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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-624

No. COA 21-257

Filed 16 November 2021

Henderson County, No. 19CVD243

JASON S. GINGRAS, Plaintiff,

v.

MELISSA STOKES, Defendant.

Appeal by defendant from order entered 15 January 2021 by Judge Emily G. Cowan in Henderson County District Court. Heard in the Court of Appeals 22 September 2021.

Donald H. Barton, P.C., by Donald H. Barton, for Defendant-Appellant.

No brief filed for Plaintiff-Appellee.

CARPENTER, Judge.

¶ 1 Melissa Stokes ("Defendant") appeals from a temporary custody order (the "Order") entered 15 January 2021 granting sole physical and legal custody to Jason S. Gingras ("Plaintiff") and modifying Defendant's visitation of the minor child to weekly two-hour supervised visits at a third-party mediation center. After careful review, we dismiss Defendant's appeal as interlocutory.

I. Factual & Procedural Background

¶ 2 Plaintiff is the biological father of minor child AKS, and Defendant is the biological mother of AKS. A temporary order granting sole physical custody of AKS to Plaintiff, joint legal custody to both Plaintiff and Defendant, and supervised visitation to Defendant was entered by the Honorable Judge Emily G. Cowan on 27 February 2019. The order mandated, *inter alia*, both parties produce urine and hair follicle tests to their respective counsel, who would then make them available to the other party. On 29 May 2019, the trial court entered an "Amended Temporary Order by Consent," which concluded, *inter alia*, the parties agreed there had been a change of circumstances affecting the welfare of the minor child. Namely, Defendant had obstained from controlled substances and had submitted negative hair follicle test results to Plaintiff and the trial court. Accordingly, the order mandated increased visitation time for Defendant "on a temporary basis pending a final hearing on the merits . . . ." Plaintiff subsequently filed multiple motions for contempt alleging Defendant failed to comply with the supervised visitation and drug testing requirements of the 29 May 2019 order. Defendant filed multiple contempt motions againt Plaintiff for visitation denial. Following a hearing on 8 June 2020 before the Honorable Judge C.W. McKeller, a temporary custody order was entered by the trial court on 11 June 2020 reinstating the existing order for visitation by Defendant.

¶ 3 On 6 July 2020, the trial court entered a "Memorandum of Judgment/Order" requiring, *inter alia*, Defendant to produce a hair follicle test within seven days of

entry of that order. On 24 August 2020, Plaintiff filed an *ex parte* petition for emergency child custody, motion for contempt, and motion for cost and attorney fees alleging the negative drug results submitted by Defendant after entry of the 6 July 2020 order were not accurate copies of her test results, and Defendant continued to use illicit substances. The same day, an *ex parte* child custody order was entered granting Plaintiff emergency custody. The order set a hearing date for 31 August 2020 to determine the duration of the emergency child custody order and to rule on the motions for hair analysis drug testing and contempt. This hearing was continued to 19 October 2020 due to Defendant's possible medical issues, and the *ex parte* order remained in effect until that time.

¶ 4 On 19 October 2020, the hearing was held before Judge Cowan to determine the duration of the emergency custody order. On 15 January 2021, the trial court entered the Order in which it made the following pertinent findings of fact:

> 7. Prior to the entry of the Amended Consent Order, the Defendant provided a document to the Plaintiff purporting said document to be a negative drug screen that was taken on May 17, 2019 (hereinafter "Purported May 17, 2019 Results"), as a result the Plaintiff entered into the Amended Consent Order.
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> . . . .
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> 9. Since Fall 2019 the Plaintiff has observed the Defendant stumbling out of a vehicle, slurring her words, and making outlandish accusations regarding the Plaintiff's wife and her children.
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> 10. On January 3, 2020, due to the Defendant's erratic behavior, the Plaintiff sent formal request to the

Defendant and her attorney to submit to a hair follicle drug test analysis.

11. The Defendant did not produce the drug test as requested. As a result, the [P]laintiff filed a motion for contempt on January 16, 2020.
12. A Show Cause Order was entered on the same day setting the matter for January 27, 2020. The matter was continued numerous times, and was finally set on July 6, 2020.
13. On or about July 6, 2020, prior to a hearing in the matter, Defendant's counsel produced to Plaintiff's counsel two documents purporting to be the negative results of a hair and urine drug test analysis completed on February 12, 2020 by Keystone Laboratories, in Asheville, North Carolina (hereinafter "Purported February 12, 2020 Results").
14. On the same day a Memorandum of Judgment was entered requiring the Defendant to submit to a hair follicle drug test within seven days of entry of the Order; provide proof that Defendant took the hair follicle test and provide results of said hair follicle test within forty-eight hours.
15. On or about July 13, 2020, Defendant's attorney faxed to Plaintiff's attorney two documents purporting to be the negative results of a hair and urine drug test analysis completed on July 7, 2020 (hereinafter "Purported July 7, 2020 Results").
16. The Defendant stated the only drug test that she underwent was administered by Keystone Lab in Asheville, North Carolina.
17. The Defendant stated she underwent a drug test on May 17, 2019, February 12, 2020, and July 7, 2020.
18. The Defendant stated that she received the Purported May 17, 2019 Results, Purported February 12, 2020 Results, and Purported July 7, 2020 Results directly from Keystone Lab in Asheville, North Carolina.
19. She further stated she provided all the results to her

> Counsel, who subsequently provided them to Plaintiff's Counsel.
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> . . . .
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> 25. The Keystone Lab's File contained a test result administered on May 17, 2019 indicating the Defendant tested positive for Methamphetamine, which is a complete contradiction to the Purported May 17, 2019 test provided by the Defendant.
> 26. The Keystone Lab's File did not contain any record of any test administered on February 12, 2020 or July 7, 2020.
> 27. Furthermore, the Purported February 12, 2020 Results has fourteen (14) digits that start with AA and the Purported July 7, 2020 has nine (9) digits that start with AA .
> 28. Keystone Lab has no record of the Defendant signing into the system on February 12, 2020 nor July 7, 2020.
> 29. Keystone Lab has no record of collecting a sample from the Defendant on February 12, 2020 nor July 7, 2020.
> 30. Keystone Lab has no record of payment for the Defendant on February 12, 2020 nor July 7, 2020.
> 31. There is no chain of custody form for the Defendant on February 12, 2020 nor July 7, 2020
> 32. The Court finds the Defendant falsified the Purported May 17, 2019 Results.
> 33. The Court finds the Defendant falsified the Purported February 12, 2020 Results[.]
> 34. The Court finds the Defendant falsified the Purported July 7, 2020 Results.
> 35. The Defendant underwent a test on August 28, 2020, which the results were negative. However, she bleached her hair prior to taking the test.

¶ 5 The trial court also made the following pertinent conclusions of law:

> 41. The Defendant is unfit to have the care, custody, and control of the minor child.

> 42. The Plaintiff is fit to have the sole care, custody, and control of the minor child.
> 43. It is in the best interest of the minor child for the Plaintiff to have the sole care[,] custody and control of the minor child.
> 44. It is not in the best interest of the minor child for the Defendant to have the care, custody, and control of the minor child .
> 45. It is in the best interest of the minor child for the Court to make a temporary determination of custody in this matter.

¶ 6 Based on these factual findings and conclusions of law, the trial court awarded Plaintiff sole care, custody, and control of the minor child and allowed Defendant supervised visitation for two hours per week at a mediation center. On 5 February 2021, Defendant timely filed a notice of appeal.

¶ 7 On appeal, Defendant contends the trial court erred in: (1) making findings of fact 7, 9–19, and 25–35; (2) concluding Defendant was unfit, and it was not in the best interests of the minor child for Defendant to have the care, custody, and control of AKS; (3) modifying Defendant's visitation with her child by limiting it to weekly two-hour supervised visits at a mediation center; (4) not determining whether Defendant could afford to pay for the supervised visitation; (5) determining what actions affected the welfare of the child; and (6) designating the Order as a temporary custody order.

II. Jurisdiction

¶ 8 As an initial matter, we consider whether Defendant's appeal is properly before this Court. Defendant argues this Order is immediately appealable under N.C. Gen.

Stat. § 7A-27(b)(2) as a permanent order because "it determined the action and seeks to prevent appellate review of the order." Alternatively, Defendant asserts "the terms of visitation set forth in the order which basically terminated [her] visitation affects a substantial right (custody/visitation) with her minor child." For the following reasons, we disagree and dismiss the appeal as interlocutory.

A. Temporary Custody Order

¶ 9 "A[n order] is either interlocutory or the final determination of the rights of the parties." N.C. Gen. Stat. §1A-1, Rule 54(a) (2019); *see Sood v. Sood*, 222 N.C. App. 807, 808, 732 S.E.2d 603, 606, *cert. denied and appeal dismissed*, 366 N.C. 417, 735 S.E.2d 336 (2012). "An interlocutory order . . . does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Id.* at 808, 732 S.E.2d at 606 (citation omitted). Normally, "there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). Two exceptions exist to this general rule and allow appealability of an interlocutory order "(1) if the order is final as to some but not all of the claims or parties and the trial court certifies there is no just reason to delay the appeal pursuant to N.C. R. Civ. P. 54(b) or (2) if the trial court's decision deprives the appellant of a substantial right which would be lost absent immediate review." *CBP Resources, Inc. v. Mountaire Farms, Inc.*, 134 N.C. App. 169, 171, 517 S.E.2d 151, 153 (1999) (citations and quotations omitted); *see* N.C.

Gen. Stat. § 1-277 (2019); N.C. Gen. Stat. § 7A-27(b)(3) (2019).

¶ 10 With respect to custody determinations, "[t]emporary custody orders resolve the issue of a party's right to custody pending the resolution of a claim for permanent custody"; therefore, temporary custody orders are generally interlocutory. *Brewer v. Brewer*, 139 N.C. App. 222, 227–28, 533 S.E.2d 541, 546 (2000). Additionally, temporary child custody orders typically do not affect any substantial right. *Id.* at 227, 533 S.E.2d at 546.

¶ 11 Thus, the threshold issue in this case is whether the Order is temporary or permanent. The determination of whether an order is temporary is a conclusion of law that is reviewed *de novo* on appeal. *Graham v. Jones*, 270 N.C. App. 674, 678, 842 S.E.2d 153, 158 (2020). A trial court's description of an order as temporary is not dispositive and does not by itself prevent appeal of that order. *Id.* at 681, 842 S.E.2d at 159. "Generally, a child custody order is temporary if . . . '(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 [is] reasonably brief[,] or (3) the order does not determine all the issues.'" *Id.* at 678, 842 S.E.2d at 158 (citation omitted). When an order fails to meet one of these three requirements, it is considered permanent. *Peters v. Pennington*, 210 N.C. App. 1, 14, 707 S.E.2d 724, 734 (2011).

¶ 12 As our Court has previously held, a temporary order may become permanent

by operation of time when neither party sets the matter for a hearing within a reasonable period of time. *See LaValley v. LaValley*, 151 N.C. App. 290, 292–93, 564 S.E.2d 913, 915 (2002); *Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003). However, as we explained in *Woodring v. Woodring*, "a temporary custody order that does not set an ongoing visitation schedule cannot become permanent by operation of time." 227 N.C. App. 638, 645, 745 S.E.2d 13, 19 (2013).

¶ 13 In this case, the Order was not "entered without prejudice to either party." *See Graham*, 270 N.C. App. at 678, 842 S.E.2d at 158. The Order originally set a reconvening time in typed Decree 6: "This matter will return back on November 2, 2020 term to address what times are available for the mediation center." This mandate was struck by hand, and it appears the trial court judge initialed next to the change. The record does not explain when or why this decree setting a reconvening time was crossed out nor does the record indicate if the parties appeared for this hearing. Nevertheless, the transcripts from the 19 October 2020 hearing indicate the trial court judge set a hearing date for 2 November 2020 to ensure Defendant was able to set specific dates and times for her supervised visitation at the Mediation Center in Buncombe County. Since the reconvening time was struck from the Order, the Order did not state a "clear and specific reconvening time." *See Graham*, 270 N.C. App. at 678, 842 S.E.2d at 158.

¶ 14 The remaining question with respect to determining the nature of the Order is

whether all issues relating to custody and visitation were decided. "Where this Court has determined that a child custody order is temporary because it did not 'determine all the issues[,]' the remaining, undecided issues were child custody matters such as legal custody, ongoing holiday schedules, and the scope of visitation for the noncustodial parent." *Kanellos v. Kanellos*, 251 N.C. App. 149, 153, 795 S.E.2d 225, 229 (2016); *see, e.g.*, *Woodring*, 227 N.C. App. at 644, 745 S.E.2d at 18 (concluding an initial order was temporary because it did not address a parent's ongoing visitation and did not explicitly address legal custody); *Sood*, 222 N.C. App. at 809, 732 S.E.2d at 606 (reasoning an order was temporary partly because although it set out a custodial holiday schedule for a certain time period, it did not resolve holidays for the indefinite future); *Simmons v. Arriola*, 160 N.C. App. 671, 675, 586 S.E.2d 809, 811 (2003) (holding an order was temporary where the trial court failed to specify visitation periods for the noncustodial parent). In contrast, our Court has defined a permanent custody order as one that determines all issues and "establishes a party's present right to custody of a child [as well as] that party's right to retain custody indefinitely." *Regan v. Smith*, 131 N.C. App. 851, 852, 509 S.E.2d 452, 454 (1998).

¶ 15 Here, the trial court mandated "Defendant shall have supervised visitation for two (2) hours per week at the [M]ediation [C]enter." The Order did not provide additional details regarding the supervised visitation such as dates or times nor did it provide an ongoing schedule. Again, the transcripts to the 19 October 2020 hearing

reveal the trial court judge considered defense counsel's concerns with excluding dates and times from the Order, but explained to the parties that they would need to schedule with the Mediation Center based on the facility's availability. The trial court also noted it could not set a return date because it did not "know what sort of progress" Defendant was going to make. The trial court then set the matter for review on 2 November 2020, approximately two weeks later, to provide the parties with an opportunity to advise the court if Defendant was not able to schedule her visitation. Since the Order could not and did not provide Defendant with an ongoing visitation schedule and did not determine legal custody of the child, the Order was temporary. *See Woodring*, 227 N.C. App. at 644, 745 S.E.2d at 18; *Sood*, 222 N.C. App. at 809, 732 S.E.2d at 606; *Simmons*, 160 N.C. App. at 675, 586 S.E.2d at 811.

B. Substantial Right

¶ 16 Because we conclude the Order is temporary, we next determine whether the Order affects a substantial right of Defendant. *See CBP Resources, Inc.*, 134 N.C. App. at 171, 517 S.E.2d at 153. Here, Defendant argues "the terms of visitation set forth in the [O]rder[,] which basically terminated [her] visitation[,] affects a substantial right (custody/visitation) with her minor child."

¶ 17 The burden is on the appellant to show "the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App.

377, 380, 444 S.E.2d 252, 254 (1994). "[T]his Court has never held that a child custody order affects a substantial right except for when the physical well-being of a child is at stake." *Hausle v. Hausle*, 226 N.C. App. 241, 244, 729 S.E.2d 203, 206 (2013); *see McConnell v. McConnell*, 151 N.C. App. 622, 625, 566 S.E.2d 801, 804 (2002) ("Where[,] as here, the physical well being of the child is at issue, we conclude that a substantial right is affected that would be lost or prejudiced unless immediate appeal is allowed."). Defendant fails to cite a case where this Court has held a child custody modification ordering weekly supervised visitation affects a substantial right nor does she explain how the Order places the well being of her minor child at issue. *See McConnell*, 151 N.C. App. at 625, 566 S.E.2d at 804. Thus, we conclude Appellant has not shown she has been deprived of a substantial right.

III. Conclusion

¶ 18 The Order was temporary because it left certain issues relating to ongoing visitation and legal custody open for determination. The trial court did not certify there was no just reason to delay the appeal pursuant to N.C. R. Civ. P. 54(b), and Defendant has failed to show how the Order affects a substantial right that would be lost or prejudiced unless immediate appeal is allowed. Therefore, we dismiss this appeal as interlocutoty.

DISMISSED.

Judges ARROWOOD and GRIFFIN concur.

Report per Rule 30(e).