IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-178

No. COA20-425

Filed 4 May 2021

New Hanover County, No. 18 CVD 3579

TERRI GRAY, Plaintiff,

v.

NIGEL HOLLIDAY, Defendant.

Appeal by Defendant from order entered 15 October 2019 by Judge Robin W. Robinson in New Hanover County District Court. Heard in the Court of Appeals 23 March 2021.

J. Albert Clyburn for Plaintiff-Appellee.

John M. Kirby for Defendant-Appellant.

INMAN, Judge.

¶ 1 Defendant-Appellant Nigel Holliday ("Father"), the biological father of Nakia,[1] appeals from a permanent custody order awarding joint legal and sole physical custody of Nakia to Plaintiff-Appellee Terri Gray ("Grandmother"), Nakia's maternal grandmother, and granting Father joint legal custody and visitation rights. After

[1] We use a pseudonym to protect the identity of the child.

careful review, we affirm the trial court's denial of Father's motion to dismiss for lack of standing and its reliance on findings from the Domestic Violence Protective Order ("DVPO"). We remand this matter to the trial court to enter a finding regarding the standard of proof it employed in determining that Father's conduct was inconsistent with his parental status.

I. FACTS & PROCEDURAL HISTORY

¶ 2 Evidence presented before the trial court tends to show the following:

¶ 3 Father met Nakia's biological mother ("Mother") in 2009. Nakia was born about five years later, in November 2014. Mother, Nakia, and Nakia's half-brother lived with Grandmother for all but ten months of Nakia's life, during which time Nakia lived with Mother in Southport, NC. Father and Mother did not live together. Father, by his account, visited Nakia "sporadic[ally]." Nakia sometimes stayed overnight in Father's home.

¶ 4 In June 2018, Mother filed a complaint for a DVPO against Father. The complaint alleged the following: (1) Father had threatened to bring "artillery" to his next child custody exchange with Mother and (2) Father grabbed Nakia from Mother during a scheduled custody exchange, placed Nakia on his lap in the front seat of a car, and instructed the driver to speed off without securing Nakia in a car seat. Father did not attend a noticed DVPO hearing. The trial court issued a DVPO forbidding Father to "assault, threaten, abuse, follow, harass (by telephone, visiting

the home or workplace, or other means) or interfere with" Mother, Nakia, and any member of their household. It also required that he stay away from Nakia's home and daycare. Father did not visit with Nakia during the term of the DVPO.

¶ 5 In October 2018, while the DVPO was still in effect, Mother passed away suddenly from an unexpected illness. Grandmother did not contact Father to inform him of Mother's illness or death. Three days after Mother died, Grandmother filed a complaint seeking legal custody of Nakia. The trial court granted the emergency custody of Nakia to her at the *ex parte* hearing. In November 2018, at Father's request, the DVPO was set aside due to Mother's death. Nakia remained in Grandmother's physical custody.

¶ 6 After the DVPO was set aside, Grandmother amended her complaint for custody, adding allegations that Father had acted inconsistently with his constitutional parental rights. Specifically, she alleged that Father repeatedly abused Mother, and that prior to October 2018 Father had not tried to establish a visitation schedule with Nakia. Father filed a motion to dismiss the action.[2] The trial court issued an *ex parte* custody order granting full legal custody to

[2] Father notes that although formally filed as a 12(b)(6), the substance of the motion was properly considered under 12(b)(1) for lack of subject matter jurisdiction, not for failure to state a claim. *See Williams v. New Hanover Cty. Bd. of Educ.*, 104 N.C. App. 425, 428, 409 S.E.2d 753, 755 (1991) (treating a motion to dismiss according to its substance rather than its label).

Grandmother and formal visitation rights to Father.

¶ 7 In January 2019, because of the trauma of her mother's sudden death and allegations regarding abuse,[3] Nakia began seeing a therapist, Tiffany Salter ("Ms. Salter"). Ms. Salter strongly recommended that Nakia continue her treatment and that her caregivers also participate in family therapy to help Nakia continue to process her trauma. Father attended the majority of family therapy sessions to which he was invited, but he stopped attending sessions six weeks before the custody hearing from which this appeal arises.[4]

¶ 8 The Department of Social Services ("DSS") had also recommended, and the trial court emphasized to Father and his counsel in a prior hearing,[5] that Father participate in parenting classes. Father did not participate in parenting classes.

¶ 9 At the permanent custody hearing, Grandmother testified that Father, inconsistent with his parental status, had long failed to provide financial support for Nakia. As of December 2018, Father had paid a total of $26 and was $660 in arrears in his child support obligation. In addition, after Mother's death, Father received and

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[3] The trial court determined that the "allegations of sexual and physical abuse, coaching, and poisoning" made by both parties to DSS were not substantiated.

[4] At the permanent custody hearing, counsel for Father contested whether therapy had been an order or a mere recommendation. The trial court judge noted that during a prior hearing, she had verbally directed Father, in the presence of his counsel, to follow the DSS recommendations.

[5] The trial court stated, "[A]t some point it came out of my mouth that [Father] was supposed to cooperate and follow the [DSS] recommendations, including parenting classes . . . . Those were words from my lips to his attorney at the time."

cashed about $5,000 in Social Security benefits intended for Nakia, even though Grandmother had legal custody of Nakia per the previous *ex parte* order from October 2018.

¶ 10 Following the custody hearing, the trial court made the following findings of fact:

> a. [Father's] involvement with the minor child has been sporadic and inconsistent throughout the minor child's life;
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> b. Prior to the filing of this action, [Father] went (6) six months without having contact with the minor child;
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> c. [Father] has never provided the minor child's day to-day necessities;
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> d. [Father] has never actively participated in any of the minor child's medical, dental, or vision appointments;
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> e. [Father] has rarely participated in the minor child's schooling;
>
> f. [Father] actually missed the minor child's graduation from pre-school, which occurred during the pendency of this case, and was made aware of the same;
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> g. [Father] has never actively participated in the minor child's extracurriculars;
>
> h. [Father] failed to follow this Court's Order without just cause or excuse, as well as failed to follow the recommendations provided by Ms. Salter to engage in joint therapy with this minor child;
>
> i. [Father] failed to participate in parenting classes;
>
> j. [Father] failed to participate in co-parenting classes;

k. [Father] has flagrantly disregarded his court ordered child support obligation to the plaintiff. The Child Support Order at the time of hearing had been in effect for (9) nine months, and [Father] has provided approximately $13.00 for the support of his minor child;

l. [Father] fraudulently benefitted from the minor child by applying to become the beneficiary of the minor child's Social Security death benefits, as well as the beneficiary of the minor child's WIC assistance. [Father] was able to receive said benefits as [Father] listed himself as the primary custodian of the minor child, contrary to the Order of this Court that granted [Grandmother] sole custody of the minor child. [Father] financially gained upwards of $5,000.00 from the minor child's death benefits;

m. [Father] has acted hostile and aggressively since the onset of this action;

n. [Father]'s aggressive and hostile behavior is not only directed towards [Grandmother] and [Grandmother]'s family, but to school officials as well;

o. [Father]'s conduct resulted in a temporary ban from the minor child's school, and was described as being verbally and physically aggressive to school officials;

p. [Father]'s been labeled "inappropriate" in the social worker's case notes regarding a therapy session with [Father] and Ms. Salter;

q. [Father] placed the minor child under substantial risk of physically injury or harm, as found by the DVPO entered 10 May 2018, and referenced hereinabove, wherein he snatched the minor child from [Mother's] arms, and sped off in a car that his brother was driving with the minor child in the front seat on the [Father]'s lap, the door was open, the minor child was not restrained, and the minor child was without a car seat;

> r. [Father] has made threats that he would bring an artillery to [Mother's] residence, wherein the minor child was present[.]

Based in part on these findings, the trial court concluded:

> 1. The Court has jurisdiction over the parties and the subject matter.
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> 2. That [Father] has in fact acted inconsistent with his protected status to parent.
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> . . . .
>
> 6. That the best interest of the minor child would be to place the child in the [Grandmother]'s primary physical custody, and [Father] to have visitation as set forth below.
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> 7. That [Grandmother] and [Father] are fit and proper to have joint legal custody. However, the [Grandmother] has the ultimate decision-making authority.

¶ 11 In its decree, the trial court reiterated its finding that Father had acted inconsistent with his status as a parent. The trial court awarded joint legal custody to Grandmother and Father, and primary physical custody to Grandmother, giving her "ultimate decision-making authority" regarding matters such as Nakia's health and education. The trial court awarded Father visitation including a schedule of weekends, weekdays, summer vacation weeks, and certain holidays.

¶ 12 Father timely appealed from the custody order. He challenges each of the findings of fact listed above. Father also argues that findings (a)-(e), (g), (q) and (r) did not establish Grandmother's standing, and that some of these findings of fact,

along with findings (f) and (h)-(p), did not support the trial court's conclusion that Father acted inconsistent with his parental status.

II. ANALYSIS

A. Standard of Proof

¶ 13 The trial court's order does not indicate the standard of proof it employed in its findings of fact. Whether a parent has acted in a manner inconsistent with his or her constitutionally protected status must be proven by clear, cogent, and convincing evidence. *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001). This standard "is a higher evidentiary standard than the greater weight of the evidence standard used in ordinary child custody cases between natural parents where the best interest of the child is the sole test." *Dunn v. Covington*, __N.C. App. __, __, 846 S.E.2d 557, 567 (2020) (citing *Everette v. Collins*, 176 N.C. App. 168, 173, 625 S.E.2d 796, 799 (2006)) (quotation marks omitted).

¶ 14 When a trial court fails to state the standard of proof applied in its decision, the case must be remanded. *See id.*; *see also David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 754 (2005) (reversing and remanding trial court's order awarding custody to non-parent over natural parent because the trial court failed to apply the clear and convincing evidence standard); *In re Church*, 136 N.C. App. 654, 658, 525 S.E.2d 478, 480-81 (2000) (vacating and remanding a trial court order terminating parental rights for a finding to determine whether the evidence satisfies the required

standard of proof of clear and convincing evidence); *Moriggia v. Castelo*, 256 N.C. App. 34, 44, 805 S.E.2d 378, 383 (2017) (vacating and remanding the trial court's order to affirmatively state the standard of proof it used to make findings based on the clear, cogent, and convincing standard).

¶ 15 The hearing transcript reflects that Father's counsel understood the applicable standard of proof and argued that Grandmother had failed to meet the heightened burden of presenting clear, cogent, and convincing evidence.[6] But without reference to the standard in the custody order, we cannot assume the trial court employed that standard. Accordingly, we must remand this case to the trial court to enter a finding of fact affirmatively stating which standard of proof it applied. *See Moriggia*, 256 N.C. App. at 44, 805 S.E.2d at 383. On remand, the trial court may, in its discretion, hear other evidence.

¶ 16 In the interest of judicial economy, we will address Father's arguments that the trial court erred in denying his motion to dismiss Grandmother's complaint for lack of standing and in relying on findings in the DVPO at both the motion to dismiss stage and also to support its conclusion on the merits.

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[6] During his closing argument, Father's counsel stated, "We're not talking one—one thing. It's the totality of the circumstances; *clear, cogent, and convincing evidence*. . . . Again, the Court [] in all of the appellate decisions, these are based on the facts as alleged in the complaint and whether the person was able to prove them by *clear, cogent, and convincing evidence*." (emphasis added).

B. Grandmother's Ability to Maintain Child Custody Action

¶ 17 Father argues that the trial court erred in denying his motion to dismiss Grandmother's complaint because it does not allege that he was unfit or acted inconsistent with his protected status. We disagree.

¶ 18 We review whether a party has standing to bring a claim *de novo*. *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001). At the motion to dismiss stage, all factual allegations made at the pleading are "viewed in the light most favorable to [the] plaintiff and granting [the] plaintiff every reasonable inference." *Grindstaff*, 152 N.C. App. at 293, 567 S.E.2d at 432.

¶ 19 Father filed a motion pursuant to North Carolina Rule of Civil Procedure 12(b)(6) for failure to state a claim, but the basis of the motion was lack of jurisdiction arguing that Grandmother did not have standing. We take this opportunity to review our caselaw and clarify the difference between two distinct but related stages in a custody dispute between a parent and non-parent, namely: (1) the standing and pleading requirements of the complaint at the motion to dismiss stage, and (2) the burden of producing evidence at the custody hearing sufficient to prove that a parent has waived the constitutional protections guaranteed to them.

¶ 20 N.C. Gen. Stat. § 50-13.1(a) grants standing to certain non-parent parties and 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[.]"

Standing is required to confer subject matter jurisdiction. *Wellons v. White*, 229 N.C. App. 164, 176, 748 S.E.2d 709, 716 (2013) ("If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim."). "A court's subject matter jurisdiction over a particular matter is invoked by the pleading." *Boseman v. Jarrell*, 364 N.C. 537, 546, 704 S.E.2d 494, 501 (2010).

¶ 21 Initially, this Court interpreted N.C. Gen. Stat. § 50-13.1(a) as a general grant of standing so that *any* person, even a legal "stranger," could assert a claim for custody or visitation. *See, e.g., Ray v. Ray*, 103 N.C. App. 790, 793, 407 S.E.2d 592, 593 (1991) (holding the step-grandmother had standing to pursue complaint for visitation over the natural parent's objection); *In re Rooker*, 43 N.C. App. 397, 398, 258 S.E.2d 828, 829 (1979) ("[T]he position of the petitioner is no greater than that of a stranger to the child.").

¶ 22 The Supreme Court of North Carolina has since clarified that the statute "was not intended to confer upon strangers the right to bring custody or visitation actions against parents of children *unrelated to such strangers*" because "such a right would conflict with the *constitutionally-protected paramount right of parents to custody, care, and control of their children*." *Petersen v. Rogers,* 337 N.C. 397, 405, 445 S.E.2d 901, 906 (1994) (emphasis added). "Although grandparents have the right to bring an initial suit for custody, they must still overcome" the parents' constitutionally

protected rights.[7] *Sharp v. Sharp,* 124 N.C. App. 357, 361, 477 S.E.2d 258, 260 (1996); *see also Rodriguez v. Rodriguez*, 211 N.C. App. 267, 276, 710 S.E.2d 235, 241-42 (2011) ("[The] plaintiffs had standing to proceed in an action for custody pursuant to N.C. Gen. Stat. § 50-13.1(a) as they alleged they are the grandparents of the children and that [the] defendant had acted inconsistently with her parental status and was unfit because she had neglected the children.") (citation omitted)).

¶ 23 To survive a motion to dismiss, the grandparent must allege facts sufficient to demonstrate that the parent is unfit or has taken action inconsistent with his or her parental status. *See, e.g., Grindstaff v. Byers,* 152 N.C. App. 288, 293, 567 S.E.2d 429, 432 (2002) (holding complaint was sufficient to survive motion to dismiss where grandmother alleged that the parents had visited the children in her care inconsistently, and "have not shown they are capable of meeting the needs of the children for care and supervision"); *Ellison v. Ramos*, 130 N.C. App. 389, 398-99, 502 S.E.2d 891, 897 (1998) (denying dismissal of complaint where the pleading alleged the caretaker had cared for the child since birth and that the father had placed the child in the care of others who were unable to care for the child's medical conditions).

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[7] *See* Cheryl D. Howell, *Nonparent vs Parent Consent Custody Orders*, UNC Sch. of Gov't (May 22, 2015), https://civil.sog.unc.edu/nonparent-vs-parent-consent-custody-orders/ ("[B]ecause standing is a matter of subject matter jurisdiction, it cannot be waived by the consent of the parties. Therefore, consent orders will be void if the action was initiated by a person who lacked a sufficient relationship with the child at the time of filing.").

¶ 24 If the pleading, however, does not allege sufficient facts of parental conduct inconsistent with his or her constitutionally protected rights, the complaint is subject to dismissal. *See, e.g., Perdue v. Fuqua*, 195 N.C. App. 583, 587-88, 673 S.E.2d 145, 149 (2009) (concluding the intervenor failed to allege conduct sufficient to support a finding that the parents engaged in conduct inconsistent with their parental rights because the allegations were that "father lost his job, obtained third-shift employment, and had a young girlfriend babysitting the minor child" and "that the parents allowed the minor child to live exclusively with the intervenor for four months"); *McDuffie v. Mitchell*, 155 N.C. App. 587, 591, 573 S.E.2d 606, 609 (2002) (holding trial court properly dismissed the grandparent's complaint for custody against the father where the complaint alleged only that the father "ha[d] been estranged from the children for some time and currently enjoys limited visitation with the children" because the allegations were insufficient to support a finding that the father had acted inconsistent with his protected status as a parent).

¶ 25 The review of the complaint for a non-parent's standing and the sufficiency of the pleadings is a separate inquiry from the trial court's substantive determination of whether the facts alleged are proven by the evidence at the custody hearing to support a conclusion that a parent has waived the constitutional protection of his or her right to custody.

¶ 26 Grandmother brings this action pursuant to N.C. Gen. Stat. § 50-13.1(a) as

Nakia's maternal grandmother and her primary caregiver. The amended complaint for custody alleges, in relevant part:

> 10. [Father] was the subject of an active domestic violence protection order, entered June 1, 2018 in New Hanover County, North Carolina. By that order, [Father] was ordered not to assault, threaten, abuse, follow, harass, or interfere with [Mother] and her minor children. He was ordered not to threaten any member of her household, including [Grandmother], and he was ordered to stay away from [Mother's] place of employment and any place where her minor children receive day care.
>
> 11. Upon information and belief, [Father] subjected the minor child's mother to a repeated pattern of physical abuse[.]
>
> 12. Further, [Father] has come to [Grandmother]'s residence, where minor child resided, on more than one occasion without being welcome, and on at least one of these occasions threatened violence to the residence of said home. [Nakia] was present in the home on that occasion.
>
> 13. [Father]'s whereabouts were previously unknown. Prior to . . . October 19, 2018, he had not attempted to address any type of visitation schedule through the court system or otherwise.

Grandmother incorporated the findings of fact and legal conclusions of the DVPO in her amended complaint, including that (1) Father had threatened to bring "artillery" to a child custody exchange and (2) Father grabbed Nakia from Mother during a scheduled custody exchange, placed Nakia on his lap in the front seat of a car, and instructed the driver to speed off without securing Nakia in a car seat.

¶ 27 When viewed in the light most favorable to Grandmother, the complaint

alleges facts sufficient to demonstrate that Father acted in a manner inconsistent with his constitutionally protected status. At the motion to dismiss stage, the trial court need not consider the evidence. Instead, it must determine only whether the allegations, if later supported by the evidence, are sufficient to deem a parent unfit or that they have acted inconsistent with their constitutionally protected rights. As such, we affirm the trial court's denial of Father's motion to dismiss.

¶ 28 Our conclusion that Grandmother's complaint suffices to establish standing means that the trial court had subject matter jurisdiction to hear this matter and enter the order from which this appeal arises.

C. Trial Court's Reliance on DVPO Findings

¶ 29 Father contends that the findings of fact in the DVPO do not constitute "competent evidence" because the doctrine of collateral estoppel does not apply to facts found in the DVPO. In particular, he argues that the findings in the DVPO should have been excluded from the trial court's consideration because (1) Father was not present at the DVPO hearing and (2) the DVPO was later set aside.

¶ 30 In the DVPO, the trial court found that Father threatened to bring a weapon to a custody exchange and that he placed Nakia in danger by not securing her in a car seat before driving. The trial court properly relied on the DVPO at both the motion to dismiss stage and during the hearing on the merits.

¶ 31 Under the doctrine of collateral estoppel, "the determination of an issue in a

prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding." *Hillsboro Partners, LLC v. City of Fayetteville*, 226 N.C. App. 30, 35, 738 S.E.2d 819, 824 (2013).

¶ 32 Father misapplies the collateral estoppel doctrine here. He was not precluded from re-litigating the facts addressed in the DVPO; Father testified in the custody hearing and disputed the findings of the DVPO. The trial court was permitted to rely on the findings of fact and conclusions of the DVPO in its permanent custody order. *See Raynor v. Odom*, 124 N.C. App. 724, 728, 478 S.E.2d 655, 657 (1996) ("When a trial judge is attempting to evaluate what is in the best interest of a child or whether a parent is unfit or has neglected the child, it is an undue restriction to prohibit the trial judge's consideration of the *history of the case on record*.") (emphasis added).

¶ 33 Father's argument on appeal attempts to recast an evidentiary ruling as the application of collateral estoppel. We note that Father was provided a full and fair opportunity to litigate the issues in the DVPO hearing—he was a named party to the action and had notice and personal knowledge of the proceeding. He simply failed to appear at that hearing. Father later appeared and unsuccessfully sought an order setting aside the DVPO during Mother's lifetime.

¶ 34 We also reject Father's argument that the trial court could not consider findings in the DVPO because it was ultimately set aside. Father concedes that no

precedent supports his position. The DVPO was set aside only after Mother died. We hold that Mother's death did not render the DVPO inadmissible, and we will not re-weigh the evidence heard by the trial court at the custody hearing on appeal. We conclude that the trial court did not err in considering the findings of the DVPO.

¶ 35 Father further argues that the trial court's findings of fact 30(a)-(e), (g), (q) and (r) related to Grandmother's complaint are unsupported by clear and convincing evidence and require reversal. We cannot consider the merits of this issue because the trial court failed to state the standard of proof it applied. For the same reason, we cannot review the trial court's conclusions of law.

III. CONCLUSION

¶ 36 For the foregoing reasons, we affirm the trial court's denial of Father's motion to dismiss Grandmother's complaint, and we hold that the trial court properly considered in evidence findings in the prior DVPO. We remand the case for the trial court to state what standard of proof it applied and make such findings and conclusions consistent with this opinion.

AFFIRMED IN PART; REMANDED IN PART.

Judges Wood and Griffin concur.

Report per Rule 30(e).