IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-790

Filed: 3 April 2018

Craven County, No. 14 CVD 1573

JOSEPH CLIFTON LEWIS, Plaintiff,

v.

SHANNON LEWIS, Defendant.

Appeal by Defendant from order entered 8 March 2017 by Judge Paul M. Quinn in District Court, Craven County. Heard in the Court of Appeals 8 January 2018.

Joseph Clifton Lewis, Plaintiff-Appellee, pro se.

Jones Law Group, PLLC, by Jacinta D. Jones, for Defendant-Appellant.

McGEE, Chief Judge.

Shannon Lewis ("Defendant") appeals from order denying her motion to set aside multiple child custody orders, as well as her motions to dismiss and strike. Defendant argues the trial court erred in denying her motion to set aside the child custody orders because (1) the court lacked subject matter jurisdiction over Defendant's minor child, L.M.T., who was the subject of the custody orders and (2) the trial court lacked personal jurisdiction over L.M.T.'s natural parents.

I. Factual & Procedural History

Joseph Clifton Lewis ("Plaintiff") and Defendant were married on 12 January 2013. They are the parents of B.M.L., who was born 6 July 2011. Defendant is also the parent of L.M.T., who was born 16 June 2008, and whose father is Alan Taylor ("Taylor"), Defendant's former husband. After Defendant and Taylor divorced, Defendant maintained sole legal and physical custody of L.M.T., who lived with Plaintiff and Defendant after they were married.

Plaintiff and Defendant separated around 18 March 2014. Their separation agreement included provisions concerning the custody of B.M.L. and L.M.T., and provided that both children would reside primarily with Defendant. Plaintiff filed a complaint against Defendant seeking custody of B.M.L. on 29 October 2014. The parties consented to a Memorandum of Order on 9 February 2015 ("February 2015 order") giving joint legal custody of B.M.L. to both Plaintiff and Defendant, with Defendant retaining primary physical custody.

After a domestic violence incident occurred in Defendant's home between Defendant and her boyfriend, Plaintiff filed a Motion in the Cause on 29 September 2016 to modify the February 2015 order, seeking immediate custody of both B.M.L. and L.M.T., as well as child support from Defendant. Plaintiff's motion did not name Taylor as a party, but alleged "[P]laintiff and . . . Taylor have a good and cooperative relationship. . . . . [Taylor] respects, however, that [B.M.L.] and [L.M.T.] are close

and should remain together, at least for the time being." As a result of the motion, a temporary custody order was entered on 29 September 2016 ("September 2016 order") granting Plaintiff sole custody of B.M.L. and joint custody of L.M.T. with Taylor. The September 2016 order stated that the order "shall be returnable for hearing . . . on 17 October 2016[.]"

Defendant filed a reply to Plaintiff's Motion in the Cause on 5 October 2016, claiming she was a fit and proper person to have custody of both children. The reply also included a counterclaim for child support for both children from Plaintiff and Taylor. The trial court entered an order on 3 November 2016, ("November 2016 order") continuing the custody provisions of the September 2016 order and granting Defendant visitation "in the discretion of [] [P]laintiff."

On 5 December 2016, Defendant filed a Motion to Set Aside Judgment or Order under N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) and (6); a Motion to Dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b); and a Motion to Strike under N.C. Gen. Stat. § 1A-1, Rules 12(f) and 19(b). In these motions, Defendant argued (1) that Plaintiff failed to join Taylor, a necessary party to determining custody of L.M.T., and (2) that because L.M.T. was not a subject of the underlying action, the trial court lacked subject matter jurisdiction over L.M.T. Defendant also argued that no summons or verified complaint was filed that was sufficient to allow the trial court to assert jurisdiction over L.M.T. or his parents, and that neither order contained the necessary findings

of fact or conclusions of law required to award custody of L.M.T. to a non-biological parent. Defendant requested that the portions of the November 2016 order and the September 2016 order related to L.M.T. be dismissed.

After a hearing, the trial court entered an order on 6 March 2017 denying Defendant's motions and ordering that L.M.T. be joined as a party to the action. The trial court amended the 6 March 2017 order on 8 March 2017 to reflect that the party to be joined was Taylor rather than L.M.T. ("Amended March 2017 order"). Defendant filed notice of appeal from the Amended March 2017 order denying her Rule 60(b), 12(b), 12(f), and 19(b) motions, and adding Taylor as a party to the action.

II. Legal Analysis

Defendant argues the trial court erred in denying her Rule 60(b) Motion to Set Aside the September 2016 order and the November 2016 order as void as they relate to L.M.T. in that (1) the trial court lacked subject matter jurisdiction over L.M.T. and (2) the trial court lacked personal jurisdiction over L.M.T.'s natural parents, Defendant and Taylor. On appeal, Defendant's arguments challenge only the trial court's denial of her Rule 60(b) Motion to Set Aside; therefore, this Court will not address the denial of Defendant's motions under Rules 12(b), 12(f), or 19(b). N.C. R. App. P. 28(b)(6) ("Issues not presented and discussed in a party's brief are deemed abandoned.").

Before we address the merits of Defendant's appeal, we must determine whether the appeal is properly before this Court. Defendant admits the Amended March 2017 order is an interlocutory order as it does "not constitute a final disposition of the underlying child custody claim." "[A]n order or judgment is interlocutory if it does not settle all of the issues in the case but rather 'directs some further proceeding preliminary to the final decree.'" *Bradley v. Bradley*, ___ N.C. App. ___, ___, 806 S.E.2d 58, 60 (2017) (quoting *Heavner v. Heavner*, 73 N.C. App. 331, 332, 326 S.E.2d 78, 80, *disc. review denied*, 313 N.C. 601, 330 S.E.2d 610 (1985)). Interlocutory orders are ordinarily not immediately appealable. *Plomaritis v. Plomaritis*, 200 N.C. App. 426, 428-29, 684 S.E.2d 702, 704 (2009).

In the present case, none of the orders entered by the trial court determined Defendant's counterclaim for child support or set a permanent visitation schedule; therefore, we agree that the Amended March 2017 order is interlocutory. *See McConnell v. McConnell*, 151 N.C. App. 622, 624, 566 S.E.2d 801, 803 (2002).

A party may appeal an interlocutory order or judgment only if (1) the trial court certifies the case for immediate appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) or (2) if the trial court's decision deprives the appellant of a substantial right that would be lost absent immediate review. *Plomaritis*, 200 N.C. App. at 429, 684 S.E.2d at 704. The trial court did not certify the Amended March 2017 order for immediate

appeal under Rule 54(b); therefore, this Court may only consider the merits of Defendant's appeal if Defendant shows that the order affects a substantial right.

Whether an interlocutory appeal affects a substantial right is determined on a case-by-case basis. *Stafford v. Stafford*, 133 N.C. App. 163, 164-65, 515 S.E.2d 43, 45 (1999). "A substantial right is 'one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment.'" *McConnell*, 151 N.C. App. at 625, 566 S.E.2d at 804.

> [T]he appellant[s] must include in [their] statement of grounds for appellate review sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right. However, the appellants must do more than merely assert that the order affects a substantial right; they must show why the order affects a substantial right. Where the appellant fails to carry the burden of making such a showing to the [C]ourt, the appeal will be dismissed.

Pigg v. Massagee, 196 N.C. App. 348, 350, 674 S.E.2d 686, 688 (2009) (internal citations and quotations omitted). "Our courts generally have taken a restrictive view of the substantial right exception." *Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001).

Defendant argues the Amended March 2017 order affected a substantial right under N.C. Gen. Stat. § 1-277 and N.C. Gen. Stat. § 7A-27 because (1) the trial court lacked the requisite jurisdiction to bind Defendant to any orders affecting L.M.T., (2) Defendant has a constitutional right to the care, custody, and control of her child, and

(3) Defendant may be forced to defend multiple actions for custody of L.M.T. We disagree.

As stated above, Defendant's only arguments on appeal relate to the denial of her Rule 60(b) motion. Rule 60(b) states:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a *final* judgment, order, or proceeding for the following reasons:
>
> . . .
>
> (4) The judgment is void; [or]
>
> . . .
>
> (6) Any other reason justifying relief from the operation of the judgment.

N.C.G.S. § 1A-1, Rule 60(b) (emphasis added). This Court has consistently held "[b]y its express terms, Rule 60(b) only applies to final judgments, orders, or proceedings; it has no application to interlocutory orders." *Pratt v. Staton*, 147 N.C. App. 771, 775, 556 S.E.2d 621, 624 (2001) (citing *Sink v. Easter*, 288 N.C. 183, 193, 217 S.E.2d 532, 540 (1975)).

In the case before us, the September 2016 and November 2016 orders were both interlocutory, rather than final orders. Ordinarily, "[a] temporary child custody order is interlocutory." *Berkman v. Berkman*, 106 N.C. App. 701, 702, 417 S.E.2d 831, 832 (1991) (quoting *Dunlap v. Dunlap*, 81 N.C. App. 675, 676, 344 S.E.2d 806, 807, *disc. review denied*, 318 N.C. 505, 349 S.E.2d 859 (1986)). A child custody order

is temporary if "(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." *Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003) (citing *LaValley v. LaValley*, 151 N.C. App. 290, 292, 564 S.E.2d 913, 915 (2002)).

The September 2016 order was a temporary order, as it set a clear and specific reconvening time less than a month after the entry of the order. *See In re N.T.S.*, 209 N.C. App. 731, 736, 707 S.E.2d 651 (2011) ("Although we have not established a bright-line definition of 'reasonably brief,' we have held that intervals of approximately three and five months were reasonably brief and, thus, have dismissed appeals from temporary orders providing a rehearing within such time periods."). The November 2016 order neither stated it was a temporary order, nor that it was entered without prejudice to either party, nor did it state a clear and specific reconvening time. Instead, it said only: "The [September 2016 order] shall remain in full force and effect pending further order of this court." However, the November 2016 order did "not determine all the issues," including Defendant's counterclaim for child support and a permanent visitation schedule for Defendant. Therefore, the order was interlocutory. *See McConnell*, 151 N.C. App. at 624, 566 S.E.2d at 803.

Because both the September 2016 and November 2016 orders were temporary orders, Defendant's Rule 60(b) motion was specifically prohibited by the language of

Rule 60(b) itself, providing relief from a final order only. *Pratt*, 147 N.C. App. at 775, 556 S.E.2d at 624. Defendant's motion to set aside could not, as a matter of law, have been proper under Rule 60(b) and we therefore dismiss Defendant's appeal.

DISMISSED.

Judges DAVIS and TYSON concur.

Report per Rule 30(e).