IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-87

No. COA21-187

Filed 1 February 2022

Johnston County, No. 17 CVD 1533

LAURA SUE TUEL, Plaintiff,

v.

ANTHONY RYAN TUEL, Defendant.

Appeal by defendant from order entered 1 October 2020 by Judge Addie H. Rawls in Johnston County District Court. Heard in the Court of Appeals 15 December 2021.

Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by Alicia Jurney, for plaintiff-appellee.

Tharrington Smith, LLP, by Jeffrey R. Russell and Evan B. Horwitz, for defendant-appellant.

ARROWOOD, Judge.

¶ 1 Anthony Ryan Tuel ("defendant") appeals from the trial court's order for child custody. Defendant contends the trial court erred by failing to follow this Court's mandate set out in *Tuel v. Tuel*, 270 N.C. App. 629, 840 S.E.2d 917 (2020) ("*Tuel I*"). Defendant further argues the trial court erred by failing to make sufficient findings

of fact and conclusions of law and abused its discretion by allowing Laura Sue Tuel ("plaintiff") to relocate to Indiana with the parties' children. For the following reasons, we reverse the trial court's order.

I. Background

¶ 2 Plaintiff and defendant were married on 21 December 2002. Two children were born of the marriage on 17 April 2014 and 12 September 2016. The parties separated on 17 May 2017.

¶ 3 On 16 May 2017, plaintiff filed a complaint for child custody. On 17 May 2017, plaintiff left the marital residence and moved with the children to her parent's home in Rushville, Rush County, Indiana. On 16 June 2017, the parties reached an agreement for temporary custody and visitation to allow defendant to visit the children on 17-18 June 2017 for Father's Day weekend. The parties later resolved the issue of temporary child custody by entering a Memorandum of Judgment/Order ("MOJ") on 21 August 2017. The MOJ established payments from defendant to plaintiff for temporary child support and postseparation support, and provided that plaintiff would return to North Carolina with the minor children, and that defendant would have custody every other weekend from Friday to Monday and every Wednesday as either a dinner visit or an overnight.

¶ 4 On 5 July 2018, the trial court conducted a hearing on the parties' claims for permanent child custody, Judge Rawls presiding. The trial court heard evidence of

plaintiff's strained relationship with her family, from whom she had been estranged up until separating from defendant. Defendant requested the trial court award "50/50" custody to the parties in North Carolina; plaintiff asked the trial court to allow her to relocate with the children to Indiana.

¶ 5 On 18 March 2019, the trial court entered an Order for Permanent Child Custody and Temporary Child Support, granting the parents joint legal and physical custody of the children, and primary custody to plaintiff, allowing her to relocate with the children to Indiana. The trial court made several findings describing Rushville, Indiana, the children's relationships with extended family members, and the circumstances that led to the parties' separation. The trial court found that "[i]t would be in the best interest of the minor children for them to be able to locate with the plaintiff to Rushville, Indiana given the strong ties of the Plaintiff's family and other support systems that would assist the Plaintiff with the care of the minor children." The trial court further found that defendant was "opposed to the relocation of the minor children and he fails to accept responsibility for the relationship between the plaintiff and her parents and what he might have done to bring about the estrangement between the plaintiff and her parents[,]" which the trial court considered "unreasonable." The trial court also found that "plaintiff's compliance with the temporary order and willingness for the defendant to continue to see the children indicates that she will comply with orders providing for the defendant's

visitation with the children after they move to Indiana." The order included a total of thirty-one numbered findings of fact.

¶ 6 Defendant filed notice of appeal from the order on 11 April 2019. On 17 March 2020, this Court filed an opinion vacating the trial court's order and remanding for further proceedings. *Tuel I*, 270 N.C. App. 629, 840 S.E.2d 917.

¶ 7 In *Tuel I*, we stated that the "trial court failed to make findings" on several factors relevant to determining custody upon relocation of a parent to a foreign jurisdiction, and that many of the findings upon which it based its conclusion of law were internally inconsistent. *Id.* at 631, 840 S.E.2d at 920 (citing *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 418 S.E.2d 675 (1992)). Specifically, apart from the advantages of a family support network to assist with childcare, "none of the trial court's findings engage in any comparison between Rushville, Indiana and defendant's home in Johnston County, North Carolina, or each area's relative potential to enrich the children's lives." *Id.* at 633, 840 S.E.2d at 921. "Additionally, the [trial] court g[ave] short shrift to several of the other *Ramirez-Barker* factors, reciting them as findings without engaging in any substantive analysis of its conclusions or relating them to the best interests of the children." *Id.* at 634, 840 S.E.2d at 921. Several of the findings the trial court did make were noted for "unresolved contradictions" which "undermined" the finding that carried the weight of the trial court's conclusion of law. *Id.* at 635, 840 S.E.2d at 922. Defendant

additionally argued that numerous findings of fact were not supported by competent evidence, but because the findings were "facially deficient and inadequate to support the trial court's conclusion of law," the question of evidentiary support was not reached. *Id.* at 636, 840 S.E.2d at 923.

¶ 8 The trial court conducted a hearing on remand on 25 August 2020. Defendant's trial counsel offered that the trial court had three options: (1) enter an order based on the same evidence requiring the children to remain in North Carolina; (2) order a new trial; or (3) conduct an additional hearing "where new evidence is presented to make findings, whatever Your Honor thinks is appropriate given the Court of Appeals opinion, and issue an order based upon that."

¶ 9 Judge Rawls responded:

> Okay. I thought it was -- if I recall what I read, it -- it is that the Court felt like that my findings did not support my conclusions or were inconsistent with the conclusion and said that they didn't even consider the issue of whether or not I had abused my discretion in the area of allowing the relocation because they felt like the findings that were set forth on *Ramirez* -- and I keep looking back because I had jotted the *Ramirez* findings that were remanded and those findings are the custodial parents interested in trying to make the move and the other noncustodial parents interest in objecting to the move and whether or not said move would disrupt the relationship of the noncustodial parent to the child.
>
> Of course, I've read in detail the *Ramirez* opinion and in reading that opinion, of course, the finding there was a little different and the circumstances were a little slightly

> different from what we have here, but in reading the Court's opinion, the Court felt like I did not address particularly, in detail enough, how the children's relocation there would be in their best interest or their life would improve based on the finding that their knowledge of the people that I felt were there to provide additional support for them, they had not had that much time with them to know whether or not they had developed what we call longstanding relationship.
>
> . . . .
>
> I certainly understand what the Court had said, but in essence, when the Court sent it back to me, I don't know that they said anything any more direct to -- to direct me on what it is they were asking this Court to do.

¶ 10 Plaintiff's trial counsel argued that this Court's opinion did not include "any reference to needing another hearing[,]" and that the trial court had discretion "to just do another order." Plaintiff's trial counsel presented a proposed order that counsel "tried to prepare . . . in such a way that was drawn from the evidence and supported [the trial court's] ultimate decision in the case." Defendant's trial counsel agreed that the trial court could "just enter a new order[,]" but added his belief that this Court "did not think that the . . . evidence was there sufficient to make . . . the findings and conclusions."

¶ 11 Judge Rawls responded:

> I don't necessarily want to receive new evidence. I think I've received the evidence that the Court needs to make a decision, but I also recognize that in drafting the opinion, and I dictated this opinion, I went back and listened to that, that there are four things that I probably need to be

> more specific concerning them and that is these four things that are relocation improve the life of the child, the motives of the custodial parent requesting the move, integrity of the noncustodial parent in opposing the move, will realistic visitation be possible and will it preserve and foster the parental relationship of the noncustodial parent. Those are the primary *Ramirez* factors for the purposes of relocation.
>
> I hinted on some. I touched on some, but I didn't particularly, I think, say some things that probably could be said, but in all fairness to the parties, I'm willing to go back and listen and redraft an opinion. I think that is the believable evidence before the Court. What may have happened that transpired afterwards certainly is subject to whatever that might be, but I think if I receive new evidence, that's the types of things that I'm going to be receiving and I think at this point I need to look at these things, listen to what the conceivable evidence says, and try to draft an opinion taking into consideration those things and those things for that.
>
> I think the Court was particular because it didn't like the drafting of it that they were not willing to go a step further in saying you were wrong with what you've done. They just said we can't analyze what you've done, because you have not done this.

¶ 12 Ultimately, the trial court did not receive any additional evidence on remand.

¶ 13 Following an additional remand hearing on 1 October 2020, the trial court entered an Order for Child Custody, again granting primary custody to plaintiff and maintaining the same custodial schedule. The new order included a total of sixty-two numbered findings of fact, many of which were identical to findings of fact in plaintiff's proposed order.

¶ 14 Defendant filed written notice of appeal on 19 October 2020.

II. Discussion

¶ 15 Defendant contends the trial court erred by failing to follow this Court's mandate as set out in *Tuel I*. Defendant further contends the trial court erred by making several findings of fact and conclusions of law and abused its discretion by allowing plaintiff to relocate with the minor children.

A. Standard of Review

¶ 16 "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). "Abuse of discretion results when the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). "An error of law is by definition an abuse of discretion." *Li v. Zhou*, 252 N.C. App. 22, 26, 797 S.E.2d 520, 523 (2017) (citation omitted).

¶ 17 "In reviewing a trial judge's findings of fact, we are 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.' " *Sauls v. Sauls*, 236 N.C. App. 371, 373, 763 S.E.2d 328, 330 (2014) (citations and quotation marks omitted). "The quality, not the quantity, of findings is

determinative." *Carpenter v. Carpenter*, 225 N.C. App. 269, 273, 737 S.E.2d 783, 787 (2013).

B. Remand and Mandate

¶ 18 "[W]hen an appellate court passes on a question and remands the cause for further proceedings, the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal[.]" *Hayes v. City of Wilmington*, 243 N.C. 525, 536, 91 S.E.2d 673, 681-82 (1956) (citations omitted). "On the remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation and departure from the mandate of the appellate court." *Bodie v. Bodie*, 239 N.C. App. 281, 284, 768 S.E.2d 879, 881 (2015) (citing *Collins v. Simms*, 257 N.C. 1, 11, 125 S.E.2d 298, 306 (1962)).

¶ 19 When determining custody upon relocation of a parent to a foreign jurisdiction, "[t]he trial court must make a comparison between the two applicants considering all factors that indicate which of the two is 'best-fitted to give the child the home-life, care, and supervision that will be most conducive to its well-being.' " *Evans v. Evans*, 138 N.C. App. 135, 142, 530 S.E.2d 576, 580 (2000) (citation and quotation marks omitted). In evaluating the best interests of a child in a proposed relocation, trial courts are required to consider, and make findings addressing, a number of factors set out in *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 418 S.E.2d 675 (1992). These

factors include but are not limited to:

> the advantages of the relocation in terms of its capacity to improve the life of the child; the motives of the custodial parent in seeking the move; the likelihood that the custodial parent will comply with visitation orders when he or she is no longer subject to the jurisdiction of the courts of North Carolina; the integrity of the noncustodial parent in resisting the relocation; and the likelihood that a realistic visitation schedule can be arranged which will preserve and foster the parental relationship with the noncustodial parent.

Ramirez-Barker, 107 N.C. App. at 80, 418 S.E.2d at 680 (citation omitted).

¶ 20 In *Tuel I*, due to the trial court's failure to address the *Ramirez-Barker* factors, the conclusion of law "rest[ed] upon its finding of an advantage in the family support network in Indiana[,]" which by itself was insufficient to carry the weight of the custody order. *Tuel I*, 270 N.C. App. at 634, 840 S.E.2d at 921. Accordingly, the trial court was instructed to enter a new order with findings that properly balanced the *Ramirez-Barker* factors and that adequately support its conclusion of law regarding custody. Unfortunately, the trial court's new order does not adequately address the *Ramirez-Barker* factors, and the findings that do address these factors are not supported by competent evidence.

1. Advantages of Relocation

¶ 21 The first factor this Court directed the trial court to consider was "the advantages of the relocation in terms of its capacity to improve the life of the

child[ren,]" after noting that the previous findings did not engage in any comparison between the two proposed locations. *Id.* at 632, 840 S.E.2d at 920; *see also id.* at 633, 840 S.E.2d at 921 ("Yet the court failed to make any finding comparing this area to Johnston County, North Carolina, or provide any explanation as to why Indiana would otherwise provide the children with a more enriching environment.").

¶ 22 In the new order, Findings of Fact 38, 39, 40, and 41 provide a description of Rushville, Indiana, the surrounding area, and plaintiff's family ties in Rushville. These findings are largely the same as Findings of Fact 8, 9, 10, 12, and 28 from the original order, with some added descriptive language.

¶ 23 Findings of Fact 42, 44, 48, 50, 53, and 55 mention North Carolina. Finding of Fact 42 describes research conducted by plaintiff "showing the relative rankings of the states on K-12 education, which showed that North Carolina was ranked lower than Indiana." Finding of Fact 44 describes the routine plaintiff had developed for the children in Indiana, "[w]hile in Johnston County, North Carolina, the minor children were not allowed to participate in many activities including participating in clubs, attending church and other extra-curricular activities that the plaintiff desired but many of which w[ere] opposed to by the defendant." Finding of Fact 48 states that "[t]he parties had a few friends in North Carolina[,]" did not have a support system for assistance in caring for the children, and that "[n]either party had any connections with North Carolina before they moved to North Carolina and did not

form any connections while they have been in North Carolina."

¶ 24 Finding of Fact 50 provides that "[t]he constant bickering within the home and failed integration in the community of Johnston County is in direct contrast to the experiences of the children while visiting in Rushville with family in May 2017 and throughout the summer[,]" and reiterates the benefits of the support system in Rushville. Finding of Fact 53 states that if plaintiff remained in North Carolina, "she anticipated that she would be unable to provide for the children as well financially as she could in Rush County," and that while "Rush County places an apparent emphasis on early childhood education[,]" there was "no apparent plan for the children's education, no relative benefits to the children identified by either party of their location in North Carolina, or anything the parties found remarkable about the children's environment in North Carolina that would have been enriching for the children." Finding of Fact 55 reiterated that "[t]he children were not involved in the community in Johnston County, had no real friends and lived in a dysfunctional household. In contrast, the children did not live in the same conflict in Rush County, had interaction with other family members and thrived while residing there."

¶ 25 Several of the aforementioned findings are identical to the same numbered findings in plaintiff's proposed order.

¶ 26 In sum, the trial court made several findings considering the advantages of relocating to Rushville, Indiana, primarily related to plaintiff's family ties in the area.

The trial court's findings with respect to North Carolina, however, are primarily concerned with the lack of family ties and a support system in North Carolina, as well as dysfunction related to the breakdown of the marriage. One of the only direct comparisons between the two locations is based on plaintiff's research into the states' relative education rankings, but this comparison provides no insight into the advantages or disadvantages between the actual school systems the children would be eligible to attend, as it does not actually provide any reference to Johnston County, North Carolina. Notably, during the 9 August 2018 hearing, Judge Rawls originally declined to include a comparison of the minor children's lifestyle between North Carolina and Indiana, stating "I can't say they're going to have a much greater lifestyle [in Indiana]."

¶ 27 Although several of the findings provide details as to why Rushville, Indiana would be an enriching environment, the new order does not adequately engage in a comparison between Rushville, Indiana, and Johnston County, North Carolina, or each area's potential to enrich the children's lives. The findings provide an adequate description of Rushville and the surrounding area, but almost no information regarding Johnston County. Instead, the trial court's references to North Carolina concern the lack of a family support network and issues related to parenting decisions and the household prior to separation. The trial court's findings are insufficient with respect to the first factor and are not in accordance with the mandate of *Tuel I*.

2. Motives of Custodial Parent in Seeking Relocation

¶ 28 The second factor regarding the motives of the custodial parent in seeking the move is addressed in Finding of Fact 53. The finding provides that plaintiff's "desire to relocate to Rush County is based on her genuine belief that doing so will be in the best [interest] for her children[,]" and that her "motives are based on her ties to the Rushville area, the resulting ties the children have to that area, the relationship the children will enjoy there, and the lifestyle afforded them there in contrast to a more introverted life in North Carolina." The finding also provides that if plaintiff were to remain in North Carolina, "she anticipated that she would be unable to provide for the children as well financially as she could in Rush County," and expressed concern about the quality and presence of "friends or relationships" in North Carolina.

¶ 29 Plaintiff asserts that this finding is "supported by and consistent with the trial court's other findings of fact that, throughout the children's lives, Plaintiff had prioritized their needs and wellbeing." Finding of Fact 53 does address the motive factor as required, but it is not supported by competent evidence.

¶ 30 At the original hearing, the trial court heard evidence regarding plaintiff's strained relationship with her parents. On remand, the trial court did not receive new evidence and accordingly based its findings on the same evidence presented at the original hearing. Although the estrangement had apparently improved to the point that plaintiff returned to Rushville in 2017, the evidence at the original hearing

was that plaintiff's connections to Rushville were tenuous at best.

¶ 31 Regarding the "resulting ties the children have to that area" and "the relationship the children will enjoy there," the trial court was aware that the children were born in 2014 and 2016, and that plaintiff was estranged from her family in Rushville until May 2017. Apart from the presence of plaintiff's parents in Rushville, the trial court did not receive evidence to establish what ties or relationships the children might enjoy in Rushville.

¶ 32 Similarly, the trial court did not receive evidence to support the portion of the finding regarding "the lifestyle afforded them there in contrast to a more introverted life in North Carolina." Although plaintiff's testimony tended to show a strained and unharmonious relationship with defendant that contributed to a more introverted life for *plaintiff*, there was no competent evidence presented with respect to comparison of lifestyles for the *children*, which was required to support the finding.

¶ 33 Despite plaintiff's "genuine belief" that relocation was in the best interest of her children, the evidence was insufficient to support the trial court's finding with respect to plaintiff's motives in seeking relocation.

3. Likelihood of Compliance by Custodial Parent

¶ 34 Regarding the third factor, the trial court found that "[t]he parties are likely to comply with the custody arrangement ordered to accommodate the plaintiff's living in Indiana and the defendant's remaining in North Carolina." This was based in part

on the trial court's determination that "defendant's insistence on adhering to the order was enough for the plaintiff to follow it despite her reservations about doing so." This finding is based on minimal evidence, apart from an absence of previous noncompliance. The fact that defendant is insistent on adhering to the order is not a sufficient basis to conclude that plaintiff will willingly comply with any order of the North Carolina courts.

4. Integrity of Noncustodial Parent in Resisting Relocation

¶ 35 The trial court addressed defendant's resistance to relocation in Finding of Fact 55:

> The defendant's resistance to the children living primarily in Indiana is based only on what he wants without apparent regard for, and refusal to acknowledge, what living in Rush County will offer the children. He failed to acknowledge his role in the strain on the relationship between the plaintiff and her parents and that they had reconciled. If he wanted his children to be near him and in his presence more of the time, then he should have shown more regard for the bad environment and hardship on their mother and primary caretaker when he had the opportunity to do so during the marriage and been more willing to come out of his little office and spend some time and share some meals with the family. Defendant created an intolerable situation for the plaintiff, which contributed directly to her desire to separate from him.
>
> . . . .
>
> The defendant's actions alienated the minor children from normal childhood activities and appeared to be more controlling of the plaintiff rather than being in the best

> interest of the minor children. The defendant's employment allows him to work from any location and in fact his family lives in Iowa which is much closer to Indiana. It is not equitable for the plaintiff not to be able to live elsewhere with the children, especially when the plaintiff is genuinely motivated by the best interest of the children in her desire to live in Rush County.

Rather than engaging in a thoughtful consideration of the evidence, the trial court went to significant length to address defendant's role in the collapse of the marriage, which is not adequate or appropriate grounds for this factor. This particular section is similar to other portions of the order in which the trial court references defendant's acts or behavior as a spouse. This finding is insufficient for purposes of *Ramirez-Barker*.

5. Likelihood of Realistic Visitation Schedule

¶ 36 Finally, the trial court was required to consider "the likelihood that a realistic visitation schedule can be arranged which will preserve and foster the parental relationship with the noncustodial parent." However, the trial court did not make any findings addressing this factor. Instead, Finding of Fact 56 provided that "[a] custody schedule should be ordered that enables the defendant to have consistent contact with the children and is feasible based on the distance between the parties' residences and does not interfere or conflict with school attendance or to create hardship on the children." Instead of considering the evidence to determine whether it was likely that a realistic schedule could be arranged, the trial court simply

concluded that one "should be ordered[.]" Similar to other previously discussed findings, this finding is identical to Finding of Fact 55 in plaintiff's proposed order.

¶ 37 When this Court remanded this case in *Tuel I*, we gave clear instructions and a mandate for the trial court to follow. Rather than following that mandate, the trial court conducted a new hearing with no additional evidence and entered an order that was mostly authored by plaintiff that does not adequately consider the *Ramirez-Barker* factors. The trial court's failure to comply with the mandate of *Tuel I* amounts to an abuse of discretion. Because the trial court abused its discretion in entering the order, the order is reversed.

B. Findings of Fact and Conclusions of Law

¶ 38 Defendant presents further arguments regarding specific findings of fact and conclusions of law, arguing the findings were not supported by competent evidence and were insufficient to support the conclusions of law. Because we reverse the trial court's order for failure to comply with the mandate of *Tuel I*, it is unnecessary to consider defendant's remaining arguments.

III. Conclusion

¶ 39 The trial court and plaintiff have had two opportunities to comply with the well-settled law set forth in *Ramirez-Barker* regarding what needs to be shown to support an order allowing a parent to relocate children to a foreign jurisdiction, and have failed to do so even in the face of a mandate from this Court. The trial court's

order is reversed without providing a further opportunity to correct the order. Mindful of the fact this matter involves the ongoing welfare of the two minor children, we remand this matter to the trial court to re-start the proceedings on the pending claim for child custody to include taking new evidence at a new trial following which the trial court shall make an award of custody as will best promote the interest and welfare of the minor children based on the then currently existing circumstances and containing findings of fact supported by competent evidence and, in turn, conclusions of law supported by those findings.

REVERSED AND REMANDED.

Judges INMAN and HAMPSON concur.

Report per Rule 30(e).