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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-237

No. COA21-604

Filed 5 April 2022

Sampson County, No. 15 CVD 266

CORIEKA JOHNSON NEWTON (now BOYKIN), Plaintiff,

v.

CHAUNCEY L. NEWTON, Defendant.

Appeal by Plaintiff from order entered 18 May 2021 by Judge William B. Sutton, Jr., in Sampson County District Court. Heard in the Court of Appeals 8 March 2022.

Gregory T. Griffin for plaintiff-appellant.

No appellee brief filed.

MURPHY, Judge.

¶ 1 When a trial court's custody order does not determine all the issues, the custody order is temporary and therefore interlocutory. Here, the trial court's custody order is temporary because it does not determine all the issues and orders further evidence to be presented before making a final disposition. As such, the temporary custody order is interlocutory, and we must dismiss the appeal for lack of jurisdiction.

BACKGROUND

¶ 2 Chauncey L. Newton ("Father") and Corieka Johnson Boykin ("Mother") were married on 13 July 2003. Mother and Father separated on 1 January 2014. Mother and Father have two children together. On 12 March 2015, Mother and Father executed a *Confession of Judgment*. The *Confession of Judgment* resolved, *inter alia*, custody of the two minor children, granting primary custody to Mother and secondary custody and visitation to Father.

¶ 3 On 21 October 2017, Father physically assaulted Mother in a Bojangles in the presence of the minor children. Father was subsequently found guilty of assault on a female and was placed on supervised probation. A *Domestic Violence Order of Protection* was issued against Father, prohibiting him from contacting Mother or the minor children for a period of one year.

¶ 4 In response to the assault, Mother filed a motion and request for an *ex parte* order, seeking exclusive custody of the minor children. In an *Order* filed 21 December 2017 ("December 2017 Order"), the trial court concluded there was a pattern of abuse by Father against Mother and the minor children, Father acted in a manner inconsistent with his constitutional rights as a natural parent, and Father was "not a fit and proper person to exercise any custody and/or visitation with the minor children." Based on these conclusions, the exclusive care, custody, and control of the minor children was granted to Mother, and Father's rights of secondary joint custody and visitation were terminated.

¶ 5 On 11 January 2019, Father attempted to see one of the minor children at their school in violation of the December 2017 Order. Father was held in contempt and ordered to serve thirty days in the Sampson County Jail. Twenty-nine days of this sentence were suspended so long as Father did not further violate the December 2017 Order.

¶ 6 On 10 July 2020, Mother filed petitions to have Father's parental rights terminated. Father subsequently filed a *Motion for Modification of Child Custody* on 21 July 2020, seeking joint legal and physical care, custody, and control of the minor children; and, in the alternative, "substantial visitation with the minor children as to preserve his relationship with [them]." A hearing on the pending petition to terminate parental rights and the pending motion to modify child custody was held on 18 March 2021.

¶ 7 During the hearing, the trial court concluded no grounds existed for the termination of Father's parental rights.[1] Further, in its *Temporary Order of Child Custody*, filed 18 May 2021 ("May 2021 Order"), the trial court made the following relevant findings of fact:

> 17. That the [December 2017] Order outlined that as a condition prior to the court considering any [m]otion in the [c]ause filed by [Father] that [Father] shall be required to comply with certain requirements and complete all treatment that may be recommended for [Father] to

[1] This conclusion is not challenged on appeal, and we therefore do not address it.

complete before returning to [c]ourt.

18. That since the entry of the December 2017 Order there has been a substantial and material change in circumstances warranting a modification of the previous orders of this [c]ourt in that:

> a. [Father] completed the INSIGHT Batterer Intervention Program with U-Care which included 26 sessions of one to one and a half hours each;
>
> b. [Father] completed parenting classes with Family First Support Center;
>
> c. [Father] completed outpatient substance abuse services at Family First Support Center;
>
> d. [Father] submitted to numerous drug screens which were all negative;
>
> e. [Father] completed a psychological evaluation which did not diagnose [Father] with any particular mental health disorder;
>
> f. [Father] has shown remorse for his actions in 2017; and
>
> g. [Father] has not engaged in any additional acts of domestic violence or criminal activity.

. . . .

30. That it is in the best interest of the minor children for [Mother] to continue to have the primary care, custody, and control of the minor children.

31. That it is not in the best interests of the minor children for [Father] to have regular visitation with the minor children at this time.

32. That it is in the best interests of the minor children for

> [Father] and [the] minor children [to] participate in family therapy together to improve their relationship *before further visitations can take place.*

(Emphasis added). The May 2021 Order also made the following relevant decrees:

> 4. That [Father] shall continue to stay away from the minor children wherever they may be except . . . as set forth [in the May 2021 Order].
>
> 5. That [Father] may contact the minor children directly and [Mother] shall provide to [Father], by and through legal counsel, contact information for the minor children including but not limited to cellular phone numbers, emails, or other forms of electronic communication to facilitate [Father's] ability to contact the minor children directly.
>
> 6. That the parties are hereby ordered to take the necessary steps to facilitate the minor children and [Father] beginning family therapy together within thirty (30) days.
>
> . . . .
>
> 10. That it is the expectation of this [c]ourt that family therapy shall be ongoing and that [the therapist] will provide a report to this [c]ourt after she is able to adequately assess the situation and make appropriate recommendations to this [c]ourt.
>
> 11. That it is the desire and intent of this [c]ourt to allow visitations between the minor children and [Father] and the purpose of family therapy is to facilitate this goal.
>
> 12. That this [May 2021] Order is temporary.

Mother appeals from the May 2021 Order.

ANALYSIS

¶ 8 Mother's appeal, in addition to challenging the trial court's substantive rulings, asserts that "[a]lthough the trial court expressed in the [May 2021] Order that 'this order is temporary,' it was in fact a permanent order subject to an immediate appeal." As explained below, we disagree. Since we conclude that this Court lacks jurisdiction to hear Mother's appeal from an interlocutory order, we do not reach the merits of her claims and dismiss the appeal.

¶ 9 "An interlocutory order is one that does not determine the issues, but directs some further proceeding preliminary to a final decree." *Brewer v. Brewer*, 139 N.C. App. 222, 227, 533 S.E.2d 541, 546 (2000). "There is, in general, no right of immediate appeal from interlocutory orders." *Sood v. Sood*, 222 N.C. App. 807, 808, 732 S.E.2d 603, 606 (marks and citation omitted), *disc. rev. denied, appeal dismissed*, 366 N.C. 417, 735 S.E.2d 336 (2012).

> Nevertheless, an interlocutory order is immediately appealable if (1) the order is final as to some claims or parties, and the trial court certifies pursuant to N.C.G.S. § 1A-1, Rule 54(b) that there is no just reason to delay the appeal, or (2) the order deprives the appellant of a substantial right that would be lost unless immediately reviewed. The burden of showing that one of these exceptions applies rests on the appellant. If the appellant fails to meet that burden, we are required to dismiss that party's appeal on jurisdictional grounds.

Id. at 808-09, 732 S.E.2d at 606 (citations omitted).

¶ 10 "Custody orders may either be 'temporary' or 'permanent.'" *Woodring v.*

Woodring, 227 N.C. App. 638, 642, 745 S.E.2d 13, 17 (2013). A temporary custody order is "interlocutory and does not affect any substantial right which cannot be protected by timely appeal from the trial court's ultimate disposition on the merits." *Brewer*, 139 N.C. App. at 227, 533 S.E.2d at 546 (marks omitted).

¶ 11 "[T]he trial court's designation of an order as 'temporary' or 'permanent' is not binding on an appellate court. Instead, whether an order is temporary or permanent in nature is a question of law, reviewed on appeal *de novo*." *File v. File*, 195 N.C. App. 562, 567, 673 S.E.2d 405, 409 (2009). "[A]n order is temporary if either (1) it is entered without prejudice to either party[;] (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or *(3) the order does not determine all the issues*." *Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003) (emphasis added). "If the order does not meet any of these criteria, it is permanent." *Woodring*, 227 N.C. App. at 643, 745 S.E.2d at 18.

¶ 12 The May 2021 Order does not determine all the issues. "Where this Court has determined that a child custody order is temporary because it did not determine all the issues, the remaining, undecided issues were child custody matters such as legal custody, ongoing holiday schedules, and the scope of visitation for the noncustodial parent." *Kanellos v. Kanellos*, 251 N.C. App. 149, 153, 795 S.E.2d 225, 229 (2016) (marks and citations omitted); *see e.g., Woodring*, 227 N.C. App. at 644, 745 S.E.2d at

18 (concluding a custody order was temporary because it did not address a parent's ongoing visitation and did not explicitly address legal custody); *Sood*, 222 N.C. App. at 809. 732 S.E.2d at 606 (reasoning a custody order was temporary partly because, although it set out a custodial holiday schedule for a certain time period, it did not resolve holidays for the indefinite future); *Simmons v. Arriola*, 160 N.C. App. 671, 675, 586 S.E.2d 809, 811 (2003) (holding a custody order was temporary where the trial court failed to specify visitation periods for the noncustodial parent). In contrast, we have defined a permanent custody order as one that determines all the issues and "establishes a party's present right to custody of a child [as well as] that party's right to retain custody *indefinitely*." *Regan v. Smith*, 131 N.C. App. 851, 852, 509 S.E.2d 452, 454 (1998) (emphasis added).

¶ 13 The May 2021 Order decrees the following:

> IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED as follows:
>
> . . . .
>
> 10. That it is the expectation of this [c]ourt that family therapy shall be ongoing and that [the therapist] will provide a report to this [c]ourt after she is able to adequately assess the situation and make appropriate recommendations to this [c]ourt.
>
> 11. That it is the desire and intent of this [c]ourt to allow visitations between the minor children and [Father] and the purpose of family therapy is to facilitate this goal.
>
> 12. That this Order is temporary.

The trial court also stated the following at the conclusion of the hearing:

> THE COURT: . . . I'm going to find that there is a material change of circumstances in the benefit of the children, so [Father] can support his children if he was asked to. He's capable of doing that. He says he wants to. Visitation though is going to be -- have to be baby steps if that. We're not even to the point where we crawl at this time. . . . Before -- and this is going to be a temporary order. It can't be anything but. It's like we're starting from scratch almost. I'm not going to order any visitation *at this time*. There's got to be some counseling, some family counseling, therapy, and I'd want to see a therapist report saying it was the best interest of the children that they have visitation with [Father] *before I make that determination*, because I just don't -- the point we're at right now is that it's going to be really hard for you to overcome this, [Father], and it's your own fault.
>
> . . . .
>
> [FATHER'S COUNSEL]: Are you ordering visits, family therapy with [Father] and the children?
>
> THE COURT: Yeah, they need to all be in some sort of therapy, and I -- I would let the therapist handle that as far as do they maybe get together, but I don't -- I will review this or any judge can if we have a therapist who says it's in the best interest of the children that they have visitation with [Father].
>
> . . . .
>
> THE COURT: Yes, I'm ordering the parties to all cooperate with doing that and that we have a -- I don't know how long a treatment program would be or a therapy program would be, but we -- *I want something like that done before I make any further determinations*.
>
> [FATHER'S COUNSEL]: And you want it with . . . the goal

> is reuniting the relationship with [Father]?
>
> THE COURT: That's my goal.
>
> . . . .
>
> [FATHER'S COUNSEL]: Yeah, are you changing anything about the legal custody. His right to --
>
> THE COURT: I -- since I'm not blocking the possibility of visitation, I am going to find that [Father], *upon submission of some further information from a qualified therapist*, I would reconsider --
>
> [FATHER'S COUNSEL]: Okay.
>
> THE COURT: -- visitation.

(Emphases added).

¶ 14 The May 2021 Order does not determine all the issues because the trial court's order and the noncontradictory statements in open court indicate it is waiting for further evidence to be presented before making a final disposition. *See State v. Johnson*, 246 N.C. App. 677, 684, 783 S.E.2d 753, 759 (2016) ("[I]f there is some conflict between oral findings and ones that are reduced to writing, the written order controls for purposes of appeal."); *see also Cox v. Cox*, 133 N.C. App. 221, 232-33, 515 S.E.2d 61, 69 (1999) (considering the trial court's statements at a hearing in determining whether the custody order was temporary). The May 2021 Order does not establish Mother's right to retain custody indefinitely. *See Regan*, 131 N.C. App. at 852, 509 S.E.2d at 454. Instead, it leaves undecided whether visitation would be

in the best interests of the minor children until the trial court receives and considers a recommendation from the court appointed therapist.

¶ 15 The trial court's May 2021 Order is a temporary order that "does not determine all the issues." *Senner*, 161 N.C. App. at 81, 587 S.E.2d at 677. As temporary custody orders are "interlocutory and do[] not affect any substantial right which cannot be protected by timely appeal from the trial court's ultimate disposition on the merits[,]" *Brewer*, 139 N.C. App. at 227, 533 S.E.2d at 546 (marks omitted), we do not have jurisdiction to hear the appeal and must dismiss the appeal for lack of jurisdiction. *See File*, 195 N.C. App. at 569, 673 S.E.2d at 410-11 (dismissing the respondent-mother's appeal for lack of jurisdiction when the trial court's custody order was considered a temporary order). Further, Mother did not meet her burden of showing that an exception applies to this interlocutory order that would make it immediately reviewable. *See Sood,* 222 N.C. App. at 808-09, 732 S.E.2d at 606.

CONCLUSION

¶ 16 This Court lacks jurisdiction to hear Mother's appeal from the interlocutory temporary custody order. We must dismiss the appeal for lack of jurisdiction.

DISMISSED.

Judges INMAN and ARROWOOD concur.

Report per Rule 30(e).