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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-802

No. COA22-93

Filed 6 December 2022

Iredell County, Nos. 12 CVD 2594, 16 CVD 2154

RYAN DELLINGER, Plaintiff,

v.

MISTINA ZIMMERMAN, Defendant.

Appeal by defendant from order entered 25 June 2021 by Judge Edward L. Hedrick, IV in Iredell County District Court. Heard in the Court of Appeals 2 November 2022.

Clodfelter Law, PLLC, by Christina Clodfelter for plaintiff-appellee.

Arnold & Smith, PLLC, by Ashley A. Crowder for defendant-appellant.

TYSON, Judge.

¶ 1 Mistina Zimmerman ("Defendant") appeals from the trial court's 25 June 2021 order on Ryan Dellinger's ("Plaintiff") motions: (1) for *ex parte* emergency custody; (2) to establish child support and consolidate files; (3) to dismiss; (4) to modify child support; and Defendant's motion to modify child custody. We affirm.

I. Background

¶ 2 Plaintiff and Defendant are the natural parents of two minor children, AD,

who was born 1 June 2012 and has special needs, and BD, born on 18 February 2016. Plaintiff and Defendant never married. Plaintiff and Defendant engaged in an "on and off" relationship from 2012 until 2020. Plaintiff and Defendant resided together from the time AD was born until October 2012. Plaintiff filed a complaint for child custody and child support on 25 October 2012. Defendant counterclaimed for child custody and child support on 29 November 2012.

¶ 3 Plaintiff and Defendant voluntarily bargained for and agreed upon a settlement agreement on all issues of child custody and support of AD, while both were represented by counsel, and which agreement was jointly presented to the court and entered as a consent order on 5 September 2014.

¶ 4 Plaintiff and Defendant resumed their relationship and began living together in October 2015. Plaintiff filed a motion to terminate child support on 1 October 2015. Plaintiff and Defendant again bargained for and agreed upon a subsequent settlement agreement on child support, which agreement was jointly presented to the trial court and entered as a consent order on 5 October 2015.

¶ 5 Plaintiff and Defendant's second child, BD, was born on 18 February 2016. Plaintiff and Defendant ceased cohabitating on 1 August 2016. Plaintiff filed a complaint for child custody and child support and filed a motion to consolidate the file for BD with that of Plaintiff's and Defendant's older child AD's file. Plaintiff and Defendant again voluntarily bargained for and agreed upon a further settlement

agreement concerning Plaintiff's motion to modify custody while both were represented by counsel, which agreement was jointly presented to the court and entered as a consent order on 4 November 2016.

¶ 6 Plaintiff sought *ex parte* emergency custody of both BD and AD on 29 December 2016. Plaintiff also moved to modify custody and for a psychological/psychiatric evaluation of Defendant on the same day. An *ex parte* emergency custody order was entered granting Plaintiff emergency custody of both children on 30 December 2016. Following a temporary custody hearing on 3 January 2017, the trial court entered a temporary custody order continuing Plaintiff's sole legal and physical custody of both BD and AD and providing Defendant with supervised visitation.

¶ 7 Plaintiff and Defendant voluntarily bargained for and agreed upon a memorandum of judgment while both were represented by counsel, which agreement was entered as an order by the trial court on 29 March 2017. The 29 March 2017 order: provided for Plaintiff to maintain sole legal and physical custody of both BD and AD, allowed Defendant to have additional visitation with both children every other weekend, ordered the parties to attend mediation to resolve permanent custody, and ordered Defendant to pay $40.00 per week to assist with childcare costs. The trial court entered a temporary custody order on 31 March 2017 consistent with the 29 March 2017 memorandum of judgment. The parties' mediation was held on 10 May 2017 and did not resolve the issue of permanent custody.

¶ 8 Plaintiff filed a motion for contempt and for show cause alleging Defendant had failed to comply with the 29 March 2017 order. Plaintiff also filed a motion to establish child support and to consolidate both children's files the same day. Defendant filed a motion for permanent custody on 28 March 2018. Plaintiff moved to dismiss Defendant's motion on 10 April 2018. The parties again resumed their cohabitational relationship and lived together for four months from April 2018 until July 2018. The parties separated again, then reconciled, and cohabitated from September 2019 until February 2020.

¶ 9 Plaintiff filed a motion to establish and modify child support on 28 July 2020. Defendant moved to set aside the prior orders, or alternatively, for child custody and child support on 26 August 2020. The custody motions filed for both children BD and AD were consolidated on 7 December 2020. The trial court entered an order on 25 June 2021, which denied Plaintiff's motions for contempt, child support and show cause filed 28 March 2018, and dismissed Plaintiff's motion to dismiss filed 10 April 2018 following a hearing on 12-13 May 2021. Plaintiff's 28 July 2020 motion to modify child support was allowed and Defendant was ordered to pay child support for both children in the amount of $788.41 per month beginning 1 August 2020. The trial court held Defendant's payments were in arrears from the prior 29 March 2017 order, totaling $5,199.90. Additional arrears created by the delay of the entry of this order totaled $8,672.51.

¶ 10 Defendant's total arrears were calculated to be $13,872.41. Defendant was ordered to pay $36.59 per month beginning 1 July 2021 until the arrearages were paid in full. Defendant's 28 August 2020 motion to modify child custody was allowed. Plaintiff was awarded primary physical custody with Defendant having secondary physical custody at set times. The order also decided a holiday visitation schedule. Defendant appeals.

II. Jurisdiction

¶ 11 The trial court's 25 June 2021 order in the record does not contain a certificate of service. Defendant's Notice of Appeal was entered 27 July 2021. The timeliness of Defendant's 27 July 2021 Notice of Appeal from the 25 June 2021 order requires further analysis.

¶ 12 This Court has held: "[W]here . . . there is no certificate of service in the record showing *when* appellant was served with the trial court judgment, *appellee* must show that *appellant received actual notice* of the judgment more than thirty days before filing notice of appeal in order to warrant dismissal of the appeal." *Brown v. Swarn*, 257 N.C. App. 417, 422, 810 S.E.2d 237, 240 (2018) (emphasis supplied).

¶ 13 "Under *Brown*, unless the appellee argues that the appeal is untimely, and offers proof of actual notice, we may not dismiss. *Adams v. Langdon*, 264 N.C. App. 251, 255, 826 S.E.2d 236, 239 (2019). Plaintiff has not argued Defendant's appeal is

untimely nor has he offered proof of service Defendant's actual notice of the 25 June 2021 order. Defendant's 27 July 2021 Notice of Appeal is deemed timely filed. *Id.*

¶ 14 This Court possesses appellate jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b) (2021).

III. Issues

¶ 15 Defendant argues the trial court erred: (1) by determining the temporary child custody and child support order had become a final order; (2) by not making sufficient findings of fact and conclusions of law to support the custody determination; (3) in making the custody determination; (4) in calculating the amount of child support; and, (5) by denying her Rule 60 motions.

IV. Permanent Order

¶ 16 Defendant argues the trial court erred by determining the 29 March 2017 order was a final order. We need not consider whether the 29 March 2017 order is temporary or permanent because the trial court concluded in the 25 June 2021 order and specifically found: "Since the entry of the March 2017 order there has been a substantial change in circumstances affecting the welfare of the minor children." *See Spahr v. Spahr*, 279 N.C. App. 683, 2021-NCCOA-546, ¶ 13, 863 S.E.2d 324 (2021) (unpublished) (citing *Smithwick v. Frame*, 62 N.C. App. 387, 391, 303 S.E.2d 217, 220 (1983); *Metz v. Metz*, 212 N.C. App. 494, 498, 711 S.E.2d 737, 740 (2011)). Defendant's argument is overruled.

V. Custody Determination

A. Standard of Review

¶ 17 "Under our standard of review of custody proceedings, the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." *Estroff v. Chatterjee*, 190 N.C. App. 61, 68, 660 S.E.2d 73, 77 (2008) (citation and internal quotation marks omitted). "Where, as here, the trial court finds that both parties are fit and proper to have custody, but determines that it is in the best interest of the child for one parent to have primary physical custody[,] such determination will be upheld if it is supported by competent evidence." *Eddington v. Lamb*, 260 N.C. App. 526, 531, 818 S.E.2d 350, 354 (2018) (citation and internal quotation marks omitted).

¶ 18 Competent evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (citation omitted). "Whether these findings support the trial court's conclusions of law is reviewable de novo." *Estroff*, 190 N.C. App. at 68, 660 S.E.2d at 77.

¶ 19 This Court has long held a trial court's decision on physical custody "ought not to be upset on appeal absent a clear showing of abuse of discretion." *Greer v. Greer*, 5 N.C. App. 160, 162, 167 S.E.2d 782, 783 (1969) (citation omitted). "An abuse of discretion results only where a decision is manifestly unsupported by reason or so

arbitrary that it could not have been the result of a reasoned decision." *Clark v. Sanger Clinic*, 175 N.C. App. 76, 84, 623 S.E.2d 293, 299 (2005) (citation and internal quotation marks omitted).

B. Findings of Fact

¶ 20 Defendant argues the trial court's conclusions of law to award primary physical custody of BD and AD to Plaintiff are not supported by the findings of fact. Defendant alleges the findings of fact support shared or even equal custodial schedule. Specifically, Defendant challenges the dispositional conclusion:

> 10. Plaintiff shall have primary physical custody of the minor children and Defendant shall have secondary physical custody of the minor children at the following times: Every other Thursday at 9:00 a.m. until the following Sunday at 6:30 p.m. If the minor children are school aged (Kindergarten and actually enrolled in school or older), Defendant's obligation shall be the same as Plaintiff to ensure the minor children do not have an unexcused absence from school during Defendant's custodial period. If a child or the children are not in school during Defendant's custodial period, Defendant may pick up the children from the childcare at the beginning of Defendant's period of physical custody and Defendant is not required to leave the minor children in childcare during the day.

¶ 21 The trial court found and concluded Plaintiff was to be the primary caretaker of both children. The trial court also found Plaintiff took physical, emotional, and financial care of both children. The trial court also found Defendant had not paid any child support, despite having earnings to support such payments. The trial court

further found and concluded Plaintiff is involved with the children physically and emotionally, has support systems in place to assist with the care of the children, and has a work schedule to enable him to properly care for the children.

¶ 22 Defendant failed to challenge any of the trial court's findings of fact. "Trial courts are permitted to consider an array of factors in order to determine what is in the best interest of the child, and findings supporting this conclusion may concern physical, mental[,] or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child." *Eddington v. Lamb*, 260 N.C. App. 526, 531, 818 S.E.2d 350, 354 (2018) (citations omitted). Defendant's argument is overruled.

C. Custody Determination

¶ 23 Defendant argues the trial court abused its discretion in its custody determination to award primary physical custody of BD and AD to Plaintiff. The record contains sufficient findings of fact to support the court's best interests determination. Defendant has failed to show any abuse of discretion and her argument is overruled.

VI. Child Support Calculation

¶ 24 Defendant argues the trial court erred in its calculation of child support. Defendant asserts the trial court erred by using Worksheet A, based upon Plaintiff having primary custody. Because we already held the trial court did not err in

awarding primary custody of the children to Plaintiff, Defendant's argument is overruled. Defendant next argues the trial court erred by rewarding Plaintiff's manipulation and control tactics. The trial court's findings of fact support its conclusions of law. Defendant's argument is overruled.

¶ 25 Defendant also asserts the trial court did not properly calculate Plaintiff's income due to his self-employment. Plaintiff filed an affidavit of financial standing on 16 March 2021 along with his income and expenses. The affidavit of financial standing is evidence of expenses. *See Row v. Row*, 185 N.C. App. 450, 460, 650 S.E.2d 1, 7 (2007). The trial court assessed current monthly gross income. *See Kaiser v. Kaiser*, 259 N.C. App. 499, 506, 816 S.E.2d 223, 228 (2018) (citation omitted). Defendant's argument is overruled.

VII. Defendant's Rule 60 Motion

A. Standard of Review

¶ 26 "[T]he standard of review of a trial court's denial of a Rule 60(b) motion is abuse of discretion." *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 2006) (citation omitted). A trial court's denial of a Ruel 60(b) motion is reversed "only upon a showing that its actions are manifestly unsupported by reason." *Id.* (citation and quotation marks omitted).

B. Analysis

¶ 27 Our Supreme Court has stated: "The test for whether a judgment, order or

proceeding should be modified or set aside under Rule 60(b) [] is two pronged: (1) extraordinary circumstances must exist[;] and[,] (2) there must be a showing that justice demands that relief be granted." *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 588 (1987) (citation omitted). Defendant asserts her reconciliations with Plaintiff necessitates the trial court to grant her Rule 60(b) Motion. *See* N.C. Gen. Stat. § 1A-1, Rule 60(b) (2021). As Defendant concedes, reconciliations of parents are "not unusual" and particularly here where multiple attempts of reconciliation and cohabitation for long periods. Defendant cannot meet the first prong of "extraordinary circumstances" to necessitate relief. Defendant's argument is overruled.

VIII. Conclusion

¶ 28 We affirm the trial court's order awarding Plaintiff principal physical custody of the children. We also affirm the trial court's calculation and award of child support. The trial court did not err in denying Defendant's Rule 60(b) Motion. The trial court's order is affirmed. *It is so ordered.*

AFFIRMED.

Judges MURPHY and WOOD concur.

Report per Rule 30(e).