IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-14

No. COA21-168

Filed 4 January 2022

Pitt County, No. 16CVD1595

BARRY IVAN LANTZ and MARGARET ANITA LIEBSCHER, Plaintiffs,

v.

TRACEY HEATH LANTZ, Defendant.

Appeal by Defendant from orders entered 17 August 2016 by Judge Paul A. Hardison and 30 September 2020 by Judge G. Galen Braddy in Pitt County District Court. Heard in the Court of Appeals 8 September 2021.

No brief filed for Plaintiffs-Appellees Barry Ivan Lantz and Margaret Anita Liebscher.

Mills & Alcorn, LLP, by Cynthia A. Mills, for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant appeals from an order denying Defendant's motion to dismiss Plaintiffs' custody action and from a Memorandum of Judgment/Order allowing Plaintiffs visitation with Defendant's minor child. We affirm.

I. Procedural and Factual History

¶ 2 Defendant Tracey Heath Lantz ("Mother") is the biological mother of Adelaide, born in March 2004.[1] Plaintiff Barry Ivan Lantz ("Grandfather") is Adelaide's paternal grandfather and his wife, Plaintiff Margaret Anita Liebscher ("Grandmother"), is Adelaide's step-paternal grandmother (collectively, "Grandparents"). Adelaide's biological father ("Father") died in a car accident on 4 July 2016.

¶ 3 Mother and Father–parents of three daughters, including Adelaide, and one son–divorced in 2006 and were parties to a custody action in 2008. Mother was awarded custody of Adelaide and her sisters; Father was awarded custody of Adelaide's brother. On 24 June 2016, Father filed a complaint for *ex parte* temporary custody of Adelaide and her sisters, alleging an abusive and injurious environment. The trial court entered an immediate temporary *ex parte* custody order on that date, giving Father temporary custody of Adelaide and her sisters ("Father's Temporary Order"). The return hearing was scheduled for 1 July 2016 but was continued to allow Mother time to obtain counsel. Father died on 4 July 2016 before a return hearing was held. Grandparents filed a complaint on 11 July 2016, seeking *ex parte* temporary and permanent custody of Adelaide and her sisters. Grandparents asked

[1] We use a pseudonym to protect the minor child's identity.

the court to "conduct temporary and permanent legal custody hearings granting legal custody of the . . . children to the [Grandparents]." The trial court entered a temporary *ex parte* order on 18 July 2016, granting Grandparents custody of Adelaide and her two sisters ("Grandparents' Temporary Order").[2]

¶ 4 Mother filed a pre-answer motion to dismiss on 18 July 2016, pursuant to Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure, for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Mother again moved to dismiss pursuant to Rules 12(b)(1) and (6) ("2016 Motion to Dismiss"), moved to strike, and filed an answer and counterclaim on 15 August 2016.

¶ 5 A hearing was held on 16 and 17 August 2016 addressing Mother's 2016 Motion to Dismiss and motion to strike, and the parties' competing claims for custody. At the beginning of the hearing, after considering arguments of counsel, the trial court concluded that Grandparents had standing to bring the action and thus the trial court had subject matter jurisdiction over the action. After hearing evidence and closing arguments, the trial court requested to see counsel in chambers. Nearly four hours later, the parties presented a Memorandum of Judgment/Order ("Consent Order") to the trial court. The Consent Order was hand-written on form AOC-CV-220 with three hand-written pages attached. The Consent Order dismissed

[2] Adelaide's brother was not included in Grandparent's Temporary Order or subsequent orders as he had reached the age of majority.

Grandparents' Temporary Order and awarded custody of the minor children to Mother. It stated that Mother is "fit and proper to have custody of the minor children"; granted Grandparents visitation every other weekend on a temporary basis, on the date of the children's father's memorial service, and on Christmas each year; and concluded, "[Mother]'s consent to this judgment is not a relinquish[ment] or waiver of her constitutionally protected status."

¶ 6 The parties were put under oath, and each party answered "Yes, sir" to the following questions by the trial court:

- Have you read this memorandum of judgment and order?
- You're in agreement with its terms and conditions?
- You've signed it?
- You're now requesting that the Court enter it as an order?

¶ 7 The Consent Order was signed by each party, their attorneys, and the trial judge, and entered the same day, 17 August 2016.

¶ 8 The parties operated under the Consent Order for nearly four years. During this time, Adelaide's sisters reached the age of majority, leaving Adelaide as the sole minor child subject to the Consent Order. On 30 July 2020, Mother noticed a hearing for 18 August 2020 on her 2016 Motion to Dismiss. Grandparents moved for a continuance, which was granted. Grandparents filed a "Motion for Contempt and

Request for Show Cause Order; Motion for Rule 11 Sanctions," arguing that "no good cause exists to litigate this Motion to Dismiss four (4) years after the entry of the [Consent Order]," and alleging that Mother sought a hearing on her motion for "frivolous and arbitrary reasons."

¶ 9 Mother's 2016 Motion to Dismiss and Grandparents' motion for sanctions came on for hearing on 26 August 2020. By separate orders entered 29 September and 30 September 2020, the trial court denied Grandparents' motion for sanctions and denied Mother's 2016 Motion to Dismiss ("2020 Denial Order").

¶ 10 On 20 October 2020, Mother filed a notice of appeal, appealing the Consent Order entered 17 August 2016, the 2020 Denial Order, and "[a]ny previous interlocutory [o]rders from which appeal is now proper."

II. Discussion

A. Motion to Dismiss

¶ 11 Mother first argues that the trial court erred by entering the 2020 Denial Order, which denied her 2016 Motion to Dismiss, because Grandparents lacked standing to bring the custody action. Mother is procedurally barred from asserting this argument.

¶ 12 Mother filed her 2016 Motion to Dismiss on 15 August 2016. The motion was heard on 16 August 2016, at which time the trial court ruled from the bench as follows:

> All right. In this case the Court finds that the Plaintiff Barry Lantz is the natural and biological grandfather of the minor children . . . and [the] biological father of the minor children is deceased, that the defendant is the natural and biological mother of the minor children in question, that the children have visited with the grandfather, Barry Lantz is here -- here and after referred to as the grandfather, during summers and at other times on holidays, that they have engaged in various age appropriate activities during the visitations, that the -- prior to the filing of this action the children had established a loving relationship with the grandfather and continues to enjoy that relationship . . . .
>
> . . . .
>
> That the defendant has participated in creating a nurturing environment with the grandfather, that the children have established a good relationship with the grandfather, and has established bonding with the grandfather and grandparents. The court concludes that the plaintiff's -- court has jurisdiction over the parties and the subject matter, concludes that the grandparents should be allowed standing to proceed and orders the same. All right. We're ready to proceed with the case.

After the custody hearing, Mother entered into the Consent Order which decided the custody matters before the court at that time.

¶ 13 On 30 July 2020, Mother noticed a second hearing on her 2016 Motion to Dismiss. As the trial court had already heard and ruled upon her 2016 Motion to Dismiss and "[a] district court judge may not ordinarily modify, overrule, or change the judgment of another district court judge previously made in the same action[,]" *Hogue v. Hogue*, 251 N.C. App. 425, 428, 795 S.E.2d 607, 609 (2016), the trial court

did not err by denying Mother's 2016 Motion to Dismiss by the 2020 Denial Order.

B. Standing

¶ 14 Next, Mother attacks the Consent Order on direct appeal, arguing that the trial court lacked subject matter jurisdiction to hear Grandparents' motion for custody and thus, the Consent Order is void.

¶ 15 We note that Mother is appealing the Consent Order four years after it was entered as a temporary order, and legal issues potentially surround the propriety of her appeal. However, as Grandparents did not file a brief in this matter, any issues have not been fully briefed. Moreover, Adelaide will turn 18 in March of 2022 and, at that point, will not be subject to the court's jurisdiction. In the interest of judicial economy and permanence for Adelaide, we treat Mother's appeal from the Consent Order as a petition for certiorari and grant the petition to reach the merits of her argument.

¶ 16 Standing is required to confer subject matter jurisdiction. *Wellons v. White*, 229 N.C. App. 164, 176, 748 S.E.2d 709, 718 (2013). "A [trial] court's subject matter jurisdiction over a particular matter is invoked by the pleading." *Boseman v. Jarrell*, 364 N.C. 537, 546, 704 S.E.2d 494, 501 (2010). At the motion to dismiss stage, all factual allegations made in the pleadings are viewed in the light most favorable to the plaintiff, granting the plaintiff every reasonable inference. *Grindstaff v. Byers,* 152 N.C. App. 288, 293, 567 S.E.2d 429, 432 (2002). We review de novo whether a

plaintiff has standing to bring a claim. *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001).

¶ 17 N.C. Gen. Stat. § 50-13.1(a) provides that "[a]ny parent, relative, or other person . . . claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child" and "grants grandparents the broad privilege to institute an action for custody . . . ." *Eakett v. Eakett*, 157 N.C. App. 550, 552, 579 S.E.2d 486, 488 (2003). "Although grandparents have the right to bring an initial suit for custody, they must still overcome" the parents' constitutionally protected rights. *Sharp v. Sharp*, 124 N.C. App. 357, 361, 477 S.E.2d 258, 260 (1996).

¶ 18 To survive a motion to dismiss for lack of standing, grandparents must allege both that they are the grandparents of the minor child and facts sufficient to demonstrate that the minor child's parent is unfit or has engaged in conduct inconsistent with their parental status. *See, e.g., Rodriguez v. Rodriguez*, 211 N.C. App. 267, 276, 710 S.E.2d 235, 241 (2011) ("[The] plaintiffs had standing to proceed in an action for custody pursuant to N.C. Gen. Stat. § 50-13.1(a) as they alleged they are the grandparents of the children and that [the] defendant had acted inconsistently with her parental status and was unfit because she had neglected the children.") (citation omitted); *Grindstaff*, 152 N.C. App. at 292, 567 S.E.2d at 432 ("[G]randparents alleging unfitness of their grandchildren's parents have a right to bring an initial suit for custody[.]").

¶ 19 Grandparents alleged in their complaint, in pertinent part, the following:

> 1. . . . Plaintiff Lantz is the biological paternal grandfather of the minor children who are the subject matter of this action, and Plaintiff Liebscher is the step-paternal grandmother of the said minor children.
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> . . . .
>
> 4. [Grandparents] have been active and involved in the minor children's lives and the children are extremely comfortable with [Grandparents].
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> . . . .
>
> 7. . . . [Mother] is incapable of providing a safe and stable environment for the minor children. She has a volatile temper, a unique personal lifestyle, and is simply not fit to raise her biological children. . . .
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> . . . .
>
> 10. [Mother] is unfit to parent the minor children, and the minor children are very uncomfortable (possibly in fear) of staying with [Mother].
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> . . . .
>
> 14. It is in the best interest of the minor children . . . that temporary and permanent, and emergency ex parte temporary legal custody be granted to [Grandparents]. They can provide a safe and stable environment for the children . . . .
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> . . . .
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> 17. Based upon [Mother]'s conduct prior to the automobile accident [that killed the biological father], she has not demonstrated proper parenting judgment, nor abilities.

> She has placed the minor children in an abusive environment. Her activities place the minor children in an injurious environment. The minor children would suffer irreparable harm if they were required to leave . . . with [Mother]. They would continue to suffer this harm if they are required to live with [Mother] based upon her previous conduct and actions.

¶ 20 Additionally, Grandparents incorporated into their complaint the allegations contained in Father's complaint for *ex parte* temporary custody and the findings of fact and legal conclusions from Father's Temporary Order.

¶ 21 The relevant findings from Father's Temporary Order include:

> 6. Since the entry of the foregoing child custody Order by this Court, there is probable cause to believe that there has been a substantial change in circumstances affecting the best interests of the parties' minor children and that some of those changes expose the minor children to a substantial risk of bodily physical and emotional injury. There is probable cause to believe [Mother] has engaged in acts of domestic violence against the minor children and has exposed the children to a substantial risk of physical and emotional injury while in her care and custody. These alleged acts include, but are not limited to, the following:
>
> > a. [Mother] has repeatedly physically abused the minor children. She has caused and attempted to cause bodily injury to the minor children.
> >
> > b. [Mother] has repeatedly verbally abused the minor children. She has placed the minor children in fear of imminent serious bodily injury and continued harassment to such a level as to inflict substantial emotional distress.

> c. [Mother] has consistently and frequently neglected the minor children. She leaves them home alone for extended periods of time during the day and night while she pursues her relationship with men.
>
> d. [Mother] has stated that one of the minor children gets on her nerves so bad she could take a baseball bat and bust the child's head wide open.
>
> e. [Mother] has called her former boyfriend, demanding he come to [Mother]'s home immediately because [Mother] was about to knock the "sh*t" out of [her minor child].
>
> f. During weekends in April 2016, [Mother] left the minor children home alone.
>
> g. [Mother] has grabbed the minor children by their hair and pulled them across the floor.
>
> h. The children are afraid of [Mother].
>
> i. In April 2016, [] [Mother] was impaired by alcohol while operating a motor vehicle with minor children as passengers.
>
> j. The minor children do not feel safe and secure with [Mother].

The relevant conclusions included:

> 2. [Father] has made an adequate showing and there exists probable cause to support the entry of this Order pursuant to [N.C. Gen. Stat.] 50-l3.5(d)(2) and (3). The[] minor children have been exposed to and continue to be exposed to a substantial risk of bodily physical and emotional injury.

¶ 22 The trial court was permitted to consider the findings of fact and conclusions of law in Father's Temporary Order when deciding the motion to dismiss. *See Raynor v. Odom*, 124 N.C. App. 724, 728, 478 S.E.2d 655, 657 (1996) ("When a trial judge is attempting to evaluate what is in the best interests of the child or whether a parent is unfit or has neglected the child, it is an undue restriction to prohibit the trial judge's consideration of the history of the case on record.").

¶ 23 When viewed in the light most favorable to Grandparents, the complaint alleges that Grandfather is the biological grandfather of the children and Grandmother is the step-grandmother of the children. The complaint further alleges facts sufficient to demonstrate that Mother was unfit and acted in a manner inconsistent with her constitutionally protected status as a parent. At a minimum, Grandfather had standing to bring this custody action pursuant to N.C. Gen. Stat. § 50-13.1(a), and the trial court had jurisdiction to hear the case. *See Rodriguez*, 211 N.C. App. at 274, 710 S.E.2d at 240.[3]

C. Finding of Unfitness at the Custody Hearing

¶ 24 Mother argues that even if Grandparents had standing to bring the action for custody, the trial court violated Mother's constitutional due process right to the care,

[3] The trial court analyzed standing based on Grandfather's biological relationship with the children. To the extent Grandmother did not have standing to pursue a claim for custody, any error in the trial court's pronouncement of "Grandparents" having standing is harmless.

custody, and control of her child when it "granted" visitation to Grandparents, even though it "found" Mother was a fit parent to have custody of her children. Mother's argument misapprehends the trial court's role in entering the Consent Order.

¶ 25 After the custody hearing but prior to the trial court announcing its findings, conclusions, and order, the trial court announced, "All right. Let me see counsel in chambers." After a nearly four-hour recess, the parties notified the court that they had reached an agreement and presented the trial court with the Consent Order. After being sworn, each party acknowledged that they had read the Consent Order and agreed to its terms and conditions. The Consent Order states, in relevant part: "the parties waive findings of fact and conclusions of law in the formal judgment/order memorializing this memorandum"; Mother is a "fit and proper [person] to have custody of the minor children and has not relinquished her constitutional right as a parent"; "[Mother]'s consent to this judgment is not a relinquish[ment] or waiver of her constitutionally protected status"; and Grandparents are allowed visitation "every other weekend" on a temporary basis, at Christmastime, and on certain holidays, as the parties agree.

¶ 26 Contrary to her assertion, the trial court did not "grant" visitation to Grandparents. Instead, Mother voluntarily agreed in the Consent Order to allow Grandparents visitation. By agreeing to its terms, Mother cannot now argue that the trial court erred in entering the Consent Order, which is premised entirely on the

agreed-upon terms. *See e.g., Walter v. Walter*, 2021-NCCOA-428, ¶8 ("[A]s a consent order is merely a court-approved contract, it is subject to the rules of contract interpretation.")(quotation marks and citation omitted); *Holden v. John Alan Holden*, 214 N.C. App. 100, 112, 715 S.E.2d 201, 209 (2011) (concluding that when a consent order clearly stated that the plaintiff was to pay the defendant a sum certain, and the plaintiff stipulated that she failed to do so, the plaintiff cannot argue that the trial court erred in ordering the plaintiff to pay). Mother's argument is without merit.

III. Conclusion

¶ 27 For the reasons stated, we affirm the Consent Order and the 2020 Denial Order.

AFFIRMED.

Judges ARROWOOD and JACKSON concur.

Report per Rule 30(e).