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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-277

Filed: 3 November 2020

Henderson County, No. 15 CVD 590

ERIC MARTIN LARUE, Plaintiff,

v.

ANGELA CALLAHAN LARUE, Defendant.

Appeal by defendant from order entered 2 January 2020 by Judge Charles W. McKeller in Henderson County District Court. Heard in the Court of Appeals 6 October 2020.

Prince, Youngblood & Massagee, PLLC, by B.B. Massagee, III and Sharon B. Alexander, for plaintiff.

Donald H. Barton, P.C., by Donald H. Barton, for defendant.

ARROWOOD, Judge.

Angela Callahan Larue (“defendant”) appeals from order entered 2 January 2020 dismissing, pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure, her motion to modify custody. For the following reasons, we affirm.

I. Background

On 24 April 2017, the district court entered a permanent custody order (“Order”) following a custody trial concerning the parties’ minor children. The Order, among other things, set out a schedule for visitation: “The parties can each have the minor children at such other, alternative and/or additional dates and times as the parties may agree from time to time. However, in the event the parties agree to such, and thereafter cease to agree for any reason, the foregoing schedule [stated herein] shall remain in force and effect.” The Order also stated that defendant “shall not consume alcoholic beverages at anytime when having the minor children (or either of them) for visitation, or at any relevant time prior to having the minor children.”

In August 2018, following the entry of the Order, plaintiff married his present wife, with whom he was living at the time the Order was entered. Defendant contends that before plaintiff’s new marriage, plaintiff voluntarily permitted defendant to visit with the minor children on a more frequent basis than mandated by the Order. According to defendant, plaintiff discontinued to deviate from the visitation schedule set out in the Order after his new marriage.

On 3 May 2018, defendant moved to modify the Order based upon a substantial change in circumstances affecting the welfare of the parties’ minor son (“B.M.L.”). Defendant, B.M.L.’s mother, alleged in her motion that there has been a

substantial change of circumstances affecting the welfare of B.M.L. since the entry of the Order in that:

- a. The minor child since being in the custody of the Plaintiff is having significant behavior problems at school and poor academic performance in school.
- b. Defendant is also advised, informed and believes and alleges upon information and belief that the child is exposed to person or persons who consume alcoholic beverages in his presence.
- c. The Plaintiff has advised the school where the minor child attends that he needed to be contacted with all issues regarding the minor child and the Defendant should only be contacted, if, for some reason the Plaintiff was not available.
- d. That, while in the care of the Plaintiff, on occasion the minor child has had to go without dinner, Plaintiff telling the minor child that the family had dinner while he was napping and there was nothing left for him to eat.

A hearing was held on defendant's motion to modify custody on 11 December 2019 in Henderson County, North Carolina. Following defendant's case in chief, the district court granted plaintiff's motion to dismiss pursuant to Rule 41 of the North Carolina Rules of Civil Procedure on the grounds that defendant failed to show a "substantial change of circumstances affecting the welfare of the minor children since the entry of the order in 2017." The district court entered an order memorializing its findings of fact and conclusions of law on 2 January 2020. Defendant appeals.

II. Discussion

Defendant claims on appeal that the district court committed reversible error by making certain findings of fact when there was no substantial competent evidence to support those findings. Defendant also avers that the district court's findings of fact do not support its conclusions of law. Overall, defendant's argument is that the district court erred by granting plaintiff's motion to dismiss her motion to modify child custody under Rule 41(b).

"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) (citing *Pulliam v. Smith*, 348 N.C. 616, 625, 501 S.E.2d 898, 903 (1998)). "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) (citing *In re Custody of Mason*, 13 N.C. App. 334, 336, 185 S.E.2d 433, 434 (1971)).

Pursuant to N.C. Gen. Stat. § 50-13.7(a), "an order of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested." N.C. Gen. Stat. § 50-13.7(a) (2019). The party moving for modification of a custody decree, here defendant, bears the burden of showing that there has been a substantial

change of circumstances affecting the welfare of the child. *Pulliam v. Smith*, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998) (citing *Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974)). “The party seeking to have the custody order vacated has the burden of showing that circumstances have changed between the time of the order and the time of the hearing on h[er] motion.” *Hensley v. Hensley*, 21 N.C. App. 306, 307, 204 S.E.2d 228, 229 (1974) (citing *Crosby v. Crosby*, 272 N.C. 235, 237, 158 S.E.2d 77, 79 (1967)).

Based on competent evidence, the district court found and defendant now challenges the following facts:

9. That the decree of the Existing Custody Order addresses and prohibits the consumption of alcohol around the minor children only by the Defendant. The Existing Custody Order did not prohibit the consumption of alcohol by any other persons in or about the presence of the minor children. The Defendant testified that the findings of Judge Mercer that she had illegal controlled substances in her home about the presence of the minor children were wrong and she continues to deny consuming alcohol around the minor children.¹

. . . .

12. That since the Existing Custody Order the Defendant has had reasonable telephone contact with the minor children, and the Plaintiff has provided the minor children with cell phones.

. . . .

¹ The trial court’s order entered 2 January 2020 contains a scrivener’s error as it includes two subsections titled “9.” This excerpt is the second (or subsequent) subsection “9.”

14. That since the Existing Custody Order the Defendant has had visitation with the minor children, including all the visitation as expressly decreed in the Existing Custody Order, as well as additional visitation periodically.
15. That the purported change of circumstances of which evidence was presented by the [defendant] in this hearing largely appear to just be the appropriate exercise by the Plaintiff of the custody that was granted to the Plaintiff by Judge Mercer in the Existing Custody Order.

Defendant likewise challenges the following two conclusions of law as stated by the district court:

3. That there has been no substantial changes or circumstances affecting the welfare of the minor children since the entry of the Existing Custody Order by Judge Mercer on April 24, 2017.
4. That the Plaintiff's motion to dismiss the Defendant's Motion For Change Of Custody pursuant to Rule 41 of the North Carolina Rules of Civil Procedure should be granted.

Based on the record before us, we hold that the district court's findings of fact are supported by substantial competent evidence and, in turn, support its conclusions of law. First, the record supports the district court's finding that defendant has had "reasonable telephone contact with the minor children" since the entry of the Order. Second, defendant's own testimony corroborates the district court's finding that she has had visitation as expressly decreed by the Order as well as *additional* visitation

privileges periodically. Lastly, the district court’s observation that the “purported change of circumstances of which evidence was presented by the [defendant] . . . largely appear to just be the appropriate exercise by the Plaintiff of the custody that was [previously] granted” is consistent with the evidence on record. Defendant’s evidence, which consists solely of her own testimony and a cursory statement proffered by a character witness, establishes the following²: defendant has had visitation privileges in excess of those mandated by the Order; defendant has had reasonable telephone contact with the minor children; defendant resides in the same residence as she did in April 2017, when the original Order was entered; the minor children, including B.M.L., are attending school on a full-time basis as they were in April 2017; and that defendant is employed by the same employer as she was at the time of the entry of the Order.

The evidence does *not* show that there has been a substantial change of circumstances affecting the welfare of the children sufficient to warrant a change in custody. Defendant testified that plaintiff informed B.M.L.’s school to contact defendant should plaintiff be unavailable. This testimony cuts against defendant’s assertion that plaintiff advised the children’s schools to cut off communications with

² B.M.L., the minor child, and his sister were interviewed by the judge in chambers, but no transcript of this testimony is included in the record.

defendant.³ Defendant, moreover, provided no evidence that her residence has become more “suitable” since the date of the Order. Indeed defendant resides in the same residence under the same conditions as she did in April 2017. While defendant maintains that her visitation privileges were diminished following plaintiff’s remarriage, “remarriage, in and of itself, is not a sufficient change of circumstance affecting the welfare of the child to justify modification of the child custody order without a finding of fact indicating the effect of the remarriage on the child.” *Evans v. Evans*, 138 N.C. App. 135, 140, 530 S.E.2d 576, 579 (2000) (citing *Kelly v. Kelly*, 77 N.C. App. 632, 636, 335 S.E.2d 780, 783 (1985)). And although defendant testified to certain changes after the entry of the Order, and after plaintiff’s remarriage in August 2018, defendant failed to present evidence regarding a purported nexus between the changes and the minor children. *Shipman*, 357 N.C. at 478, 586 S.E.2d at 256 (requiring evidence directly linking the asserted changes to the welfare of the child). Moreover, defendant’s testimony as to many of the purported changes (*e.g.*, B.M.L.’s alleged behavioral problems and that B.M.L. has since once went without

³ We also note that the Family Educational Rights and Privacy Act (colloquially referred to as “FERPA” or as the “Buckley Amendment”) is a federal law that regulates access to students’ educational records. FERPA conditions receipt of federal funds on schools’ providing parents with access to their children’s education records. Given that the trial court’s order does not limit defendant’s access to such information, FERPA and other state laws provide defendant with the right to access her children’s education records.

dinner) is not based on personal knowledge or otherwise supported by competent evidence.

In sum, defendant has failed to satisfy her burden of showing a substantial change of circumstances affecting the welfare of the children between the time of the Order and the time of the hearing on her motion for change of custody.⁴ *Ford*, 170 N.C. App. at 97, 611 S.E.2d at 461 (reversing trial court's order granting motion to modify custody where parties had made voluntary modifications, including increased visitation, subsequent to the entry of the original order); *In re Harrell*, 11 N.C. App. 351, 355, 181 S.E.2d 188, 190 (1971) (holding that evidence of record did not support a finding of changed circumstances affecting the welfare of child that would permit modification of prior custody order by changing custody from father to mother). The district court, therefore, did not err by dismissing this action pursuant to Rule 41 of the North Carolina Rules of Civil Procedure.⁵ *See* N.C. R. Civ. P. 41(b) (2019); *see also Walsh v. Jones*, 263 N.C. App. 582, 586, 824 S.E.2d 129, 132 (2019) (emphasis in

⁴ Defendant also argues that because she has not consumed alcoholic beverages or illegal substances in compliance with the Order, she has demonstrated a substantial change of circumstances. However, defendant presents no authority that compliance with one condition of a permanent custody order is sufficient evidence of a substantial change of circumstances to amend such an order. Nor does defendant claim that by refraining from drinking and using narcotics she thereby created positive changes in her life affecting the welfare of the children. Defendant likewise offers no evidence that, since the entry of the Order, plaintiff (or plaintiff's new wife) have changed their alcohol consumption in the presence (or to the detriment) of the minor children. *See Ford v. Wright*, 170 N.C. App. 89, 97, 611 S.E.2d 456, 461 (2005).

⁵ Defendant did not object or argue below that she had been deprived of sufficient opportunity (or time) to present her evidence or that her ability to do so was impaired in any way. In the words of defendant's trial counsel, "[t]hat's it for me."

original) (“Since the trial court must make findings of fact to support an order under Rule 41(b), there is little practical or legal difference between an order *dismissing* a motion to modify custody under Rule 41(b) and an order *denying* a party’s claim for modification of custody.”) (citing *Helms v. Rea*, 282 N.C. 610, 619, 194 S.E.2d 1, 7 (1973)).

III. Conclusion

The district court’s findings of fact are supported by substantial evidence, and these findings are adequate to support the district court’s conclusions of law. As such, the order filed 2 January 2020 in the district court is affirmed.

AFFIRMED.

Chief Judge MCGEE and Judge STROUD concur.

Report per Rule 30(e).