IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-181

Filed: 2 October 2018

Mecklenburg County, No. 13 CVD 11939

KELVIN K. DRAKEFORD, Plaintiff,

v.

JANIL BAEZ, Defendant.

Appeal by defendant from order entered 25 August 2017 by Judge Kimberly Best-Staton in Mecklenburg County District Court. Heard in the Court of Appeals 6 September 2018.

No brief for plaintiff-appellee.

McDonald Williams, PLLC, by Simoné A. Williams, for defendant-appellant.

TYSON, Judge.

Janil Baez ("Defendant") appeals from an order modifying custody of minor child ("KJ") and granting primary custody to Kelvin K. Drakeford ("Plaintiff"). We affirm.

I. Background

Plaintiff and Defendant were never married, but had engaged in a relationship that resulted in the birth of one minor child, KJ, born in March 2013. The parties met in Charlotte, but prior to the birth of KJ, Defendant moved back to her home in Edgecombe County. Plaintiff and Defendant entered into a voluntary parenting agreement, which was approved by the Mecklenburg County District Court on or around 14 March 2014. As agreed, Defendant was granted primary custody of KJ, and Plaintiff was granted visitation "at least one weekend a month from Thursday until Sunday."

In August 2015, Plaintiff filed a *pro se* motion to modify custody, alleging a substantial change in circumstances had occurred. The motion asserted, in part, that the parties had agreed Plaintiff would be given more time with KJ starting in 2014, and he "had been exercising [visitation] at least one week per month" until Defendant began "making excuses why the child could not visit." The motion also cited to Defendant's "inconsistent work schedule," which had led to KJ often being in the care of other family members overnight.

Defendant filed an answer and a countermotion to modify custody in October 2015. Defendant's answer alleged Plaintiff had failed to identify a substantial change of circumstances. Her countermotion alleged a substantial change of circumstances affecting KJ had occurred, including that KJ "will begin pre-school and the current

schedule will be unworkable as [Plaintiff] will be unable to get [KJ] to and from pre-school pursuant to the current Thursday – Sunday schedule."

At the time of the trial on 21 November 2016, KJ was three and a half years old. He was attending daycare in Edgecombe County, at the same facility he had been attending since his mother returned to work. Plaintiff was employed as a teacher and a coach at Cannon School, in Mecklenburg County, where he works from about 7:15 a.m. to about 3:30 p.m. and has evening coaching duties during basketball season. Plaintiff's employment with the school includes a significant reduction in tuition. He had filled out an application for KJ to begin "JrK" in the 2017-2018 school year. Defendant was employed as a police officer with the Rocky Mount Police Department and worked Sunday through Tuesday from 5:30 a.m. to 5:00 p.m.

The visitation schedule had been adjusted by the parties after the initial agreement. At first, Plaintiff was to have two weeks of visitation with KJ a month, then the schedule changed to one week a month. When Plaintiff requested more time to visit, the schedule was again adjusted to every other weekend from Thursday to Sunday. The custody agreement left holiday allocation to the parties, and disagreements arose on where KJ would spend holidays.

At the close of Plaintiff's evidence, Defendant made a motion to dismiss the case "for a lack of showing of significant change of circumstances affecting the child."

The trial court denied Defendant's motion "based on the arguments the Court [had] heard."

Over seven months later, on 25 August 2017, the order modifying custody was filed. The trial court found a substantial change in circumstances had occurred warranting modification, specifically finding that "KJ is entering into a new stage in life, namely school and among other things this has affected KJ's best interests." Defendant was granted custody for the remainder of the summer of 2017, with primary custody then transferring to Plaintiff. Defendant was granted custody on alternating weekends, from Friday to Sunday, and eight out of the ten weeks of summer vacation. Holidays were divided equally, with alternating years. KJ was to be enrolled in Cannon School, and Plaintiff was to be responsible for all costs. Defendant timely appeals.

II. Jurisdiction

An appeal of right lies to this Court from a child custody order entered in a district court pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2017).

III. Issues

Defendant argues the trial court erred in denying her motion to dismiss. She also asserts the trial court erred in modifying custody to award Plaintiff primary custody because insufficient evidence supports a finding that a substantial change in

circumstances had occurred, that such a change had an effect on KJ, and that the transfer of custody was in the best interests of the child.

IV. Standard of Review

The trial court may modify a custody order upon a showing of a substantial change of circumstances. *Shipman v. Shipman*, 357 N.C. 471, 473, 586 S.E.2d 250, 253 (2003). Before modifying an existing custody order, the trial court must determine both whether a change in circumstances exists and, if so, whether that change affected the child. *Id.* at 474, 586 S.E.2d at 253.

In reviewing a trial court's decision to modify custody, "the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence." *Id.* (citation omitted). "[T]he trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings." *Peters v. Pennington*, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011).

Conclusions of law must be supported by the findings of fact. *Id.* at 13, 707 S.E.2d at 733. "Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal." *Everette v. Collins*, 176 N.C. App. 168, 171, 625 S.E.2d 796, 798 (2006) (citation omitted).

V. Analysis

Defendant argues insufficient evidence shows a substantial change in circumstances affecting KJ. We disagree.

A court may modify a custody order when a change in circumstances "is, or is likely to be, beneficial to the child[.]" *Pulliam v. Smith*, 348 N.C. 616, 620, 501 S.E.2d 898, 900 (1998). Defendant argues the trial court was unclear by not detailing what the changed circumstances might be, but finding of fact 24 clearly identifies KJ is entering into "a new stage of life, namely school age." Defendant asserts no competent evidence supports this finding, because at the time of the trial, KJ was three and a half, too young to attend any pre-kindergarten program in North Carolina. However, Defendant identified KJ's impending entrance to preschool as a substantial change in circumstances in her countermotion to modify custody and noted the "current [custody] schedule will be unworkable." Defendant sought to modify the custody schedule to give Plaintiff visitation "every other weekend from Friday until Sunday based on the child's [preschool] schedule." The trial court could find the upcoming transition of a minor child between day care and preschool is a substantial change in circumstances, as asserted by Defendant.

Defendant argues even if a substantial change had occurred, no evidence supports a finding that the change had any effect on KJ. This Court has previously remanded cases to the trial court where there were insufficient findings to show how a relevant change would affect the child's well-being.

In *Brewer v. Brewer*, the children's paternal aunt and uncle initiated an action to modify an earlier custody agreement and obtain custody of two minor children. 139 N.C. App. 222, 223, 533 S.E.2d 541, 543 (2000). The earlier custody agreement had placed primary custody with the defendant-father. *Id.* at 224, 533 S.E.2d at 544. The defendant-father had voluntarily let the children live with their aunt and uncle when his work schedule became more demanding. *Id.* Due to the many positive changes in the defendant-mother's life, the trial court modified the custody order to place primary custody of the children with the defendant-mother. *Id.* at 227, 533 S.E.2d at 546.

This Court reversed the trial court's decision and concluded, in relevant part, "[t]he trial court did find that [defendant-mother] could now provide the children with the opportunity of private school, insurance, a computer, and a stable home life. However, the court does not make findings how those results affect the children's physical and emotional well-being." *Id.* at 233, 533 S.E.2d at 549.

The rationale in *Brewer* differs from this case because the only substantial change the trial court identified in that case was the change in the defendant-mother's lifestyle. *Id.* Here, the effect of the changed circumstance on KJ is self-evident; his new stage of life and eligibility for educational opportunities makes placing primary custody with Plaintiff beneficial to him and in his best interest. *See Shipman*, 357 N.C. at 479, 586 S.E.2d at 256. As Defendant asserted in her

countermotion, the existing custody order, granting Plaintiff visitation at least once a month from Thursday through Sunday, would interfere with KJ's pre-kindergarten classes at either parent's county of residence.

"The court's primary concern is the furtherance of the welfare and best interests of the child and its placement in the home environment that will be most conducive to the full development of its physical, mental and moral faculties." *Evans v. Evans*, 138 N.C. App. 135, 141, 530 S.E.2d 576, 580 (2000) (citation omitted). The trial court found "[i]t is in the best interests of the minor child . . . to attend the best school possible . . . . and that Cannon School . . . is the best scholastic opportunity for KJ."

Evidence was presented at trial detailing the education KJ would receive at Cannon School, including the rigorous academics, focus on emotional and moral development, enrichment opportunities, and physical development. Defendant asserts Plaintiff failed to present adequate information regarding the other school options for KJ, but several documents concerning the academic rankings of schools located near Defendant were admitted at trial.

In addition to the benefits for KJ attending Cannon School, it is also in his best interest to have a workable custody schedule to provide stability. *See Pulliam*, 348 N.C. at 620, 501 S.E.2d at 900. As all parties agreed, the current schedule does not take into account the substantial change in KJ's schedule due to starting school.

Further, having a more detailed custody schedule in place will prevent disagreements between the parents over visitation and holidays.

VI. Conclusion

Both parties asserted to the trial court that the change in KJ's schedule brought on by his entry into school constitutes a substantial change, which renders the previously agreed-upon custody schedule unworkable.

The trial court's findings of fact are supported by competent evidence. *See Peters*, 210 N.C. App. at 12-13, 707 S.E.2d at 733. Even though the evidence might support a different finding, we conclude Defendant failed to show the trial court abused its discretion in modifying custody to grant primary physical custody to Plaintiff. *See Everette*, 176 N.C. App. at 171, 625 S.E.2d at 798. The trial court's order modifying custody is affirmed. *It is so ordered*.

AFFIRMED.

Judges INMAN and BERGER concur.

Report per Rule 30(e).