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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-171

Filed: 5 May 2020

Cabarrus County, No. 15-CVD-2371

KERA HILL, Plaintiff,

v.

DARIN KENNEDY, Defendant.

CLETUS OLIVER HILL, JR., DONALD KELLY GOUDY, and LISA GOUDY,
Intervenors.

Appeal by Defendant from orders entered 16 April 2018 and 31 October 2018
by Judge Christy E. Wilhelm in District Court, Cabarrus County. Heard in the Court
of Appeals 20 August 2019.

*Hartsell & Williams, PA, by Austin “Dutch” Entwistle III, for Intervenor-
Appellee Stepfather.*

Jones Law PLLC, by Brian E. Jones, for Defendant-Appellant Father.

McGEE, Chief Judge.

Defendant Darin Kennedy (“Father”), the father of K.R.H., a minor child, ap-
peals from the trial court’s order modifying his rights to custody of and visitation with
K.R.H., as well as orders denying his motions for reconsideration under Rules 52, 59,

and 60. Defendant contends that the trial court erred by granting primary physical custody of K.R.H. to her nonbiological stepparent without giving proper consideration to Father's constitutional right to parent K.R.H. We reverse and remand.

I. Factual and Procedural Background

Plaintiff Kera Hill ("Mother") gave birth to K.R.H. in July of 2010. When she was three months pregnant, Mother told Father that she believed he might be the father of the child, but that she intended to raise K.R.H. with her then-boyfriend, Intervenor Cletus Hill ("Stepfather"). Neither Mother nor Father made any attempt to establish or rebut paternity at that time, and instead ceased all communication for some time. Stepfather and Mother married in fall 2010, and Stepfather has assisted with the care of K.R.H. since the child was born. Mother again informed Father that there was a possibility that K.R.H. was his biological child in May 2014. Paternity testing confirmed that Father was K.R.H.'s biological father in July 2015.

Mother filed an action against Father seeking custody and other relief on 22 July 2015. Father filed an answer and counterclaim requesting custody of the child. The parties attended custody mediation and entered into a Parenting Agreement. The trial court entered an Order Approving Parenting Agreement on 11 February 2016 (the "2016 Custody Order"). Under the 2016 Custody Order, the parties shared joint legal custody, Mother had primary physical custody of K.R.H. and Father had secondary physical custody in the form of visitation every other weekend. The 2016

Custody Order also set out a detailed schedule of each parent's time with K.R.H. for holidays and vacation.

Mother and Stepfather separated on 31 May 2017 and Mother moved out of their marital home. Mother left K.R.H. in Stepfather's custody. Stepfather filed a Motion to Intervene and a Motion for Custody/Visitation on 2 June 2017 in this pending action involving K.R.H.'s biological parents. Mother and Father did not oppose Stepfather's Motion to Intervene, and the trial court granted the motion on 28 June 2017. Though Mother moved out of the marital home, K.R.H. continued to reside with Stepfather throughout the custody modification proceedings.

Based upon a hearing held on 9 and 22 January 2018, the trial court entered an order on 16 April 2018 (the "2018 Modification Order") modifying the 2016 Custody Order by granting primary legal and physical custody of K.R.H. to Stepfather, maintaining Father's secondary physical custody, increasing Father's visitation rights, and granting visitation rights to Mother and Mother's parents ("Intervenor Grandparents").¹ The 2018 Modification Order also released Father's attorney, Ms. Hannah R. Bell, as his attorney of record in the matter. Stepfather's counsel filed a certificate of service on 15 October 2018 stating that the 2018 Modification Order was filed with the court and was served on Ms. Bell's office on 16 April 2018. An associate attorney in Ms. Bell's office then mailed a copy of the 2018 Modification Order to

¹ K.R.H.'s maternal grandparents also intervened on 29 December 2017, seeking only visitation with K.R.H.

Father's personal residence on 23 April 2018. In response to the 2018 Modification Order, Father first filed both a Rule 59 Motion for New Trial, as well as a Rule 52 Motion for Amended Judgment, on 5 July 2018. Father also filed a Rule 60 Motion for Relief on 24 August 2018. Following a hearing, the trial court entered orders denying each of Father's motions on 31 October 2018.

Father filed a notice of appeal on 21 November 2018 from the 2018 Modification Order and from each of the October 31 orders denying his Rule 52, 59, and 60 motions. Father subsequently filed a petition for writ of certiorari on 22 February 2019.

II. Analysis

Father presents three issues to this Court on appeal: (1) whether Father's notice of appeal from the 2018 Modification Order was timely filed; (2) whether the trial court erred in granting primary physical custody to Stepfather in the 2018 Modification Order; and (3) whether the trial court erred in denying Father's Rule 52 and 59 motions. We address each issue in turn.

A. Timeliness of Appeal

Father has filed a petition for writ of certiorari asking this Court to review the 2018 Modification Order in the event this Court determines Father's appeal was not timely. Stepfather contends that Father's petition should be denied, and this appeal should be dismissed, because Father "simply neglected to file a timely notice of

appeal” after receiving service of the 2018 Modification Order. We disagree and grant Father’s petition.

The North Carolina Rules of Civil and Appellate Procedure, together, define the parameters of a timely appeal from a trial court’s decision. Following entry of a judgment, “if the judge does not otherwise designate, the party who prepares the judgment[] shall serve a copy of the judgment upon all other parties within three days after the judgment is entered.” N.C. Gen. Stat. § 1A-1, Rule 58 (2017). Under Rule 3 of the North Carolina Rules of Appellate Procedure, a party who wishes to appeal a judgment must ordinarily file and serve notice of appeal at most thirty (30) days after he or she receives proper service of the judgment being appealed:

[A] party must file and serve notice of appeal[] (1) within thirty [30] days after entry of judgment if the party has been served with a copy of the judgment within the three day period prescribed by Rule 58 of the Rules of Civil Procedure; or (2) within thirty [30] days after service upon the party of a copy of the judgment if service was not made within that three-day period[.]

N.C. R. App. P. 3(c)(1)-(2). “The provisions of Rule 3 are jurisdictional, and failure to follow the requirements thereof requires dismissal of an appeal.” *Wallis v. Cambron*, 194 N.C. App. 190, 193, 670 S.E.2d 239, 241 (2008) (citation omitted).

Following entry of a judgment, a party may also elect to move the trial court to amend its findings or make additional findings under Rule 52 of the Rules of Civil Procedure, or move for a new trial pursuant to Rule 59. N.C. Gen. Stat. § 1A-1, Rules

52(b), 59(a) (2017). Motions under Rules 52 and 59 must generally be filed not later than ten (10) days after entry of the judgment, N.C. Gen. Stat. § 1A-1, Rules 52(b), 59(b); but this time period is “tolled for the duration of any period of noncompliance” with the service requirement of Rule 58, “provided however that no time period . . . shall be tolled longer than [ninety (90)] days from the date the judgment is entered[.]” N.C. Gen. Stat. § 1A-1, Rule 58. Motions under Rules 52 and 59 do not substitute for a formal appeal, but timely filing of a motion under Rules 52 or 59 tolls the thirty (30) day time period allowed to file a notice of appeal “until entry of an order disposing of the [Rules 52 or 59] motion and then runs as to each party from the date of entry of the order or its untimely service upon the party[.]” N.C. R. App. P. 3(c).

In the present case, the trial court entered its order modifying the 2016 Order on 16 April 2018. Father filed motions under Rules 52 and 59 on 5 July 2018, eighty (80) days after entry of the 2018 Modification Order. The trial court entered orders denying the Rules 52 and 59 motions on 31 October 2018. Father then filed notice of appeal on 21 November 2018, twenty-one (21) days after entry of the October 31 orders and two hundred nineteen (219) days after entry of the 2018 Modification Order. The record before this Court contains a certificate of service filed by Stepfather on 15 October 2018 evidencing Stepfather’s Rule 5 service of the 2018 Modification Order. Though it was filed in October, the certificate (1) shows

Stepfather served the 2018 Modification Order on Ms. Bell's office on 16 April 2018 and (2) claims that Ms. Bell's office then mailed the 2018 Modification Order to Father's personal address on 23 April 2018.

However, given the plain language of Rule 58, these actions do not constitute appropriate service on Father. Rule 58 states that the "party who prepares the [order]" is to serve the order on all parties. N.C. R. Civ. P. 58; *see Manone v. Coffee*, 217 N.C. App. 619, 622, 720 S.E.2d 781, 783 (2011). N.C. Gen. Stat. § 1A-1, Rule 5 states that proper service may be accomplished by delivery "[u]pon a party's attorney of record," but the 2018 Modification Order "released [Ms. Bell] as counsel of record for [Father]" and expressly decreed that Ms. Bell would "have no further responsibility to [Father] in connection with this lawsuit." The trial court requested that Stepfather prepare the 2018 Modification Order. Therefore, according to Rule 58, it was Stepfather's duty to serve the 2018 Modification Order on Father. The 15 October certificate of service shows only that Stepfather served Ms. Bell, and purports that Ms. Bell then served Father. Without proper service, the time period for filing motions under Rules 52 and 59 was tolled up to ninety (90) days, with which Father complied. The time to file notice of appeal was further tolled until thirty (30) days after resolution of the Rules 52 and 59 motions, with which Father also complied.

Stepfather contends that service on Father was accomplished on 16 April 2018 when he served Ms. Bell. Specifically, Stepfather argues he reasonably believed Ms.

Bell was an acceptable point of service for Father following the 2018 Modification Order because Ms. Bell, Father, and Stepfather's counsel exchanged a series of e-mails on 12 April 2018, in which Ms. Bell's office acknowledged that, while Father was "handling the child support issues" on his own, Ms. Bell was "still representing [Father] for custody." We disagree with Stepfather's contention. As of April 12, Ms. Bell was still representing Father in this action. But the 2018 Modification Order is clear that, from that point forward, Ms. Bell was released as Father's counsel of record with respect to all matters in this case.

Stepfather also contends that whether Father received proper service of the 2018 Modification Order is immaterial because the evidence shows that Father had actual notice of the order long before he elected to file any motions or his notice of appeal. Stepfather is correct in his assertion that, "when a party receives actual notice that a judgment has been entered, the service requirements of Rule 3(c) are not applicable, and actual notice substitutes for proper service." *Magazian v. Creagh*, 234 N.C. App. 511, 513, 759 S.E.2d 130, 131 (2014). Further, language in Father's Rule 52 and 59 motions mirrors language from the 2018 Modification Order, showing Father had actual knowledge of the 2018 Modification Order no later than eighty (80) days after entry of the 2018 Modification Order, when those motions were filed. *See Huebner v. Triangle Research Collaborative*, 193 N.C. App. 420, 425, 667 S.E.2d 309, 312 (2008).

Nonetheless, this case is distinguishable from our state's actual notice jurisprudence because there is no reliable evidence in the record that shows when Father actually received the 2018 Modification Order within this eighty (80) days, and within the overall ninety (90) day period. *See, e.g., id.* at 193 N.C. App. at 422–23, 667 S.E.2d at 310–11 (finding plaintiff had actual notice of a 2004 order in 2004 where plaintiff timely filed a Rule 60 motion with language identical to the order in 2004, but waited until three years after entry of an order resolving the Rule 60 motion to file his notice of appeal); *Manone*, 217 N.C. App. at 623–24, 720 S.E.2d at 784 (finding waiver of proper service due to actual notice where defense counsel physically picked up a custody order from the courthouse, rather than wait for service by plaintiff's counsel, even though plaintiff's counsel never properly served the order). The record before this Court does not contain sufficient evidence of when Father received actual notice of the 2018 Modification Order. The October 15 certificate of service contains only Stepfather's counsel's affirmation that he received an enclosure memorandum showing that Ms. Bell's office sent the 2018 Modification Order to Father on 23 April 2018, along with a copy of the enclosure memorandum. Stepfather's certificate of service signifies his receipt of the enclosure memorandum, but we are reluctant to accept it as proof of mailing by Ms. Bell, Father's former attorney whose signature does not appear on the certificate of service.

Stepfather also argues that Father had actual notice of the terms of the 2018 Modification Order because Father represented himself in subsequent hearings in this case on 7 May 2018, rather than having Ms. Bell appear on his behalf. Contrary to Stepfather’s argument, Father’s self-representation does not indicate knowledge of Ms. Bell’s release as his counsel in the 2018 Modification Order because the May 7 proceedings concerned child support payments. The same 12 April 2018 emails referenced above show that Father’s intent was always to represent himself regarding child support and was not a result of the 2018 Modification Order.

In any event, Father has also petitioned this Court for writ of certiorari. Though Stepfather contends in his answer to Father’s petition that “a writ of certiorari is appropriate in only [the] three scenarios” described in N.C. R. App. P. 21(a)(1), our Supreme Court has made it clear that this Court may issue a writ for any appropriate reason:

[T]he Court of Appeals maintains broad jurisdiction [under N.C. Gen. Stat. § 7A-32(c) (2017)] to issue writs of certiorari unless a more specific statute revokes or limits that jurisdiction.

...

Rule 21 does not prevent the Court of Appeals from issuing writs of certiorari or have any bearing upon the decision as to whether a writ of certiorari should be issued. Therefore, the Court of Appeals should exercise its discretion to determine whether it should grant or deny defendant’s petition for writ of certiorari.

State v. Ledbetter, 371 N.C. 192, 195–97, 814 S.E.2d 39, 41–43 (2018).

The October 15 certificate of service does not evidence proper service on Father, and we do not view it as evidence of the date when Father acquired actual notice of the 2018 Modification Order’s terms. Father concedes that he received service of the 2018 Modification Order, though he “does not remember when or from whom.” It is unclear from the record when Father received service of the 2018 Modification Order, or when he acquired actual notice of the 2018 Modification Order’s terms. Assuming, *arguendo*, Father’s appeal of the 2018 Modification Order was untimely, we exercise our discretion and grant certiorari to review the merits of his appeal, in that the issues in this appeal bear the weight of the proper placement of a child within her parent’s custody.

B. Modification of Custody Order

We now consider the merits of Father’s appeal. Father principally argues that the trial court erred in granting primary physical custody to Stepfather, a non-biological parent of K.R.H., because it failed to “give [Father] the benefit of” the *Petersen* presumption. We agree.

N.C. Gen. Stat. § 50-13.1(a) provides 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) (2017). The parties in the present case all concede that Stepfather has cared for K.R.H. since her birth and that they share an established, familial relationship. *See Myers v. Bald-*

win, 205 N.C. App. 696, 698–99, 698 S.E.2d 108, 110 (2010) (“[W]here a third party and a child have an established relationship in the nature of a parent-child relationship, the third party [has] standing as an ‘other person’ under N.C. Gen. Stat. § 50-13.1(a) to seek custody.” (citation omitted)).

Nonetheless, our Supreme Court held in *Petersen v. Rogers* that a non-parent requesting custody of a minor child must overcome the natural parents’ constitutional “paramount right . . . to custody, care, and nurture of their children[.]” *Petersen v. Rogers*, 337 N.C. 397, 402, 445 S.E.2d 901, 904 (1994). This paramount right arises from a presumption that a natural parent will perform his or her parental duties in the best interest of the child. *In re Hughes*, 254 N.C. 434, 436, 119 S.E.2d 189, 191 (1961).

In *Price v. Howard*, the Supreme Court elaborated on the terms of the presumption in *Petersen* in favor of the biological parents’ paramount right to parent, explaining that “the parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child.” *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997). Such inconsistent conduct clearly includes, but is not limited to, “[u]nfitness, neglect, and abandonment,” but there is no bright-line rule for what conduct “rise[s] to this level so as to be inconsistent with the protected status of natural parents.” *Id.* at 79, 484 S.E.2d at 534–35. The “best interest of the child”

analysis fundamental in child custody actions should be applied only after the presumption in *Petersen* has been rebutted. *Id.* Therefore, “[r]egardless of the compelling and significant relationship between the stepfather and []step-child in the case sub judice, the trial court [may] not grant [a] stepfather [primary custody] solely based on the best interest analysis.” *Seyboth v. Seyboth*, 147 N.C. App. 63, 68, 554 S.E.2d 378, 382 (2001).

1. Substantial Change in Circumstances

We first note that Stepfather’s motion sought modification of the 2016 Custody Order. “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.” *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003). If the findings are supported, we then “determine if the trial court’s factual findings support its conclusions of law.” *Id.* at 475, 586 S.E.2d at 254. “The issue of whether a trial court has utilized the correct legal standard in ruling on a request for modification of custody is a question of law that we review de novo.” *Hatcher v. Matthews*, 248 N.C. App. 491, 492, 789 S.E.2d 499, 501 (2016) (citation omitted).

The starting point for analysis of a motion to modify custody is the circumstances existing as of the date of entry of the prior order, here April 2016. First, the trial court had to determine whether a substantial change in circumstances affecting

the welfare of the child had occurred. If, and only if, the trial court expressly found such a change in circumstances was the court then permitted to determine whether a modification of custody would be in the best interests of the child—and, in this case, whether the facts supported rebuttal of the *Petersen* presumption. *See West v. Marko*, 141 N.C. App. 688, 690–91, 541 S.E.2d 226, 228 (2001) (“Permanent custody orders can only be modified by first finding that there has been a substantial change of circumstances affecting the welfare of the child. Once the trial court makes the threshold determination that a substantial change has occurred, the trial court then must consider whether a change in custody would be in the best interests of the child”) (internal citations omitted). “There are no exceptions in North Carolina law to the requirement that a change in circumstances be shown before a custody decree may be modified.” *Hibshman v. Hibshman*, 212 N.C. App. 113, 124, 710 S.E.2d 438, 445 (2011) (citation omitted). “As such, ‘the trial court commits reversible error by modifying child custody absent any finding of substantial change of circumstances affecting the welfare of the child.’” *Hatcher*, 248 N.C. App. at 494, 789 S.E.2d at 502 (citation omitted).

The 2016 Custody Order granted joint legal and physical custody of K.R.H. to Mother and Father. Thus, as of February 2016, both Mother and Father were fit parents and neither lost the benefit of the *Petersen* presumption in favor of a natural parent. For the 2016 Custody Order to be modified as between Mother and Father

alone, a finding of a substantial change of circumstances affecting the best interests of the minor child would be sufficient. But, in this case, Stepfather is a non-parent seeking custody, so the prior order may be modified to grant custody to a non-parent only if (1) there has been both a substantial change of circumstances affecting the minor child and (2) the trial court finds, by clear and convincing evidence, that both parents have become unfit or acted inconsistently with their constitutionally protected rights as a parent by their actions or changed circumstances occurring *after* February 2016. If one parent has become unfit but the other has not, the parent who remains fit still has the benefit of the *Petersen* presumption. *See Brewer v. Brewer*, 139 N.C. App. 222, 231–32, 533 S.E.2d 541, 548 (2000). Mother did not appeal from the trial court’s order and the trial court determined that “at the time of filing [Stepfather’s] motion to intervene,” Mother had engaged “in conduct inconsistent with her constitutionally protected status as a parent” by her “chronic alcoholism which rendered her incapable of providing care and maintenance for the minor child[;]” by leaving the home for extended periods of time “at all hours of the day” many times, without letting anyone know where she was or when she would return; by her failure to maintain stable housing or employment; and by abdicating her role as a parent to Stepfather.

There is no argument in this case that a substantial change in circumstances affecting the best interest of the minor child had not occurred since entry of the 2016

Custody Order. The 2018 Modification Order includes a series of findings in Paragraph 22 which the trial court states constitute “substantial change of circumstances affecting the welfare of the minor child since entry of the [2016 Custody Order].” These findings are not challenged on appeal and thus are binding on this Court. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

The subparagraphs of Finding 22 address the child having been enrolled in school since the 2016 Custody Order; her relationships with the Intervenor; Father’s new employment as of January 2017 and residence “within a one hour drive” of the child’s home; Father’s mother’s retirement and availability to care for the child; Mother and Stepfather’s separation; Mother’s request for Stepfather to have primary custody; and recent improvement in Mother’s employment, housing, transportation, and Alcoholics Anonymous attendance following her separation from Stepfather. Notably, the changed circumstances noted by the trial court as supporting a modification of custody do not address any negative changes as to Father since the 2016 Custody Order.

The real issue in this case arises in the second part of the inquiry: whether the trial court made sufficient findings, by clear and convincing evidence, to support its determination that Father had become an unfit parent or acted inconsistently with his constitutionally protected rights as a parent, by his actions or changes occurring *after* February 2016. The 2016 Custody Order, which approved the parents’ mediated

parenting agreement, had granted both Mother and Father joint legal and physical custody of the child.

The U.S. Constitution protects a parent's interest in companionship, custody, care and control of his or her child. *Price*, 346 N.C. at 79, 484 S.E.2d at 534. Absent a finding of unfitness or neglect by the natural parent, a best interest of the child test would violate the parent's constitutional rights. *Id.*

Brewer v. Brewer, 139 N.C. App. at 231-32, 533 S.E.2d at 548.

2. Findings of Fact

Father challenges several findings of fact as unsupported by the evidence. In our review, the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even in the face of contradictory evidence. *Owenby v. Young*, 357 N.C. 142, 147, 579 S.E.2d 264, 268 (2003). Nonetheless, the determination that a parent has taken actions inconsistent with their parental status is a "fact-sensitive inquiry," *see Boseman v. Jarrell*, 364 N.C. 537, 550, 704 S.E.2d 494, 503 (2010), that "must be supported by clear and convincing evidence." *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001). Whether Father's conduct was inconsistent with his right to parent is a conclusion of law which this Court reviews *de novo*. *In re A.C.*, 247 N.C. App. 528, 535, 786 S.E.2d 728, 735 (2016). In addition, the findings here must address the Father's fitness and actions since entry of the 2016 Custody Order in February 2016, as that order established his fitness as of that time.

Specifically, Father challenges Finding of Fact 21 of the February 2016

Custody Order:

21. By clear and convincing evidence, at the time of [Father] filing his motion to modify custody, as well as prior to the filing of his motion, [Father] was engaging in conduct inconsistent with his constitutionally protected status as a parent in that:

a. Since the minor child's birth, [Father] has been employed but has worked for at least three different employers;

b. Since the minor child's birth, [Father] has resided in at least three different cities and residences both inside and outside of the State of North Carolina;

c. [Father]'s frequent changes in employment and residences have made his home life unstable and made it more difficult for him to be located by [Mother] to care for the minor child;

d. When [Father] was initially informed of [Mother]'s pregnancy during her first trimester, [Father] ended all communication with [Mother] and blocked her on social media platforms;

e. [Father] did not participate in prenatal appointments, the minor child's birth, or her early childhood;

f. When [Mother] contacted [Father] in May 2014 again with suspicions that he was in fact the minor child's father, [Father] did not see the child for approximately six months following that conversation;

g. After [Mother] and [Father] entered into a Parenting Agreement in February 2016, [Father] did not use all the visitation times granted to him pursuant to that Agreement. Frequently the minor child would be left in the

care of [Father]’s mother[] while [Father] worked during the weekends he had scheduled visits;

h. [Father] did not make an effort to become informed about the minor child’s homeschooling or her enrollment in public school, however, his mother[] took the minor child to Sylvan Learning for some diagnostic test, the results of which were not shared with the other parties or the Court;

i. [Father] has not paid child support despite a Child Support Order entered March 2016, and despite his full time employment since at least January 2017. His last child support payment was paid via income withholding the first week of October 2016;

j. [Father] testified that he has participated in a legitimation proceeding at some point in 2017, but provided no documentation of completion of that proceeding; and

k. [Father]’s original Motion filed before this Court, after [Mother] had left the marital residence and the minor child was in the primary care of [Stepfather], [Father] re-requested to have the child for visitation every weekend but did not request custody. This request shows [Father]’s intention to leave the child in the primary care of [Stepfather].

Several of these findings specifically address circumstances existing prior to entry of the 2016 Custody Order. Therefore, those findings alone, even if supported by the evidence, cannot support a conclusion that Father’s conduct was inconsistent with his parental rights or that he is unfit.

Only Findings 21(g), (i), (j), and (k) above directly address circumstances or changes since entry of the prior order in 2016, although several refer generally to the period since K.R.H.’s birth, which may include the relevant period as well as before

the prior order. The prior subparagraphs all address facts existing before entry of the 2016 Custody Order and thus cannot demonstrate changes in circumstances supporting modification of custody or Father's unfitness as a parent. The 2016 Custody Order established that both parents were fit and proper parents. Therefore, even if the findings of fact regarding Father's actions, and other events, prior to February 2016 were supported by competent evidence, as a matter of law they cannot overcome Father's *Petersen* presumption. We will thus focus on the findings of fact addressing circumstances *after* entry of the 2016 Custody Order.

We recognize that the trial court is in the position of seeing the parties, listening to the witnesses, and detecting the “tenors, tones and flavors that are lost in the bare printed record” before us on appeal. *Adams*, 354 N.C. at 63, 550 S.E.2d at 503 (citation omitted). Some of the findings made in subparagraphs (a) through (j) of finding of fact 21 are supported by competent evidence and are therefore binding on appeal. *Owenby*, 357 N.C. at 147, 579 S.E.2d at 268. We disagree, however, that a balance of these facts supports the conclusion that Father's conduct since entry of the 2016 Custody Order is inconsistent with his constitutional right to parent K.R.H. under *Petersen* and *Price*.

Findings 21(a) and (b) address Father's changes in employment and residences “since the minor child's birth.” They are supported by the evidence, but Father's employment and housing history do not reflect instability inconsistent with his ability

to parent K.R.H. Since these findings address the child’s entire life, and not the period since February 2016, they are not sufficient to support a conclusion of a change in Father’s fitness as a parent since February 2016. In addition, finding 21(a) states that Father “has been employed” consistently “[s]ince the minor child’s birth,” notes no instances of unemployment, and does not otherwise explain how a change of employer denotes unfitness or acting inconsistently with constitutionally protected parental rights. Unchallenged finding of fact 22(c) states that Father was employed at the time of the trial, having started a new full-time job in January 2017. Finding 21(b) regarding Father’s housing circumstances, as of April 2018, and Finding 22(c) states Father “is residing within a one hour drive of [K.R.H.]’s residence where she has lived since birth[.]”

Finding 21(c) states that Father’s “frequent changes in employment and residences” have made his “home life unstable” and “made it more difficult” for Mother to locate him or for him to care for the child. Again, this finding does not address the time period when these “changes” happened. These changes in employment or residence would be relevant only if they occurred after February 2016.

Finding 21(g) further conflicts with the trial court’s conclusion of inconsistent conduct when juxtaposed against findings 21(a) and (c). The trial court appears to have negatively considered both what it construed as employment difficulties in finding 21(a) alongside Father’s efforts to work and maintain his job in finding 21(g).

Father enlisted Father's mother, a reasonable caretaker, to watch K.R.H. while he was working during his custodial weekends. The evidence before the trial court was that Father's mother was recently retired from full-time work, had ample time and resources to watch K.R.H., intended to assist Father in keeping K.R.H. should he be awarded primary custody, and was otherwise a fit caretaker. Finding 21(c) is therefore unsupported by the evidence.

Findings 21(d), (e), and (f) all recount Father's apparent failure to take interest in the child during Mother's pregnancy and in the early years of K.R.H.'s life. All of these findings address the time prior to entry of the 2016 Custody Order and are not now relevant to the issue of Father's fitness as a parent.

Finding of fact 21(k) addresses Father's "original Motion" filed after Mother left Stepfather and left the child in Stepfather's care. The Finding addresses the relevant time period, but it is not supported by the evidence. The trial court found therein that Father "requested to have the child for visitation every weekend but did not request custody." Rather, in his original reply to Stepfather's motion to modify custody, Father requested that the 2016 Custody Order be modified "awarding [him] joint physical custody of [K.R.H.] to be exercised every weekend." At that time, the 2016 Custody Order provided Father with secondary, joint physical custody of K.R.H. to be exercised every other weekend, while Mother had primary physical custody. Father did indeed request both custody of K.R.H. and more frequent physical custody

than he had received at the time of his reply. While Father's initial request does, admittedly, leave open the question of whom he originally believed would watch K.R.H. during weekdays, his request for continued, joint custody with more frequent visitation tends to show Father's desire to perform his parental duties. In addition, at the hearing on the matter, Father argued that he should receive primary custody.

Finally, the evidence supports finding 21(i), regarding Father's failure to make timely, sufficient child support payments as directed by the Child Support Order. Father testified that he felt child support was unacceptable because he felt that he did not get enough time with his daughter. However, it is well-established that a parent's duty to pay child support is not dependent upon his visitation with the child.

In this State, the duty of a parent to support his or her children is not dependent upon the granting of visitation rights, nor is it dependent upon the parent's opportunity to exercise visitation rights. We conclude that visitation and child support rights are independent rights accruing primarily to the benefit of the minor child and that one is not, and may not be made, contingent upon the other.

Appert v. Appert, 80 N.C. App. 27, 41, 341 S.E.2d 342, 350 (1986).

Stepfather argues that failure to pay child support for over a year is a ground for termination of Father's parental rights under N.C. Gen. Stat. § 7B-1111, and that a finding of any one ground is sufficient. N.C. Gen. Stat. § 7B-111(a) (2017). But our Court has recognized that the grounds within N.C. Gen. Stat. § 7B-1111 are but one of two methods that may be used to find the forfeiture of a parent's constitutional

right to parent. *Owenby*, 357 N.C. at 145–46, 579 S.E.2d at 267. The trial court in the present case used the second method outlined in *Owenby*, a determination that a parent engaged in conduct inconsistent with his parental status. *Id.* The “statutory procedure [of a full termination of parental rights] is not the subject of the present case.” *Id.* at 146, 579 S.E.2d at 267. In any event, Father’s failure to pay child support has been the subject of other proceedings for modification, wage garnishment, and contempt in our record.

3. Conclusions of Law

We must note that the trial court’s conclusions of law do not clearly address whether it considered Stepfather’s motion to modify custody as a motion for modification of the 2016 Custody Order or as an initial custody determination. The order does expressly modify the 2016 Custody Order, but the findings mostly address the best interests of the child, as would be appropriate in custody proceedings between two natural parents. In this case, where a non-parent seeks custody, a higher standard applies. “The issue of whether a trial court has utilized the correct legal standard in ruling on a request for modification of custody is a question of law that we review *de novo*.” *Hatcher*, 248 N.C. App. at 492, 789 S.E.2d at 501. Whether Father’s conduct was inconsistent with his right to parent is a conclusion of law which this Court also reviews *de novo*. *In re A.C.*, 247 N.C. App. at 535, 786 S.E.2d at 735.

Based upon the trial court’s findings of fact, even if all were supported by the evidence, the order does not support a conclusion that Father’s fitness as a parent has changed since the 2016 Custody Order or that he has acted inconsistently with his constitutionally protected rights as a parent since the 2016 Custody Order. The only finding which may be relevant to this conclusion is the finding regarding Father’s failure to pay child support, but that finding alone cannot support the trial court’s conclusion that Father has acted inconsistently with his constitutional rights as a parent. In fact, the trial court also concluded that Father was a “fit and proper person[]” to have “secondary physical custody” of the child.

III. Conclusion

We hold that Father continues to retain the benefit of the *Petersen* presumption since the trial court’s findings of fact cannot support a conclusion that Father’s actions were so inconsistent with his parental responsibilities as to warrant a relinquishment of his paramount, constitutional right to parent K.R.H. His fitness as a parent was established by the 2016 Custody Order and Father’s fitness has not changed.

Therefore, we reverse the 2018 Modification Order and remand for entry of a new order granting Father full legal and physical custody of K.R.H. We note that, on remand, our decision has no bearing on the trial court’s findings of fact and conclusions of law with respect to Mother’s fitness as a parent or its findings

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supporting visitation by Mother and the Intervenor Grandparents; thus, the trial court's order on remand should set out an appropriate schedule of visitation for Mother and the Intervenor Grandparents. Because we hold that the trial court's conclusion was not supported by its findings of fact under *Petersen* and *Price*, we need not address Father's arguments regarding the denial of his Rules 52, 59, and 60 motions.

REVERSED AND REMANDED.

Judges STROUD and MURPHY concur.

Report per Rule 30(e).