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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-234

Filed: 18 February 2020

Guilford County, No. 17 CVD 1384

MICHAEL MCMASTER and MELISSA GOODWIN MCMASTER, Plaintiffs,

v.

JESSICA MCMASTER and GARY LAMONT WILLIAMS, Defendants.

Appeal by plaintiffs from order entered 31 July 2018 by Judge Susan R. Burch in Guilford County District Court. Heard in the Court of Appeals 8 January 2020.

Morrow, Porter, Vermitsky and Taylor, PLLC, by John C. Vermitsky, for the plaintiffs.

Fox Rothschild LLP, by Troy D. Shelton, amicus curiae.

ARROWOOD, Judge.

Michael and Melissa McMaster (“plaintiffs”) appeal from an order dismissing their complaint for lack of standing to petition for custody of their great-niece (“the minor child”), who is the biological child of Jessica McMaster and Gary Williams (collectively, “defendants”). Plaintiffs allege the trial court erred in finding they

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lacked standing because defendants acted inconsistently with their protected role as parents. For the following reasons, we affirm the order of the trial court.

I. Background

Jessica McMaster (“Jessica”) and Gary Williams (“Williams”) are the natural parents of the minor child, who was born out of wedlock on 24 March 2006. Shortly after the minor child’s birth, Jessica accepted help with childcare from plaintiffs, her maternal great-uncle and his wife, her great-aunt by marriage, and relied heavily on their assistance. Williams was largely absent from the minor child’s life and spent much of it in and out of prison. From the minor child’s birth until 2015, plaintiffs provided much of the financial support for her, took her to many of her doctors and dentist appointments, assisted with transporting her to and from daycare and school, attended parent-teacher conferences, celebrated the holidays with her, and brought her along on their family vacations.

During the period of 2006 to 2013, the minor child primarily resided with and was cared for by plaintiffs. Beginning in 2014, Jessica’s arrangement with plaintiffs changed such that the minor child began residing with Jessica more often. By 2015, she resided with Jessica Sunday through Thursday and would spend the remainder of the week with plaintiffs. The minor child also visited with plaintiffs during school breaks, holidays, and the entire summer. This arrangement continued until August 2017, at which point Jessica further limited plaintiffs’ access to the minor child.

Plaintiffs subsequently filed a non-parent custody suit on 21 November 2017, alleging that Jessica and Williams were unfit, had neglected the minor child, and otherwise acted inconsistent with their constitutionally protected roles as parents. Jessica moved to dismiss the action on the grounds plaintiffs lacked standing to seek custody of the minor child.

The matter came on for hearing on 13 April 2018. On 31 July 2018, the trial court entered a written order in which it made the following findings of fact:

10. The minor child that is the subject of this action was the first child born to the Defendant. She was very young at the time of birth and was not prepared to care for a newborn child.

11. The Defendant relied heavily on the Plaintiffs for support and assistance.

12. The Defendant has struggled at times to provide clean and safe housing for the minor child and this struggle has increased as the Defendant has given birth to additional children.

13. Even though the Defendant has struggled, she has not failed in providing for the minor child. The Defendant's extended family has provided support and the Defendant has been able to pay them back.

14. Records from DSS showed that the Defendant did not keep her residence clean at times, did not always keep her children bathed, and that she did not appropriately supervise her children at times.

15. However, DSS records show that every time DSS got involved, the Defendant accepted the information from the DSS investigation and responded appropriately.

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The Court finds it significant that out of all the complaints DSS investigated, the Department did not substantiate abuse or neglect a single time.

. . . .

18. Regarding the issue of whether the Defendant's behavior was inconsistent or not with her Constitutionally protected status as a biological parent, the cases in North Carolina limit this issue to situations in which the biological parent created a nuclear family involving the non-parent party(ies) and the minor child.

19. The evidence before the Court does not support that the Defendant's reliance upon her extended family went so far as to create a nuclear family involving the Plaintiffs and the minor child.

Based on its findings of fact, the trial court concluded:

2. The defendant has not conducted herself in a manner which is unfit.
3. The defendant did not abandon or fail to provide for the minor child.
4. The defendant's behavior was not inconsistent with her paramount protected Constitutional status as the biological parent of the minor child.
5. The Plaintiffs have failed to prove standing by clear and convincing evidence.

The trial court thus granted Jessica's motion to dismiss the action for lack of standing.

On 31 July 2018, the trial court entered a written order dismissing the action.

Plaintiffs timely filed a written notice of appeal on 7 August 2018.

II. Discussion

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On appeal, plaintiffs contend the trial court erred in concluding that Jessica did not act inconsistently with her protected role as a parent. Plaintiffs further contend the trial court erred in making findings of fact 18 and 19, which they allege amount to misstatements of the law. We disagree.

“Standing is a question of law which this Court reviews *de novo*.” *Chavez v. Wadlington*, __ N.C. App. __, __, 821 S.E.2d 289, 292 (2018) (citing *Perdue v. Fuqua*, 195 N.C. App. 583, 585, 673 S.E.2d 145, 147 (2009)). “Under this review, we consider[] the matter anew and freely substitute[] [our] own judgment for that of the lower tribunal.” *Weideman v. Shelton*, 247 N.C. App. 875, 880, 787 S.E.2d 412, 417 (2016) (quotation marks and citation omitted). In child custody cases, the trial court has the opportunity to see and hear the parties and witnesses, and enjoys broad discretion in making its findings of fact. *Faulkenberry v. Faulkenberry*, 169 N.C. App. 428, 429-30, 610 S.E.2d 237, 238 (2005) (quoting *Smithwick v. Frame*, 62 N.C. App. 387, 392, 303 S.E.2d 217, 221 (1983)). Thus, “the trial court’s findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary.” *Owenby v. Young*, 357 N.C. 142, 147, 579 S.E.2d 264, 268 (2003).

In child custody actions brought by a person who is not the parent of the minor child, the non-parent must first establish they have standing to bring suit before the question of custody may be reached. N.C. Gen. Stat. § 50-13.1(a) governs standing in

child custody actions and provides, in pertinent part, that “[a]ny parent, relative, or other person . . . claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child” N.C. Gen. Stat. § 50-13.1(a) (2019). Despite the broad language of the statute, due process requires that non-parents seeking to take custody from the minor child’s biological parent first show the parent acted inconsistently with their constitutionally protected status as a parent. *Yurek v. Shaffer*, 198 N.C. App. 67, 75, 678 S.E.2d 738, 744 (2009).

In *Petersen v. Rogers*, our Supreme Court recognized that parents have a constitutionally protected right to the custody, care, and control of their child. 337 N.C. 397, 403-404, 445 S.E.2d 901, 905 (1994). This right is paramount, and may be curtailed only upon a showing that the parent is unfit, has neglected the welfare of their child, or their conduct is otherwise inconsistent with their constitutionally protected status as a parent. *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534-35 (1997). “The protected liberty interest complements the responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child.” *Owenby*, 357 N.C. at 145, 579 S.E.2d at 267 (citing *Price*, 346 N.C. at 79, 484 S.E.2d at 534)). Absent a successful rebuttal of this presumption, a plaintiff does not have standing to seek the application of the “best interest of the child” test employed in child custody actions. *Price*, 346 N.C. at 79, 484 S.E.2d at 534.

“[T]here is no bright line” beyond which a parent is found to be acting inconsistently with his or her protected status. *Boseman v. Jarrell*, 364 N.C. 537, 549-50, 704 S.E.2d 494, 503 (2010). The analysis of whether a biological parent’s conduct constitutes conduct inconsistent with the parent’s protected status is a “fact-sensitive inquiry” and such a determination must be made on a case-by-case basis. *Id.* As the plaintiffs were required to establish by clear and convincing evidence that the minor child’s parents acted inconsistently with their protected roles as parents, we determine on appeal whether they satisfied this burden. *Weideman*, 247 N.C. App. at 880, 787 S.E.2d at 417.

North Carolina appellate courts have considered three factors to aid in our analysis of whether a parent acted inconsistently with their protected status: (1) whether her relinquishment of custody was intended to be temporary or permanent; (2) whether her behavior had created the family unit that existed between the plaintiff and the child; and (3) the degree of custodial, personal, and financial contact between her and her child. *Cantrell v. Wishon*, 141 N.C. App. 340, 343, 540 S.E.2d 804, 806 (2000) (citing *Price*, 346 N.C. at 83-84, 484 S.E.2d at 537). “[I]f a parent cedes paramount decision-making authority, then, so long as he or she creates no expectation that the arrangement is for only a temporary period, that parent has acted inconsistently with his or her paramount parental status.” *Boseman*, 364 N.C. at 552, 704 S.E.2d at 504 (citing *Mason v. Dwinnell*, 190 N.C. App. 209, 225-28, 660

S.E.2d 58, 68-70 (2008)). Ultimately, “the parent may no longer enjoy a paramount status if . . . she fails to shoulder the responsibilities that are attendant to rearing a child.” *Price*, 346 N.C. at 79, 484 S.E.2d at 534.

This Court has previously had the opportunity to address non-parent child custody actions in *Yurek* and *Weideman*. In *Yurek*, the Department of Social Services was concerned about domestic violence and substance abuse occurring in the biological parents’ home and suggested the minor child either be placed in foster care or that custody be given to his paternal aunt and uncle. 198 N.C. App. 67, 70, 678 S.E.2d 738, 741. The biological parents subsequently signed a consent judgment granting the “exclusive care, custody, and control of [their] minor child” to the paternal aunt and uncle. *Id.* at 77, 678 S.E.2d at 745. Noting that at the time of the consent judgment the biological parents were unemployed, dealing with substance abuse, unable to care for their minor child, and had voluntarily granted custody of the minor child to non-parents, we held the trial court did not err in concluding the parents’ actions were inconsistent with their protected status as parents. *Id.*

We also found it notable there was no evidence the parents had a substantial degree of personal, financial, or custodial contact with the minor child after placing them with the non-parents. *Id.* at 78, 678 S.E.2d at 745. *See also Cantrell*, 141 N.C. App. 340, 540 S.E.2d 804 (remanding for further findings of fact, but noting the biological parent executed an agreement leaving her minor children in the care of

their paternal aunt and uncle and did not reassume care of the children even after returning from rehabilitation).

In *Weideman* we expanded upon our holding in *Yurek*. In that case, we held that where there is evidence a biological parent does not intend for a custody agreement with a non-parent to be permanent, they have not acted in a manner inconsistent with their protected status as a parent. 247 N.C. App. at 882-83, 787 S.E.2d at 417-18. There, the mother signed an agreement giving her mother and her mother's domestic partner legal guardianship over her minor child while she struggled with mental health and substance abuse issues. *Id.* at 877, 787 S.E.2d at 415. The mother insisted that the agreement include a provision stating that "the parties agree that the appointment is temporary." *Id.* For the first six years of the minor child's life, the mother left him in the care of his legal guardians but interacted with him frequently. *Id.* at 877-78, 787 S.E.2d. at 415. The mother later executed a consent judgment granting custody of her minor child to her mother only, following the deterioration of her relationship with her mother's then-former domestic partner. *Id.* at 878, 787 S.E.2d at 415-16. Noting that the grant of custody was the mother's attempt to place her minor child with someone who would allow her to assert her rights as a parent and have more access to her child, we held it was not an act inconsistent with her protected status as a parent. *Id.* at 883, 787 S.E.2d at 418.

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In the case *sub judice*, the trial court found that Jessica was very young at the time of the minor child's birth and unprepared to care for the child. She also later became a single mother to four more children, making it hard for her to care for them all on her own. She thus relied heavily on plaintiffs for help raising the minor child, especially in the child's early years. Though the evidence showed plaintiffs were the minor child's primary caretakers from 2006 to 2013, it also showed Jessica reasserted her parental rights and took on the role of primary caretaker from 2014 onward. In addition, even when the minor child resided primarily with plaintiffs Jessica spent an average of two nights a week with her and otherwise cared for her when able to do so. Thus, Jessica did not "fail[] to maintain personal contact with the child or fail[] to resume custody when able." *Price*, 346 N.C. at 84, 484 S.E.2d at 537.

Moreover, Jessica's arrangement with plaintiffs indicates they understood Jessica was not intending to give them permanent custody of the minor child. On the contrary, plaintiffs' testimony at trial revealed they originally began caring for the minor child because Jessica needed someone to watch her while she went to work. The arrangement was initially extended because plaintiffs insisted the minor child stay with them more often so that she would not be exposed to smoke in Jessica's home. Jessica soon gave birth to more children and needed more help with childcare. Aware of Jessica's struggles with parenting and her unstable living situation, plaintiffs continued to care for the minor child until Jessica was able to reach a

position where she could do so herself. Similar to the mother in *Weideman*, Jessica's temporary relinquishment of custody to non-parents is not an act that should strip away her parental rights when there is evidence she took action to regain parental control and care of her child.

Though plaintiffs may have provided much of the care and financial support of the minor child during her early years, plaintiffs themselves conceded Jessica never completely abandoned her parental role. Unlike the biological parents in *Yurek*, Jessica did not execute an agreement signing over the exclusive care and custody of her child to plaintiffs, and did exercise a substantial degree of personal, financial, and custodial contact with the minor child, particularly in recent years.

Notably, plaintiffs instituted this action at a time when Jessica was increasingly exercising her parental rights to the care, custody, and control of the minor child. By plaintiffs' own admission, the minor child has resided primarily with her mother since 2014, and this complaint arose only because Jessica had restricted plaintiffs' access to the child. These are not the actions of a parent who has failed to shoulder the responsibilities attendant to rearing a child, but of one who has taken on more parental responsibility. As we reasoned in *Weideman*, we do not think a parent's heavy reliance on non-parents—especially those who are relatives—for help with raising a child means they have acted inconsistently with their protected status

where there is evidence the arrangement was only meant to be temporary. We therefore affirm the order of the trial court.

Plaintiffs contend the trial court's ruling was error because the trial court applied an incorrect legal standard in making its decision. In support of their argument, plaintiffs point to the trial court's oral findings of fact. However, it is well settled a trial court's written order is controlling on appeal. *See In re O.D.S.*, 247 N.C. App. 711, 721, 786 S.E.2d 410, 417 (2016) (“[P]rior opinions of this Court have made clear that, as a general proposition, the written and entered order or judgment controls over an oral rendition of that order or judgment.”). Thus, we consider only the trial court's written order on appeal. In its written order, the trial court made several findings of fact, including:

18. Regarding the issue of whether the Defendant's behavior was inconsistent or not with her Constitutionally protected status as a biological parent, the cases in North Carolina limit this issue to situations in which the biological parent created a nuclear family involving the non-parent party(ies) and the minor child.

19. The evidence before the Court does not support that the Defendant's reliance upon her extended family went so far as to create a nuclear family involving the Plaintiffs and the minor child.

Thus, the trial court correctly articulated the second *Price* factor. Though the trial court referred to creation of a “nuclear family” instead of using the “family unit” terminology used by this Court, we do not believe there to be a significant difference

in meaning between the two terms such that the meaning of the legal standard itself is altered. Accordingly, we hold the trial court's finding was not a misstatement of the law and supports its conclusion that "[t]he defendant's behavior was not inconsistent with her paramount protected Constitutional status as the biological parent of the minor child."

III. Conclusion

For the foregoing reasons, we affirm the order of the trial court.

AFFIRMED.

Judges ZACHARY and MURPHY concur.

Report per Rule 30(e).