IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-788

Filed: 3 July 2018

New Hanover County, No. 11 CVD 822

RUSS CARROLL BRYAN, Plaintiff

v.

SUZANNE DAILEY, Defendant

Appeal by plaintiff from order entered 30 March 2017 by Judge Jeffrey Evan Noecker in New Hanover County District Court. Heard in the Court of Appeals 7 February 2018.

The Law Group, by Michael P. Kepley, for plaintiff-appellant.

LeeAnne Quattrucci, for defendant-appellee.

CALABRIA, Judge.

Russ Carroll Bryan ("plaintiff") appeals from the trial court's order modifying a prior child custody order, based on the court's conclusion that a substantial change of circumstances existed. After careful review, we affirm.

I. Factual and Procedural Background

Plaintiff and Suzanne Dailey ("defendant") were married on 18 June 2006, and separated on 11 February 2011. One child, Lauren, was born to the marriage on 6 July 2008, and in March of 2004, defendant adopted a son, Kyle, born on 13 May 2001 in Belarus. Although plaintiff never formally adopted Kyle, Kyle considers plaintiff to be his father.

On 25 February 2011, plaintiff filed a complaint against defendant asserting claims for child custody and child support. On 4 May 2011, defendant filed her answer, and counterclaims for child custody and child support. On 24 May 2011, the trial court entered an order on temporary child custody granting joint legal custody to the parties, primary physical custody to defendant, and secondary physical custody "by way of visitation" to plaintiff. On 13 March 2014, the trial court entered a permanent custody order ("the Permanent Order"), granting joint legal custody to the parties, permanent primary physical custody to plaintiff, and secondary physical custody "by way of liberal visitation" to defendant.

On 9 September 2014, defendant filed a motion to show cause, motion for contempt, and motion to modify visitation and custody. In her motion, defendant alleged multiple willful violations of the Permanent Order by plaintiff. In response, on 13 November 2014, plaintiff filed a motion to dismiss defendant's motion to modify custody for failure to state a claim. Plaintiff also denied defendant's allegations of willful violations of the Permanent Order.

On 14 August 2015, plaintiff filed a motion in the cause alleging that, after the children spent a period of summer visitation with defendant, defendant expressed an intent to not return the children to plaintiff pursuant to the Permanent Order, and in fact did not return them. Plaintiff therefore sought an immediate order requiring defendant to return the children, and taxing costs against defendant. That same day, the trial court entered an order requiring defendant to return the children, and reserving the issue of attorney's fees for a future hearing.

On 10 November 2015, the trial court entered an order on defendant's motions to show cause, for contempt, and to modify custody ("the First Modification Order"). The trial court concluded that it was in Lauren's best interest to be in plaintiff's custody, but in Kyle's best interest to be in defendant's custody. The trial court therefore granted the motion to modify custody, maintaining joint legal custody, but placing Lauren in plaintiff's primary physical custody and Kyle in defendant's.

On 22 February 2016, defendant filed a motion in the cause, motion for contempt, motion to modify custody, and motion to waive mediation. Defendant alleged, inter alia, that plaintiff had failed to comply with the First Modification Order's requirements on co-parenting, and that his conduct increasingly alienated Lauren from defendant. Plaintiff filed a response denying defendant's allegations and moving to dismiss the motion. On 30 March 2017, the trial court entered an order on defendant's motion ("the Second Modification Order"). The trial court

determined that although defendant had not met her burden of showing a substantial change in circumstances which would warrant a modification of primary physical custody of Lauren, she had met her burden of showing a substantial change in circumstances which warranted a modification to address disputes that had arisen between the parties following entry of the First Modification Order.

From the Second Modification Order, plaintiff appeals.

II. Second Modification Order

In multiple arguments, plaintiff argues that the trial court erred by entering the Second Modification Order, based on the court's conclusion that a substantial change of circumstances existed. We disagree.

A. Standard of Review

An order "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." N.C. Gen. Stat. 50-13.7(a) (2017). The party seeking modification of an existing custody order "bears the burden of proving the existence of a substantial change in circumstances affecting the welfare of the child." *Evans v. Evans*, 138 N.C. App. 135, 139, 530 S.E.2d 576, 579 (2000). "The trial court's examination of whether to modify an existing child custody order is twofold. The trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child." *Shipman v. Shipman*, 357 N.C. 471, 474, 586

S.E.2d 250, 253 (2003). In determining whether a substantial change of circumstances has occurred,

> courts must consider and weigh all evidence of changed circumstances which affect or will affect the best interests of the child, both changed circumstances which will have salutary effects upon the child and those which will have adverse effects upon the child. In appropriate cases, either may support a modification of custody on the ground of a change in circumstances.

Pulliam v. Smith, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998).

We review a trial court's order modifying an existing child custody order to determine whether the findings of fact are supported by substantial evidence. *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citation and quotation marks omitted). Where "there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, even if record evidence might sustain findings to the contrary." *Id.* at 475, 586 S.E.2d at 253-54.

We review the trial court's findings of fact to determine whether such findings support its conclusions of law. *Id.* at 475, 586 S.E.2d at 254. "[T]he trial court must determine whether there has been a substantial change in circumstances and whether that change affected the minor child. Upon concluding that such a change affects the child's welfare, the trial court must then decide whether a modification of

custody was in the child's best interests." *Id.* If we determine that the trial court "properly concluded that the facts show that a substantial change of circumstances has affected the welfare of the minor child and that modification was in the child's best interests, we will defer to the trial court's judgment and not disturb its decision to modify an existing custody agreement." *Id.*

B. Analysis

In the instant case, defendant filed a motion requesting, *inter alia*, primary custody of Lauren and modification of the existing visitation terms and provisions, due to issues that had arisen following entry of the First Modification Order. After a hearing, the trial court concluded, in relevant part:

> 2. Considering the Defendant's evidence in the light most favorable to Defendant, Defendant has failed to show that there has been a material and substantial change in circumstances which warrants a modification of primary physical custody of [Lauren] from Plaintiff to Defendant.
>
> 3. Considering the Defendant's evidence in the light most favorable to Defendant, Defendant has met her burden [of] proving that there has been a material and substantial change in circumstances which warrants a modification of the [First Modification] Order to address disputes that have surfaced between the parties since the entry of the [First Modification] Order.

On appeal, plaintiff first argues that the trial court erred by entering the Second Modification Order after determining in Conclusion of Law #2 that there had not been a substantial change of circumstances. Plaintiff, quoting *Lewis v. Lewis*, 181 N.C.

App. 114, 638 S.E.2d 628 (2007), argues that "[t]he trial court cannot, on the one hand, conclude there was not a substantial change of circumstances and, at the same time, change the existing order." *Id.* at 119, 638 S.E.2d at 631. "Either a substantial change of circumstances occurred or not." *Id.*

However, *Lewis* is inapposite. In the instant case, the trial court did not conclude that there was not a substantial change of circumstances *as to all issues*. Rather, in Conclusion of Law #2, the trial court determined that there had not been material and substantial change in circumstances which would warrant changing Lauren's primary physical custodian from plaintiff to defendant. However, in Conclusion of Law #3, the court further determined that there had been a material and substantial change in circumstances which warranted modification to address disputes that had surfaced between plaintiff and defendant following entry of the First Modification Order. We hold that the trial court's Conclusions of Law #2 and #3 are not inconsistent, as they clearly pertain to defendant's separate requests for custody in her motion to modify. Therefore, plaintiff's first argument is overruled.

Plaintiff next challenges the trial court's determination in Conclusion of Law #3 that a substantial change of circumstances existed. As an initial matter, however, we note that plaintiff has not challenged any of the trial court's findings of fact. Indeed, he acknowledges that "[t]here were findings to support the conclusion that disputes had occurred between Plaintiff and Defendant since the" First Modification

Order was entered. Nevertheless, plaintiff is correct that "mere factual findings regarding disputes between the parties [are] not enough to show a substantial change of circumstances." *See Wolgin v. Wolgin*, 217 N.C. App. 278, 285, 719 S.E.2d 196, 201 (2011) (explaining that "[d]isagreements 'alone' between the parties, even with the appointment of a co-parenting therapist, do not constitute a substantial change in circumstances"). Rather, in order to support such a conclusion, the trial court must make "specific findings of instances where the parties' failure to communicate subsequent to the prior custody order . . . affected the welfare of the child." *Ford v. Wright*, 170 N.C. App. 89, 94, 611 S.E.2d 456, 459 (2005).

The trial court's Second Modification Order contains the following relevant findings:

> 11. Shortly after entry of the [First Modification] Order, Defendant proposed that the parties create a schedule to facilitate telephone and Skype contact between Defendant and [Lauren]. Defendant proposed that a one (1) hour block of time be created three (3) times per week for telephone contact and a one (1) hour block of time be created for Skype contact. Defendant proposed that said one (1) hour block of time be an "uninterrupted" block of time for the purposes of facilitating telephone and Skype contact. Plaintiff declined Defendant's proposal and instead suggested that Defendant initiate telephone contact and Skype contact on an "as needed" basis. The parties submitted said dispute to [Parenting Coordinator] Catherine Pittman for resolution. Catherine Pittman declined to adopt Defendant's proposal and instead suggested short telephone calls on an every other day basis. Plaintiff would not agree to any schedule of calls or Skypes. Calls and Skypes between [Lauren] and Defendant did

occur, but as of the hearing of this matter, the parties have been unable to resolve said issue.

. . .

19. The parties consulted Catherine Pittman to resolve a number of disputes since entry of the [First Modification] Order. Plaintiff and Defendant complied with Catherine Pittman's recommendations when they appeared to suit their own interests. Plaintiff and Defendant refused to comply with Parent Coordinator recommendations when it appeared to not serve their own interests. One troubling incident involved [Lauren]'s return from Defendant at the conclusion of her summer visit. While the [First Modification] Order directs that [Lauren] [be returned] no later than forty-eight (48) hours prior to the resumption of school, the parties agreed that [Lauren] would be returned to Plaintiff on Sunday, August 21, 2016. Prior to the agreed upon return date, Defendant began to insist that Plaintiff make arrangements for [Lauren]'s return on the grounds that she had provided more of the children's transportation during the summer. The parties' pattern and/or practice had been for Defendant to schedule all of [Lauren]'s transportation when [Lauren] was traveling for visits with Defendant and for Plaintiff to schedule [Kyle]'s travel associated with visits with Plaintiff. Counsel for Plaintiff and Defendant were involved in the negotiations for [Lauren]'s return which they were unable to resolve. Defendant failed to return [Lauren] on August 21, 2016 as agreed. On August 21, 2016, Catherine Pittman then instructed Plaintiff to book a flight for [Lauren]'s return after receiving confirmation from Defendant's attorney that Defendant would comply. Plaintiff complied with Catherine Pittman's request. After booking [Lauren]'s flight, Defendant took the position that she had no intention of putting [Lauren] on the flight that Plaintiff had booked on the grounds that [Lauren] should not fly as an unaccompanied minor. Catherine Pittman sought advice from this Court. This Court directed Defendant to either place [Lauren] on the flight booked by Plaintiff or

> make arrangements to drive [Lauren] from Lexington to Wilmington. Defendant continued to refuse said directive and Plaintiff flew to Lexington to retrieve [Lauren] and returned with her on Tuesday, August 22, 2016.
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> 20. The parties have continued to experience disputes regarding scheduling electronic contact; schedule changes and transportation responsibilities.
>
> 21. Both parties have failed to cooperate for the sake of the children.

Although not challenged by plaintiff, these findings of fact are supported by substantial evidence and address specific instances where the parties' failure to communicate following entry of the First Modification Order affected the welfare of the children. *Cf. id.* at 94, 611 S.E.2d at 459-60 (concluding that the trial court's findings regarding the parents' failure to communicate were not supported by substantial evidence, because "although plaintiff and defendant had disagreements and verbal disputes, they had developed ways to communicate regarding the welfare of their son. . . . [T]he parties had discussed holiday arrangements, had split every holiday, and for Mother's and Father's Day had consented to allow the appropriate party keep the child overnight."). The trial court's unchallenged findings further support Conclusion of Law #3, "that there has been a material and substantial change of circumstances which warrants a modification of the [First Modification Order] to address disputes that have surfaced between the parties since the entry of the . . . Order." Accordingly, we overrule plaintiff's second argument.

In his final argument, plaintiff contends that the trial court erred by denying him an opportunity to offer additional evidence before entering the Second Modification Order. On 23 February 2017, plaintiff filed a motion asserting, *inter alia*, that

> 4. Following the presentation of Defendant's evidence, Plaintiff made a Motion pursuant to Rule 41(b) to dismiss Defendant's order to modify custody. The Court granted Plaintiff's Motion. Although Plaintiff was afforded an opportunity to present some evidence on said issue, Plaintiff was not afforded an opportunity to present all evidence he intended to present on said issue.

On appeal, plaintiff cites N.C. Gen. Stat. § 1A-1, Rule 43(c) in arguing that "the failure to allow a party the opportunity to make a record of the excluded evidence is not discretionary . . . ." However, plaintiff did not cite this Rule in his motion before the trial court, and "the law does not permit parties to swap horses between courts in order to get a better mount[.]" *Wood v. Weldon*, 160 N.C. App. 697, 699, 586 S.E.2d 801, 803 (2003) (citation omitted), *disc. review denied*, 358 N.C. 550, 600 S.E.2d 469 (2004); *see also* N.C.R. App. P. 10(a)(1) (explaining that "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make"). Moreover, plaintiff fails to explain what additional evidence he intended to present, or how doing so might have affected the outcome of the Second Modification Order. In any event, it is clear from plaintiff's motion that

he was afforded an opportunity to present evidence, and did so at least somewhat successfully, since the trial court granted his Rule 41(b) motion to dismiss. Plaintiff's final argument is overruled.

III. Conclusion

There is substantial, competent evidence to support the trial court's findings of fact, which in turn, support the court's conclusion that there had been a material and substantial change of circumstances which warranted a modification of the existing custody order to address disputes that had surfaced between the parties following entry of the First Modification Order. Therefore, we affirm the trial court's Second Modification Order.

AFFIRMED.

Judges ZACHARY and ARROWOOD concur.

Report per Rule 30(e).