IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-67

No. COA20-52

Filed 1 February 2022

Rowan County, No. 17 CVD 1308

MELANIE ANN EVANS, Plaintiff,

v.

RAY ALLEN MYERS, Defendant,

v.

ALLEN AND CHRISTINE MYERS, Intervenors.

Appeals by plaintiff and defendant from order entered 13 June 2019 by Judge Charlie Brown in Rowan County District Court. Heard in the Court of Appeals 2 September 2021.

Barton & Doomy Law Firm, PLLC, by Matthew J. Barton, for plaintiff-appellant.

Ellis & Newsome, PLLC, by Spencer Newsome and Cindy Ellis, for defendant-appellant.

Rice Law, PLLC, by Richard Forrest Kern, Mark Spencer Williams, and Christine M. Sprow, for intervenors-appellees.

DIETZ, Judge.

¶ 1 Plaintiff Melanie Evans and Defendant Ray Myers are the parents of a minor

child. Two years into a custody dispute between the parents, Allen and Christine Myers, the paternal grandfather and step-grandmother, intervened, alleging neglect by both parents. The district court allowed the grandparents to intervene, granted them custody of the child, and awarded the parents extremely limited visitation. The parents appealed, challenging the grandparents' standing to intervene and the court's rulings on custody and visitation.

¶ 2 As explained below, we hold that the grandparents alleged sufficient facts to confer standing to seek custody. But we also hold that the trial court's findings of fact are insufficient to support the court's conclusion that the parents forfeited their constitutionally protected status as parents. We therefore vacate the trial court's order and remand for further proceedings. On remand, the trial court may enter a new order on the existing record or conduct any further proceedings the court deems necessary in the interests of justice.

Facts and Procedural History

¶ 3 Plaintiff Melanie Evans and Defendant Ray Myers have a child, Chevelle, born in April 2013. Intervenors Allen and Christine Myers are the paternal grandparents. Since birth, Chevelle has lived in various custody arrangements involving both parents.

¶ 4 In 2017, Evans initiated a custody action in Rowan County District Court. The court found Evans and Myers to be fit parents and gave them joint legal and physical

custody with a week-on, week-off schedule with alternating holidays. As a result, each parent had Chevelle at least fourteen days per month. Chevelle was enrolled in school in Rowan County, where Evans resided at that time.

¶ 5 In 2018, Evans filed a motion to modify custody, on the ground that she planned to move to Forsyth County. Myers filed a motion to dismiss, and the court granted Myers's motion.

¶ 6 Later that year, Evans moved to Cabarrus County. In December 2018, Evans filed a *pro se* show cause motion against Myers, alleging that Chevelle should now be enrolled in the Cabarrus County School District as the school closest to her.

¶ 7 In January 2019, the grandparents filed joint motions to intervene and to modify the prior custody order. The grandparents alleged that the parents' "inability and/or unwillingness to properly care for their child arises to the level of abuse and neglect, and abrogates their constitutional right to parent their child."

¶ 8 On 6 February 2019, Evans filed a voluntary dismissal of her most recent motion to show cause. A month later, on 7 March 2019, Evans filed a motion, again *pro se*, to modify custody.

¶ 9 The trial court heard the case on 21 May 2019. Myers and the grandparents were both represented by counsel, while Evans again appeared *pro se*.

¶ 10 On 13 June 2019, the court entered an order concluding there was a "substantial change in circumstances affecting the welfare" of Chevelle that

warranted a modification of custody. The court found by "clear, cogent, and convincing evidence" that Myers and Evans had both acted inconsistently with their "parental duties and responsibilities." The court entered a custody order placing Chevelle into the legal and physical custody of her paternal grandparents in Oak Island. The order gave Myers two weeks of visitation per year and gave Evans two days of visitation per year.

¶ 11 Myers timely appealed. Evans, who had a history of *pro se* interactions with the court throughout the proceedings, appeared through counsel in this appeal in March 2020. After the court struck Evans's initial brief, Evans petitioned for a writ of certiorari pursuant to Rule 21 of the Rules of Appellate Procedure to join in the appeal. This Court allowed the petition and permitted Evans join as an appellant.

Analysis

I. Standing to intervene

¶ 12 We first address the parents' argument concerning the grandparents' standing to intervene. Standing is a threshold issue this Court reviews *de novo* as a question of law. *Perdue v. Fuqua*, 195 N.C. App. 583, 585, 673 S.E.2d 145, 147 (2009).

¶ 13 Standing in custody cases involving third parties, such as grandparents, is conferred by N.C. Gen. Stat. § 50-13.1(a). *Wellons v. White*, 229 N.C. App. 164, 174, 784 S.E.2d 709, 717–18 (2013). But because parents have a presumptive, constitutional right to custody of their children, a grandparent must allege sufficient

facts to show that the parents have acted in a manner inconsistent with this constitutionally protected status. *See Rivera v. Matthews*, 263 N.C. App. 652, 658–59, 824 S.E.2d 164, 168–69 (2019). To do so, the allegations in the pleading must include specific facts demonstrating unfitness or other conduct sufficient to forfeit this constitutional right "such as: (i) the parents have not provided safe and suitable housing for their children; (ii) the parents have not contributed to child support; (iii) the parents have not been involved in the children's upbringing; and (iv) the children are at substantial risk of harm from the parents." *Wellons,* 229 N.C. App. at 176, 748 S.E.2d at 719.

¶ 14 In the grandparents' verified motion to intervene and modify custody, they asserted the following allegations concerning the fitness of the parents:

> 13. The mother has changed residences 4 times since the entry of the previous order . . . .
>
> 14. The mother has also changed jobs 5 times since the entry of the previous order . . . .
>
> 15. When the Plaintiff-mother has custody of the minor child, the child is not transported to school in Rowan County and thereby misses school every other week[.]
>
> 16. The Plaintiff and Defendant have been served with truancy papers related to the child's repeated and extended absences from school and have a hearing set . . . .
>
> 17. The minor child has expressed fear and "hate" for her mother, and has exhibited symptoms consistent with emotional distress, including screaming "don't hit me" in

> the middle of the night, wetting her pants, and worrying about not getting enough to eat at her mothers.
>
> 18. The Defendant-father has pending four sexual abuse charges in Rowan County and upon information and belief, faces 25 years of possible jail time.
>
> 19. The Father is unemployed, and upon information and belief has not had a verified income source for many years, does not have a valid driver's license, does not have a reliable, registered or insured vehicle, and doesn't use a seatbelt [for] the child when transporting the child.
>
> 20. The parents have otherwise failed to provide for the best interest of the child in ways to be proven at trial.
>
> 21. The minor child has been substantially affected by the Plaintiff's and Defendant's inability to safely care for their minor child.
>
> 22. The parents' inability and/or unwillingness to properly care for their child arises to the level of abuse and neglect, and abrogates their constitutional right to parent their child by failing to provide for the best interest of the child.

¶ 15 Together these allegations are sufficient, at the pleading stage, to confer standing on the grandparents. They sufficiently allege that the child is at substantial risk of harm, including neglect and abuse, inability to attend school, and failure to get enough to eat. We therefore reject the parents' standing argument and turn to the merits of the grandparents' motion to intervene and modify custody.

II. Trial court's findings concerning constitutional rights of parents

¶ 16 The parents next argue that the trial court's conclusion that they acted

inconsistent with their constitutionally protected parental status was not sufficiently supported by the court's findings of fact.

¶ 17 When reviewing a child custody determination, this Court examines whether the findings of fact are supported by substantial evidence and, in turn, whether those findings of fact support the trial court's conclusions of law. *Wellons*, 229 N.C. App. at 173, 748 S.E.2d at 716–17. The trial court's "findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings." *Mastny v. Mastny*, 259 N.C. App. 572, 574, 816 S.E.2d 241, 244 (2018).

¶ 18 As noted above, the standard for demonstrating acts inconsistent with a parent's constitutionally protected status is a high one. The parents' conduct must be "so egregious" that it forfeits this constitutional right. *Wellons*, 229 N.C. App. at 176, 748 S.E.2d at 718. There is "no bright line" rule to determine when a parent's conduct amounts to action inconsistent with their parental status. *Boseman v. Jarrell*, 364 N.C. 537, 549–50, 704 S.E.2d 494, 503 (2010). It is a "fact-sensitive inquiry" requiring examination of each parent's circumstance. *Id.* "[U]nfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status as parents enjoy." *Wilson v. Sweely*, 278 N.C. App. 149, 2021-NCCOA-293, ¶ 11. "Parental unfitness includes (i) the inability of a parent to provide safe and suitable housing; (ii) the lack of any contribution of child support by a parent; (iii) a lack of

involvement by a parent in the upbringing of the child; and (iv) any situation where a child is at substantial risk of harm from the parents." *Id.*

¶ 19 Here, the trial court made a series of findings concerning each parent's unfitness. We will examine those findings individually and then examine the trial court's corresponding finding of their cumulative impact.

¶ 20 First, although the child had not yet reached the age of compulsory school attendance, the trial court found that the parents chose to enroll the child in school and that her grades declined throughout the school year. The court then found that the child was absent for more than a month and a half of the school year.

¶ 21 Proper care and supervision of a child includes providing a basic education, and a parent's deliberate refusal to provide this education is neglect, which is conduct inconsistent with parental status. *In re J.C.M.J.C.*, 268 N.C. App. 47, 59, 834 S.E.2d 670, 678 (2019). But there is no finding that the mother deliberately refused to educate her child, nor is there a finding that the repeated absences and tardiness placed the child at a substantial risk of harm. Instead, the court found that the mother, who was primarily responsible for transporting the child to school, had to drive more than one hour each way to take the child to school and suffered car problems. The trial court did not find that the mother's failure to take the child to school was volitional, as opposed to the result of an unexpected socioeconomic circumstance because she lacked a working car. Likewise, the court did not find that

the child's difficulty in school resulted from the parents' failure to ensure her regular attendance. Without those findings, the child's absences from school are insufficient, standing alone, to conclude that "the natural parent has forfeited his or her constitutionally protected status." *Owenby v. Young*, 357 N.C. 142, 148, 579 S.E.2d 264, 268 (2003).

¶ 22 Similarly, the trial court found that the mother lived with the child in four different locations during her life; that the mother also lived with her own mother and her brother, both of whom are disabled; that her current residence had only two bedrooms; and that there were pictures on social media showing the child in a bedroom with no sheets or pillowcases on the bed, and pictures of the child appearing with "dirty fingernails and an unkempt condition."

¶ 23 But again, the trial court did not make any findings that any of these circumstances, while unquestionably difficult for any child, are so unsafe or unsuitable for a child of that age that it causes substantial harm and thus amounts to unfitness. As this Court explained in *Dunn v. Covington*, "socioeconomic factors such as the quality of a parent's residence, job history, or other aspects of their financial situation would be relevant to the determination of whose custody is in the best interest of the child," but "those factors have no bearing on the question of fitness." 272 N.C. App. 252, 265, 846 S.E.2d 557, 567 (2020).

¶ 24 The court also found that the mother posted pictures of the child with an ex-

boyfriend and a current boyfriend and notes that the mother did not provide an address for her current boyfriend except that he "resides in Charlotte." But, without additional findings, these facts about the mother's relationships do not suggest that the child is not receiving proper care or support or is at risk of any harm.

¶ 25 The same is true of the findings concerning the father. The trial court found that the father has health problems, inconsistent employment, could not produce evidence of income, and that the child would stay with the father in a mobile home that was heated by a woodstove that burned coal. Under *Dunn*, none of these socioeconomic factors suggest unfitness or conduct inconsistent with the father's constitutionally protected status without additional findings that these factors result in substantial harm to the child. *Id.* at 265, 846 S.E.2d at 568.

¶ 26 The trial court also found that the intervenor-grandmother once saw the father driving the child "without her seat belt in a vehicle without working tail lights." A parent's *willful* decision to put the child at risk, such as driving the child without a seat belt or in a car without tail lights, certainly could be a factor demonstrating unfitness or conduct inconsistent with the father's constitutionally protected status. But there is no finding of willfulness, only a finding about what the grandmother once observed. Without that finding, this single incident, standing alone, is not sufficient to show that "the natural parent has forfeited his or her constitutionally protected status." *Owenby*, 357 N.C. at 148, 579 S.E.2d at 268.

¶ 27 The trial court also found that the father "has pending sex offense charges" and incorporated by reference an exhibit not included in the record on appeal. As with the other findings, the existence of an unproven sex offense charge, without any details concerning the charge, is not sufficient on its own to demonstrate unfitness or forfeiture of a parent's constitutionally protected status.

¶ 28 Finally, after setting out all these facts, the trial court found that "the parents' conduct viewed cumulatively, and their past misconduct impacts the present and could impact the future of" the child. But the trial court did not make a finding concerning *how* that conduct impacts or could impact the child—indeed, the finding does not even indicate the impact is detrimental. Thus, this finding is not the same as one finding that a parent's conduct, cumulatively, demonstrated that the child was not receiving proper care and support or was exposed to substantial harm.

¶ 29 In sum, we hold that the trial court's findings are insufficient to support the conclusion that either parent was unfit or acted inconsistent with the parent's constitutionally protected status. Our holding does not suggest that the record would not support the necessary findings. We hold only that those findings are not present in the challenged order. We therefore vacate the order and remand for further proceedings. On remand, the trial court may enter a new order on the existing record or conduct any further proceedings the court deems necessary in the interests of justice. Because we vacate the challenged order, we need not address the parents'

challenge to the visitation award, which may be mooted by the trial court's decision on remand.

Conclusion

¶ 30 We vacate the trial court's order and remand for further proceedings.

VACATED AND REMANDED.

Judges ZACHARY and COLLINS concur.

Report per Rule 30(e).