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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-780

Filed: 4 February 2020

Davidson County, No. 17 CVD 2512

KRYSTAL DAVIDSON, Plaintiff,

v.

JACOB LAWS, Defendant.

Appeal by defendant from orders entered 11 and 26 April 2018 by Chief District Court Judge Wayne L. Michael, and 12 and 24 April 2018 by Judge April C. Wood in Davidson County District Court. Heard in the Court of Appeals 24 April 2019.

Krystal Davidson pro se.

Fox Rothschild, LLP, by Michelle Connell, for defendant-appellant.

BRYANT, Judge.

Defendant Jacob Laws, a deployed servicemember who acted in accordance with notice requirements set forth within the Servicemembers Civil Relief Act, was entitled to a ruling on his motion for a 90-day stay. Within 90 days of the date defendant filed his 90-day stay application, the trial court set for hearing plaintiff Krystal Davidson's motion to modify custody and entered a temporary custody order

as a result. We hold the trial court erred. Accordingly, we vacate those orders and remand this matter to the trial court to address defendant's motion for a 90-day stay of proceedings filed pursuant to the Servicemembers Civil Relief Act.

On 23 January 2012, pursuant to a petition for legitimation, custody and/or visitation of A.L.M.D. (hereinafter "the minor child"), the Family Division of Superior Court of Fulton County, Georgia awarded temporary sole legal and physical custody of the minor child to defendant. The whereabouts of plaintiff, the minor child's mother, were unknown. On 19 April 2012, a final order was entered changing the name of the minor child and awarding permanent custody to defendant. At some point, defendant and the minor child moved from Georgia to North Carolina.

Years later in the fall of 2017, plaintiff filed a petition and obtained registration of the Georgia foreign child custody order. The order confirming registration was entered 12 October 2017 in Guilford County District Court. A few days later, plaintiff filed a motion seeking modification of the newly registered foreign child custody order. Venue was changed to Davidson County as both parties were residents of Davidson County.

Plaintiff's motion to modify custody was set for hearing in Davidson County District Court during the 29 January 2018 calendar session; however, upon defendant's request, the hearing was continued until the week of 16 April 2018.

Defendant had enlisted in the Army in December 2017 and would be training until 13 April 2018.

On 19 March 2018, defendant filed a motion to stay the proceedings pursuant to the Servicemembers Civil Relief Act, 50 U.S.C. App. § 522. Defendant requested that the trial court grant him a 90-day stay of proceedings or in the alternative, a stay of at least 90 days in order to allow defendant time to meet with his trial counsel and prepare for the hearing. Defendant stated that he would be available to appear on or after 21 April 2018. Defendant also filed notice of hearing on his motion for stay of the proceedings.

On 11 April 2018, the Chief District Court Judge peremptorily set for hearing plaintiff's motion for modification of the child custody order to commence 24 April 2018. The Honorable April C. Wood, Judge presiding in Davidson County District Court, likewise entered an order continuing the hearing on defendant's motion for a stay of the proceedings until 24 April 2018.

On 23 April 2018, defendant filed a motion for relief pursuant to Rules 59 and 60 in which he requested that the court hold a new hearing (on defendant's motion for a stay) or set aside the order setting for hearing plaintiff's motion to modify custody. Defendant argued the court had committed legal error by failing to rule on his motion for a stay of the proceedings pursuant to the Servicemembers Civil Relief Act. Defendant asserted that he graduated from Basic Training at Fort Benning on

20 April 2018 and was unable to meet with his attorney until 23 April 2018—the day before his child custody hearing was scheduled.

On 24 April 2018, the matter was heard in Davidson County District Court, Judge Wood presiding. Present were plaintiff, who appeared pro se; defendant; and defendant’s attorney. Per defendant, no evidentiary hearing was conducted; the court noted its findings of fact were made “[a]fter reviewing the file and hearing arguments and reports from the Plaintiff and the Defendant” The same day, 24 April 2018, the court entered a temporary custody order which modified the permanent custody order, though still awarded custody of the minor child to defendant. However, the trial court made no reference to defendant’s Rule 59 or 60 motions nor did the trial court make a formal ruling on defendant’s motion for a stay pursuant to the Servicemembers Civil Relief Act.

On 26 April 2018, in accordance with Judge Wood’s 24 April 2018 temporary child custody order, the Chief District Court Judge peremptorily set for hearing on 26 June 2018, the matter of permanent custody of the minor child.

Defendant appeals the peremptory setting order entered 11 April 2018, the order of continuance entered 12 April 2018, the temporary custody order entered 24 April 2018, and the peremptory setting order entered 26 April 2018. Pursuant to a writ of supersedeas entered by this Court on 2 July 2018, further proceedings in the trial court are stayed pending this appeal.

We first consider the propriety of this interlocutory appeal.

“Interlocutory orders are those made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court in order to settle and determine the entire controversy. As a general rule, interlocutory orders are not immediately appealable.” *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (citations omitted). “Normally, a temporary child custody order is interlocutory and does not affect any substantial right . . . which cannot be protected by timely appeal from the trial court’s ultimate disposition . . . on the merits.” *Brewer v. Brewer*, 139 N.C. App. 222, 227–28, 533 S.E.2d 541, 546 (2000) (alterations in original) (citations omitted). “However, interlocutory orders are immediately appealable if delaying the appeal will irreparably impair a substantial right of the party.” *Maxwell v. Maxwell*, 212 N.C. App. 614, 617, 713 S.E.2d 489, 492 (2011) (citation omitted); *see also* N.C. Gen. Stat. §§ 1-277 (“Appeal from superior or district court judge”), 7A-27(b)(3)a. (“Appeals of right from the courts of the trial divisions”) (2017).

[Our Supreme] Court in [*Oestreicher v. Am. Nat’l Stores*, 290 N.C. 118, 225 S.E.2d 797 (1976),] adopted the dictionary definition of “substantial right”: “‘a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a [person] is entitled to have preserved and protected by law: a material right.’ ” *Oestreicher*, 290 N.C. at 130, 225 S.E.2d at 805 (quoting

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY
2280 (1971)).

Sharpe v. Worland, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999). “[T]he right to immediate appeal is reserved for those cases in which the normal course of procedure is inadequate to protect the substantial right affected by the order sought to be appealed.” *Blackwelder v. Dep’t of Human Res.*, 60 N.C. App. 331, 335, 299 S.E.2d 777, 780–81 (1983). “Our courts have generally taken a restrictive view of the substantial right exception. The burden is on the appealing party to establish that a substantial right will be affected.” *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000) (citations omitted).

Pursuant to the Servicemembers Civil Relief Act, the statutory rights conveyed to deployed servicemembers, with regard to civil actions or proceedings—specifically, “any child custody proceeding”¹—includes the right to request a stay in the proceedings for a period of at least 90 days. 50 U.S.C. § 3932(a) (2013).² The statutory

¹ We note that within Chapter 50A (Article 3) of our General Statutes, is the Uniform Deployed Parents Custody and Visitation Act, which directly addresses a trial court’s authority to issue a temporary custody order while a parent is deployed. *See* N.C. Gen. Stat. § 50A-370(a) (2017) (“After a deploying parent receives notice of deployment and during the deployment, a court may issue a temporary order granting custodial responsibility unless prohibited by the Servicemembers Civil Relief Act, 50 U.S.C. App. §§ 521-522.”)

² Pursuant to United States Code, Title 50, section 3902,

[t]he purposes of [Servicemembers Civil Relief] are-

(1) to provide for, strengthen, and expedite the national defense through protection extended by this chapter to servicemembers

right for deployed servicemen to request a stay of a child custody proceedings pursuant to the Servicemembers Civil Relief Act is a substantial right, “a right materially affecting those interests which a [person] is entitled to have preserved and protected by law: a material right.” *Sharpe*, 351 N.C. at 162, 522 S.E.2d at 579 (citation omitted).

The trial court’s failure to enter a ruling on defendant’s motion to stay the proceedings pursuant to the Servicemembers Civil Relief Act negatively affects a substantial right—the right to stay the proceedings and allow defendant time to prepare and be heard at trial after being given notice of the motion to modify child custody while deployed. Accordingly, defendant’s appeal from the interlocutory orders is properly before this Court.

On appeal, defendant argues that the trial court erred by failing to give effect to the automatic temporary stay provided by the Servicemembers Civil Relief Act now codified under 50 U.S.C. § 3932. We agree.

of the United States to enable such persons to devote their entire energy to the defense needs of the Nation; and

(2) to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of servicemembers during their military service.

50 U.S.C. § 3902 (2013).

Pursuant to our General Statutes, section 50A-370, “[a]fter a deploying parent receives notice of deployment and during the deployment, a court may issue a temporary order granting custodial responsibility unless prohibited by the Servicemembers Civil Relief Act, [codified at 50 U.S.C. § 3932].” N.C. Gen. Stat. § 50A-370(a) (2017) (“Proceeding for temporary custody order”). The Servicemembers Civil Relief Act, within Chapter 50 of the United States Code (“War and National Defense”), Title 50 (“Servicemembers Civil Relief Act”), Code section 3932 (“Stay of proceedings when servicemember has notice”) provides the following:

(a) Applicability of this section

This section applies to any civil action or proceeding, *including any child custody proceeding*, in which the plaintiff or defendant at the time of filing an application under this section-

(1) is in military service or is within 90 days after termination of or release from military service; and

(2) has received notice of the action or proceeding.

(b) Stay of proceedings

(1) Authority for stay

At any stage before final judgment in a civil action or proceeding in which a servicemember described in subsection (a) is a party, *the court . . . shall, upon application by the servicemember, stay the action for a period of not less than 90 days*, if the conditions in paragraph (2) are met.

(2) Conditions for stay

An application for a stay under paragraph (1) shall include the following:

(A) A letter or other communication setting forth facts stating the manner in which current military duty requirements materially affect the servicemember's ability to appear and stating a date when the servicemember will be available to appear.

(B) A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter.

50 U.S.C. § 3932 (2013).

The record before us indicates that plaintiff filed a motion in the cause seeking to modify a child custody order that had recently been registered in North Carolina as a foreign child custody order. On 20 December 2017, plaintiff filed a request to calendar the motion for modification of the custody order on the Davidson County District Court's civil calendar. On 29 January 2018, an order was entered scheduling the motion to modify custody to be heard during the term commencing 16 April 2018.

On 19 March 2018, defendant filed a motion to stay the 16 April 2018 proceedings pursuant to the Servicemembers Civil Relief Act, 50 U.S.C. § 3932, "for 90-days; or in the alternative, a further stay of these proceedings for at least 90 days to allow [defendant] time to meet and prepare for hearing with counsel." In accordance with requirements of section 3932(b)(2)(1), defendant attached a letter setting forth how his current military service materially affected his ability to appear in Davidson County District Court and provided a date by which he would be

available (on or after 21 April 2018). In accord with the requirements of section 3932(b)(2)(2), defendant provided a letter from his commanding officer which stated that defendant's current military duty prevented his appearance for court and that military leave was not authorized for the servicemember at the time of the letter. Thus, defendant presented statements in accordance with the requirements of 50 U.S.C. § 3932(b)(2). Per section 3932(b)(1), "[a]t any stage before final judgment in a civil action or proceeding in which a servicemember [is in military service or within 90 days after termination of or release from military service and has received notice of the action] . . . *the court . . . shall, upon application of the servicemember, stay the action for a period of not less than 90 days . . .*" 50 U.S.C. § 3932(b)(1) (emphasis added). Defendant's application was filed 19 March 2018.

On 11 April 2018, the Chief District Court Judge entered an order peremptorily setting plaintiff's motion for hearing on 24 April 2018 (from 16 April 2018). On 12 April 2018, the trial court entered an order continuing the hearing date of defendant's motion to stay the custody modification proceedings also until 24 April 2018.

On 23 April 2018, defendant filed a motion for relief pursuant to Rules 59 and 60, seeking to hold a new trial or amend or set aside the court's 12 April 2018 order and the order for peremptory setting on 24 April 2018. In his motion, defendant states that he "[had been] unable to determine whether there has been a ruling on

[his] Motion for Stay of Proceedings pursuant to Servicemember's Civil Relief Act . .
..”

In its 24 April 2018 temporary custody order, the court made the following findings of fact:

9. The paperwork provided to the [c]ourt indicated that [defendant] began his active duty status on December 27, 2017.

. . . .

11. . . . [T]he matter was continued to April 24, 2018, as the information provided to the [c]ourt was that [defendant] was scheduled to graduate from Basic Training on April 20, 2018 and would not be available to appear in [c]ourt until after that date.

12. [Defendant] is requesting a stay of these proceedings or a continuance in this matter in order to allow him the opportunity to prepare for a full hearing on [plaintiff]'s request to Modify Custody.

13. [Defendant] is present in Court and able to participate in these proceedings.

14. There has been a significant period of time wherein there has been no contact between [plaintiff] and the parties' minor child. It would be in the best interests of the minor child for there to be a period of reintroduction.

. . .

The court concluded “[t]hat there is a need for a Temporary Custody Order and this Order is in the best interests of the minor child.” The court also peremptorily set a hearing date for a permanent custody hearing—26 June 2018 (more than ninety days after the 19 March 2018 date defendant filed his motion for a 90-day stay).

It appears that while the trial court attempted to weigh the best interests of the minor child and the need to enter a temporary custody order (because it did so prior to making an affirmative ruling on defendant's motion for a 90-day stay of the proceedings), the trial court erred in failing to address defendant's motion for a 90-day stay. Furthermore, the trial court's 24 April 2018 temporary custody order fails to make findings of fact to support its conclusion that there was an immediate need that could not be reasonably addressed after a 90-day stay. *Cf.* N.C. Gen. Stat. § 50A-204 (2017) ("Temporary emergency jurisdiction") (providing a statutory basis for jurisdiction where "it is necessary in an emergency to protect [a] child").

The trial court's 24 April 2018 temporary child custody order acknowledges that defendant requested a 90-day stay of the proceedings due to his status as a servicemember of the United States Army and that defendant was stationed at Fort Campbell, Kentucky, and was currently on leave as of 20 April 2018 (four days before the 24 April 2018 hearing) having completed basic training. We hold the trial court erred by failing to enter a ruling on defendant's motion for 90-day stay of the proceedings requested pursuant to the Servicemembers Civil Relief Act, and by scheduling and conducting a child custody hearing, and entering a temporary child custody order within the 90-day period following defendant's 90-day stay application/filing date. Accordingly, we vacate the trial court's order entered 11 April 2018 (peremptorily setting the hearing on plaintiff's motion to modify the existing

custody order for 24 April 2018) and the 24 April 2018 temporary child custody order. The orders entered 12 April 2018 (continuing the hearing on defendant's motion for a 90-day stay until 24 April 2018) and 26 April 2018 (peremptorily setting a permanent custody hearing on 26 June 2018) appear to be moot. We remand the matter to the trial court to address defendant's 19 March 2018 motion for stay of proceedings filed pursuant to the Servicemembers Civil Relief Act and thereafter, make appropriate child custody determinations.

VACATED AND REMANDED.

Judges STROUD and COLLINS concur.

Report per Rule 30(e).