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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-537

No. COA20-710

Filed 5 October 2021

Iredell County, No. 17 CVD 391

MARLA BLACKWELL (now MARLA ZIELINSKI), Plaintiff,

v.

BRIAN BLACKWELL, Defendant.

Appeal by plaintiff from orders entered 17 May 2018 and 27 February 2020 by Judge Deborah P. Brown in Iredell County District Court. Heard in the Court of Appeals 21 September 2021.

Fox Rothschild LLP, by Michelle D. Connell, for plaintiff-appellant.

Collins Family Law Group, by Rebecca K. Watts, for defendant-appellee.

TYSON, Judge.

¶ 1 Plaintiff appeals from an order by the trial court modifying her child custody agreement, awarding Defendant attorney fees, and denying her new trial. We affirm in part, vacate in part, and remand.

I. Background

¶ 2 Plaintiff, Marla Blackwell (“Mother”), and Brian Blackwell (“Father”) married in June 2011 and divorced in June 2015. One child, a daughter, was born in 2012 of

the marriage (“the minor child.”).

¶ 3 Mother filed a complaint against Father seeking custody of the minor child, for child support and attorney fees on 19 December 2013. Father counterclaimed. Mother replied to Father’s counterclaims and alleged Father suffered from mental health and substance abuse. To prove her allegations about Father’s mental health status and alleged drug and alcohol use, Mother’s attorney issued nine subpoenas to collect information regarding Father’s mental health and substance abuse. In August 2014, the court entered the parties’ consent protective order to govern access to and use of any documentation received in response to these subpoenas.

¶ 4 That protective order stated all documents received pursuant to Mother’s subpoenas were to remain sealed in the court file and reviewable only by the court, the parties, and their attorneys. The protective order further provided “as the relevant pending claims in this matter have been properly settled by the Court, any and all documents produced pursuant to the Subpoenas shall be returned to Defendant.” The court issued additional subpoenas to psychiatrists, psychologists, behavioral health specialists, custody evaluators, doctors, and pharmacies. Those documents were restricted to use only in the “pending claims in this matter.”

¶ 5 In August 2014, the parties also entered into two consent orders: one for temporary child support, post-separation support, alimony, and equitable distribution and the other for forensic parenting capacity evaluation of Father. The

parties agreed, and the trial court found as fact, both parties were fit and proper persons to have the temporary custody of the minor child.

¶ 6 A second protective order was entered by a memorandum of judgment (“MOJ”) in January 2016. The MOJ awarded Father visitation every other weekend. The parties agreed to joint legal custody, while Mother had final decision-making authority. The parties agreed to a summer schedule. Mother had physical custody during all other times.

¶ 7 In August 2016, Mother filed a motion to change venue from Mecklenburg County to Iredell County. On 12 September 2016, the parties entered into another MOJ which detailed the holiday custody schedule and addressed steps the parties must take to protect the minor child from firearms and medications.

¶ 8 On 21 December 2016, after the MOJ resolving custody had been entered but prior to the time the formal order based upon the MOJ’s were entered by the trial court, Mother filed a motion for temporary modification of custody. Mother alleged a substantial change in circumstances. Her employer had eliminated her position in North Carolina, and she had been offered a new job with that employer in Pennsylvania starting 4 January 2017.

¶ 9 On 29 December 2016, the two MOJ’s were formalized into an order for permanent child custody, child support, and for attorney fees. The memorandums were incorporated into a formal permanent child custody order filed on 29 December

2016. This order remained in place until 17 May 2018 when an order modifying child custody was entered. No trial judge had reviewed the documents being held under the protective orders at this point in the litigation.

¶ 10 Also on 29 December 2016, an order was entered changing venue from Mecklenburg County to Iredell County. The Mecklenburg County clerk's office mailed the court file to Iredell County. On 7 February 2017, the file was mailed from Iredell County back to the Mecklenburg County clerk, because during transport from Mecklenburg to Iredell County items were purportedly lost in transit.

¶ 11 Mother moved to Pennsylvania with the minor child in January 2017. On 15 February 2017, Father filed motions seeking *ex parte* emergency custody, requesting injunctive relief, asking that Mother be held in contempt, and asking that custody be modified.

¶ 12 The factual allegations common to these motions asserted Mother had moved with the minor child to Pennsylvania. Mother and the minor child were living in a hotel, Mother was denying Father access to the child. Defendant asserted a substantial change in circumstances affecting the welfare of the child had occurred due to Mother's move, out of state, and the custody order should be modified.

¶ 13 On 8 June 2017, the trial court denied Mother's motion for temporary modification, held Mother in contempt, and directed the parties to strictly adhere to the custody order until a hearing on Father's motion to modify.

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¶ 14 On 15 August 2017, Mother filed a motion to modify custody, asserting a substantial change in circumstances since the entry of the prior order in that she had moved to Pennsylvania and the child was about to begin kindergarten.

¶ 15 On 8 September 2017, Father filed another motion for contempt. He alleged subsequent to the entry of the initial order holding Mother in contempt for failing to allow Father to have visitation or contact with the child, Mother had continued to deny Father visitation or phone contact.

¶ 16 The hearing for the respective motions to modify custody began on 31 January 2018. Mother requested the court to consider the sealed documents, which had never been considered by either judge prior to either party taking evidence.

¶ 17 Counsel for Mother requested the court to “do an *in camera* review to determine what documents may be relevant if Your Honor doesn’t want to just hold them open.” Mother’s counsel stated, “those are facts that have never been presented to the Court before, evidence that has never been presented to the Court before. And (sic) pursuant to *Newsome v. Newsome*, we would ask that the Court consider those in this Motion to Modify Custody.”

¶ 18 On 17 May 2018, the trial court granted the parties’ respective motions to modify, awarded primary custody of the child to Father, found Mother in contempt, and awarded attorney fees to Father related to his pursuits of contempt. The trial court made findings of fact and conclusions of law regarding the change in

circumstances alleged by the parties, the effects the change had on the child, and the custodial schedule that would be in the child's best interests going forward. The trial court also made findings regarding Mother's failure to allow visitation to Father, failure to consult with Father regarding the minor child, and Mother's assertions the child's "busy schedule" prevented the child from being available for Facetime visits with Father.

¶ 19 Plaintiff served a motion for new trial pursuant to Rule 59 of our Rules of Civil Procedure. The motion was denied. On 9 March 2020, Plaintiff filed notice of appeal of both the 17 May 2018 order modifying child custody, child support, attorney fees, and contempt and the order denying Plaintiff's Rule 59 order.

II. Jurisdiction

¶ 20 An appeal from an order modifying child custody lies before this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2019).

III. Issues

¶ 21 Plaintiff raises five issues on appeal. We consolidate the arguments into three issues for our review. Did the trial court err by: (1) not considering the sealed evidence during the custody hearings and failing to make a finding of fact based upon that evidence; (2) awarding attorney fees to Father; and (3) denying Mother's motion for a new trial.

IV. Standard of Review

¶ 22 This Court reviews “a trial court’s decision to modify an existing child custody order by determining: (1) whether the trial court’s findings of fact are supported by substantial evidence; and (2) whether those findings of fact support its conclusions of law.” *Spoon v. Spoon*, 233 N.C. App. 38, 41, 755 S.E.2d 66, 69 (2014) (citation omitted). “Whether [the trial court’s] findings of fact support [its] conclusions of law is reviewable *de novo*.” *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 904 (2008).

V. Analysis

A. Modification of Custody

¶ 23 Mother and Father sought to modify custody based on the substantial change in circumstances because of Mother’s employment and move to Pennsylvania.

¶ 24 In *Shipman*, our Supreme Court set forth the requirements for modification of a custody order and the standard of review of an order modifying custody. *Shipman v. Shipman*, 357 N.C. 471, 473–75, 586 S.E.2d 250, 253–54 (2003). A trial court may order the modification of an existing child custody order if the court determines there has been a substantial change of circumstances affecting the child’s welfare and the modification is in the child’s best interests. *Id.* at 475, 586 S.E.2d at 254.

¶ 25 When a party affirmatively requests a trial court to modify custody and the trial court modifies custody, that party has induced the very action the trial court took, as “the party who induces an error can’t take advantage of it on appeal, or more

colloquially, you can't complain about a result you caused." *Romulus v. Romulus*, 215 N.C. App. 495, 528, 715 S.E.2d 308, 329 (2011) (citation and internal quotation marks omitted).

¶ 26 Here, both Mother and Father filed motions to modify custody, alleging Mother's move to Pennsylvania constituted a substantial change in circumstances warranting a modification of custody. Both asked the trial court to modify custody. The trial court agreed the move to Pennsylvania constituted a substantial change in circumstances and modified custody.

¶ 27 The 17 May 2018 Order for Modification of Child Custody included 36 findings of fact. The trial court considered the distance between Mother and Father, their current home situations, their compliance with previous orders and their financial capabilities. Upon these findings, the trial court determined and concluded the best interest of the minor child would be served by granting Father permanent child custody, child support and attorney fees.

¶ 28 Mother filed a motion asking the trial court to modify custody based upon her move to Pennsylvania being a substantial change in circumstances and the trial court obliged. The outcome of the modification was not what Mother wanted. A party may not base an appeal on an alleged error that she invited. *Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994). The modification of custody by the trial court is affirmed.

B. Evidence and *In Camera* Interview

¶ 29 At the modification hearing, Mother sought to admit Father’s mental health records, which predated the parties’ custody order. The trial court indicated it was not concerned with evidence predating the custody order. Mother asked the trial court to review the records *in camera* and to reconsider the decision to exclude the evidence. The trial court in its discretion denied that request.

1. Abuse of Discretion

¶ 30 The standard of review on admissibility of evidence is abuse of discretion. *In re Foreclosure of Cain*, 248 N.C. App. 190, 198, 789 S.E.2d 835, 842 (2016).

2. *Newsome v. Newsome*

¶ 31 Mother cites *Newsome v. Newsome* to support her argument where facts were not disclosed and litigated as part of the original custody proceeding, those facts must be considered as part of a motion to modify. *Newsome v. Newsome*, 42 N.C. App. 416, 425, 266 S.E.2d 849, 854 (1979). Mother argues a trial court is required to review facts not litigated in order to adequately determine whether a substantial change in circumstances has occurred, and what new custody arrangement would be in the child’s best interests.

¶ 32 *Newsome* is not a blanket rule to allow a trial court to treat a modification of a custody order, incorporating a separation agreement as an initial determination, to consider circumstances that existed prior to the date of the original order. *See id.*

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¶ 33 Mother argues because the original custody order was entered by agreement of the parties and not as the result of a trial. She asserts the trial court was obligated to consider evidence that predated the entry of the original order, when considering the parties' respective motions to modify. Her argument is not supported by case law.

¶ 34 "When all substantial facts relevant to the issue of custody are revealed to the court at the time of the original custody decree, a change of circumstances must be shown before that decree can be modified." *Woodring v. Woodring*, 227 N.C. App. 638, 645, 745 S.E.2d 13, 19 (2013) (citation omitted).

¶ 35 Here, the court determined Father's prior sealed medical records from years prior had no bearing on the alleged change in circumstances or what would be in the child's best interests. In its discretion, the trial court relied upon the fact the trial court had signed a consent order containing findings of fact and conclusions of law that Father was a fit and proper person to have custody of the minor child. Mother had consented to this order with full knowledge of the contents of the prior sealed records.

¶ 36 All facts and circumstances existed at the entry of the original custody consent order and were known by the parties and available to the trial court. Both Mother and the trial court issued subpoenas for Father's medical information. The trial court also ordered a custody evaluation of Father. The details of Mother's allegations against Father were known by both parties and the trial court before the original

custody order was entered. No information was missing or undisclosed to the parties or the trial court.

¶ 37 To determine whether Mother's change in employment and move with the child to Pennsylvania constituted a substantial change in circumstances, the trial court had no need to review evidence regarding Mother's allegations about Father's past mental health or drug and alcohol use years before. All of those allegations and evidence pre-dated the original order. The change in circumstances asserted by both parties focused solely on Mother's actions since the entry of the original order and on the effect Mother's actions had on the minor child. Mother's motion raised no issues of Father's conduct.

¶ 38 When the parties signed the consent order, they did so with full knowledge of all relevant facts and circumstances. The trial court also had all relevant information at hand when it entered that order. In the original order, Mother agreed Father was a fit and proper person to have legal and physical custody of the minor child and the trial court entered its order containing those findings. The trial court did not abuse its discretion by refusing to view sealed evidence, admittedly known to the parties prior to and at the time of their original custody agreement, and which was not asserted or relevant to the current allegations of change in circumstances. Mother's argument is without merit.

C. Adequate Findings of Fact

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¶ 39 Mother argues the trial court failed to make an adequate finding of fact to support its determination on the substantial change in circumstances.

¶ 40 The trial court is only required to make sufficient findings of fact to resolve the issues in dispute. *Carpenter v. Carpenter*, 225 N.C. App. 269, 279, 737 S.E.2d 783, 790 (2013) (findings of fact in a child custody order must “resolve the primary disputes between the parties and . . . explain why awarding primary custody” is in the child’s best interest).

¶ 41 The trial court found Mother began withholding Father’s visitation with the minor child at the end of the summer in 2017, enrolled the child in a school without Father’s knowledge or consent, withheld visitation from Father on multiple occasions, was several hours late arriving when she did permit the exchange of the minor child to Father, and refused to answer phone calls or communicate with Father concerning her late arrival time, after Father had been waiting at a mid-point out of state location for hours.

¶ 42 The trial court found and articulated a best interest analysis in the order. The court considered the distance between North Carolina and Pennsylvania and found “realistic visitation” was unlikely due to “Mother’s stubborn resistance.” The court also found Mother’s “capacity to improve the life of the minor child, not clear at all.” The court listed the minor child’s involvement and connection to dance, gymnastics, piano, extended family, stepsiblings, and determined the minor child would have

more family and activities available in North Carolina.

¶ 43 The trial court had discretion to choose to review the sealed evidence. The trial court determined it was unnecessary to open these files to determine the current issue of modification only involving Mother's move to Pennsylvania. The trial court relied upon the original consent orders entered into by Mother and Father. Mother has failed to show the trial court abused its discretion. Her arguments are overruled.

VI. Denying Mother's Motion for a New Trial

¶ 44 Mother asserts, at the time of trial, several documents were missing from the court file. After the custody order was entered, Mother's attorney filed an affidavit noting their absence. One of those documents is her attorney's "Application for Good Cause Shown," which was her attorney's request to allow a hearing on temporary modification of custody less than five days after service of the motion. Also missing from the court file, according to Mother's attorney's affidavit: (1) a cover sheet for a third-party affidavit that pre-dates the original order; (2) a certificate of service for a third-party affidavit that pre-dates the original order; (3) Mother's motion to modify temporary custody; (4) Father's response to Mother's motion to modify temporary custody; (5) an attachment to Father's 2015 contempt motion (which motion had been resolved); and, (6) a page from Father's 2016 financial affidavit.

¶ 45 Mother argues the trial court's failure to admit evidence, predating the original custody order, was an error of law entitling her to a new trial, and the trial court

erred in denying her Rule 59 motion.

¶ 46 Rule 59 of the North Carolina Rules of Civil Procedure provides the trial court may grant a new trial for any of the reasons enumerated in the rule. N.C. Gen. Stat. §1A-1, Rule 59 (2019). “By using the word ‘may,’ Rule 59 ‘expressly grants the trial court the discretion to determine whether a new trial should be granted.’” *Greene v. Royster*, 187 N.C. App. 71, 77-78, 652 S.E.2d 277, 282 (2007).

A. Standard of Review

¶ 47 A trial judge’s discretionary order granting or denying a Rule 59 motion may be reversed by this Court only when an abuse of discretion is clearly shown. *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982).

B. Analysis

¶ 48 None of these missing documents have any bearing on, or relevance to, the parties’ motions to modify custody, which are based upon Mother’s employment and move to Pennsylvania, the trial court’s ability to determine whether Mother’s move to Pennsylvania constituted a substantial change in circumstances, or what custody arrangement would be in the child’s best interests.

¶ 49 Presuming *arguendo*, the trial court erred in its exclusion of evidence that predated the original custody order, that presumed error in and of itself does not entitle Mother to a new trial. *See Dept. of Transportation. v. Craine*, 89 N.C. App. 223, 226, 365 S.E.2d 694, 697 (1988) (“Every erroneous ruling in the admission or exclusion of

evidence does not *ipso facto* entitle the appealing party to a new trial. He must show that he was prejudiced and that the erroneous ruling probably influenced the [outcome].”).

¶ 50 The trial court considered all relevant evidence of the current status of the parties and the best interests of the child as of the date of entry of the modification order. The trial court’s findings on best interests are binding on appeal. *See Peters v. Pennington*, 210 N.C. App 1, 13, 707 S.E.2d 724, 733 (2011) (“Unchallenged findings of fact are binding on appeal”). Mother’s arguments are overruled.

VII. Father’s Attorney Fees

¶ 51 Mother argues the trial court failed to make the requisite findings of fact to support its award of attorney fees for contempt. Father concedes the trial court’s order lacks the required showing and findings of fact, and he agrees the portion of the order awarding attorney fees related to his contempt motion should be vacated and remanded. The award of attorney fees to Father is vacated and remanded to the trial court to make the additional findings of fact necessary to support the award of fees.

VIII. Conclusion

¶ 52 Based upon both parties’ motions, the trial court properly found a substantial change in circumstances had occurred to modify custody. The custody modification order is affirmed. The trial court acted within its discretion when it decided not to review evidence that pre-dated the original custody order. The trial court properly

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denied Mother's Rule 59 motion.

¶ 53 Finally, the parties agree the trial court failed to make the requisite findings to support its award of attorney fees to Father. The award of attorney fees is vacated and remanded for the trial court to make the requisite findings in fact. *It is so ordered.*

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

Judges GORE and JACKSON concur.

Report per Rule 30(e).