IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1047

Filed: 3 April 2018

Wilkes County, No. 16 CVD 992

ROCKY LEE WHITLEY, Plaintiff,

v.

AMANDA LEITH BAUGESS, Defendant.

Appeal by Plaintiff from order entered 2 May 2017 by Judge Jeanie Reavis Houston in Wilkes County District Court. Heard in the Court of Appeals 6 March 2018.

Randolph and Fischer, by J. Clark Fischer, for the Plaintiff-Appellant.

No brief filed on behalf of the Defendant-Appellee.

DILLON, Judge.

Rocky Lee Whitley ("Father") appeals the trial court's order granting Amanda Leith Baugess ("Mother") primary physical custody of R.B. ("Rose")[1]. The trial court granted primary physical custody to Mother despite an oral pronouncement of joint

[1] A pseudonym is used to protect the anonymity of the juvenile and for ease of reading. *See* N.C. R. App. P. 3.1(b) (2015).

physical custody in open court. Father challenges the order for a violation of his due process rights, and contends that the trial court made insufficient findings of fact to give Mother primary physical custody. We affirm.

I. Background

In April 2015, Mother gave birth to Rose. Shortly thereafter, a paternity test proved that Father was Rose's biological father, and he began visiting Rose intermittently. Father and Mother are unmarried and live separately. Father and Mother have similar living arrangements and financial circumstances.

In August 2016, Father brought this action seeking at least joint physical and legal custody of Rose. The trial court entered a temporary custody order in October 2016, granting joint legal and physical custody of Rose to Mother and Father. The temporary custody order provided that Mother and Father would equally share physical custody of Rose on an alternating weekly basis.

On 14 February 2017, the trial court held a hearing on the permanent custody of Rose, and announced in open court that it would issue a written order granting the parties joint legal and physical custody. However, on 2 May 2017, the trial court issued a written order granting joint legal custody to both parties, but granting primary physical custody to Mother, with Father receiving only alternating weekend visitation. Father appeals.

II. Analysis

Father makes two arguments on appeal First, he argues that the trial court violated his right to due process because its written order did not match what the judge stated she would write in open court. Second, Father contends that the trial court failed to make sufficient findings of fact regarding significant factual issues. For the following reasons, we affirm.

Regarding his due process argument, Father alleges that he should have been given an opportunity to present additional evidence before the trial court issued a custody order that was "radically different" than what it announced in open court.

The right to due process of law is granted by our federal and State Constitutions, U.S. Const. amend. XIV; N.C. Const. sec. 19; and we therefore review alleged violations *de novo*. *Cooper v. Berger*, ___ N.C. ___, ___, 809 S.E.2d 98, 110 (2018). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Johnston v. State*, 224 N.C. App. 282, 305, 735 S.E.2d 859, 875 (2012) (citing *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976)).

Our Court has recently upheld the rule that trial courts are free to change their minds between the conclusion of a hearing and the entry of a written order, and may enter a written order that conflicts with oral statements made in court by a judge. *See Scoggin v. Scoggin*, ___ N.C. App. ___, ___, 791 S.E.2d 524, 528 (2016); *In re O.D.S.*, ___ N.C. App. ___, ___, 786 S.E.2d 410, 417 (2016). However, in *In re O.D.S.*,

this Court stated that "there may be situations" imaginable in which a "written judgment that does not generally conform with the oral judgment is necessarily invalid." *In re O.D.S.*, ___ N.C. App. at ___, 786 S.E.2d at 417 (emphasis removed).

Father contends that this case presents a situation where the discrepancy between the judgments reflects error and attempts to distinguish this case from *Scoggin* and *In re O.D.S.*. In *Scoggin*, the trial court announced that it would give the defendant primary physical custody of the children, but later changed its mind upon further consideration. *Scoggin*, ___ N.C. App. at ___, 791 S.E.2d at 527. The trial court informed the parties within a week of the hearing that it would be deciding differently and included in the written order an explanation as to why. *Id.*

In *In re O.D.S.*, the trial court was silent as to the issue of dependency when issuing oral judgment at the end of the trial, even though each counsel argued grounds for termination of parental rights at trial based on a theory of dependency. *In re O.D.S.*, ___ N.C. App. at ___, 786 S.E.2d at 417. Nonetheless, we held that it was not error when the written order terminating the father's parental rights included findings supporting termination based on dependency. *Id.*

Father attempts to distinguish the present case by noting that, here, nearly three months elapsed between the February 2017 hearing and the entry of the written order from which Father appeals. Also, Father notes that during that time the trial court had no communication with Mother or Father and the written order

itself does not address the reasoning for the shift from the trial court's announced decision. We disagree, however, with Father's assertion that these differences are material, making the written order "necessarily invalid."

The trial court is free to make whatever ruling it sees fit, as long as that ruling is based upon competent evidence. In this case, the trial court addressed the issue of physical custody in court and did not explain why it changed its decision in the written order. However, the important consideration is whether the final, entered order reflects what was argued at trial. In both *Scoggin* and *In re O.D.S.*, the decisions rendered in the written orders came as a surprise to the appealing party, but the subject matter did not. The same is true for this case, as Father fully expected the trial court to issue a decision pertaining to the legal and physical custody of Rose, albeit one consistent with the oral ruling given at the conclusion of the hearing. Further, Father participated in a full custody hearing in which he received ample opportunity to raise all arguments regarding the pending physical custody of Rose. The trial court's actions did not give rise to any further need to be heard because there were no new, material considerations decided in the order, but unheard at trial. We hold that the trial court "[d]id not err by entering an order that reached a conclusion that differed from its oral pronouncement." *Scoggin*, ___ N.C. App. at ___, 791 S.E.2d at 528. The only concern is whether the final written and formally entered order was supported by sufficient findings of fact.

Trial courts historically have wide discretion in ruling on family law cases, and shall be overturned on appeal only where their decision reflects a clear abuse of discretion. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). A trial court's findings of fact are conclusive if supported by substantial, competent evidence, while its conclusions of law are reviewed *de novo*. *See Barker v. Barker*, 228 N.C. App. 362, 364, 745 S.E.2d 910, 912 (2013). The trial court's order must contain sufficient findings of fact resolving material factual issues such that a reviewing court is capable of determining whether the trial court's conclusions are supported. *Sergeef v. Sergeef*, ___ N.C. App. ___, ___, 792 S.E.2d 192, 193 (2016). However, a judge's findings of fact need only be sufficient to establish a link between the welfare of the child and the parent's actions. *See Shepherd v. Shepherd,* 273 N.C. 71, 75, 159 S.E.2d 357, 361 (1968).

As to his second argument, Father specifically notes that the trial court failed to make any findings of fact regarding the time that elapsed between the October 2016 temporary custody order and the February 2017 hearing. Father acknowledges that Finding of Fact 9 states in great detail his interactions with Rose prior to the commencement of this action in August 2016, but maintains that the trial court should have made findings as to the impact of the alternating weekly custody schedule on his parental fitness. Father also argues that the trial court should have

given weight to Father and Mother's oral agreement at trial that the alternating weekly basis worked out well.

The trial court ultimately found that Father's visitation with Rose was "sporadic," that he refused many opportunities to see her, and that he sometimes refused to keep her when she was sick or upset. At trial, Mother presented a log recording each interaction Father made with Rose prior to the commencement of this action in August 2016. Although Father presented evidence that he and Rose had bonded during the alternating weekly custody plan established by the October 2016 temporary custody order, the trial court was free to make such findings supported by the evidence and conclusions as it deemed appropriate. *Owenby v. Young,* 357 N.C. 142, 147, 579 S.E.2d 264, 268 (2003) ("In a custody proceeding, the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary."). Further, oral agreements made between the parties and presented at trial can be disregarded by the trial court. *See Wiencek-Adams v. Adams*, 331 N.C. 688, 692, 417 S.E.2d 449, 452 (1992). We find that the trial court's finding of fact 9 was supported by substantial evidence, and that it was sufficient to support the trial court's custody disposition.

We hold that the trial court did not violate Father's due process rights by altering its final decision in the case outside of his presence. The trial court was free

to issue any decision sufficiently supported by the evidence. We conclude that the trial court's decision was based upon sufficient evidence, and therefore affirm.

AFFIRMED.

Judges BRYANT and TYSON concur.

Report per Rule 30(e).