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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-719

No. COA22-228

Filed 1 November 2022

Surry County, No. 20 CVD 781

BARRY DEAN BODENHAMER, Plaintiff,

v.

KELLIE BROWN-BODENHAMER, Defendant.

Appeal by Defendant from order entered 15 September 2021 by Judge Marion M. Boone in Surry County District Court. Heard in the Court of Appeals 20 September 2022.

Morrow, Porter, Vermitsky and Taylor, PLLC, by John C. Vermitsky, for Plaintiff-Appellee.

J. Clark Fischer for Defendant-Appellant.

INMAN, Judge.

¶ 1 Kellie Brown-Bodenhamer ("Mother") appeals from an order of the trial court awarding joint legal custody of ten-year-old twin children to her and Barry Dean Bodenhamer ("Father"), with primary physical custody to Father. Mother's sole contention on appeal is that the trial court abused its discretion in awarding primary

physical custody to Father based in large part upon his proximity to the children's desired elementary school. After careful review of the record, we affirm the trial court.

I. FACTUAL & PROCEDURAL HISTORY

¶ 2 The record tends to show the following:

¶ 3 Mother and Father married in August 2008 and had twins in February 2012. When the children were four, the family moved to Copeland, North Carolina, where Father and Mother remodeled a cannery to be their home. The family home is less than one mile from Copeland Elementary School, but the children were enrolled at Shoals Elementary School, the school's after-school program, and "Judy's Daycare" in Copeland for supplemental care.

¶ 4 In early 2020, after one of Mother's male friends assaulted Father, Mother and Father executed a separation agreement providing both parents were fit and proper. At the same time, the children transitioned to remote learning with the onset of the COVID-19 pandemic. At the start of the 2020-2021 school year, Father hired a tutor for the children and one month later, with Mother's consent, enrolled them in Surry County Virtual Academy for more challenging courses. The children were on a week-to-week custody schedule between their parents, so both parents assisted the children in catching up on missed coursework for the program. During one weekend, Father helped the children complete 17 assignments. However, Mother has been inconsistent in supporting the children to complete their online assignments. On several

occasions, the children submitted work between 9:00 p.m. and 11:00 p.m. on school nights, and the children failed to complete two units of a project while in Mother's care. Nonetheless, the children have excelled at school.

¶ 5 Father wanted the children to attend Copeland Elementary beginning in the 2021-2022 school year, while Mother preferred Forsyth County Schools, closer to where she lives with the children's maternal grandmother in Winston-Salem. Father's parents are deceased, but Father's older sister, Candy Lowe, a retired teacher in Surry County schools, and other extended family members live on the family land in Copeland. In addition to Judy's Daycare, Father has enrolled the children in various extracurricular activities including golf and drum lessons, and Mother has secured YMCA memberships for them. Both parents are highly educated medical professionals with nursing degrees who have provided for the needs of their children, and the children love both parents. Mother and Father have difficulty communicating.

¶ 6 On 10 July 2020, Father filed a complaint for child custody of the children, alleging, among other things, that it was in the children's best interest to attend Copeland Elementary for the upcoming school year because of its proximity to the Copeland family residence. The case came on for trial on 23 March and 13 April 2021, and the trial court judge, with permission of both parents, spoke with the children in chambers. According to the children, Mother was rarely home because she was

working or with her boyfriend, and the son did not do his schoolwork during Mother's custodial periods. The trial court entered a final custody order on 15 September 2021 awarding the parties joint legal custody and Father primary physical custody. Mother appeals.

II. ANALYSIS

¶ 7 Mother argues the trial court abused its discretion in awarding Father primary physical custody of the children because it failed to make findings addressing Father's partial relocation away from Copeland Elementary in Surry County to his girlfriend's residence in Advance, North Carolina. The trial court's unchallenged findings support its conclusion, and Mother has failed to demonstrate an abuse of discretion.

A. Standard of Review

¶ 8 We review child custody orders to determine "(1) whether the challenged findings of fact are supported by substantial evidence; (2) whether the trial court's findings of fact support its conclusions of law; and (3) whether the trial court abused its discretion in fashioning the custody and visitation order." *Peters v. Pennington*, 210 N.C. App. 1, 12, 707 S.E.2d 724, 733 (2011). 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. *Everette v. Collins*, 176 N.C. App. 168, 170, 625 S.E.2d 796, 798 (2006). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Peters*, 210 N.C.

App. at 12, 707 S.E.2d at 733 (quotation marks and citation omitted). Unchallenged findings of fact are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). We will not disturb the trial court's decision in a child custody matter absent an abuse of discretion. *Everette,* 176 N.C. App. at 171, 625 S.E.2d at 798.

B. Challenged Findings

¶ 9 "[T]he trial court need not make a finding as to every fact which arises from the evidence; rather, the court need only find those facts which are material to the resolution of the dispute." *Witherow v. Witherow*, 99 N.C. App. 61, 63, 392 S.E.2d 627, 629 (1990).

¶ 10 Despite Mother's contention, the trial court explicitly considered Father's changed living arrangement in its order: "The father has a stable home and environment for the children. The children have lived at the Copeland residence for several years, when they are not at the father's girlfriend's house in Davidson County." The trial court also found, "When not in Davidson County at the father's girlfriend's home, [the children] live on a farm near father's sister's home . . . ." And these findings are supported by Father's testimony that, on average, he spent eight nights, four with his children, out of a four-week period at the family farm in Surry County as well as Ms. Lowe's testimony that Father "live[d] a majority of his time . . . with his girlfriend" in Advance. In conversation with the children, the trial

court further learned the son liked Father's girlfriend and her son.

¶ 11 Mother also challenges Finding of Fact 52 as unsupported by the evidence and contends the trial court improperly considered Ms. Lowe's opinion about the efficacy of a larger, urban school in Forsyth County. That finding provides, in relevant part:

> . . . . Candy Lowe taught at Copeland Elementary School and is very familiar with Judy's Daycare. Candy Lowe is concerned about the children attending Forsyth County Schools because children in larger cities generally do not graduate or otherwise go to school with the same children during the course of their education. However, at Copeland, the children are more likely to attend school during the course of their education with the children that they began school with.

¶ 12 This finding is supported by Ms. Lowe's lay testimony, as a retired teacher familiar with the Surry County school system and Copeland Elementary, in particular, and as Father's older sister, that: (1) Copeland is a "wonderful," "community school," where the children would have "emotional stability" by maintaining the same classmates and friends throughout their k-12 education; and (2) the children's caretaker Judy at "Judy's Daycare" was "a wonderful caregiver" with many connections to the school district and the students at Copeland. When asked what concerns Ms. Lowe would have with the children attending a school in Forsyth County, she replied "it would just depend on the type of school that it was . . . a lot of the schools that are in Winston-Salem are not necessarily the smaller community schools."

¶ 13 "[A]s the finder of fact 'it is within the trial court's discretion to determine the weight and credibility that should be given to all evidence that is presented during the trial.'" *Berry v. Berry*, 257 N.C. App. 408, 415, 809 S.E.2d 908, 913 (2018) (quoting *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994)). To the extent, if any, the trial court drew a misguided generalization about the efficacy of urban schools from Ms. Lowe's testimony, the remaining unchallenged findings of fact outlined below support the trial court's physical custody determination. *See id.* (holding sufficient evidence supports the trial court's physical custody assignment based on 170 other unchallenged findings of fact).

C. Unchallenged Findings Support Physical Custody Assignment

¶ 14 The trial court's unchallenged findings about Father's involvement in his children's education and the children's established familial and academic care in Copeland support the assignment of primary physical custody to Father:

> 13. The parties moved to Copeland when the children were four (4) years old. The father and mother remodeled a cannery at the Copeland property to be the parties' home. The Copeland home is less than half a mile from Copeland Elementary School. While the parties were living in Copeland, the children were enrolled in Shoals Elementary School. The parties utilized Shoals Elementary['s] after school program during the school year and Judy's Daycare in Copeland for the children's after-school care at other times.
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> . . . .
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> 20. The father hired Jenna Patton to tutor the

children . . . .

21. The father began researching a more challenging alternative [school] and discovered the Surry County Virtual Academy . . . . The father and children's tutor reviewed the courses and the material and believed that the Surry County Virtual Academy would be better for the children.

. . . .

23. In order for the children to be caught up with the Surry County Virtual Academy courses, the father took the children to the Copeland residence and spent an entire weekend assisting the children to complete all courses . . . .

. . . .

25. The father believes the children should begin attending Copeland Elementary School beginning in the 2021-2022 school year. The father believes it is in the children's best interest to attend school live rather than remotely.

. . . .

27. The father had, and did make, educational plans for the children that were in the children's best interest and welfare.

. . . .

29. The children enjoy attending Judy's Daycare and they have friends there. Most of the children at Judy's Daycare attend Copeland Elementary School.

30. Judy's Daycare picks up its students up [sic] from Copeland Elementary School for after school care.

31. The father has enrolled the children in extracurricular activities.

. . . .

33. The father's family lives in Copeland.

34. The father's sister, Candy Lowe, lives on family land in Copeland.

. . . .

44. The mother moved from Copeland to Winston-Salem.

. . . .

52. Candy Lowe is a retired school teacher. The children love to go to her home. The father has a good family and lives on a family compound that consists of many of the father's relatives living close by on family land . . . .

. . . .

79. . . . . The father has been passionate about the children's education and he ensures that the children's education is a priority. The father has also ensured that all of the children's school assignments are completed.

. . . .

82. The Court has considered the mother's request for joint physical custody. However, based on the evidence presented, the mother does not view the children's educational needs as a priority. The mother is rarely home to assist the children with school during the day and the mother is not at home at night when the children are in her physical custody. Accordingly, the Court finds as fact that joint physical custody is not in the children's best interest and welfare.

Because Mother has failed to demonstrate the trial court abused its discretion, we will not disturb the physical custody decision below. *See Everette,* 176 N.C. App. at 171, 625 S.E.2d at 798.

III. CONCLUSION

¶ 15 For the foregoing reasons, we hold the trial court did not abuse its discretion in awarding primary physical custody to Father and affirm the trial court's order.

AFFIRMED.

Judges DIETZ and JACKSON concur.

Report per Rule 30(e).