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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-571

No. COA21-120

Filed 19 October 2021

Mecklenburg County, No. 19CVD12030

TANIKKI L. JACOBS, Plaintiff,

v.

ANDREW T. DUDLEY, Defendant,

Appeal by plaintiff from order entered 27 October 2020 by Judge Gary L. Henderson in Mecklenburg County District Court. Heard in the Court of Appeals 25 August 2021.

The Blain Law Firm, PC, by Sabrina Blain, for Plaintiff-Appellant.

Collins Family Law Group, by Rebecca K. Watts, for Defendant-Appellee.

CARPENTER, Judge.

¶ 1 Tanikki Jacobs ("Plaintiff"), mother of minor child N.J., appeals from a permanent child custody order (the "Permanent Custody Order"), which granted joint physical and legal custody to Andrew T. Dudley ("Defendant"), N.J.'s father. We hold the trial court erred in its entry of the Permanent Custody Order by not concluding the award of joint custody would best promote the interest and welfare of the child.

Therefore, we vacate the order and remand the matter to the trial court for a proper custody determination.

I. Factual & Procedural Background

¶ 2 The record tends to show the following: Plaintiff and Defendant are residents of North Carolina and had been residents of North Carolina for six months preceding the institution of the action. Both parties are the natural and biological parents of N.J., their 10-month-old daughter, and were never married. Plaintiff filed a complaint for child custody on 18 June 2019. Defendant answered Plaintiff's complaint and made a counterclaim for custody of N.J. Defendant then filed a motion seeking a temporary parenting arrangement claiming Plaintiff was withholding the child from him and unreasonably restricting parenting time. On 14 October 2019, at a hearing addressing the temporary parenting agreement, the parties agreed to a resolution of custody and entered into a memorandum of judgment/order, which provided the parties with joint legal and physical custody. On 5 November 2019, an order memorializing the memorandum of judgment for temporary parenting arrangement order (the "Temporary Custody Order") was entered, which formalized the results of the hearing on 14 October 2019. On 12 and 13 August 2020, a hearing was held on the issues of permanent child custody and attorney's fees. As a result of the proceedings, the Permanent Custody Order was filed on 27 October 2020. Plaintiff gave timely notice of appeal following the entry of this order.

¶ 3 The trial court made the following pertinent findings of fact in the Permanent Custody Order:

> 12. The Court heard from the daycare[ ]worker, Ms. Laura Pate and Ms. Pate talked about how the child appeared when she was brought in by Mr. Dudley and pictures were shown of her clothing and how she is kept which is important to the Court.
>
> 13. The Court found Ms. Pate's testimony concerning. However, the Court also found it was concerning that she never talked to Father about her concerns[.]
>
> 14. The Court finds that the daycare worker and Mother failed to communicate concerns in the minor child's appearance to Father.
>
> 15. The Court heard testimony that Ms. Pate had concerns about the food provided for the child at school by Father, which was also concerning to the Court. However, again the Court also finds it concerning that she, nor mother, talked to [] Father about this concern.
>
> 16. The Court finds it disingenuous for the daycare worker and Mother to have had these concerns over hygiene and food selection for months and to have never brought it to Father's attention other than to spring it on him at this custody trial.
>
> 17. The Court also heard testimony by Ms. Pate and Mother on a third area of concern regarding the changes in the child's behavior while in Father's care.
>
> 18. Mother testified that the child is seeing a social worker because the child's behavior was problematic.
>
> 19. Ms. Pate testified that she never called Father when the child was sick. Due to her failure to communicate with

Father on this issue and the above stated issues, the Court gave little weight to her testimony.

20. Ms. Pate testified that she never talked to Father about the child's behavior.

21. The Court found Ms. Pate negated her credibility with the Court by her failure to bring anything to Father's attention so that they could have been addressed.

22. It does not sit well with the Court that the daycare and Mother have had issues for the last eight (8) months with the child's cleanliness, hair, appearance, and food, but failed to say anything and waited to come to court and spring it here. How can someone do better if they don't know?

23. The Court does not have enough evidence about the child's change in behavior and whether her aggressiveness lately is a biproduct of her getting older and her age right now in life or whether there is something more.

24. The Court did not hear from the child's social worker.

25. In October of 2019, the parties started down a road of a 50/50 arrangement that is what the parties thought is best for the child at the time and while the Court has heard concerns at this hearing, the Court has not heard anything that should cause a deviation from the path the parties started on.

26. The Court finds it was improper for Mother to change the daycare without any input from Father especially when the first daycare was visited together and selected together. [These] last two actions by Mother of changing the daycare without Father's input leaves the Court to give him final decision-making authority over educational matters.

> 27. The Court finds that the parties should share joint legal custody with Mother having final decision-making with medical and religious issues and Father having final decision-making authority with educational issues.

¶ 4 Additionally, the trial court made the following pertinent conclusion of law in the Permanent Custody Order: "[t]he parties are [awarded] joint permanent physical and joint permanent legal custody of the minor child . . . ."

II. Jurisdiction

¶ 5 Jurisdiction lies in this Court over an appeal of a final judgment regarding child custody in a civil district court action pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2019).

III. Issues

¶ 6 The issues presented on appeal are whether: (1) the temporary custody order filed on 5 November 2019 became permanent as a matter of law before the trial proceedings began on 12 August 2020; (2) the trial court applied the correct standard to the modification of the 5 November 2019 order; (3) the trial court made sufficient findings of fact and conclusions of law to support its judgment; and (4) the trial court made sufficient findings of fact to support a joint custody and allocation of specific decision-making authority to each party.

IV. Analysis

A. Modification of Temporary Custody Order

¶ 7 As an initial matter, we consider whether the 5 November 2019 Temporary Custody Order became permanent by operation of law and whether the trial court applied the correct standard in modifying the Temporary Custody Order.

¶ 8 Plaintiff argues the trial court erroneously applied the "substantial change of circumstances" standard when modifying the 5 November 2019 Temporary Custody Order on the basis the order never became permanent. Plaintiff further maintains the trial court abused its discretion by "impos[ing] an improper burden on the parties" by applying the incorrect standard.

¶ 9 Defendant contends the Temporary Custody Order became permanent by operation of law because it resolved all issues between the parties, because the trial court treated it as permanent by considering whether there was a change in circumstances that warranted a modification of custody, and because "there is nothing in the record to indicate that anything happened with the case after the entry of the temporary order in October 2019 and the trial in August 2020."

¶ 10 After careful review, we agree with Plaintiff's argument to the extent she asserts the 5 November 2019 order was temporary. However, because the trial court failed to make the proper conclusions of law as required by N.C. Gen. Stat. § 50-13.2(a) (2019), as discussed in detail below, we need not reach the issue of whether an incorrect standard was utilized by the trial court.

The trial court's designation of an order as temporary or

> permanent does not control. *Brewer v. Brewer*, 139 N.C. App. 222, 228, 533 S.E.2d 541, 546 (2000). "[A]n order is temporary if either (1) it is entered without prejudice to either party[;] (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues." *Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003). If the order does not meet any of these criteria, it is permanent. *See id.*

Peters v. Pennington, 210 N.C. App. 1, 13–14, 707 S.E.2d 724, 734 (2011). Although an order may be properly classified as a temporary order at the time of its entry, this Court has held that a temporary order can be converted by operation of law into a final order when neither party sets the matter for a hearing within a "reasonable time." *LaValley v. LaValley*, 151 N.C. App. 290, 292, 564 S.E.2d 913, 915 (2002).

¶ 11 In this case, it is clear by the temporal language contained in the Temporary Custody Order's title and terms that it was not permanent when entered on 5 November 2019. Although the order does not set a specific reconvening time, it does state it was entered without prejudice to the parties; thus, we conclude the 5 November 2019 Temporary Custody Order was in fact temporary when entered. *See Senner,* 161 N.C. App. at 81, 587 S.E.2d at 677. The record reveals there was an approximate ten-month period between the entry of the Temporary Custody Order and the date of hearing for permanent child custody. Since there is no indication from the record that either party unreasonably delayed calendaring the matter for hearing, we hold the Temporary Custody Order did not become permanent by

operation of law. Thus, this Court will review the Permanent Custody Order, the subject of this appeal, as requiring a "best interest of the child" analysis without a showing of a "substantial change in circumstances." *See Simmons v. Arriola*, 160 N.C. App. 671, 674, 586 S.E.2d 809, 811 (2003) ("[I]f a child custody or visitation order is considered temporary, the applicable standard of review for proposed modifications is 'best interest of the child,' not 'substantial change in circumstances.'").

B. Sufficiency of Conclusions of Law

¶ 12 Next, Plaintiff argues the trial court did not enter the proper conclusions of law in the Permanent Custody Order in making its custody determination as required by N.C. Gen. Stat. § 50-13.2(a). We agree.

¶ 13 "Conclusions of law are reviewed *de novo* and are subject to full review." *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011) (emphasis added); *see also Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) ("Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal."). "'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship,* 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)); *see also Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354

(2009). "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) (citation omitted). "Nevertheless, the findings and conclusions of the trial court must comport with our case law regarding child custody matters." *Diehl v. Diehl*, 177 N.C. App. 642, 645, 630 S.E.2d 25, 27 (2006) (citation and internal quotations omitted).

¶ 14 "An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child." N.C. Gen. Stat. § 50-13.2(a). As a matter of law, "the trial court must conclude . . . that the award of custody to [a] particular party will best promote the interest and welfare of the child." *Evans v. Evans*, 138 N.C. App. 135, 141, 530 S.E.2d 576, 580 (2000) (citation and internal quotations omitted).

¶ 15 Upon review of the conclusions of law on the Permanent Custody Order, entered 27 October 2020, we hold the order's conclusions are insufficient as a matter of law because they fail to conclude the award of joint custody to the parties "will best promote the interest and welfare of the child." *See* N.C. Gen. Stat. § 50-13.2(a). The trial court concluded "[t]he parties are [awarded] joint permanent physical and joint permanent custody of the minor child as set forth below." Following the conclusion, in the mandate of the order, the trial court considered the best interest of the child

as it related to one aspect of the parenting arrangement: physical custody. In ordering physical custody, the court decreed "[t]he parties are both fit and proper persons to have the joint physical custody of the minor child, and that it is in the best interest of the minor child for her physical custody to continue jointly with Mother and Father as set forth below."

¶ 16 However, since the Permanent Custody Order lacks a conclusion of law that comports with the requirements of N.C. Gen. Stat. § 50-13.2(a), denoting what "will best promote the interest and welfare of the child," the order is inadequate to confer custody jointly or otherwise. *See Evans*, 138 N.C. App. at 141, 530 S.E.2d at 580. Accordingly, we vacate the custody order and remand to the trial court to make a proper conclusion of what "will best promote the interest and welfare of the child." N.C. Gen. Stat. § 50-13.2(a). Although we vacate the order, we briefly consider Plaintiff's remaining arguments to assist the trial court on remand.

C. Sufficiency of Factual Findings

¶ 17 Plaintiff argues the trial court's findings of fact are insufficient to determine what is in the best interests of the child and to support the court's judgment. She further argues, relying on *In re Peal*, 305 N.C. 640, 290 S.E.2d 664 (1982), "[t]here is not a single [finding of fact] discussing the competing environments offered for the full development of the child's physical, mental, emotional, moral, and spiritual faculties, as is required." Defendant asserts the trial court was not required to make

findings of fact addressing the specific criteria posed by Plaintiff. For the reasons set forth below, we agree with Plaintiff the trial court failed to make sufficient findings of fact that considered the competing environments of the parties when ruling on the best interests of the child.

¶ 18 Whether the findings of fact in a bench trial support a trial court's conclusions of law is reviewed *de novo*. *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 904 (2008) (citation omitted).

> Findings of fact regarding the competing parties must be made to support the necessary legal conclusions. These findings may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child. However, the trial court need not make a finding as to every fact which arises from the evidence; rather, the court need only find those facts which are material to the resolution of the dispute.

Carpenter v. Carpenter, 225 N.C. App. 269, 271, 737 S.E.2d 783, 785 (2013) (quoting *Witherow v. Witherow,* 99 N.C. App. 61, 63, 392 S.E.2d 627, 629 (1990)) (citations and internal quotations omitted). Findings of fact "should resolve the material disputed issues, or [state] if the trial court does not find that there was sufficient credible evidence to resolve an issue . . . ." *Carpenter*, 225 N.C. App. at 279, 737 S.E.2d at 790. Ultimately,

> a custody order is fatally defective where it fails to make detailed findings of fact from which an appellate court can determine that the order is in the best interest of the

> child, *Swicegood v. Swicegood,* 270 N.C. 278, [283,] 154 S.E.2d 324[, 327] (1967), and custody orders are routinely vacated where the "findings of fact" consist of mere conclusory statements that the party being awarded custody is a fit and proper person to have custody and that it will be in the best interest of the child to award custody to that person. *See, e.g., Hunt v. Hunt,* 29 N.C. App. 380, 224 S.E.2d 270 (1976); *Austin v. Austin,* 12 N.C. App. 286, 183 S.E.2d 420 (1971). A custody order will also be vacated where the findings of fact are too meager to support the award. *Montgomery v. Montgomery,* 32 N.C. App. 154, [158,] 231 S.E.2d 26[, 29] (1977).

Dixon v. Dixon, 67 N.C. App. 73, 76–77, 312 S.E.2d 669, 672 (1984).

¶ 19 Here, the trial court's findings of fact focus on the child's changes in behavior when in the care of Defendant, testimony from Plaintiff and a worker from the child's daycare facility, the child's appearance and meals at daycare when Defendant dropped her off, the daycare worker's and Plaintiff's failure to raise their concerns to Defendant regarding his parenting choices, and Plaintiff's failure to inform Defendant of a change in daycare. The findings, however, do little to demonstrate the fitness of the competing parties, and contain mere conclusory statements as to the trial court's determination on joint legal custody. *See Carpenter*, 225 N.C. App. at 271, 737 S.E.2d at 785; *Dixon*, 67 N.C. App. at 76–77, 312 S.E.2d at 672. We note "the trial court need not make a finding as to every fact which arises from the evidence." *See Carpenter*, 225 N.C. App. at 271, 737 S.E.2d at 785. On remand, however, the trial court should make detailed findings of fact "that support the

determination of what is in the best interest of the child" after considering "all relevant factors." *See* N.C. Gen. Stat. § 50-13.2(a).

D. Allocation of Decision-Making Authority

¶ 20 Finally, Plaintiff contends the trial court's findings of fact were insufficient to bestow authority to each parent to make specific decisions regarding the child.

> This Court has acknowledged that the General Assembly's choice to leave "joint legal custody" undefined implies a legislative intent to allow a trial court "substantial latitude in fashioning a 'joint [legal] custody' arrangement." *Patterson,* 140 N.C. App. at 96, 535 S.E.2d at 378. This grant of latitude refers to a trial court's discretion to distribute certain decision-making authority that would normally fall within the ambit of joint legal custody to one party rather than another based upon the specifics of the case. *See, e.g., MacLagan v. Klein,* 123 N.C. App. 557, 565, 473 S.E.2d 778, 784 (1996) (awarding parties joint legal custody, but granting father exclusive control over child's religious upbringing), *overruled on other grounds by Pulliam v. Smith,* 348 N.C. 616, 501 S.E.2d 898 (1998). A trial court's decision to exercise this discretion must, however, be accompanied by sufficient findings of fact to show that such a decision was warranted. *See id.* at 564, 473 S.E.2d at 784 (finding that parties had agreed to raise [the] child in father's Jewish faith, that the child had been so raised since birth and derived considerable mental well-being therefrom, and that the mother had recently begun pressuring the child to become Christian).

Diehl, 177 N.C. App. at 647, 630 S.E.2d at 28.

¶ 21 Regarding the allocation of specific decision-making authority, the trial court made the following findings:

> 26. The Court finds it was improper for Mother to change the daycare without any input from Father especially when the first daycare was visited together and selected together. Th[ese] last two actions by Mother of changing the daycare without Father's input leaves the Court to give him final decision-making authority over educational matters.
>
> 27. The Court finds that the parties should share joint legal custody with Mother having final decision-making with medical and religious issues and Father having final decision-making authority with educational issues.

¶ 22 Based upon these findings, the trial court awarded joint legal custody in the custody order and mandated in the order: "[s]hould the parties be unable to agree after good faith consultation, Mother shall have final decision-making authority over the child's health care and religion and Father shall have final decision making authority over the child's education and extra-curricular activities."

¶ 23 The trial court's decision to give Defendant final decision-making authority regarding education is supported by finding of fact 26. However, no findings were made that support the allocation of exclusive decision-making authority for extra-curricular activities to Defendant, or exclusive decision-making authority to Plaintiff over the child's health care and religion. If the trial court grants final decision-making authority for specific aspects of the child's life to either parent, each authority should "be accompanied by sufficient findings of fact to show that such a decision was warranted." *See Diehl*, 177 N.C. App. at 647, 630 S.E.2d at 28.

V. Conclusion

¶ 24 The Permanent Custody Order filed on 27 October 2020 is vacated. The matter is remanded for entry of a custody order, which makes conclusions of law as to what will best promote the interest and welfare of the child. Sufficient factual findings should support the conclusions of law and allocation of any specific decision-making authority. The trial court is permitted to rely on the existing record or may receive additional evidence, if necessary.

VACATED AND REMANDED.

Judges TYSON and GRIFFIN concur.

Report per Rule 30(e).