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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-817

Filed: 7 April 2020

Cabarrus County, No. 17 CVD 643

JENNIFER L. YOW, Plaintiff,

v.

TURCK A. HENRY, Defendant.

Appeal by plaintiff from order entered 15 March 2019 by Judge Christy E. Wilhelm in Cabarrus County District Court. Heard in the Court of Appeals 19 February 2020.

*Ferguson, Hayes, Hawkins & DeMay, PLLC, by James R. DeMay, for plaintiff-appellant.*

*Adkins Law, PLLC, by Charles Christopher Adkins and Sarah Bennett, for defendant-appellee.*

BERGER, Judge.

On March 15, 2019, the trial court denied a motion made by Jennifer L. Yow (“Plaintiff”) to modify a preexisting child custody arrangement with Turck A. Henry (“Defendant”) and granted Defendant’s motion to dismiss the action based upon Plaintiff’s failure to show a substantial change of circumstances affecting the parties’

minor child. On appeal, Plaintiff contends that the case should be remanded because the trial court failed to make adequate findings of fact. In the alternative, Plaintiff argues that the trial court erred in concluding that there was not a substantial change of circumstances. We agree with Plaintiff that the trial court failed to make adequate findings of fact to support its legal conclusion. Accordingly, we must vacate and remand the trial court's March 15, 2019 order for additional findings of fact.

Factual and Procedural Background

Plaintiff and Defendant are parents of a minor child born November 25, 2013. Following the child's birth, Plaintiff and Defendant were married in December 2015, but subsequently separated. A consent order which established a schedule for joint physical custody was entered on November 3, 2017.

On January 8, 2018, Plaintiff filed a motion to modify the custody order. On July 24, 2018, the trial court modified the custody order and granted Plaintiff primary custody of the minor child on weekdays. The July 24, 2018 modification order further required, among other things, that each party (1) ensure the minor child is present at daycare/school each day unless sick; (2) enable the other party to have telephone contact with the minor child each day at 7:00 p.m.; (3) notify the other party of any trips with the child and provide location details and emergency contact information; and (4) cooperate with the court-appointed parenting coordinator.

Plaintiff filed another motion to modify the parties' child custody arrangement on September 13, 2018. The trial court held several hearings on the motion, and Plaintiff presented considerable evidence of Defendant's failure to abide by the July 24, 2018 modification order. On March 15, 2019, pursuant to a one-page order that set forth basic procedural findings, the trial court denied Plaintiff's motion to modify and granted dismissal in favor of Defendant. Plaintiff timely appeals.

Standard of Review

Trial courts are generally granted broad discretion in child custody matters. *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003). "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 . . . ." *Id.* at 474, 586 S.E.2d at 253 (citation and quotation marks omitted).

"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." *Id.* at 474, 586 S.E.2d at 253. Then, we must determine if the trial court's factual findings support its ultimate conclusions of law, namely, whether there has been a substantial change of circumstances and whether that change has affected the minor child. *Id.* at 475, 586 S.E.2d at 254.

Analysis

“A determination of whether there has been a substantial change of circumstances is a legal conclusion, which must be supported by adequate findings of fact.” *Hibshman v. Hibshman*, 212 N.C. App. 113, 121, 710 S.E.2d 438, 443-44 (2011) (citation and quotation marks omitted). Our Court has previously determined that repeated noncompliance with an existing child custody order is sufficient to constitute a substantial change of circumstances affecting the welfare of a minor child. *Savani v. Savani*, 102 N.C. App. 496, 505-06, 403 S.E.2d 900, 906 (1991).

While the trial court has considerable discretion in child custody matters, this discretion is a result of the trial court’s unique position to hear testimony and judge the veracity of witnesses. *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253. Put another way, this discretion is based upon the trial court’s ability to judge for itself those aspects of the evidence which are lost in the bare, printed appellate record. *Id.* at 474, 586 S.E.2d at 253. In the absence of factual findings, and as a result of the trial court’s unique position as fact finder, “[i]t is not enough that there is evidence in the record from which such findings could have been made because it is for the trial court, and not this [C]ourt, to determine what facts are established by the evidence.” *Talent v. Talent*, 76 N.C. App. 545, 548-49, 334 S.E.2d 256, 259 (1985). Accordingly, unless the change of circumstances or lack thereof is self-evident, our Court will vacate and

remand so that additional findings of fact may be taken. *Ford v. Wright*, 170 N.C. App. 89, 96-97, 611 S.E.2d 456, 461 (2005).

In the instant case, it is not plainly evident from the record that there was not a substantial change of circumstances affecting the minor child. Exhibits and testimony produced by Plaintiff demonstrate that Defendant regularly failed to abide by the July 24, 2018 custody modification order. Among other things, Plaintiff produced evidence that tended to show that Defendant kept the minor child from daycare or school on several occasions, prevented Plaintiff from having telephone contact with the minor child, failed to notify Plaintiff before taking the minor child on trips outside of North Carolina, and refused to cooperate with the parenting coordinator. As a result, the trial court was required to make findings of fact to support its conclusions of law.

Therefore, because the trial court failed to make any findings of fact to support its legal conclusion that “Plaintiff has not met the burden of proof to show a substantial change of circumstances affecting the minor child,” we vacate and remand for additional factual findings. Additionally, cognizant of our role as a court of review, we decline to address the merits of Plaintiff’s alternative claim for relief which will turn on the factual determinations made by the trial court on remand. N.C. Gen. Stat. § 7A-26 (2019).

Conclusion

YOW V. HENRY

*Opinion of the Court*

For the reasons stated herein, we vacate and remand to the trial court to make additional findings of fact.

VACATED AND REMANDED.

Judges DILLON and ARROWOOD concur.

Report per Rule 30(e).