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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-919

Filed: 21 August 2018

Wake County, No. 10-CVD-20375

ROBERT RICHARD KOZEC, JR., Plaintiff,

v.

KRISTEN ANNE MURPHY, Defendant.

Appeal by Plaintiff from judgment entered 7 December 2016 by Judge Michael S. Denning in Wake County District Court. Heard in the Court of Appeals 23 January 2018.

The Law Office of Robert Schupp, by Robert L. Schupp, for plaintiff-appellant.

MURPHY, Judge.

Robert Richard Kozec ("Father") appeals a 7 December 2016 "Temporary Emergency Custody Order" that modified a prior permanent custody decree from 6 February 2013 by suspending all of his visitation rights and prohibiting him from having phone contact with his children. Because we conclude that the trial court's 7 December 2016 "temporary" custody order modified a prior "permanent" custody order, we vacate the 7 December 2016 custody order as it did not find a substantial change in circumstances affecting the welfare of the minor children.

BACKGROUND

This case arises from a custody dispute between the parties who have two children approximately 8 and 10 years old. On 6 February 2013, a permanent child support and child custody order was entered, vesting Mother with sole legal and physical custody. Father was granted scheduled visitation. The 6 February 2013 permanent custody order also provided that each party "shall be permitted reasonable phone contact with the minor children during the other parent's custodial time."

Following concerns about potential abuse, on 3 November 2016, Mother moved to modify the 6 February 2013 custody order, and requested the trial court to suspend Father's visitation and prevent him from having any communication with the children. In response to this motion, an Ex Parte Emergency Custody Order was entered which ordered that Father have no contact with the minor children until further orders of the court. A return hearing was subsequently held on 6 December 2016. On 7 December 2016, the trial court entered a "Temporary Emergency Custody Order" that granted Mother sole legal and physical custody, and suspended Father's visitation and communication rights. The 7 December 2016 custody order made the following findings of fact:

> 5. The Court entered an Order for Permanent Custody and Child Support on February 6, 2013.
>
> 6. The therapist for the minor children, Ms. Mary Jernigan,

> has been counseling the children for approximately 2 months.
>
> 7. The therapist, after several sessions with the children, obtained enough information to warrant a report to Child Protective Services in Johnston and Wake Counties.
>
> 8. The therapist reported her concerns about potential physical and sexual abuse of the minor children.
>
> 9. The therapist recommended that there be no contact with the minor children at the present time.
>
> 10. The investigator for the Wake County Child Protective Services was on vacation and was not available to appear at the emergency hearing.
>
> 11. The investigations of Wake and Johnston Counties, and of the Johnston County Sheriff's Department, are ongoing and have not reached any final conclusions or recommended services as of yet.
>
> 12. The Court finds, based on the evidence presented, that there is a substantial risk of physical harm if the minor children are returned at this time to the [Father's] care and custody for their regular visitation.

Based on these findings, the trial court concluded:

> 3. The [Mother] is a fit and proper person to have sole temporary emergency physical and legal custody of the minor child[ren] pending a temporary custody hearing.
>
> 4. Pursuant to N.C.G.S. 50-13.5(d)(3), [Father] has placed and will continue to place the minor child[ren] at substantial risk of physical or sexual abuse unless [Mother] is granted temporary emergency custody of the minor children.
>
> 5. This Order is necessary and appropriate and in the best interests of the minor children.

The decretal portion of the 7 December 2016 order states in relevant part:

> 2. Sole legal and physical custody of the minor children are granted to the [Mother].
>
> 3. The [Father] shall not have any visitation with the minor children and shall not have phone contact with the children while this order remains in effect.
>
> . . . .
>
> 8. At such time as Child Protective Services has completed its investigation, the parties shall return to Court for a review hearing.

On 13 June 2017, Father filed a Petition for Writ of Certiorari with this court. On 5 July 2017, a prior panel of this court granted his petition for the purpose of reviewing the 7 December 2016 order.

ANALYSIS

"When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003). If the findings are supported by substantial evidence, we "must determine if the trial court's factual findings support its conclusions of law." *Id.* at 475, 586 S.E.2d at 254.

The issue of whether a trial court has utilized the correct legal standard in ruling on a request for modification of custody is a question of law that we review *de novo*. *Hatcher v. Matthews*, ____ N.C. App. ____, _____, 789 S.E.2d 499, 502 (2016).

> If a child custody order is final, a party moving for its modification must first show a substantial change of circumstances. If a child custody order is temporary in nature . . . the trial court is to determine custody using the best interests of the child test without requiring either party to show a substantial change of circumstances.

LaValley v. LaValley, 151 N.C. App. 290, 292, 564 S.E.2d 913, 914-15 (2002) (citations and footnote omitted).

> Our Supreme Court has explained why it is essential for trial courts to include a specific finding of a substantial change in circumstances affecting the welfare of the child prior to modifying a custody order: "A decree of custody is entitled to such stability as would end the vicious litigation so often accompanying such contests, unless it be found that some change of circumstances has occurred affecting the welfare of the child so as to require modification of the order. To hold otherwise would invite constant litigation by a dissatisfied party so as to keep the involved child constantly torn between parents and in a resulting state of turmoil and insecurity. This in itself would destroy the paramount aim of the court, that is, that the welfare of the child be promoted and subserved."

Davis v. Davis, 229 N.C. App. 494, 500, 748 S.E.2d 594, 599 (citing *Shepherd v. Shepherd*, 273 N.C. 71, 75, 159 S.E.2d 357, 361 (1968)). We have consistently held that "the trial court commit[s] reversible error by modifying child custody . . . absent any finding of substantial change of circumstances affecting the welfare of the child."

Hibshman v. Hibshman, 212 N.C. App. 113, 121, 710 S.E.2d 438, 443 (2011) (alterations in original) (citation omitted); *see also Davis*, 229 N.C. App. at 502, 748 S.E.2d at 600 ("Our case law is clear that before a trial court may modify an existing custody order the trial court must determine that a substantial change of circumstances has occurred and that the change has affected the children's welfare."). This requirement is a statutory one, N.C.G.S. § 50-13.7(a) (2017), and "[t]here are no exceptions in North Carolina law to the requirement that a change in circumstances be shown before a custody decree may be modified." *Hibshman*, 212 N.C. App. at 124, 710 S.E.2d at 445 (citation and emphasis omitted).

In the instant case, the 7 December 2016 custody order modified a prior permanent custody order because it suspended Father's visitation rights established by the 6 February 2013 custody order. Since the 7 December 2016 custody order modified a permanent custody order, the party moving for its modification (Mother) must show a "substantial change of circumstances." *LaValley*, 151 N.C. App. at 292, 564 S.E.2d at 914-15. Furthermore, the trial court was required to make a "finding of substantial change of circumstances affecting the welfare of the child." *Cox v. Cox*, 238 N.C. App. 22, 33, 768 S.E.2d 308, 316 (2014) (citation omitted).

The 7 December 2016 custody order did not expressly find that there was a substantial change in circumstances before suspending Father's visitation rights. Even though the order found that Father "has placed and will continue to place the

minor child[ren] at substantial risk of physical or sexual abuse," this is not a finding that there has been a "substantial change in circumstances affecting the welfare of the child." Furthermore, "[a] finding of a substantial change in circumstances affecting the interests of the child is not just a 'buzz word' . . . and even if the 'magic words' are not used, the factual findings must still make the substantial change of circumstances and its effect upon the children *clear*." *Davis*, 229 N.C. App. at 503, 748 S.E.2d at 601 (emphasis added). Notwithstanding the 7 December 2016 order's omission of the phrase "substantial change in circumstances," the order's factual findings still do not clearly support that there has been a substantial change of circumstances affecting the welfare of the parties' children. The order found that that the children's new therapist had "concerns about potential physical and sexual abuse" and that she recommended that there be no contact between Father and his children. However, none of the trial court's findings give any clear indication why the therapist had those concerns. The 7 December 2016 order also found that Wake County CPS and Johnston County CPS had each initiated investigations. However, as of 6 December 2016 these investigations were still ongoing and inconclusive,[1] and one of the CPS investigators was on vacation, unavailable to appear at the hearing.

[1] We note that the inconclusiveness of the CPS investigations is evinced by the trial court's statements made at the conclusion of the hearing. "*The Court*: I'm not making any determination one way or the other whether somebody's got more of a valid view or the other, but I would like to hear from CPS. And it should come as no surprise to anybody that the Court is extremely cautious about that, so until I hear from CPS, the emergency order is sustained."

Collectively, the findings in the 7 December 2016 order express that the children's therapist had concerns about potential abuse, reported those concerns to CPS, and as result CPS started an investigation but had not finished it nor reached any interim conclusions. Standing alone, these findings do not "make the substantial change of circumstances and its effect upon the children clear." *Id.* Therefore, the findings of fact and conclusions of law in the 7 December 2016 order do not support the indefinite suspension of Father's custody rights established by the 6 February 2013 permanent custody order. Accordingly, we vacate the 7 December 2016 order.

VACATED.

Judges BRYANT and BERGER concur.

Report per Rule 30(e).