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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-578

No. COA21-201

Filed 16 August 2022

Cleveland County, No. 17-CVD-1379

DAVID SALTER, Plaintiff,

v.

AMANDA SALTER, Defendant.

Appeal by defendant from order entered 5 November 2020 by Judge Jeannette R. Reeves in Cleveland County District Court. Heard in the Court of Appeals 16 November 2021.

McIlveen Family Law Firm, by Sean F. McIlveen & Chelsea M. Chapman, for plaintiff-appellee.

Rech Law, P.C., by Kate A. Rech, for defendant-appellant.

GORE, Judge.

¶ 1 Defendant Amanda Salter appeals from the trial court's Order modifying child custody, finding defendant in contempt, and awarding attorney's fees to plaintiff David Salter. For the following reasons we affirm the trial court's order.

I. Background

¶ 2 Plaintiff and defendant were married on or about 17 December 2005. Two children were born of the marriage on 6 May 2003 and 31 December 2006.[1] The parties' date of separation is disputed; however, they were granted Judgment for Absolute Divorce on 20 December 2018. On 1 August 2017, plaintiff filed a claim against defendant alleging claims for ex parte custody and child support, post separation support/alimony, and attorney's fees. On 22 August 2017, the trial court entered a handwritten Temporary Memorandum of Judgment/Order establishing that the parties shall share legal custody of the minor children and that plaintiff shall have primary physical custody with defendant having secondary physical custody. After receiving an extension of time to file her answer, defendant filed an Answer and Counterclaim on 12 October 2017. In her counterclaim against plaintiff, defendant brought claims for child custody, child support, and attorney's fees.

¶ 3 Following a hearing on 13 November 2017, the trial court entered a subsequent Temporary Order on 14 December 2017. The Temporary Order established that defendant shall pay plaintiff child support and that defendant shall maintain health and dental insurance for and on behalf of plaintiff and the minor children.

¶ 4 On 14 March 2018, the trial court entered an Order Approving Parenting Agreement ("2018 Order") which incorporated a parenting agreement reached by the

[1] This appeal pertains only to custody of the youngest child.

parties. The parenting agreement established that the younger minor child will reside in the shared care and residence of both parents on a two-week rotating schedule. The parenting agreement also provided for joint legal custody and decision-making authority and established that the parties agreed that neither party will share the bedroom overnight with anyone, not related by blood or marriage, while either minor children stayed with them.

¶ 5 Plaintiff filed a motion on 16 December 2019 moving to modify child custody due to a substantial change of circumstances, to have defendant held in contempt for violating the parenting agreement's provision pertaining to overnight dating partners, and moving for attorney's fees. The alleged change in circumstances include that defendant had moved several times since entry of the parenting agreement, that defendant was currently living seventy-two miles from the minor child's school, that the minor child was frequently tardy or absent from school when staying with defendant, defendant does not ensure the minor child completes her homework, defendant has lived with at least three romantic partners since the parenting agreement was entered, the minor child is in counseling due to self-harm and defendant does not participate in her counseling, and that defendant is behind on child support and has not maintained health insurance for the minor child. Plaintiff sought temporary and permanent custody of the minor child. That same day the trial court issued a Show Cause Order ordering defendant to appear before the court and

show cause why she should not be found in willful contempt of court. A subsequent Temporary Order was entered on 17 July 2020, which altered the parties' shared physical custody schedule. On 18 August 2020, defendant filed her own Motion to Modify Child Custody.

¶ 6 A hearing was held on both parties' motions on 19 and 20 August 2020. Following the hearing, and prior to the entry of the final order, the trial court entered in open court an order allowing plaintiff to enroll the minor child in school. The trial court entered a Final Order on 5 November 2020. The order maintained joint legal custody between the parties, granted plaintiff primary physical custody of the minor child, and secondary physical custody with defendant. The order also established a custody schedule for defendant, found defendant was in willful contempt for violations of the previous order, and awarded plaintiff $500.00 in attorney's fees.

¶ 7 Defendant filed written notice of appeal on 30 November 2020.

II. Discussion

¶ 8 On appeal, defendant argues that the trial court erred in finding that there had been a substantial change in circumstances affecting the welfare of the minor child without first making findings regarding the circumstances existing at the time of the entry of the 2018 Order and entering two orders following the 2018 Order without first finding that there was a substantial change in circumstances affecting the welfare of the minor child. Defendant also argues that the trial court erred in

finding her in contempt of court without providing her notice of whether she was being held in civil or criminal contempt.

A. Modification of Child Custody

¶ 9 "It is well established in this jurisdiction that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a substantial change of circumstances affecting the welfare of the child warrants a change in custody." *Shipman v. Shipman*, 357 N.C. 471, 473, 586 S.E.2d 250, 253 (2003) (cleaned up). The substantial change in circumstances may be either adverse or beneficial to the welfare of the child. *See Pulliam v. Smith*, 348 N.C. 616, 620, 501 S.E.2d 898, 900 (1998).

¶ 10 "When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate court must examine the trial court's findings of fact to determine whether they are supported by substantial evidence." *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253 (citing *Pulliam*, 348 N.C. at 625, 501 S.E.2d at 903). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citation omitted).

¶ 11 "In addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, this Court must determine if the trial court's factual findings support its conclusions of law." *Id.* at 475, 586 S.E.2d at 254 (citation omitted).

> If we determine that the trial court has properly concluded that the facts show that substantial change of circumstances has affected the welfare of the minor child and that modification was in the child's best interests, we will defer to the trial court's judgment and not disturb its decision to modify an existing custody agreement.

Id.

¶ 12 "Upon determining that substantial chance in circumstances affecting the welfare of the minor child occurred, a trial court must then determine whether modification would serve to promote the child's best interests." *Id.* at 481, 586 S.E.2d at 257.

¶ 13 Additionally, if the trial court is asked to modify a child custody order which was entered with the parties' consent and contains no findings of fact, the trial court is "required to make appropriate findings in order to provide a base line before it can determine if there had been a substantial and material change in circumstances" which would warrant a modification of child custody. *Henderson v. Wittig*, 2021-NCCOA-296, ¶ 8 (quoting *Balawejder v. Balawejder*, 216 N.C. App. 301, 309, 721 S.E.2d 679, 684 (2011)) (cleaned up). There is no minimum threshold for the number, content, or specificity of these findings. *Id.* "There only needs to be sufficient findings to establish a base line of events at the time the initial custody order was entered." *Id.* Defendant argues that the trial court failed to make findings of fact as to the circumstances existing at the time of the 2018 Order.

¶ 14 In the case *sub judice* the 2018 Order does not contain any findings of fact. In the November 2020 Order which modified child custody the trial court made several findings of fact which demonstrate there was a substantial change in circumstances that had an effect on the minor child. These findings include that in the span of three years defendant moved to three different towns to live with three different romantic partners, the minor child began cutting herself after the parties' separation, the custody battle is difficult on the minor child, during the 2018-19 and 2019-20 school years the minor child was absent for and tardy for several school days while staying with defendant, the minor child often does not turn in school work while staying with defendant, and defendant withdrew the minor child from public school and enrolled her in an online school without consulting plaintiff. All of these findings pertain to events that occurred after the 2018 Order was entered. The November 2020 Order contains no findings of fact establishing a "base line of events at the time the initial custody order was entered." *Henderson*, 2021-NCCOA-296, ¶ 8.

¶ 15 This Court's precedent is clear that it is in error for a trial court to modify a consent custody order which does not contain findings of fact without first making findings as to a base line of circumstances at the time the initial order was entered. *See Henderson*, 2021-NCCOA-296, ¶ 8; *Balawejder*, 216 N.C. App. at 309, 721 S.E.2d at 684. The trial court in the present case made no findings whatsoever as to the

circumstances at the time of the initial child custody order, thus, we must remand the matter to the trial court for further findings.

¶ 16 Defendant also argues that the trial court erred by entering the July 2020 Temporary Order and a partial order in open court immediately following the hearing on the parties' motions to modify child custody, without first concluding there had been a substantial change in circumstances that had an effect on the minor child. However, this argument was made moot by the subsequent entry of the Order on 5 November 2020. *Smithwick v. Frame*, 62 N.C. App. 387, 391, 303 S.E.2d 217, 220 (1983) ("Any objections that defendants may have had to [an intermediate temporary] order, interlocutory on its face, were made moot by the [Final] Order awarding plaintiff permanent custody of his minor child. We therefore will not consider them."). Thus, we do not consider this argument.

B. Contempt

¶ 17 Defendant also argues that the trial court erred by holding her in contempt of court without providing her notice of whether she was being held in civil or criminal contempt. The trial court found defendant in willful contempt for violating the provision of the parenting agreement pertaining to overnight romantic partners. Defendant does not argue that she violated this provision of the agreement, only that the trial court procedurally erred by finding her in contempt of court.

¶ 18 The trial court's order does not need to specify what form of contempt is being applied, the order only needs to comply with the procedures of either civil or criminal contempt. *See Tyll v. Berry*, 234 N.C. App. 96, 102-04, 758 S.E.2d 411, 415-17, *disc. rev. denied*, 367 N.C. 532, 762 S.E.2d 207 (2014).

> Civil contempt is a term applied when the proceeding is had to preserve the rights of private parties and to compel obedience to orders and decrees made for the benefit of such parties. Criminal contempt is generally applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice.

Id. at 102, 758 S.E.2d at 415 (quoting *O'Briant v. O'Briant*, 31 N.C. 432, 434, 329 S.E.2d 370, 373 (1985)).

¶ 19 Here, we can deduce that the mother was not held in civil contempt because the punishment for contempt did not include imprisonment (instead she was required to pay attorney's fees) and the contempt order did not include a way mother could purge contempt. Both are required characteristics of civil contempt. *See* N.C. Gen. Stat. §§ 5A-22 & 5A-23 (2020). Thus, defendant must have been found in criminal contempt. Further, the trial court followed the statutory procedure for plenary criminal contempt proceedings (*i.e.*, issued a show cause order and subsequently held a hearing on the matter). N.C. Gen. Stat. § 5A-15(a).

¶ 20 Therefore, we conclude that the trial court did not err in holding defendant in contempt of court without providing her notice that she was being held in criminal

contempt because it is clear from the procedure followed by the trial court the defendant was being held in criminal contempt.

III. Conclusion

¶ 21 For the foregoing reasons we affirm the trial court's finding that defendant was in willful contempt of court. We also reverse the trial court's modification of child custody and remand the matter to the trial court for further findings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges DILLON and MURPHY concur.

Report per Rule 30(e).