An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-915

Filed: 7 May 2019

Jackson County, No. 12 CVD 217

JENNIFER STULL, Plaintiff,

v.

JARED D. STULL, Defendant.

Appeal by defendant from order entered 2 February 2018 by Judge Kristina Earwood in Jackson County District Court. Heard in the Court of Appeals 28 February 2019.

Donald N. Patten, PLLC, by Donald N. Patten, for plaintiff-appellee.

Snyder Law, by Barry Snyder, for defendant-appellant.

ZACHARY, Judge.

Defendant-Father appeals from the trial court's order denying his Motion to Modify Custody of his minor child with Plaintiff-Mother. We remand for additional findings of fact and conclusions of law.

Background

Plaintiff-Mother and Defendant-Father were married in April 2004 and had one child, born in 2006. The parties divorced in 2013. On 2 December 2016, Defendant-Father filed a Motion to Modify Custody as set out in the parties' prior custody order entered on 30 January 2015. Defendant-Father's Motion to Modify Custody sought unsupervised visitation with the child, as he merely had supervised visitation pursuant to the terms of the 30 January 2015 order.

Clinical psychologist Dr. Jay Ian Fine testified on Defendant-Father's behalf at the hearing on his Motion to Modify Custody. During the hearing, Defendant-Father attempted to introduce Dr. Fine's opinions and reports resulting from several counseling sessions that he had with Defendant-Father in 2014, but that his trial counsel had failed to disclose to the trial court prior to its entry of the 30 January 2015 custody order. The trial court declined to admit the testimony, reasoning that the court could "only hear evidence as to January 30th, 2015 until the date of filing which was December 2nd, 2016 on the motion to modify." The trial court thereafter permitted Dr. Fine to testify as to his three sessions with Defendant-Father that occurred after January 2015. Based on those sessions, Dr. Fine opined that he "would have no concerns about [Defendant-Father] having unsupervised or increased visitation with his daughter."

The trial court denied Defendant-Father's Motion to Modify Custody by order entered 2 February 2018. The trial court's order contains no findings of fact or conclusions of law. Defendant-Father filed written notice of appeal on 2 March 2018.

Discussion

Defendant-Father first argues that the trial court erred at the hearing on his Motion to Modify Custody by refusing to admit into evidence Defendant-Father's "previously undisclosed mental evaluation and testimony regarding [his] qualification to enjoy unsupervised visitation." We agree that the trial court erred in excluding this evidence, but conclude that Defendant-Father was not prejudiced as to warrant a new hearing.

In evaluating whether to modify a child custody order due to a substantial change in circumstances, generally the trial court "may only consider events which occurred after the entry of the previous order." *Woodring v. Woodring*, 227 N.C. App. 638, 645, 745 S.E.2d 13, 20 (2013). The reason for this rule "is to prevent relitigation of conduct and circumstances that antedate the prior custody order." *Id.* at 645, 745 S.E.2d at 19 (emphasis omitted). However, "[w]hen . . . facts pertinent to the custody issue were not disclosed to the court at the time the original custody decree was rendered, courts have held that a prior decree is not res judicata as to those facts not before the court." *Newsome v. Newsome*, 42 N.C. App. 416, 425, 256 S.E.2d 849, 854 (1979). Accordingly, trial courts may consider events that occurred before the entry

of a prior custody order in determining the appropriateness of modifying that order if "the events were previously undisclosed to the court." *Woodring*, 227 N.C. App. at 645, 745 S.E.2d at 20.

In the instant case, because it appears that Defendant-Father's mental evaluations prior to January 2015 were undisclosed to the trial court when it entered the custody order that Defendant-Father now seeks to modify, the trial court should have permitted Defendant-Father to introduce such evidence at the hearing on his Motion to Modify Custody. The trial court erred in excluding this evidence.

However, attached to Defendant-Father's Motion to Modify Custody was a report from Dr. Fine, which indicated that his evaluation of Defendant-Father's overall progress from prior to January 2015 was also "supported through [his] most recent therapy encounter[s]" with Defendant-Father, testimony of which the trial court did admit into evidence. Moreover, Defendant-Father did not make an offer of proof demonstrating how Dr. Fine's testimony concerning Defendant-Father's progress prior to January 2015, if admitted, might have differed from the opinions he offered regarding the post-January 2015 sessions. *See GE Betz, Inc. v. Conrad*, 231 N.C. App. 214, 232, 752 S.E.2d 634, 648 (2013) ("[A] party may preserve the exclusion of evidence for appellate review by making a specific offer of proof."), *disc. review denied*, 367 N.C. 786, 766 S.E.2d 837 (2014). Accordingly, we conclude that the record fails to indicate that the trial court's exclusion of the previously undisclosed

evaluations prejudiced Defendant-Father so as to require a new hearing. *See Dep't. of Transp. v. Craine*, 89 N.C. App. 223, 226, 365 S.E.2d 694, 697 ("Every erroneous ruling in the admission or exclusion of evidence does not *ipso facto* entitle the appealing party to a new trial. He must show that he was prejudiced and that the erroneous ruling probably influenced the [outcome]."), *disc. review denied*, 322 N.C. 479, 370 S.E.2d 221 (1988).

Next, Defendant-Father argues that the trial court erred by denying his Motion to Modify Custody without making findings of fact or conclusions of law. Indeed, the trial court's order simply provides that "Defendant's Motion is hereby denied." We agree with Defendant-Father that the trial court's order must be remanded for appropriate findings of fact and conclusions of law.

Pursuant to N.C. Gen. Stat. § 50-13.7, "an order of a court of this State 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). It is well established that

> [t]he 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. If the trial court concludes either that a substantial change has not occurred or that a substantial change did occur but that it did not affect the minor child's welfare, the court's examination ends, and no modification can be ordered.

Shipman v. Shipman, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003). "If . . . the trial court determines that there has been a substantial change in circumstances . . . affect[ing] the welfare of the child, the court must then examine whether a change in custody is in the child's best interests." *Id.* "The party moving for the modification of custody bears the burden of showing such a change in circumstances." *Woncik v. Woncik*, 82 N.C. App. 244, 247, 346 S.E.2d 277, 279 (1986).

Upon appeal of "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*, 357 N.C. at 474, 586 S.E.2d at 253. "[S]hould 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." *Id.* at 475, 586 S.E.2d at 253-54 (quotation marks omitted). Finally, "this Court must determine if the trial court's factual findings support its conclusions of law." *Id.* at 475, 586 S.E.2d at 254.

Regarding "the trial court's conclusions of law, . . . the trial court must determine whether there has been a substantial change in circumstances" affecting the welfare of the minor child. *Id.* If, however, the trial court denies a party's motion to modify custody on the ground that "there [have] been no material changes of circumstances with respect to the custody and welfare of the minor [child]," then the

trial court need only make a conclusion of law to that effect; the court is not "required to make negative findings of fact justifying" that conclusion. *Searl v. Searl*, 34 N.C. App. 583, 587, 239 S.E.2d 305, 308-09 (1977) (quotation marks omitted), *overruled in part on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998).

In the present case, the trial court's order denying Defendant-Father's Motion to Modify Custody contains no findings of fact or conclusions of law, and therefore we are unable to determine the propriety of the trial court's ruling. *See D'Alessandro v. D'Alessandro*, 235 N.C. App. 458, 467, 762 S.E.2d 329, 335 (2014) ("It would appear from the lack of findings of fact and conclusions of law . . . that the trial court did not find [the] defendant's requests [for custody modification] to be supported by the facts, the law, or perhaps both, but still the trial court needs to make findings of fact so that it is clear that [the] defendant's motion to modify custody was addressed in full."). We are unable to ascertain from the order whether the trial court denied Defendant-Father's Motion to Modify Custody based on a conclusion (1) that there had been no substantial change in circumstances affecting the welfare of the child, or (2) that a change in custody was not in the child's best interest. Accordingly, we must remand this matter to the trial court for findings of fact and conclusions of law addressing its denial of Defendant-Father's Motion to Modify Custody.

Conclusion

The trial court's order is remanded for the court to make findings of fact and conclusions of law as described herein.

REMANDED.

Judges BERGER and HAMPSON concur.

Report per Rule 30(e).