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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-546

No. COA20-570

Filed 5 October 2021

Wake County, No. 13CVD3440

TONYA A. SPAHR, Plaintiff,

v.

TIMOTHY D. SPAHR, Defendant,

v.

CAROL A. PEARCE, Intervenor.

Appeal by Defendant from orders entered 5 January 2018, 8 July 2019, 9 July 2019, 8 October 2019, and 9 December 2019 by Judge Michael Denning in Wake County District Court. Heard in the Court of Appeals on 26 May 2021.

*Bryant Duke Paris III PLLC, by Bryant Duke Paris, III, for Plaintiff-Appellee.*

*Fox Rothschild LLP, by Michelle D. Connell, for Defendant-Appellant.*

CARPENTER, Judge.

¶ 1 Defendant appeals from the trial court's orders entered 8 July 2019 denying Defendant's motion for school reassignment of minor children and Defendant's motion for appointment of therapist for minor children. Defendant also appeals from the temporary child custody modification order (the "Omnibus Order") entered 5

January 2018; the order entered 9 July 2019 setting all pending matters for hearing; the order entered 9 December 2019 denying Defendant’s motions for relief pursuant to Rules 59 and 60; the gatekeeper order (the “Gatekeeper Order”) entered 9 December 2019; the expert witness fees order entered 9 December 2019; and the incorporation of results of a Child Family Examination (“CFE”) and permanent custody order entered 8 October 2019 (the “8 October 2019 Order”), which modified the existing custody arrangement. We hold the trial court’s entry of the 8 October 2019 Order establishing a new permanent custody order violated Defendant’s due process rights under the North Carolina Constitution and the Constitution of the United States when entering the new permanent custody order. Accordingly, we vacate the 8 October 2019 Order and remand for a new hearing. Because the 8 October 2019 Order is vacated, Defendant’s argument the trial court erred in denying his motions for relief pursuant to Rules 59 and 60 is mooted.

¶ 2

Next, we vacate and remand the Gatekeeper Order for further consideration since it was entered based in part on the 13 September 2019 hearing (the “September 2019 Hearing”), at which Defendant’s due process rights were violated. We also vacate and remand the order concerning expert witness fees because there is no evidence in the record to support the trial court’s findings of fact stating the time the witnesses spent testifying. We need not consider the appeal of the Omnibus Order because any objections to the order’s custody and visitation modifications were

rendered moot by the entry of the 8 October 2019 Order. Finally, we note Defendant abandoned his arguments with respect to the order denying Defendant’s motion for appointment of therapist for minor children, the order denying Defendant’s motion for school reassignment of minor children, and the order setting all pending matters for hearing. N.C. R. App. P. 28(b)(6) (“Issues not presented in a party’s brief or in support of which no reason or argument is stated, will be taken as abandoned.”).

### **I. Factual & Procedural Background**

¶ 3

Tonya A. Hollowell, formerly known as Tonya A. Spahr (“Plaintiff”), and Timothy D. Spahr (“Defendant”) married in 2008. During their marriage, Plaintiff and Defendant had two children, and the parties later divorced. The parties were granted joint custody of their two children by permanent custody order on 29 October 2015 by Judge Michael Denning, which gave primary physical custody of both children to Plaintiff and visitation to Defendant. Defendant moved to modify custody and visitation on 16 June 2017, and Plaintiff moved to modify permanent custody on 1 September 2017. On 12 September 2017, the trial court held a hearing on both parties’ motions to modify custody. Shortly before this hearing, Wake County Child Protective Services (“CPS”) initiated an investigation and report into the welfare of the minor children and ordered a CFE to be completed. The CFE began on 26 September 2017 and ended on 6 November 2017. During that time, Defendant had temporarily moved to Portland, Oregon for work. The CFE was completed and

submitted to the trial court on 22 November 2017. The trial court entered the Omnibus Order on 5 January 2018, which found that the final CFE report would “be helpful” in determining any custody modification issues. Although the CFE had already been submitted to the trial court, the court found that because the court had not heard from either party in regard to the CFE, and Defendant had moved across the country, it was “premature for the [c]ourt to order a custody evaluation at [that] time.” On 28 May 2019, Defendant filed a petition for Writ of Mandamus with this Court, and this Court entered an order on 21 June 2019 ordering the trial court to decide on all pending and unresolved issues in this case. The unresolved issues included the motions to modify child custody filed on 16 June 2017 and 1 September 2017 and taken under advisement on 3 January 2018, and the related motion to incorporate findings from the CFE hearing on 13 March 2019. On 21 June 2019, the trial court held a hearing to address this Court’s order but did not consider the motions to modify or to incorporate the CFE into the final order to modify custody, and instead set the motions for hearing on 13 September 2019. Pursuant to its 5 July 2019 order, the trial court ordered that there be “no hearing or argument on any issues disposed of” by the Omnibus Order. At the September 2019 Hearing, the trial court heard ten separate motions, including Defendant’s motion to incorporate the results of the CFE. During the hearing, the trial court asked Defendant’s counsel whether he was doing any counseling. Defendant did not provide any evidence of his

compliance with the CFE, in an effort to comply with the trial court's restriction on evidence. Defendant's counsel answered the court by stating,

As of right now, I don't know if he's doing any currently. I don't know. Are you doing any currently? Yeah, he did do some stuff with Dr. Wynn here in the last few months and . . . with those family groups. And I didn't have him come today, because we weren't really taking the evidence past November of '17.

¶ 4

Despite the limits in scope of the hearing imposed by the trial court, the trial court made the following findings of fact arising between November 2017 and September 2019.

31. Despite completion of the CFE in November of 2017 and receipt shortly thereafter, the significant amount of litigation he has initiated since, and his repeated stated desire to incorporate the CFE and its recommendations, [Father] has taken no substantive steps to implement the recommendations that pertain specifically to him such as entering individual counseling.
32. Given the high conflict, contentious and consistent dysfunction in the parties' . . . relationship as well as the facts and circumstances known about [Father's] behavior that resulted in his sudden absence from his children's lives this is an appropriate recommendation.
33. Neither after receipt of the psychological evaluation nor the CFE did [Father] take any steps to implement this recommendation.
- . . . .
38. The Court previously ordered the parties to engage in parental education in their permanent order. As with any therapy and or education ordered by the Court, success is predicated on willing compliance by

the parties. Although the parties complied with the Court's order (albeit well after it was ordered and then, as is evident by the timing of subsequent motions, only as a basis for the filing of motions for an order to show cause) it has proved to be of little if any benefit.

....

44. The intervening time period from when [Father] unilaterally ceased his visitation with the minor children, moved to Portland Oregon and then returned to North Carolina in conjunction with both the volume and varying substance of motions underscore the conflict and dysfunction in the parties' relationship.

45. Defendant's actions during this period have be [sic] detrimental to, and not in the best interests of the minor children, leaving them with significant issues to navigate that absent the therapeutic intervention sought by [Mother] would have left the children in an increasingly detrimental circumstance.

....

50. [Father] has been adamant in his pursuit of a return to, or an expansion of, his previous custodial rights and the Court does not doubt his sincere desire for this or his love for his children. However, [Father's] behavior towards the minor children without any acknowledgment or active implementation of recommendations known to him and an apparent lack of appreciation [of] the detrimental effects his behavior has had on the minor children is concerning.

51. Plaintiff's current employment and domestic situation vis a vis full time care of the minor children and the parties' ongoing custodial issues, has severely impaired her ability to manage these issues in light of [Father's] behavior.

....

54. The minor children continue to be exposed to various

aspects of the litigation between the parties and in some instances improperly interrogated about the events that take place at either parties' residence.

....

56. The parties' dysfunctional relational and custodial history which has been significantly exacerbated by [Father's] behavior underscores that any modification of their current custodial relationship absent the severe or permanent curtailing or elimination parental participation of one of them is likely to improve the current circumstance.
57. The failure of the parties to make a concerted and sincere effort to conform to implementation of the recommendations of the CFE and the custodial parameters as set forth in this this [sic] order is likely to ultimately end in such a drastic result.

¶ 5

On 8 October 2019, the trial court entered the permanent custody order. On 11 October 2019, Defendant filed motions for relief from the new permanent custody order under both Rule 59(a) and 60(b), which were both denied by the trial court. The trial court also entered the Gatekeeper Order, which enjoined Defendant from filing any more documents in this case without signature of counsel. On 6 January 2020, Defendant filed a notice of appeal.

## **II. Jurisdiction**

¶ 6

This Court has jurisdiction to address Defendant's appeal under N.C. Gen. Stat. § 7A-27(b)(2), which gives appellate jurisdiction as a matter of right from final judgments in a civil action. N.C. Gen. Stat. § 7A-27(b)(2) (2019).

## **III. Issues**

¶ 7

The issues on appeal are: (1) whether the trial court violated Defendant’s due process when it refused to hear any evidence of a change in circumstances between November 2017 and the September 2019 Hearing, but still made findings of fact from that time period and modified custody; (2) whether the trial court erred by awarding expert witness fees to the counselor and psychologist; (3) whether the trial court erred in denying Defendant’s Rule 59 and 60(b) motions for relief from the new permanent custody order; and (4) whether the trial court erred by entering a Gatekeeper Order against Defendant, which enjoined him from filing any documents in this case without approval of counsel.

#### **IV. Analysis**

¶ 8

On appeal, the parties first dispute whether the Omnibus Order, entered subsequent to the 29 October 2015 permanent custody order, was a temporary or a permanent modification order. Defendant maintains that “the two-year passage of time between the January 2018 Omnibus temporary order and September 2019 modification hearing would have transformed the temporary order into a permanent order.” Conversely, Plaintiff contends that the Omnibus Order is temporary because “it did not determine all the issues before the trial court at the 12 September 2017 hearing.” For the reasons set forth below, we need not reach the parties’ arguments with respect to the Omnibus Order.

¶ 9

Defendant next argues the trial court violated his due process rights by



refusing to hear evidence during the two-year time period between November 2017 and the September 2019 Hearing. Defendant seeks the 8 October 2019 Order be vacated and a new trial be held on modification of custody because the trial court violated his due process rights under both the North Carolina Constitution, *see* N.C. Const. art. I, § 18, and the Constitution of the United States, *see* U.S. Const. amend. XIV, § 1. We agree.

¶ 10 The parties agree the trial court erred in awarding expert witness fees in its 9 December 2019 order because there was no competent evidence to support the trial court's findings of fact. Because the parties do not dispute that the trial court's findings were unsupported by record evidence, we vacate the 9 December 2019 order awarding expert witness fees.

¶ 11 Finally, Defendant, relying on his aforementioned arguments, contends the trial court erred by denying his motions for relief pursuant to Rules 59 and 60. We need not consider this issue as the 8 October 2019 Order is vacated and remanded.

A. Omnibus Order

¶ 12 A “trial court’s designation of an order as ‘temporary’ or ‘permanent’ is not binding on an appellate court.” *Smith v. Barbour*, 195 N.C. App. 244, 249, 671 S.E.2d 578, 582 (2009). The determination of “whether an order is temporary or permanent in nature is a question of law,” which this Court reviews *de novo*. *Id.* at 249, 671 S.E.2d at 582. The applicable standard of review for proposed modifications to a

temporary custody order is “best interest of the child.” *Woodring v. Woodring*, 227 N.C. App. 638, 643, 745 S.E.2d 13, 18 (2013). A permanent child custody order may be modified only if the trial court finds a substantial change of circumstances since the entry of the last order. *Id.* at 643, 745 S.E.2d at 18. The entry of a permanent custody order moots any appeal of a previously entered temporary custody order that is interlocutory on its face. *See Smithwick v. Frame*, 62 N.C. App. 387, 391, 303 S.E.2d 217, 220 (1983); *Metz v. Metz*, 212 N.C. App. 494, 498, 711 S.E.2d 737, 740 (2011).

¶ 13

Here, the parties concede the Omnibus Order was interlocutory on its face with respect to the custody and visitation modifications as the trial court “held open the evidence [of the permanent order] for completion and consideration of the . . . CFE.” We need not consider the parties’ arguments of whether the Omnibus Order is temporary or permanent, because regardless of the nature of the order, the trial court concluded in its 8 October 2019 permanent order that “there ha[d] been a substantial change in circumstances affecting the welfare of the minor children since the entry of the last order”; thus, the appeal of the Omnibus Order was mooted to the extent the appeal concerned child custody and visitation. *See Smithwick*, 62 N.C. App. at 391, 303 S.E.2d at 220; *Metz*, 212 N.C. App. at 498, 711 S.E.2d at 740. Because Defendant’s appeal of the Omnibus Order is moot, we decline to expressly affirm the order; however, we acknowledge the mandates in the Omnibus Order concerning

custody and visitation remain in effect until the trial court has entered the permanent custody order on remand.

**B. Defendant's Due Process Rights**

¶ 14 This Court reviews alleged constitutional violations *de novo*. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009); *see also Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) (“[D]e novo review is ordinarily appropriate in cases where constitutional rights are implicated.”) (emphasis added). To determine whether a constitutional violation has occurred, “it is necessary to ask what process the State provided, and whether it was constitutionally adequate.” *Town of Beech Mt. v. Genesis Wildlife Sanctuary, Inc.*, 247 N.C. App. 444, 458, 786 S.E.2d 335, 346 (2016) (quoting *Zinerman v. Burch*, 494 U.S. 113, 125-26, 110 S. Ct. 975, 983, 108 L. Ed. 2d 100, 113–14 (1990)). The North Carolina Constitution states, “[a]ll courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.” N.C. Const. art. I, § 18. The Constitution of the United States provides “nor shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, Sec. 1.

¶ 15 The North Carolina Supreme Court has determined these due process protections guarantee “notice and the opportunity to be heard . . . at a meaningful

time and in a meaningful manner.” *Peace v. Employment Sec. Comm’n*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998); *see also Matthews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18, 32 (1976) (holding the same). Further, “[t]he right to present evidence in one’s own defense is protected under both the United States and North Carolina Constitutions.” *State v. Fair*, 354 N.C. 131, 149, 557 S.E.2d 500, 515 (2001).

¶ 16 In the context of child-custody disputes, this Court has held “[a] parent’s due process rights include the right to present evidence, and the right to confront and cross-examine witnesses.” *In re J.M.*, 190 N.C. App. 379, 382, \_\_ S.E.2d \_\_ (2008) (citing *Thrift v. Buncombe Cnty. Dep’t of Soc. Servs.*, 137 N.C. App. 559, 561, 528 S.E.2d 394, 395 (2000); *see also State v. Williams*, 295 N.C. 655, 671, 249 S.E.2d 709, 720 (1978) (“Due process, in other words, requires that [a parent] be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed.”) (citation omitted)).

¶ 17 In the case at bar, the trial court instructed the parties that it would not be hearing evidence regarding circumstances arising after November 2017, yet made ten separate findings of fact within that time period. The trial court directly violated Defendant’s due process because it did not afford him “the right to present evidence,” and entered the 8 October 2019 Order, which included findings that arose after

November 2017. *See Thrift*, 137 N.C. App. at 561, 528 S.E.2d at 395. Because the trial court refused to consider evidence arising between November 2017 and the September 2019 Hearing, Defendant was deprived of the opportunity to present evidence in support of his motion to modify child custody. Although Defendant's counsel stated to the trial court that he was unsure of Defendant's involvement with counseling, this would not suffice as evidence because "it is axiomatic that the arguments of counsel are not evidence." *State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996). Additionally, our Court has stated a trial court "may only consider events which occurred after the entry of the previous order, unless the events were previously undisclosed to the court." *Woodring*, 227 N.C. App. at 645, 745 S.E.2d at 20. This is not a case where a party failed to disclose an event which occurred prior to the entry of a previous order. Rather, the trial court expressly refused to allow evidence from the parties concerning a given period, yet made findings of fact in its order pertaining to the very time period in which the parties were prohibited from presenting evidence. Therefore, we hold the trial court violated Defendant's right to present evidence, and thereby violated his right to due process. *See Fair*, 354 N.C. at 149, 557 S.E.2d at 515. In light of our holding, we do not reach the issue concerning the Rule 59 and 60(b) motions.

C. Expert Witness Fees

minor children’s counselor and psychologist testified.” Moreover, the only evidence offered to indicate the length of time the expert witnesses were on the stand was based on the argument of Defendant’s counsel. Plaintiff concedes the order pertaining to expert witness fees should be vacated because “the trial court failed to rely on competent and substantial evidence when it made its findings of fact” in its order awarding expert witness fees to Plaintiff in its 9 December order.

¶ 19 Court costs in custody proceedings under Chapter 50A of the North Carolina General Statutes “shall be taxed against either party, or apportioned among the parties, in the discretion of the court.” N.C. Gen. Stat. § 6-21 (2019). The costs that may be recoverable are enumerated in N.C. Gen. Stat. § 7A-305 (2019). Pursuant to subsection (d)(11), a trial court is required to assess costs for “[r]easonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings.” N.C. Gen. Stat. § 7A-305 (d)(11) (2019).

¶ 20 “Whether a trial court has properly interpreted the statutory framework applicable to costs is a question of law reviewed *de novo* on appeal.” *Peters v. Pennington*, 210 N.C. App. 1, 25, 707 S.E.2d 724, 741 (2011). “A trial court’s taxing of costs is reviewed under an abuse of discretion standard.” *Bennett v. Equity Residential*, 192 N.C. App. 512, 514, 665 S.E.2d 514, 516 (2008). A court’s decision regarding taxing of costs “may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason.” *White v. White*, 312 N.C. 770,

777, 324 S.E.2d 829, 833 (1985). “A ruling committed to a trial court’s discretion “is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.” *Id.* at 777, 324 S.E.2d at 833.

¶ 21 Here, Defendant’s counsel objected at trial to an invoice, which supported Plaintiff’s motion for expert witness fees and detailed a flat fee charge of \$2,400.00, on the basis that Plaintiff did not seek costs for only the actual time the expert witnesses spent testifying, as required by statute. Plaintiff concedes that she did not present evidence to support the findings of fact made by the trial court in the order for expert witness fees. Thus, there is no evidence on the record to provide a factual basis for “reasonable and necessary fees” for the “actual time” the expert witnesses spent testifying. *See* N.C. Gen. Stat. § 7A-305(d)(11). Therefore, we vacate and remand the order awarding expert witness fees.

## **V. Conclusion**

¶ 22 Since the trial court refused to hear evidence between November 2017 and the September 2019 Hearing, but made findings of fact from that time period and modified custody, we hold the trial court violated Defendant’s due process by disallowing him his right to present evidence in his own defense. Accordingly, we vacate the 8 October 2019 Order and remand for a new hearing. Since the Gatekeeper Order was entered after Defendant’s due process rights were violated, we vacate the

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Gatekeeper Order and remand for further consideration. Lastly, we vacate and remand the order awarding expert witness fees as there was no evidence in the record to support the findings of the expert witnesses' times spent testifying.

VACATED AND REMANDED; NEW TRIAL.

Judges DILLON and GORE concur.

Report per Rule 30(e).