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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1217

Filed: 5 June 2018

Mecklenburg County, No. 16-CVD-8615

JOSEPH P. STRAZZANTI, Plaintiff,

v.

DANA ANTHONY DOLCE, Defendant.

Appeal by Defendant from order entered 15 March 2017 by Judge Kimberly Best-Staton in Mecklenburg County District Court. Heard in the Court of Appeals 18 April 2018.

No brief filed for the Plaintiff-Appellee.

Plumides, Romano, Johnson & Cacheris, PC, by Richard B. Johnson, for the Defendant-Appellant.

DILLON, Judge.

Dana Anthony Dolce ("Father") appeals from the trial court's order granting full custody of his two minor children, Ariel and August Dolce,[1] to his great-uncle, Joseph P. Strazzanti ("Uncle"). Father argues that the trial court made insufficient

[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).

findings of fact to support its custody decision and its award of attorney's fees. We reverse both the grant of custody to Uncle and the award of attorney's fees, and we remand for further proceedings consistent with this opinion.

I. Background

Prior to 2011, Father and the two children lived in Ohio. In 2006, the children's mother died, causing Father to enter a period of depression which he believed was impairing his ability to raise the children. In May 2011, Father and Uncle executed a Temporary Guardianship, under which Uncle gained temporary legal and physical custody of the children until 19 May 2012. The children moved to Charlotte to live with Uncle.

Father's circumstances continued, and the parties renewed the Temporary Guardianship twice for a total of four additional years, to end on 19 March 2016. In February 2016, the month before the Temporary Guardianship was set to expire, Father decided that he was ready to regain custody of the children. Father informed Uncle that he would not be extending the Temporary Guardianship and that he would pick up the children during the summer. Uncle initially did not respond, and communications between Father and Uncle eventually devolved into each party threatening to involve the police if Father came to Charlotte to pick up the children.

Uncle filed an action seeking custody of the children, child support, and attorney's fees. Father answered and counterclaimed, and the trial court granted

him temporary emergency custody. In March 2017, the trial court entered an order granting Uncle custody of the children and awarding him attorney's fees. Father appealed. This Court granted a Temporary Stay and Writ of Supersedeas, pending our review, and the children currently remain in Father's custody in Ohio.

II. Analysis

Father argues that the trial court's findings of fact are insufficient to support its grant of custody to Uncle and its award of attorney's fees. We agree.

In granting custody to Uncle, the trial court determined that Father's behavior was inconsistent with his right to parent his children. The right of a parent to raise his child is constitutional, rising out of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Adams v. Tessener*, 354 N.C. 57, 60, 550 S.E.2d 499, 501 (2001); *Petersen v. Rogers,* 337 N.C. 397, 401, 445 S.E.2d 901, 903 (1994). Nonetheless, this ordinarily paramount right may be forfeited where the parent acts in a manner inconsistent with his right to parent such that it no longer serves the best interest of the child. *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997).

We find that the trial court failed to state the standard by which it found that Father acted inconsistently. "[A] trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence." *Adams*, 354 N.C. at 63, 550 S.E.2d at 503. Our

Supreme Court has held that when the trial court fails to apply the clear and convincing evidence standard the case must be remanded. *David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 754 (2005).

Here, the trial court concluded that Father acted inconsistently with his constitutional right to parent his children because his actions amounted to abandonment. However, we find no indication in the trial court's order that it applied a clear and convincing evidence standard in reaching this conclusion. Therefore, we must remand. *See Bennett v. Hawks*, 170 N.C. App. 426, 429, 613 S.E.2d 40, 42 (2005) (reversing and remanding where the trial court failed to indicate that it applied a clear and convincing evidence standard in determining the plaintiff's constitutionally protected status as a natural parent). On remand, the trial court is free to make new and/or additional findings of fact resolving material disputes in the evidence.[2]

Because we reverse and remand the custody decision, we also reverse the trial court's award of attorney's fees. On remand, should the trial court find that attorney's fees are still warranted, the trial court is required to make sufficient findings to support its award. We note that the current findings and conclusions are insufficient

[2] We note that some of the trial court's findings appear to be mere recitations of certain evidence presented rather than an attempt by the trial court to resolve conflicts in the evidence, as is its duty. *See Morehead v. Harris*, 255 N.C. 130, 135-36, 120 S.E.2d 425, 429 (1961); N.C. R. Civ. P. 52(a). "[R]ecitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented." *Gilbert v. Guilford Cty.*, 238 N.C. App. 54, 58, 767 S.E.2d 93, 96 (2014) (emphasis in original).

to support attorney's fees. A trial court may award attorney's fees where "the party seeking the award [proves that it] is (1) an interested party acting in good faith, and (2) has insufficient means to defray the expense of the suit." *Taylor v. Taylor*, 343 N.C. 50, 54, 468 S.E.2d 33, 35 (1996); N.C. Gen. Stat. § 50-13.6 (2015). The trial court must support its award of attorney's fees with detailed findings of fact regarding each party's monthly income and expenses, and their respective ability to pay attorney's fees. *See Schneider v. Schneider*, ___ N.C. App. ___, ___, 807 S.E.2d 165, 166 (2017).

The trial court made multiple findings of fact regarding Father's yearly income, employment history, financial struggles, and expensive purchases. However, the trial court made no detailed findings with respect to Father's current financial status and Uncle's inability to pay his fees. Rather, the order contains a single, summary conclusion of law on the issue of attorney's fees:

> 14. [Uncle] is an interested party acting in good faith with insufficient means to defray the cost and expenses of this litigation. [Uncle] is able to defray 50% of the cost and expenses of this litigation because he resides with his partner.

This statement is conclusory, and is not supported by additional, detailed findings of fact as required by our case law. "[B]ecause the findings in this case contain little more than the bare statutory language, the order is insufficient to support an award of attorney's fees." *Dixon v. Gordon*, 223 N.C. App. 365, 373, 734 S.E.2d 299, 305 (2012).

III. Conclusion

We conclude that the trial court's findings of fact do not support its custody award or award for attorney's fees. We therefore reverse the decision of the trial court and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges DIETZ and ARROWOOD concur.

Report per Rule 30(e).