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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-749

Filed: 17 September 2019

Cumberland County, No. 06 CVD 6628

SALVATORE DANIELE, Plaintiff,

v.

MARIA DANIELE, now DELAGARZA, Defendant.

Appeal by plaintiff from order entered 25 September 2017 by Judge Edward A. Pone in Cumberland County District Court. Heard in the Court of Appeals 7 August 2019.

*Lewis, Deese, Nance & Briggs, LLP, by Renny W. Deese, for plaintiff-appellant.*

*No brief was filed for defendant.*

BRYANT, Judge.

Where the record established a connection between a substantial change in circumstances and the welfare of the minor children, the trial court's modification of an existing child custody order was proper. Accordingly, we affirm.

On 21 July 2006 in Cumberland County District Court, plaintiff Salvatore Daniele (hereinafter "plaintiff-father") filed a complaint for child custody and child

support against defendant Maria Daniele (now Delagarza) (hereinafter “defendant-mother”). Defendant-mother answered and counterclaimed for child custody, child support, alimony, post-separation support, attorney’s fees, and equitable distribution. A temporary custody and visitation order was entered on 24 May 2007, which granted the parties joint legal custody of their two minor children with defendant-mother being the primary caretaker and plaintiff-father being the secondary caretaker.

On 14 December 2009, the Honorable A. Elizabeth Keever, Judge presiding, entered an order addressing equitable distribution, child custody, and visitation. The court found that the parties were married on 4 July 2003, separated on 27 May 2006, and divorced on 2 August 2007. The union produced two children. As to child custody, the court ordered that the parties were to have joint custody of the two minor children, with defendant-mother being the primary custodian and plaintiff-father being the secondary custodian. The court further provided visitation schedules for both parties on major holidays and school breaks for both even and odd numbered years.

On 22 December 2014, defendant-mother moved the court to suspend or modify the visitation order asserting there had been a substantial change in circumstances affecting the welfare of the minor children. Defendant-mother alleged that plaintiff-father had remarried and that the children had observed incidents of domestic

violence between plaintiff-father and his new wife. Plaintiff-father denied the allegations and requested that he be granted primary custody.

On 7 August 2015 (amended 28 August 2015), the trial court entered an order appointing a child custody expert (hereinafter “CCE”) authorized to review all information, records, and reports concerning the parties’ minor children, including medical and educational records and reports.

On 2 November 2015, the Honorable Edward A. Pone, Judge presiding, heard evidence and arguments of counsel regarding defendant-mother’s motion for emergency modification of custody. In an order entered 23 November 2015, Judge Pone denied defendant-mother’s motion for emergency modification of custody.

On 23 February and 1 June 2017, Judge Pone heard plaintiff-father and defendant-mother’s respective motions for modification of custody and visitation. Defendant-mother alleged that plaintiff-father and his new wife had committed several acts of domestic violence in view of the minor children and that the minor children did not feel safe in plaintiff-father’s home. Plaintiff-father alleged defendant-mother was neglectful of the minor children with regard to their school attendance, education, and involvement in extra-curricular activities; had attempted to alienate the minor children from plaintiff-father; had become obsessed with plaintiff-father’s wife; had discarded gifts plaintiff-father had given the minor children; had failed to consistently provide medical and dental care; and had refused

to allow the children to travel to Canada to see their paternal grandparents. During the pendency of the matter, defendant-mother filed a second motion to modify custody and a motion to allow her and the minor children to relocate to Texas, to live in the residence of defendant-mother's current husband.

In an order entered 25 September 2017 modifying custody and visitation, the court concluded that neither party proved any specific act alleged in their respective motions, but "they have shown that together they have created a substantial change in circumstance and environment adversely affecting the welfare of the minor children." In plaintiff-father's residence, the minor children have heard arguing but have not observed domestic violence; the minor children were not afraid to visit plaintiff-father, however, they insist plaintiff-father does not spend enough time with them; and they were delegated as babysitters for their younger siblings, along with their assigned chores. Defendant-mother has not been neglectful but has been slow to respond to the minor children's school attendance, education, and extra-curricular activities to the point the minor children's school has sent the matter to truancy mediation. Defendant-mother has failed to make and keep "a couple of dental appointments." The court also noted specific concerns regarding defendant-mother's marriage to her new husband—a man she has known only a short period, with whom she has not lived during the marriage (they were together only long enough to get married before going separate ways), and whom the minor children did not know.

Both minor children were in therapy. Recounting events revealed by the minor children in therapy, the court found that “[i]t is clear that the conflict between the Plaintiff[-father] and the Defendant[-mother] is adversely affecting the minor children.”

The court concluded that if defendant-mother were allowed to relocate to Texas with the minor children, the bond between the plaintiff-father and the minor children would be damaged, a relationship the minor children “want to desperately preserve.” The court found that “both Plaintiff[-father] and Defendant[-mother] are fit and proper persons to have the permanent legal care, custody, and control of the minor children and it is in their best interests that joint legal and physical custody is . . . awarded . . . .” Defendant-mother was granted primary physical custody, and plaintiff-father was awarded secondary physical custody, with specific visitation. “If however, the defendant[-mother] relocates at a distance more than 100 miles the custodial provisions shall reverse.”

On 4 October 2017, plaintiff-father filed a Rule 59 motion to re-open the judgment and take new evidence from the minor children regarding their displeasure with the lack of visitation time with plaintiff-father. In an order filed 23 March 2018, Judge Pone denied the Rule 59 motion. Plaintiff-father appeals the trial court’s 25 September 2017 order.

On appeal, plaintiff-father argues that the trial court erred by reducing the amount of time the minor children were scheduled to be in his physical custody. More specifically, plaintiff-father contends that the court abused its discretion by reducing his physical custody of the minor children from approximately 43% of the year pursuant to the 14 December 2009 child custody order to 20% of the year pursuant to the 25 September 2017 child custody order. We disagree.

In a child custody case, . . . [u]nchallenged findings of fact are binding on appeal. *See, e.g., Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (“Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.”). The trial court’s conclusions of law must be supported by adequate findings of fact. *Witherow v. Witherow*, 99 N.C. App. 61, 63, 392 S.E.2d 627, 629 (1990). Whether a district court has utilized the proper custody modification standard is a question of law we review *de novo*. *See, e.g., Simmons v. Arriola*, 160 N.C. App. 671, 674–76, 586 S.E.2d 809, 811–12 (2003) (according no deference to the trial court’s modification standard determinations). “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)].

*Peters v. Pennington*, 210 N.C. App. 1, 12–13, 707 S.E.2d 724, 733 (2011). “[I]f [a] finding of fact is essentially a conclusion of law . . . it will be treated as a conclusion of law which is reviewable on appeal.” *Smith v. Beaufort Cty. Hosp. Ass’n*, 141 N.C. App. 203, 214, 540 S.E.2d 775, 782 (2000) (second and third alteration in original)

(quoting *Bowles Distributing Co. v. Pabst Brewing Co.*, 69 N.C. App. 341, 344, 348, 317 S.E.2d 684, 686 (1984)), *aff'd per curiam*, 354 N.C. 212, 552 S.E.2d 139 (2001).

Plaintiff-father first argues that the trial court failed to make sufficient conclusions of law regarding the court's jurisdiction over the subject matter, what substantial change in circumstances warranted a change in child custody, or how the modification of the 23 December 2009 custody order would be in the best interests of the minor children.

*Jurisdiction*

Pursuant to General Statutes, section 50A-201 ("Initial Child-Custody Jurisdiction"), "a court of this State has jurisdiction to make an initial child-custody determination only if: (1) This State is the home state of the child on the date of the commencement of the proceeding . . . ." N.C. Gen. Stat. § 50A-201(a) (2017). "'Home state' means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding." *Id.* § 50A-102(7). "[A] court of this State which has made a child-custody determination consistent with G.S. 50A-201 . . . has exclusive, continuing jurisdiction over the determination . . . ." *Id.* § 50A-202(a).

In his 25 September 2017 order, Judge Pone acknowledged the 14 December 2009 order of the court awarding the parties joint custody of their minor children and made the following unchallenged findings of fact:

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1. That the Plaintiff is a resident of Cumberland County, North Carolina and has been for six months preceding the institution of this action.

2. That the Defendant is a resident of Cumberland County, North Carolina and has been for six months next preceding the institution of this action.

. . . .

4. That the Plaintiff and Defendant are the parents of two minor children . . . born December 1, 2003, and . . . June 1, 2005.

5. That the [c]ourt has jurisdiction over this matter and the parties in that North Carolina is the home state of the minor children.

“[I]f [a] finding of fact is essentially a conclusion of law . . . it will be treated as a conclusion of law which is reviewable on appeal.” *In re M.R.D.C.*, 166 N.C. App. 693, 697, 603 S.E.2d 890, 893 (2004) (second alteration in original) (citation omitted). We affirm the trial court’s conclusions that North Carolina is the home state of the minor children and the court has jurisdiction over the matter. Therefore, plaintiff-father’s contention to the contrary is overruled.

*Substantial Change in Circumstances*

Plaintiff-father contends that the trial court failed to make sufficient conclusions of law regarding what substantial change in circumstances warranted a change in child custody.

“It is well established in this jurisdiction that a trial court may order a modification of an existing child custody order

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between two natural parents if the party moving for modification shows that a ‘substantial change of circumstances affecting the welfare of the child’ warrants a change in custody.” *Shipman v. Shipman*, 357 N.C. 471, 473, 586 S.E.2d 250, 253 (2003) (citations omitted). The modification of a custody decree must be supported by findings of fact reflecting the fulfillment of this burden. *See Tucker v. Tucker*, 288 N.C. 81, 87, 216 S.E.2d 1, 5 (1975). “[T]he 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.” *Shipman*, 357 N.C. at 478, 586 S.E.2d at 255 (citation omitted).

In determining whether a substantial change in circumstances has occurred [c]ourts must consider and weigh all evidence of changed circumstances which effect or will affect the best interests of the child, both changed circumstances which will have salutary effects upon a child and those which will have adverse effects upon the child.

*Hibshman v. Hibshman*, 212 N.C. App. 113, 121, 710 S.E.2d 438, 443 (2011) (citations and quotation marks omitted).

*Thomas v. Thomas*, 233 N.C. App. 736, 740, 757 S.E.2d 375, 379 (2014).

In *Laprade v. Barry*, \_\_\_ N.C. App. \_\_\_, 800 S.E.2d 112 (2017), this Court addressed whether a trial court erred by granting a mother’s motion to modify child custody based on a substantial change in circumstances where the mother made positive changes to her behavior in the years following the entry of the permanent custody order and where the father’s failure to communicate with the mother

interfered with the child's relationship with the mother. The trial court's findings indicated that the mother had ceased attempting to initiate an investigation of the father for abuse of the minor child. *Id.* at \_\_\_, 800 S.E.2d at 116. As to communication between the mother and father regarding the minor child,

[t]he trial court found that

the parties have been polarized, with the [father] and his girlfriend keeping tight control of [the minor child] . . . , and severely limiting contact between [the minor child] and the [mother] . . . . The [father]'s practice in this regard has had a negative effect upon [the minor child]: her anxiety level is high.

*Id.* at \_\_\_, 800 S.E.2d at 115–16. Furthermore, the court found that the parties communicated almost exclusively by text messages, with the father often failing to respond to the mother's messages or inquiries; often the minor child was in the sole care of the father's girlfriend who, along with the father, was unwilling to provide the mother with the girlfriend's telephone number; and when the mother spoke with the minor child by telephone, the telephone was often placed on speaker with the father and/or his girlfriend listening and suggesting answers for the minor child to say. *Id.* at \_\_\_, 800 S.E.2d at 116–17. This Court reasoned as follows:

[i]t 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 [the minor child]'s welfare that constitutes a change of circumstances. *See generally Shipman*, 357 N.C. at 473–75, 586 S.E.2d at 253–54. In fact, it is foreseeable the communication problems are likely to affect [the minor child] 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.

*Id.* at \_\_\_, 800 S.E.2d at 117; *see also Shell v. Shell*, \_\_\_ N.C. App. \_\_\_, 819 S.E.2d 566, 572–73 (2018) (affirming the trial court's conclusion that a substantial change in circumstances occurred where the parents' inability to communicate and cooperate since the permanent custody order had a negative impact on the children that was becoming more substantial as the children grew older).

Here, as to the circumstances that amount to a substantial change of circumstances, the trial court made the following findings of fact:

15. Neither party has proven any specific acts as alleged in their respective motions. However, they have shown that together they have created a substantial change in circumstances and environment adversely affecting the welfare of the minor children. The court makes the following findings concerning those changes:

1. The children have not witnessed domestic violence in the Plaintiff[-father]'s home, but have heard the Plaintiff[-father] and their step mother arguing from

time to time behind closed doors.

2. The children are not afraid to visit their [plaintiff-father], they are however, frustrated with the visitations as they have issues with the step-mother and they insist the [plaintiff-father] does not spend enough time with them. Instead they are delegated babysitters for their younger siblings and are spending their time there doing chores. They desire more alone time with their [plaintiff-father] and to date that has not happened.

. . . .

6. There is extreme sadness in the children caused by the Plaintiff[-father] and the Defendant[-mother]. *This results from the Plaintiff[-father] interrogating the children and making promises as it relates to the custody and such conduct by the [plaintiff-father] is clearly more damaging than any action the [defendant-mother] has taken.*

. . . .

16. The children are both in therapy, in fact they now have two therapists. This too has also been a source of contention for the parties.
17. The children have revealed inappropriate behavior by both of their parents.
18. On a recent therapy date of February 13, 2017, [the younger child] expressed her dislike for having to take gymnastics and her love of basketball. She expressed her [plaintiff-father] would not allow her to play basketball because he says it is for boys. Further she indicated her [plaintiff-father] threatened punishment if she didn't continue gymnastics. The child also expressed she does not like coming to therapy and did not like having to

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come to court as a result of her parents' divorce years ago. She also indicated her [plaintiff-father] would ask her and her sister questions and would not let them go until they answered. [The younger child] also informed the therapist she did not like going to the other therapist because she had cried on three occasions because of something the other therapist said to her. [The younger child] also expressed that on their return from their recent trip to Texas, their [plaintiff-father] questioned them about their stay with the step father and wanted to know the address and phone number and wanted to see pictures of the house they stayed in. The Plaintiff[-father] also asked the child whether or not the mom and the step father were affectionate and kissed and [the younger child] felt this was an inappropriate question to ask.

19. The Plaintiff father stated to the minor child that their [defendant-mother and step father “were not a real family” and rather the “real family was the Plaintiff[-father] and his new wife.”
20. *It is clear that the conflict between the Plaintiff[-father] and the Defendant[-mother] is adversely affecting the minor children.*
21. [The elder child] expressed similar concerns during a February 23, 2017 therapy session. She recounted a 2015 incident where the Plaintiff father disciplined her for failure to watch for her younger half sibling. The family was going out and got in the vehicle. [Plaintiff-father] began to back up with the younger sibling behind him before he realized she was there. Plaintiff[-father] became angry at [the elder child] for not supervising the younger sibling and hit her on the arm. The Plaintiff[-father] denies this. The court does find that the [plaintiff-father] acted out of frustration and took it out on the child by misplacing his own fault upon the minor child.

....

23. The Plaintiff[-father]'s evidence attempted to show that they have a blended family with the girls and everything is just fine. The witnesses recounted how well they act as a blended family.
24. The girls, however, have recounted a different scenario and an entirely different picture to the new therapist and the child custody expert.
25. [The elder child] expressed to the therapist that the step mother speaks in Spanish and says things that are not nice about them. The step mother does not realize that the girls speak Spanish better than she is aware. When the girls tell the step mother something the other siblings have done, she makes a sarcastic face and doesn't like to listen to them. [The elder child] does not look forward to going to the Plaintiff[-father]'s home because Plaintiff[-father] works long hours and does not spend time with the girls and the step mother uses her as a babysitter for the younger siblings.
26. [The elder child] also reports that the Plaintiff father still brings up the 2015 incident and insists that their [defendant-mother] is brainwashing them. [The elder child] also told [plaintiff-father] about the possibility of moving and he became upset and took away some of her toys. [The elder child] reports she does not understand why [plaintiff-father] would want to keep them here when he treats her and her sister poorly and they do not spend time as they used to.
27. The report from The Haymount Institute indicates that the girls do not get along well with the step mother. During a therapy session, [the elder child] described to the therapist what was an interrogation session by her [plaintiff-father] when they returned

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from their trip to Texas. She says he took notes about what was going on there, and asked many questions. The behavior by the [plaintiff]-father was wrong. She further disclosed the [plaintiff]-father told her he was going to get full custody of them and promised to take them to the hair salon to get their hair cut and colored if they made the “A/B Honor roll.”

28. The child custody expert . . . met with the children and both the children reported they do not care for the step mother. The step mother shows preferential treatment for her biological children . . . and yells at [the minor children] a lot. The step mother always takes [her biological child’s] side without hearing from [the minor children] and the Plaintiff father does not come to their defense when she is yelling at them. He usually doesn’t say anything. *They both expressed their desire to visit with their [plaintiff]-father, however they want to visit with [plaintiff-father], and [plaintiff-father] alone.* They want to be able to hang out with him and spend time together without the step mother and the other half siblings being there.

. . . .

33. The children want to spend time with their [plaintiff]-father and want more alone time with him. *The [plaintiff]-father has clearly missed that point, either due to indifference or a refusal to accept the reality and it has taken this [c]ourt to determine a solution.*
34. It is also clear to the [c]ourt that the conflict between the Plaintiff[-father] and the Defendant[-mother] is now significantly and adversely affecting the welfare of the minor child. The children are tired of the back and forth and they simply want this to be over.

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35. There has been in fact a substantial change in circumstance affecting the welfare of the minor children since the previous order was entered, to wit:
- a. Plaintiff[-father] and Defendant[-mother] have each remarried to different people.
  - b. Plaintiff[-father] and his new wife now have three children together.
  - c. The [minor] Children do not like the step mother in particular or the new sibling[s].
  - d. Plaintiff[-father] has acted inappropriately in questioning the children as it related to their [defendant-]mother and her new husband and has caused great distress to these minor children.

....

- f. The [minor] children also now have two therapists; this constant division between the parties is not a healthy environment for the children.

36. *The Parties can no longer effectively co parent.*

37. This Court has considered placing sole custody in one parent or the other.

....

41. The [c]ourt finds that both Plaintiff[-father] and Defendant[-mother] are fit and proper persons to have the permanent legal care, custody, and control of the minor children and it is in their best interest that joint legal custody, and control of the minor children and it is in their best interest that joint legal and physical custody is hereby awarded, with the Defendant/Mother having primary physical custody, and the Plaintiff/Father having secondary physical custody by way of specific visitation; and that the terms for custody as set forth herein, are in

the best interests of the minor children.

(emphasis added).

The court ordered that plaintiff-father have visitation with the minor children every first and third weekend, Father's Day, spring/Easter break during odd numbered years, the first six weeks of summer recess as well as alternating weekends during the period defendant-mother has physical custody during the summer recess, the Thanksgiving holiday during even numbered years, and either the vacation period before Christmas or the period after Christmas depending on whether the calendar year was numbered even or odd.

The trial court's finding that "[plaintiff-father and defendant-mother] have shown that together they have created a substantial change in circumstances and environment adversely affecting the welfare of the minor children" is a statement of both law and fact. *See Smith*, 141 N.C. App. at 214, 540 S.E.2d at 782. Further, we hold that the trial court's findings of fact describe current circumstances which adversely affect the welfare of the minor children sufficient to conclude that a substantial change in circumstances has occurred. *See Laprade*, \_\_\_ N.C. App. \_\_\_, 800 S.E.2d 112. Where the trial court concluded that "the conduct by the [plaintiff-father] is clearly more damaging than any action the [defendant-mother] has taken," and that the custody arrangement awarding primary physical custody to defendant-mother and secondary physical custody to plaintiff-father by way of specific visitation

is “in the best interests of the minor children,” the trial court established a connection between the substantial change in circumstances and the welfare of the children such that the trial court’s modification of an existing child custody order was proper. *See Thomas*, 233 N.C. App. at 740, 757 S.E.2d at 379. Accordingly, the trial court’s 25 September 2017 order modifying custody and visitation is

AFFIRMED.

Judges STROUD and DIETZ concur.

Report per Rule 30(e).