mental health evaluation in *Maxwell v. Maxwell*:

> Arguably, the trial court's order could be construed as temporary because it was entered without prejudice as to either party, and contemplated further action following Plaintiff's mental health evaluation. *See Senner,* 161 N.C. App. at 81, 587 S.E.2d at 677 (noting that this Court will find that an order is "temporary" where an order is entered without prejudice as to either party, or the order is not determinative of all the issues presented to the trial court for review). However, the trial court failed to set forth a specific date on which to reconvene and review Plaintiff's evaluation. Accordingly, this Court will view the trial court's order as a permanent one[.]

Maxwell v. Maxwell, 212 N.C. App. 614, 618, 713 S.E.2d 489, 492-93 (2011).

Following *Maxwell*, the custody order before us was not entered "without prejudice" and does not set forth any date to reconvene or any specific condition to review Plaintiff's psychiatric evaluation. The custody order leaves no issues of custody undetermined, and fails to satisfy the third *Woodring* factor. *See id.* We conclude the order appealed from is a permanent order.

VI. Conclusion

The 21 April 2015 custody order is a permanent order. The trial court's 29 March 2017 order is affirmed. *It is so ordered.*

AFFIRMED.

Chief Judge McGEE and Judge DAVIS concur.

Report per Rule 30(e).