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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-667

No. COA20-668

Filed 7 December 2021

Pitt County, No. 14 CVD 2771

RONNIE LEE EUBANKS, JR., Plaintiff,

v.

BRIDGET ELIZABETH BUCK, (f/k/a EUBANKS), Defendant.

Appeal by plaintiff from order entered 14 February 2020 by Judge Lee F. Teague in District Court, Pitt County. Heard in the Court of Appeals 27 April 2021.

W. Gregory Duke, for plaintiff-appellant.

No brief filed, for defendant-appellee.

STROUD, Chief Judge.

¶ 1 Plaintiff-father appeals order denying his motion to modify child custody. Because the trial court did not abuse its discretion by concluding Father failed to demonstrate a substantial change in circumstances affecting the welfare of the minor child justifying modification of the existing custody order, we affirm.

I. Background

¶ 2 On or about 7 November 2014, plaintiff-father filed a verified complaint for absolute divorce. The complaint alleged the parties were married in 2006, had a child

in 2008, and separated in 2013. The complaint further alleged there were "no pending claims for child custody and child support" and "equitable distribution of all marital property" was agreed to "in a Separation Agreement and Property Settlement executed on September 11, 2013 and properly amended . . . [on] October 27, 2014" ("Separation Agreement") and "an Amendment to Separation Agreement and Property Settlement dated October 27, 2014 ("Amendment to Separation Agreement"). Thereafter, defendant-mother *pro se* filed "DEFENDANT'S ACCEPTANCE OF SERVICE, WAIVER OF RIGHT TO FURTHER ANSWER, AND WAIVER OF RIGHT TO REQUEST JURY TRIAL" in which she accepted service of the complaint, waived her right to answer Father's complaint, and waived her right to a jury trial. On 21 November 2014, Father filed a motion for a summary judgment divorce. On 4 December 2014, the trial court entered its judgment of absolute divorce incorporating the Separation Agreement and the Amendment to the Separation Agreement. Under the order incorporating the Separation Agreement, Mother and Father shared legal and physical custody of the child.

¶ 3 Thereafter, on 1 August 2019, Father filed a verified motion to modify child custody alleging "the following material and substantial change of circumstances affecting the welfare of the minor child[] have occurred:"

> (a) The parties' minor child is severely autistic and non-verbal and, because of this, needs an environment which is structured and consistent. Defendant, since

the entry of the Order, has not provided the structured and consistent environment that the minor child needs. Defendant has introduced the minor child to no fewer than three (3) men she was having relationships with in violation of the Order both in terms of the manner in which she introduced the men to the minor child and, also, in [that she] permitted the men to spend the night with Defendant in her home while the minor child was there. With regard to one of the men Defendant was dating, there were incidents of domestic violence between the two of them committed in Defendant's home. Plaintiff has significant concerns about Defendant's home environment.

(b) The Existing Order provides for multiple custodial transitions per week and this schedule has had an adverse effect on the minor child given the minor child's autism and his need for consistency.

(c) Defendant has been unwilling to co-parent with Plaintiff regarding issues relating to the minor child's school, the minor child's diet and the minor child's medications and has been unwilling to follow the recommendations made by the minor child's doctor. Defendant has failed to forward information from the minor child's school to Plaintiff regarding scheduling school conferences. Defendant has disregarded recommendations made by the minor child's doctor that the parties not use strongly-scented items, including soaps, detergents, perfumes, aftershave and fabric softeners, because the minor child's exposure to such strongly-scented items cause him to scratch himself to the point that the minor child makes himself bleed. Defendant has disregarded medical recommendations that the minor child follow a gluten-free and dairy-free diet in order to decrease his gastrointestinal issues and to improve the minor child's behaviors relating to his

> autism (including stimming, hyperactivity, and vocalizations-yelling). Plaintiff has even offered to provide the gluten-free and dairy-free [food] to Defendant but Defendant's response to Plaintiff has been to "just give her the money" and she will buy the foods. The minor child has been diagnosed with encopresis (this is when a person resists having bowel movements which causes the impacted stool to collect in the colon and rectum and leads to leakage of feces) and has refused to administer Miralax to the minor child daily as recommended by the minor child's doctor. Defendant, with regard to other medications for the minor child, has not properly administered them (for example, Defendant double-medicated the minor child with his Clonidine).
>
> (d) Defendant refuses to constructively speak with Plaintiff regarding the minor child and the minor child's medical issues. Plaintiff has forwarded information to [Defendant] regarding the minor child's autism and other medical issues to read and educate herself but Defendant has shown no real interest in reading any of the information.
>
> (e) Defendant regularly travels with the minor child out-of-town and out-of-state and doesn't let Plaintiff know where she is going or where she is staying with the minor child. Defendant has told Plaintiff that she is the minor child's mother and she can do what she wants with the minor child.
>
> (f) Such other change of circumstances as may be shown during the hearing of this matter.

After Father's motion was filed, the parties were ordered to attend custody mediation, but they "were unable to reach a mediated parenting agreement."

¶ 4 After a hearing on 21 and 22 January 2020, the trial court entered an order denying Father's motion to modify because there had not been a substantial change of circumstances justifying modification of custody. The trial court found:

> 4. The parties executed a Separation and Property Settlement Agreement on September 11, 2013 and an Amendment to Separation Agreement and Property Settlement on October 27, 2014 ("the Agreements") both of which were incorporated into the Divorce Judgment entered between the parties on December 4, 2014 thus making the parties' Agreements a court order ("the Order"). The Order provided, among other things, that the parties would have joint decision-making authority and granted the parties' joint physical custody of the minor child on a "2-2-3-2" basis.
>
> 5. Plaintiff and Defendant, in September of 2018, changed the custodial schedule outlined in the Order. Instead of transitioning [Sam[1]] between households on a "2-2-3-2" basis, they agreed for [Sam] to alternate one-week periods between the households from Friday of one week until Friday of the next week. The parties continue to follow this custodial schedule.
>
> 6. The parties' minor child who is the subject matter of this action, "[Sam]", has been diagnosed with Autism Disorder.
>
> 7. [Sam] is severely autistic and non-verbal but can make sounds and communicate in other ways. The minor child is in the 6th Grade at [redacted] School in [redacted], North Carolina. Since [Sam] has been in school, he has had an Individualized Education

[1] A pseudonym is used to protect the identity of the minor child.

Program. The minor child has also worked with a mentor through Easter Seals, a mentor through the Autism Society, and, most recently, is receiving Applied Behavior Analysis (ABA) therapy.

8. The ABA therapy is daily therapy and requires [Sam] to be transported from school each day at 11:30 a.m. Plaintiff has arranged for [Sam]'s transportation both during his custodial weeks and during Defendant's custodial weeks. Plaintiff provides the transportation two days each week and pays for [Sam]'s Autism Society mentor to provide the transportation on the other three days each week.

9. The parties have agreed on multiple issues with [Sam]'s daily health care work associated with Autism.

10. [Sam] has caregivers and dedicated healthcare professionals working to make sure that he maximizes his life efforts.

11. Both parties agree that [Sam] has progressed over the last five years and continues to learn new adaptive behaviors that are consistent with happiness and structured living.

12. Both parties agree that since approximately 2011, the parties have disagreed on [Sam]'s diet.

13. The evidence is overwhelming that the parties have been able to work together for the good of their son in terms of medical treatment and therapy even through the dispute mentioned above relating to [Sam]'s diet and environment.

14. The Plaintiff believes that [Sam] should have a gluten and dairy free diet. He believes this is

consistent with medical evidence.

15. [Sam] has been tested for celiac disease and gluten allergies, both tests were negative.

16. [Sam] has never been diagnosed with a dairy allergy except based upon historical evidence offered by the Plaintiff to healthcare providers.

17. The Defendant does not believe that the minor child has a sensitivity to gluten or dairy.

18. The Defendant does not regularly feed the minor child dairy or provide excessive amounts of gluten. However, she testified that she rarely observes [Sam] experiencing any adverse effects from any food that [Sam] eats. She believes there was one time in the last several years that an educator contacted her stating [Sam] was having stomach discomfort.

19. The Plaintiff has felt for a long time that the Defendant is an inadequate mother. He expressed this to her in April of 2014 through text messages. This was before the Absolute Divorce Judgment from December 4, 2014.

20. The Plaintiff is described as passionate about research and understanding of potential treatments for Autism that would make [Sam]'s life more comfortable.

21. The Plaintiff has been involved in this type of research and enthusiastic education on the topic since the minor child was diagnosed well prior to the parties' separation in 2013.

22. No persuasive evidence indicates that the minor child is being abused, neglected, or otherwise

unattended to in the home of the Plaintiff or Defendant.

23. Both the Plaintiff and the Defendant provide a nice, comfortable and safe home for the minor child. The minor child has thrived under his current circumstances.

24. The minor child is very involved with members of his larger family, and has benefited from substantial bonds with both parents and maternal and paternal relatives.

25. Both parties enjoy extensive outdoor activities with [Sam] and travel with him on vacation and educational endeavors.

26. Neither party abuses alcohol or drugs nor places [Sam] in environment of hostility or danger.

27. [Sam]'s family members and educators indicate that he is progressing within the boundaries of his disorder. He is learning new matters consistently with being a member of a household and helping with cleaning up after himself.

28. Both parties live in a relatively convenient geographical location to one another and their abilities to pick up and drop off the minor child are not hindered by any difficulties associated with where either party resides.

29. The parties have worked together to modify physical custodial schedules consistent with [Sam]'s best interest and have demonstrated an ability to provide for the physical custodial needs of the minor child when in each party's custody.

30. The parties have worked together to discuss medical

> treatments of [Sam] and discuss supplemental opportunities to make [Sam]'s life more comfortable.
>
> 31. Obviously, they have disagreed on issues associated with diet and some lifestyle issues; however, they have been able to agree on the larger more subsistent issues that directly affect the health and welfare of the minor child.
>
> 32. The health and welfare of [Sam] has been established as [an] overall healthy and well-adjusted young boy.
>
> 33. The parties, by their conduct, have always attempted to encourage the best interest of [Sam]. Both parties work hard to make sure that [Sam]'s life is enjoyable and he grows into [the] human he was meant to become.
>
> 34. While disagreements may occur between parents, no disagreement ha[s] risen to the level that either party has sacrificed [Sam]'s best interest.
>
> 35. The disagreements testified to in this hearing were agreed by most witnesses as longstanding disagreements between the parties.

The trial court concluded there had "not been a substantial change in circumstances for the Court to modify the permanent custody order[,]" and thus denied Father's motion to modify custody. Father appeals.

II. Custody Modification

¶ 5 Father raises only one argument on appeal: "The trial court erred in denying [Father's] motion to modify [the] child custody order." (Capitalization altered.)

A. Standard of Review

¶ 6 As our Supreme Court has explained,

> When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
>
> Our trial courts are vested with broad discretion in child custody matters. This discretion is based upon the trial courts' opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges. Accordingly, should we conclude that there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, even if record evidence might sustain findings to the contrary.
>
> In addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, this Court must determine if the trial court's factual findings support its conclusions of law. With regard to the trial court's conclusions of law, our case law indicates that the trial court must determine whether there has been a substantial change in circumstances and whether that change affected the minor child. Upon concluding that such a change affects the child's welfare, the trial court must then decide whether a modification of custody was in the child's best interests. If we determine that the trial court has properly concluded that the facts show that a substantial change of circumstances has affected the welfare of the minor child and that modification was in the child's best interests, we will defer to the trial court's judgment and not disturb its decision to modify an existing custody agreement.

Shipman v. Shipman, 357 N.C. 471, 474-75, 586 S.E.2d 250, 253-54 (2003) (citations, quotation marks, and brackets omitted).

B. Findings of Fact

¶ 7 Father challenges eight findings of fact. We will address the findings in groups based on the topics of the findings: (1) findings of fact 12, 13, 16, and 18 regarding Sam's diet; (2) finding of fact 26 regarding significant others in Mother's life; and (3) findings of fact 30, 31, 33, 34, and 35 regarding how well the parties work together.

1. Findings of Fact Regarding Sam's Diet

¶ 8 Father challenges the following findings of fact as not supported by competent evidence:

> 12. Both parties agree that since approximately 2011, the parties have disagreed on [Sam]'s diet.
>
> 13. The evidence is overwhelming that the parties have been able to work together for the good of their son in terms of medical treatment and therapy even through the dispute mentioned above relating to [Sam]'s diet and environment.
>
> . . . .
>
> 16. [Sam] has never been diagnosed with a dairy allergy except based upon historical evidence offered by the Plaintiff to healthcare providers.
>
> . . . .
>
> 18. The Defendant does not regularly feed the minor child dairy or provide excessive amounts of gluten.

> However, she testified that she rarely observes [Sam] experiencing any adverse effects from any food that [Sam] eats. She believes there was one time in the last several years that an educator contacted her stating [Sam] was having stomach discomfort.

a. Finding of Fact 12

¶ 9 As to finding of fact 12, that the parties have disagreed about Sam's diet since 2011, Mother testified that she and Father had "butted heads about the gluten diet issues" "since at least 2011[.]" Most of this case is about the parties' current and past disagreements regarding Sam's diet and other health issues, and the competent evidence supports finding of fact 12. We also note that Father did not challenge finding of fact 15, which states that "[Sam] has been tested for celiac disease and gluten allergies, both tests were negative."

b. Finding of Fact 13

¶ 10 Finding of fact 13 states that "[t]he evidence is overwhelming that the parties have been able to work together for the good of their son in terms of medical treatment and therapy even through the dispute mentioned above relating to [Sam's] diet and environment." Despite the parties' disagreements on many issues – which the trial court noted – still the parties were able to work together well enough to provide for Sam's welfare and Sam was generally doing well. Sam's growth and positive development is noted throughout the record and other unchallenged findings of fact,

and Father does not explain what portion of finding of fact 13 he challenges. Finding of fact 13 is supported by competent evidence.

c. Finding of Fact 16

¶ 11 Finding of fact 16 notes that Sam does not have an official diagnosis of a dairy allergy. Father then refers this Court to approximately 130 pages of medical records, we address two pages to which Father made specific individual citations. Both documents are what can best be described as intake records where the overall health of a child is noted by a physician as is reported by their caretakers and the physician's examinations. Neither document states a definitive diagnosis or medical assessment of a known allergy.

¶ 12 The first document which has the heading "Encounter Summary[.]" As to dairy, the form notes that the issue was first identified in 2011, and Sam may have a "*possible* hypersensitivity" to dairy. (Emphasis added.) The document notes nothing in spaces where the status, doctor's evaluation, condition, or evolution of the issue could be noted. The second document is quite similar; this document is from 2014 but notes an allergy to "Milk Containing Products" was noted in 2011, and there is no further information on the matter; this note should be contrasted with the identified allergy to "Amoxicillin" which notes Sam had a "Topical" reaction of "Hives[.]"

¶ 13 In 2011, when the *possible* sensitivity to dairy was noted, [Sam] was

approximately 3 years old. At the time of the hearing in 2020, he was almost 12. Because this "allergy" has no specific details other than being noted as a "possible" hypersensitivity in 2011, with no specific reaction being noted in 2014, distinguishing it from the other allergies listed, the trial court's findings are supported by the evidence. The evidence does not show any testing or a definitive diagnosis of an allergy, but the medical records show only a physician's notes of the parent's reported concerns and *possible* issues. Instead, the evidence Father specifically directs us to is general information noting various issues which may or may not exist and the long-term history of reported issues Sam has had at one time or another over the course of his life. Finding of fact 16 is supported by the evidence.

d. Finding of Fact 18

¶ 14 Finding 18, that Mother does not regularly give Sam gluten or dairy but when she does, she does not notice distress, is also supported by the record. Father again extensively discusses the evidence from his perspective, noting that he once took a photo of a cheese cracker wrapper to document what Mother had allowed Sam to eat. Father also notes evidence that Mother allowed Sam to eat a Pop-tart. But evidence that Mother once allowed Sam to eat crackers and a Pop-tart, both presumably not gluten-free versions, would support the trial court's finding that Mother "does not *regularly* feed" these items to Sam, as was confirmed by her own testimony. Father also notes the distress he sees in Sam after consuming dairy or gluten, but Mother

testified she did not see this distress. The trial court weighed the evidence and determined its credibility. *See generally Shipman*, 357 N.C. at 474, 586 S.E.2d at 253. Finding of fact 18 is supported by the evidence.

2. Finding of Fact 26 Regarding Mother's Significant Others

¶ 15 The trial court found "[n]either party abuses alcohol or drugs nor places [Sam] in [an] environment of hostility or danger." Father contends that Mother exposed Sam to several individuals, one of whom she had a domestic violence altercation with, and thus finding of fact 26 is not supported by the evidence. But Father does not direct us to any evidence Sam was in any danger from any person associated with Mother, and Mother *immediately* ended the relationship with the individual who struck her. Thus, finding of fact 26 is supported by competent evidence.

3. Finding of Fact 30, 31, 33, 34, and 35 Regarding the Parties Working Together

¶ 16 Lastly as to the findings of fact, Father contends findings 30, 31, 33, 34, and 35 are not supported by competent evidence because it "is clear that the parties have not been able to work together on the issues that most directly affect" Sam's health. These findings provide:

> 30. The parties have worked together to discuss medical treatments of [Sam] and discuss supplemental opportunities to make [Sam]'s life more comfortable.
>
> 31. Obviously, they have disagreed on issues associated with diet and some lifestyle issues; however, they

> have been able to agree on the larger more subsistent issues that directly affect the health and welfare of the minor child.
>
> . . . .
>
> 33. The parties, by their conduct, have always attempted to encourage the best interest of [Sam]. Both parties work hard to make sure that [Sam]'s life is enjoyable and he grows into [the] human he was meant to become.
>
> 34. While disagreements may occur between parents, no disagreement ha[s] risen to the level that either party has sacrificed [Sam]'s best interest.
>
> 35. The disagreements testified to in this hearing were agreed by most witnesses as longstanding disagreements between the parties.

¶ 17 Father does not challenge the trial court's findings that Sam is doing well. The evidence certainly shows that the parties do not agree on several issues regarding Sam's care, such as diet and medication, but there is no evidence that Mother's approach actually causes harm. The record and transcript is replete with evidence Sam is doing well with his current custody situation, although the parties have always had different approaches to his care and their disagreements began escalating by 2011. Dealing with the difficult issues presented by caring for a severely autistic child would be challenging enough for parents who agree on every aspect of care; it is even more difficult when the parents have different views on details of care. But ultimately, the trial court must consider the child's best interests, *see id.* at 474, 586

S.E.2d at 253, and despite their differing approaches, both Mother and Father were doing a good job caring for Sam. The trial court found Sam was an "overall healthy and well-adjusted young boy."

¶ 18 Put simply, it appears that Father wants to exert control over Sam's life when he is with Mother, making the visits exactly like his time with Father, but according to the parties' Separation Agreement, "[d]ecisions on routine day-to-day matters shall be made by the party with whom the child is residing at the time." All Father's complaints fall under this provision, and the evidence did not show that Mother's decisions on "day-to-day matters" such as diet had harmed Sam. The fact that Father feels more strongly about a strictly regimented diet is not enough to create a substantial change in circumstances justifying modification of custody without evidence showing an actual change in or affecting Sam's health or well-being.

¶ 19 Furthermore, as noted by the trial court, the parties have disagreed about Sam's diet since 2011. In summary, this case can be summed up by finding 19, "[t]he Plaintiff has felt for a long time that the Defendant is an inadequate mother." The evidence before this Court shows though that both parents are committed to Sam and parenting him well, even if differently. Father does not contest the findings that indicate Sam is in a safe and loving home with his Mother, and Sam has thrived.

C. Conclusion of Law 3

¶ 20 Father's only remaining argument is a challenge to conclusion of law 3, "[t]hat

based on the facts, there has not been a substantial change of circumstances for the Court to modify the permanent custody order." Again, the alleged changes of circumstances Father argues on appeal are disagreements about diet and other related health issues, and the evidence indicates these have been topics of disagreement since 2011, as found by the trial court.

¶ 21 While escalating conflict can constitute a substantial change of circumstances in some situations, where the conflict negatively affects the child's best interests, the disagreements here do not rise to that level based on the trial court's findings that Sam is healthy and well-cared-for by both parties. *Contrast Laprade v. Barry*, 253 N.C. App. 296, 303–04, 800 S.E.2d 112, 117 (2017) ("It is beyond obvious that a parent's unwillingness or inability to communicate in a reasonable manner with the other parent regarding their child's needs may adversely affect a child, and the trial court's findings abundantly demonstrate these communication problems and the child's resulting anxiety from her father's actions. While father is correct that this case overall demonstrates a woeful refusal or inability of both parties to communicate with one another as reasonable adults on many occasions, we can find no reason to question the trial court's finding that these communication problems are presently having a negative impact on Reagan's welfare that constitutes a change of circumstances." (Emphasis omitted.))

III. Conclusion

¶ 22 Because Father failed to demonstrate a substantial change of circumstances affecting Sam's welfare, we affirm the trial court order denying a modification of custody.

AFFIRMED.

Judges TYSON and ZACHARY concur.

Report per Rule 30(e).