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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-991

Filed: 16 April 2019

Rowan County, No. 09-CVD-725

JUSTIN M. JONES, Plaintiff,

v.

PAULA JONES, Defendant,

v.

CORA F. EDWARDS MILLS, INTERVENOR.

Appeal by intervenor from order entered 15 February 2018 by Judge Beth Dixon in District Court, Rowan County. Heard in the Court of Appeals 13 March 2019.

The Vernon Law Firm, P.A., by Benjamin D. Overby, for intervenor-appellant.

No appellee brief filed.

STROUD, Judge.

Intervenor-Great-Grandmother appeals from an order modifying custody to change primary custody to Appellee-Father and granting her visitation. The trial court's findings of fact are supported by the evidence and the findings of fact support its conclusions of law, and the trial court did not abuse its discretion in determining that the modification is in the best interest of the minor child. We affirm.

I. Background

Father and Mother were married and had two children, Josh and Tammy¹, born in 2005 and 2007 respectively. Only the custody of Josh is at issue in this appeal. On 5 March 2009, Father filed a complaint for divorce from bed and board, child custody, and child support. On 19 March 2009, Father and Mother entered into a consent order which granted Father primary custody of Josh and visitation to Mother. On 2 September 2011, Josh's paternal great-grandmother ("Grandmother") moved to intervene in the case based upon her allegations that Father had essentially ceded care of Josh to her.

Grandmother was granted temporary custody of Josh, and on 2 August 2012, the trial court entered a custody order finding that Father "was often gone or had no contact with the minor child for days and up to periods in excess of a week; that said pattern continued for years[;]" failed "to attend . . . [Josh's] graduation exercise despite an invitation[;]" "works forty or more hours a week and is on call seven days

¹ Pseudonyms are used to protect the identity of the minors involved.

a week[;]” and Father had acknowledged that Grandmother kept Josh most nights of the week, enrolled Josh in school and extracurricular activities, and took him to his medical appointments. The trial court determined Josh’s parents had “waived their protected parental rights status” although both were still “fit and proper persons to have access to” him, and ultimately granted Grandmother primary custody of Josh with both parents having visitation.

On 30 November 2016, Father moved to modify the custody arrangement of Josh alleging a substantial change of circumstances because Grandmother’s health was declining, she had interfered with Josh’s relationship with both parents and their time with Josh, he had become more involved in Josh’s life, and he had remarried to a woman who had a close relationship with Josh. On 15 February 2018, the trial court entered an order modifying custody such that at the conclusion of that school year, Father would have primary physical custody and “sole legal custody” of Josh with Grandmother and Mother having visitation. Grandmother appeals.

II. Standard of Review

Our standard of review for an order modifying custody is well-established:

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. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Our trial courts are vested with broad discretion in

child custody matters. This discretion is based upon the trial courts' opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges. Accordingly, should we conclude that 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.

In addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, this Court must determine if the trial court's factual findings support its conclusions of law. With regard to the trial court's conclusions of law, our case law indicates that the 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. If we determine that the trial court has 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.

Shipman v. Shipman, 357 N.C. 471, 474-75, 586 S.E.2d 250, 253-54 (2003) (citations and quotation marks omitted).

III. Modification of Custody

To modify a child custody arrangement, the trial court must first find a substantial change of circumstances affecting the welfare of the minor child since the entry of the prior order. *See id.* at 474, 586 S.E.2d at 253. The change may be either positive or negative, as long as they affect the child. *See Shell v. Shell*, ___ N.C. App.

____, ____, 819 S.E.2d 566, 571 (2018) (“Changes in circumstances may be either negative or positive.”). If there has been a substantial change of circumstances, the trial court must consider if modification will be in the best interest of the child. *See In re A.C.*, 247 N.C. App. 528, 548–49, 786 S.E.2d 728, 742–43 (2016).

Once the custody of a minor child is judicially determined, that order of the court cannot be modified until it is determined that (1) there has been a substantial change in circumstances affecting the welfare of the child; and (2) a change in custody is in the best interest of the child. The evidence must demonstrate a connection between the substantial change in circumstances and the welfare of the child, and flowing from that prerequisite is the requirement that the trial court make findings of fact regarding that connection. However, where the effects of the substantial changes in circumstances on the minor child are self-evident, there is no need for evidence directly linking the change to the effect on the child.

Id. (citations, quotation marks, and brackets omitted).

As in most child custody proceedings, a trial court’s principal objective is to measure whether a change in custody will serve to promote the child’s best interests. Therefore, if the trial court does indeed determine that a substantial change in circumstances affects the welfare of the child, it may only modify the existing custody order if it further concludes that a change in custody is in the child’s best interests.

Shipman, 357 N.C. at 474, 586 S.E.2d at 253.

Further,

Once the trial court makes the threshold determination that a substantial change has occurred, the court then must consider whether a change in custody would be in the

best interests of the child. As long as there is competent evidence to support the trial court's findings, its determination as to the child's best interests cannot be upset absent a manifest abuse of discretion.

Metz v. Metz, 138 N.C. App. 538, 540-41, 530 S.E.2d 79, 81 (2000) (citations omitted).

A. Findings of Fact

Grandmother first challenges many findings of fact as unsupported by the evidence, but her argument is actually not that there is no evidence to support the findings but that the findings are not sufficient to support the conclusions of law. Grandmother challenges findings we will group in three categories: findings regarding Grandmother's health, findings regarding positive changes in Father's life, and findings regarding Grandmother's interference with Josh's relationship with Father.

1. Grandmother's Health

Grandmother challenges three findings:

17. Intervenor had open heart surgery and did not tell Plaintiff or Defendant. [Josh] was sent to live with his paternal grandmother during Intervenor's recovery period.

....

30. Intervenor is 78 years old and her husband is 81 years old.

....

35. Intervenor's health is declining. She had open

heart surgery and is hard of hearing. This will make it increasingly difficult for her to be active with an athletic, active, pre-teen.

Grandmother does not contend that findings 17 and 30 are not supported by the evidence. Instead, she contends that the findings are incomplete because “she was provided a clean bill of health two months” after her surgery, and she takes no medication other than aspirin, so her health is not a substantial change of circumstances. We first note that the trial court is the sole judge of the credibility and weight of the evidence and may accept or reject any of the evidence. *In re Oghenekevebe*, 123 N.C. App. 434, 440, 473 S.E.2d 393, 398 (1996) (“The function of trial judges in nonjury trials is to weigh and determine the credibility of a witness.”).

In addition, as to these particular facts, the trial judge’s ability “to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges” is especially important. *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253. There was no dispute that Grandmother had recovered from her surgery, but the findings of fact are supported by the evidence. The trial court properly considered Grandmother’s health, abilities, and age, as well as Josh’s age and needs, in determining if the changes were substantial and if they affected Josh. As we noted in *Shell v. Shell*, where the father had limited intellectual capabilities and had obtained custody of the children when they were five and two:

[A]s children become older, they have more involvement with school activities, parent-teacher meetings become more detailed, and homework becomes more complex. As the children have advanced in school, Father's limited capabilities have had more of an impact on the children's lives and this will likely continue as the children get older.

___ N.C. App. ___, ___, 819 S.E.2d 566, 569-73 (2018). The same is true here regarding Grandmother's physical capabilities, *compare id.*, and this consideration is relevant in weighing Josh's best interests. *See Shipman*, 357 N.C. at 474, 586 S.E.2d at 253. As Grandmother contends, these findings *alone* would likely not be enough to support a substantial change in circumstances affecting Josh's welfare, but they are part of the overall circumstances supporting the modification of custody.

2. Father's Positive Changes

Grandmother next challenges findings of fact regarding Father:

7. Since the entry of the last Order, Plaintiff has switched jobs from Pike Electric to Energy United. He now works a flexible 10 hour week Monday through Friday and is no longer on call.

....

11. [Mother] and [Stepmother] get along well and have spent holidays together so that the children can be together as a family.

....

19. [Stepmother] . . . is an RN at Northeast Medical Center and works a flexible schedule. She works three, 12 hour shifts per week with a rotating weekend shift. She has no other children and is available to help

care for [Josh].

. . . .

25. [Mother] also has a 13 year old step-son named . . . [Bob]. [Josh] and [Bob] get along well and play X-Box together. The two boys also communicate via X-Box. [Josh] enjoys being at [Mother's] home with [Bob].

26. [Father] and [Mother] now get along very well and are able to co-parent [Tammy] and [Josh].

We first note that the trial court's findings address several of the issues noted in the prior custody order which supported the trial court's conclusion that Grandmother should have custody of Josh in 2012, properly addressing the specific areas of concern. Grandmother's argument begins by focusing on ways in which Father has not improved, but again she does not contest the evidentiary basis for the findings. In fact, she concedes, "[a]dmittedly, the evidence shows that . . . [Father] improved his lifestyle from the 2012 order[,] but contends the order does not show a sufficient effect on Josh to support a substantial change in circumstances.

As to Father's lack of involvement in Josh's life, the trial court was not required to find Father has become a perfect parent in order for custody to be modified. Father has made positive changes and the "trial court's principal objective is to measure whether a change in custody will serve to promote the child's best interests." The positive changes by Father noted the trial court include that he has a much more stable work schedule and lifestyle given the change in his job; his new wife has a

loving relationship with Josh and is available to care for him; Josh is able to visit with his sister in his Father's custody and to engage in activities with both his Father and Mother; and Father attends Josh's activities. These changes do exhibit a substantial change in circumstances affecting Josh's welfare. *See Shell*, ___ N.C. App. at ___, 819 S.E.2d at 571–73 (affirming there was a substantial change of circumstances due to the mother's sobriety, maintaining a more stable lifestyle, marrying an individual who had a positive relationship with her children, and changes in communication with the father).

3. Interference with Relationship

Grandmother then notes six findings of fact regarding her negative interactions with Josh's parents, including failing to notify them of his baptism, not allowing weekend visits, not allowing Josh to go on a cruise with his Mother, criticizing Josh's parents in front of him, and overall interference in Josh's relationship with his parents. Again, Grandmother does not contend the findings of fact are unsupported by the evidence but rather argues "that [the] link is not present" that shows this had an effect on Josh's welfare. But it is difficult to understand how repeated instances of interference with a child's relationship with his parents could *not* affect his welfare negatively. Our Court has previously noted that the parents' failure to communicate and contentious relationship can have a negative impact on the child which results in a substantial change of circumstances. *See Laprade v.*

Barry, ___ N.C. App. ___, ___, 800 S.E.2d 112, 117 (2017) (“It is beyond obvious that a parent’s unwillingness or inability to communicate in a reasonable manner with the other parent regarding their child’s needs may adversely affect a child, and the trial court’s findings abundantly demonstrate these communication problems and the child’s resulting anxiety from her father’s actions. While father is correct that this case overall demonstrates a woeful refusal or inability of both parties to communicate with one another as reasonable adults on many occasions, we can find no reason to question the trial court’s finding that these communication problems are presently having a negative impact on Reagan’s welfare that constitutes a change of circumstances. In fact, it is foreseeable the communication problems are likely to affect Reagan more and more as she becomes older and is engaged in more activities which require parental cooperation and as she is more aware of the conflict between her parents. Therefore, we conclude that the binding findings of fact support the conclusion that there was a substantial change of circumstances justifying modification of custody. This argument is overruled.” (citations omitted)).

Again, the trial court’s findings address issues noted in the 2012 custody order. In that order, the trial court found that Grandmother “encouraged . . . [Father] to hunt, fish, take vacations, and spend time with the minor child[,]” but he did not take advantage of these opportunities. Father also did not attend a graduation ceremony. But here, the trial court found that Grandmother had shifted from encouraging

Father to spend time with Josh to seeking to limit it. Grandmother had not informed his parents of his baptism, did not allow him to go on a cruise with his Mother, and was disparaging of his parents in front of him. These are substantial changes which negatively affect Josh. *See id.* This argument is overruled.

B. Best Interests

Finally, Grandmother contends that Josh's "home" is with her, and the trial court abused its discretion in determining it was not in Josh's best interests to remain primarily in her physical custody. Grandmother focuses on all the positive things she brings to Josh's life. There is no dispute that Grandmother was Josh's primary loving caretaker for much of his life and took excellent care of him, but the trial court acted within its discretion in weighing the relative benefits to Josh of granting primary custody to either Grandmother or Father and determining that it would be in his best interests to reside with Father. The trial court's determination of a "child's best interests cannot be upset absent a manifest abuse of discretion[.]" and despite all the positives Grandmother brings to Josh's life, the trial court did not abuse its discretion in determining it was in Josh's best interests to be with his Father, who has become more involved in his life, has a wife who is positively involved in Josh's life, and has a positive relationship with Josh's Mother which allows that relationship and his relationship with his sister and step-brother to grow. *See Metz*, 138 N.C. App. at 540-41, 530 S.E.2d at 81. This argument is overruled.

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Opinion of the Court

IV. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judges INMAN and ZACHARY concur.

Report per Rule 30(e).