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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-120

No. COA21-340

Filed 15 February 2022

New Hanover County, No. 17 CVD 160

NIGEL WILLIAMS, Plaintiff,

v.

LATORIA JOHNSON, Defendant.

Appeal by Defendant from order entered 14 January 2021 by Judge Jeffrey Evan Noecker in New Hanover County District Court. Heard in the Court of Appeals 12 January 2022.

*Cordell Law, LLP, by Brittany Hart, for the Plaintiff-Appellant.*

*No brief filed for the Defendant.*

GRIFFIN, Judge.

¶ 1 Plaintiff Nigel Williams (“Father”) appeals from the trial court’s order granting legal and physical custody of his minor child, K.W., to K.W.’s non-party caretaker. Father contends the trial court erred by (1) granting custody of K.W. to an individual who was not a party to the case; (2) finding Father had acted inconsistent with his right to parent; (3) ending the hearing before Father finished presenting evidence; and (4) abdicating its discretionary authority to the non-party caretaker. We hold

the trial court erred by granting custody of K.W. to a non-party to this action. We vacate and remand for a new custody hearing.

### **I. Factual and Procedural Background**

¶ 2 Father and Defendant Latoria Johnson (“Mother”) married on 1 May 2015. On 17 February 2016, K.W. was born to the marriage. Mother and Father separated on 30 April 2016. Father initiated proceedings for custody of K.W. on 17 January 2017 by filing a complaint for child custody.

¶ 3 On 28 April 2017, the trial court entered a custody order granting joint legal custody of K.W. to Mother and Father, primary physical custody to Mother, and secondary physical custody by visitation to Father. On 11 August 2020, the trial court entered an order modifying custody of K.W. in response to an *ex parte* motion by Mother, but then vacated the order on 1 September 2020. As of 1 September 2020, custody of K.W. was as established in the 28 April order, but open to further modification pending the results of court-ordered mediation between the parties.

¶ 4 On 15 October 2020, Father filed a motion to modify custody and motion for contempt. The trial court conducted an online hearing on the matter through Webex, which lasted a total of thirty-seven minutes. Linda Key testified during the hearing that she had been K.W.’s caretaker for nearly three years, but Ms. Key never intervened in the case, pleaded any claim for custody, or otherwise joined the case as a party. Father tried to present an additional witness after Ms. Key, but the trial

court refused to hear testimony from Father’s second witness and ended the hearing. On 14 January 2021, the trial court entered an order (the “2021 Order”) finding that both parents had acted inconsistently with their constitutional right to parent; granting legal and physical custody of K.W. to Ms. Key; and allowing custody of K.W. to be placed with Mother or Father in the future if Ms. Key determines it to be appropriate. Father timely appeals.

## II. Analysis

¶ 5 Father makes four arguments on appeal: (1) the trial court erred by granting custody of K.W. to a non-party; (2) the trial court erred by finding Father acted inconsistent with his constitutional right to parent; (3) the trial court erred by ending the custody hearing prematurely; and (4) the trial court erred by allowing Ms. Key to make future custody determinations.

¶ 6 We hold the trial court abused its discretion and erred as a matter of law by granting custody of K.W. to Ms. Key because Ms. Key was not a party to the present action.

¶ 7 “Our trial courts are vested with broad discretion in child custody matters.” *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (citation omitted). “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) (citation omitted). “A [trial] court by definition abuses its

discretion when it makes an error of law.” *In re A.F.*, 231 N.C. App. 348, 352, 752 S.E.2d 245, 248 (2013) (quoting *Koon v. U.S.*, 518 U.S. 81, 100 (1996)). “[T]he extent to which the trial court exercised its discretion on the basis of an incorrect understanding of the applicable law raises an issue of law subject to *de novo* review on appeal.” *Id.* at 352, S.E.2d at 249. (citation omitted).

¶ 8

“In proceedings involving the custody and support of a minor child, the trial judge is authorized to determine the *party or parties* to whom custody of the child shall be awarded[.]” *Appert v. Appert*, 80 N.C. App. 27, 34, 341 S.E.2d 342, 346 (1986) (emphasis added) (citations omitted); N.C. Gen. Stat. § 50-13.1(a) (2019) (“Any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided.”). “In awarding custody to a person who is not a party to the action or proceeding, it would be proper and advisable for that person to be made a party to the action or proceeding to the end that such party would be subject to orders of the court.” *In re Custody of Branch*, 16 N.C. App. 413, 415, 192 S.E.2d 43, 45 (1972).

¶ 9

Our Court has made a non-party to a child custody action into a party for the first time on appeal. *Id.* (“We have held, however, that [a person may be made a party to a custody proceeding] even after judgment and by the appellate court when the case is appealed[.]”). However, nonparties who are granted custody rights are

typically made parties for the first time on appeal where (1) that non-party has formally established a significant relationship to the child, *Petersen v. Rogers*, 337 N.C. 397, 406, 445 S.E.2d 901, 906 (1994) (“N.C.G.S. § 50–13.1 was not intended to confer upon strangers the right to bring custody or visitation actions against parents of children unrelated to such strangers.”), and (2) that non-party, or an actual party, makes some affirmative showing that the non-party would like to be involved in the action, see *Roybal v. Raulli*, 266 N.C. App. 318, 330, 832 S.E.2d 202, 210 (2019) (holding at appellate level that the stepmother was a “*de facto*” party to the case where the father’s complaint asked that the stepmother receive custody and the trial court’s order granted the stepmother contact rights with the father’s child); *Sloan v. Sloan*, 164 N.C. App. 190, 194, 595 S.E.2d 228, 231 (2004) (holding motion to intervene on appeal was properly granted where intervenors “were initially awarded temporary custody and subsequently awarded permanent visitation rights” by trial court’s underlying order); *Brandon v. Brandon*, 10 N.C. App. 457, 462, 179 S.E.2d 177, 180 (1971) (upholding grant of custody to grandparents who were not initially parties to trial court proceedings, but filed motions to become parties at the appellate level).

¶ 10 During the custody hearing in this case, Father testified that Mother has not taken care of K.W., and Mother left K.W. in the care of Ms. Key for nearly three years. Ms. Key is the godmother of Mother’s husband, and is not otherwise related to K.W.

Ms. Key was involved in this action as a witness on behalf of Father. She testified that she had taken care of K.W. for the “past two and a half, almost three years” because Mother had moved to Atlanta, Georgia, and “nobody really knows where [Mother] is.” Ms. Key explained to the court that K.W. had been doing well in her and her husband’s care, that they enrolled K.W. in school and other developmental services, and that they provided for K.W. financially.

¶ 11           However, nothing in the Record on appeal shows Ms. Key was a party to this action or filed any motion to intervene or otherwise join as a party. Throughout all custody proceedings prior to the present action and the entirety of the thirty-seven-minute-long hearing on Father’s present motion for custody, no one requested that Ms. Key be given custody of K.W. Ms. Key has not joined this action on appeal to defend the trial court’s grant of custody to her. We find it proper and advisable to remand this matter to the trial court:

While the court upon proper findings and conclusions, can award the custody of a minor child to any person, agency, or institution as will best promote the interest and welfare of the child, under the circumstances of this case, where the court awarded custody of the child to [an individual] who is not a party to the proceeding, we think the proceeding should be remanded with directions that the trial court issue the necessary notices and orders to make [the individual] a party to this action to the end that the court has effective jurisdiction over her person.

*In re Edwards*, 25 N.C. App. 608, 611, 214 S.E.2d 215, 217 (1975) (citations omitted).

¶ 12

We must vacate the 2021 Order and remand to the trial court. Because we vacate and remand on this ground, we decline to address Father's additional arguments at this time. We remind the trial court to allow each party to present evidence regarding the best interest of the minor and to retain the trial court's discretion regarding a party's ability to visit with and/or have custody of a minor. It appears from the Record and transcript of the trial court's virtual hearing that the court may have made its decision summarily following testimony from Ms. Key. Ms. Key being properly added to this case as a party would position each party in a significantly different posture. We therefore vacate and remand to the trial court for a new custody hearing.

### **III. Conclusion**

¶ 13

We vacate the 2021 Order and remand to the trial court for a new custody hearing. On remand, the trial court may add additional parties to the action and rehear all relevant evidence as it sees fit.

VACATED AND REMANDED.

Judges MURPHY and COLLINS concur.

Report per Rule 30(e).