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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-375

Filed 21 February 2023

Guilford County, No. 19 CVD 7868

HEATHER MONIQUE DUNCAN, Plaintiff,

v.

STEFANIE ROCHELLE TRANSEAU, and KENT COLEMAN DUNCAN,
Defendants.

Appeal by defendant-father Kent Coleman Duncan from order entered 3 September 2021 by Judge Brian K. Tomlin in Guilford County District Court. Heard in the Court of Appeals 29 November 2022.

No brief filed on behalf of plaintiff-appellee.

Patrick Law PLLC, by Kirsten A. Grieser, and Johnson-Parris Law, by Afi Johnson-Parris, for defendant-appellant-father Kent Coleman Duncan.

No brief filed on behalf of defendant-appellee-mother Stefanie Rochelle Transeau.

ZACHARY, Judge.

Defendant Kent Coleman Duncan (“Defendant-Father”) appeals from the trial court’s order transitioning primary legal and physical custody of the minor child

H.D.¹ from Plaintiff Heather Monique Duncan (“Plaintiff-Grandmother”) to Defendant Stefanie Rochelle Transeau (“Defendant-Mother”), and awarding Defendant-Father visitation during such times as H.D. is in the physical custody of Plaintiff-Grandmother. After careful review, we reverse and remand.

I. Background

Defendants are H.D.’s biological parents, and Plaintiff-Grandmother is H.D.’s paternal grandmother.² After H.D. was born in May 2019, Defendants’ relationship deteriorated to the point that it was “non-existent[.]” Defendant-Mother “has a history of hospitalization for mental health[.]” including two such hospitalizations in the months following H.D.’s birth. During the first few months of H.D.’s life, Plaintiff-Grandmother played an important role in his care.

On 14 August 2019, Plaintiff-Grandmother filed a complaint seeking custody of H.D., along with a motion for emergency *ex parte* temporary custody or, in the alternative, a temporary parenting arrangement. That same day, Plaintiff-Grandmother obtained an *ex parte* emergency custody order awarding her sole legal and physical custody of H.D. On 23 August 2019, Defendant-Mother responded to Plaintiff-Grandmother’s complaint by filing a motion to dismiss, together with her answer and counterclaim for temporary and permanent custody of H.D. Defendant-

¹ We use initials to protect the identity of the minor child.

² In her complaint, Plaintiff-Grandmother identifies herself as H.D.’s “maternal grandmother[.]” and this description is echoed in the trial court’s *ex parte* emergency custody order and the temporary custody order. However, she is actually H.D.’s paternal grandmother.

Father did not file an answer because initially he “fully endorsed” Plaintiff-Grandmother having custody of H.D.

On 17 September 2019, the matter came on for a temporary custody hearing before Judge Tabatha Holliday in Guilford County District Court. Defendant-Father appeared *pro se*, while Plaintiff-Grandmother and Defendant-Mother were represented by counsel. The trial court limited the parties to “one hour per party to present their evidence.” During this hearing, Defendant-Father expressed his opinion that it was in H.D.’s best interests for Plaintiff-Grandmother to have custody of H.D.

On 26 September 2019, the trial court entered a temporary custody order (the “Temporary Order”) determining that both Defendants had “acted in a manner inconsistent with [their] right of exclusive care, custody, and control of [H.D.] and ha[d] acted inconsistent with [their] constitutionally protected right” to parent H.D. In support of this determination, the trial court found that Defendant-Father had:

- a. Show[ed] an unwillingness to care for the daily needs of [H.D.]
- b. Not visit[ed] with [H.D.] for six to eight weeks after [H.D.] was born.
- c. Entrust[ed] the rearing of [H.D.] to a third party, namely, . . . Plaintiff[-Grandmother].
- d. Express[ed] his own desire that . . . Plaintiff[-Grandmother] have custody of [H.D.] as it would be in the best [sic] interest of [H.D.]

The trial court ultimately concluded, “[b]y clear and convincing evidence,” that

both Defendants had “acted inconsistently with and waived [their] constitutionally protected rights as parent of” H.D., and consequently, neither was “fit and proper to have custody of” H.D. Meanwhile, the trial court further concluded that Plaintiff-Grandmother was a fit and proper person to have sole custody of H.D., and that it was in H.D.’s best interest to award Plaintiff-Grandmother temporary legal and physical custody of H.D. and to permit Defendants to exercise supervised visitation in Plaintiff-Grandmother’s discretion.

On 15 October 2019, Defendant-Mother filed a motion for a new trial and a supplement to her motion in which she argued, *inter alia*, that the trial court’s findings and conclusions that her “purported actions [were] inconsistent with her constitutionally protected status” as H.D.’s parent were “improper at a temporary custody hearing.” On 27 December 2019, the trial court entered an order denying Defendant-Mother’s motion for a new trial. Regarding the temporary custody hearing, the trial court specifically found:

10. The Court ruled for . . . Plaintiff[-Grandmother]. As . . . Plaintiff[-Grandmother] is a third-party non-parent seeking custody, the Court necessarily decided and did decide upon the fitness of . . . Defendants, the natural parents of [H.D.], in granting custody to . . . Plaintiff[-Grandmother].

11. Given the time Defendant[-Mother] had to prepare, her representation by counsel, notice, and opportunity to be heard and present evidence, the process afforded to her satisfies constitutional due process.

Prior to the matter coming on for a permanent custody hearing, Defendant-

Mother filed a motion in limine to clarify “the legal standard to be applied at this hearing for permanent custody.”³ On 16 January 2020, this matter came on for hearing before Judge Brian Tomlin in Guilford County District Court. The trial court considered Defendant-Mother’s motion and announced its ruling. The trial court subsequently entered a written order memorializing its ruling that the fitness of Defendants would not be revisited, and that the only issue on which the court would receive evidence was that of the best interest of the child:

3. [The temporary custody] hearing took place September 17, 2019 and the Court entered [the Temporary Order] on September 26, 2019.

4. [The Temporary Order] addressed the parental presumption afforded to . . . Defendants . . . wherein the Court found by clear and convincing evidence that . . . Defendants had acted inconsistent with their constitutionally protected rights as parents, and that such constitutional protections were deemed waived.

5. Nothing in the [Temporary Order] indicates that these findings are preliminary or without prejudice to a further hearing.

6. Counsel for Defendant[-Mother] thereafter filed a Motion for a new trial under Rule 59, arguing, in part, that, “[t]he Court’s findings and conclusion regarding Defendant[-Mother]’s purported actions inconsistent with her constitutionally protected status, and her purported waiver thereof are improper at a temporary custody hearing.”

7. Defendant[-Mother]’s Rule 59 motion was heard and denied in an Order filed December 27, 2019. In so doing,

³ Defendant-Mother’s motion in limine does not appear in the record on appeal.

the Court notes in paragraph 10 of its Order that the “Court necessarily decided and did decide upon the fitness of . . . Defendants, the natural parents of [H.D.], in granting custody to . . . Plaintiff[-Grandmother].”

8. The Court also decided on the constitutionality of the process afforded her in paragraph 11 of th[e Temporary] Order.

9. The Court has previously ruled on this issue in favor of . . . Plaintiff[-Grandmother].

At some point between the temporary custody hearing and the beginning of the permanent custody hearing, Defendant-Father obtained legal counsel. When the permanent custody hearing commenced before Judge Tomlin on 5 March 2020, Defendant-Father’s counsel cross-examined Plaintiff-Grandmother’s witnesses about Defendant-Father’s relationship with H.D. However, the hearing was not completed that first day; when the hearing resumed over a year later on 24 March 2021, and at each subsequent hearing date, Defendant-Father again appeared *pro se*.

On 24 March 2021, Defendant-Father testified as a witness for Plaintiff-Grandmother. During direct examination, much of Defendant-Father’s testimony concerned his relationship with Defendant-Mother; her mental health; her parenting of her older child from a previous relationship, as well as Defendant-Father’s relationship with that child; Plaintiff-Grandmother’s care of H.D. following the entry of the Temporary Order; and Defendant-Father’s relationship with H.D. during his supervised visits.

Toward the end of Defendant-Father’s direct examination, Plaintiff-

Grandmother's counsel asked: "What about physical custody of [H.D.], how do you believe that should go?" Defendant-Father replied:

[DEFENDANT-FATHER:] Well, I would -- I would like to, for the first time since he has been brought into this world to be able to assume my own role as a parent for partial custody.

[DEFENDANT-MOTHER'S COUNSEL]: I'm going to object. You can -- he can be a witness. I was saying, he can be a witness. He has filed nothing as a party. Nobody has any notice that his lawyer is her lawyer. He's going to be asking him, "Tell us what custody you want." He doesn't have a lawyer. He can put on his own -- but he has filed nothing. He's been found to be unfit.

You found what the findings of unfitness was [sic] made by Judge [Holliday] about the law of the case. To the extent that ---

THE COURT: To the extent that it's his child, he can express his opinion through his testimony. I don't know how much value the opinion has, but I don't think it falls to the level of just completely being irrelevant, so I'll allow the questions and overrule the objection.

[PLAINTIFF-GRANDMOTHER'S COUNSEL]: You can answer.

[DEFENDANT-FATHER]: I would -- I would like to be able to assume some role in a partial, whatnot.

I think [H.D.] is bonded, attached to my mom. He has acclimated to his raising very well. I see the relationship and the dynamic that they have. I don't want to see him ripped away from that, because I know it would tear him apart.

I think he needs to remain where he has been accelerating and he has been rolling and getting ahead of the development with my mother and I know he's safe.

The permanent custody hearing continued the following day, 25 March, and resumed on 2 June, before concluding on 3 June 2021. Still proceeding *pro se*, Defendant-Father cross-examined two witnesses, including asking Defendant-Mother about his relationship with H.D. The trial court did not offer Defendant-Father an opportunity to present evidence or deliver a closing argument.

At the conclusion of the permanent custody hearing on 3 June 2021, the trial court rendered an oral ruling that Defendant-Mother had “exhibited progress [that] warrant[ed] placing her on a path that could result in her having . . . primary legal and physical custody of” H.D. More specifically, the trial court concluded that Defendant-Mother was now “a fit, and proper person [to] have primary physical custody and primary legal custody of” H.D., and that Defendant-Father was “a fit and proper person to have visitation with [H.D.] on the same schedule as” Plaintiff-Grandmother. Thus, the trial court concluded that it was in H.D.’s best interests to “transition” primary physical and legal custody “gradually” from Plaintiff-Grandmother to Defendant-Mother.

During discussions regarding Defendant-Father’s visitation schedule, the following exchange occurred:

[PLAINTIFF-GRANDMOTHER’S COUNSEL]: Are there any provisions you want to make for [Defendant-Father] for his particular time or no?

THE COURT: Well, my thinking was that whatever times [H.D.] is with [Plaintiff-Grandmother], that those will be [Defendant-Father]’s visitation times. I understood that to

be what you all were suggesting.

[PLAINTIFF-GRANDMOTHER'S COUNSEL]: It was not, Judge. I think there's -- you've heard there's been some animus between those parties.

THE COURT: Of course. [Defendant-Father] has not really asserted his claim today and I thought his plan is not to, and didn't present evidence that the cross-examined one would.

On 3 September 2021, the trial court entered its permanent custody order (the "Permanent Order"). The trial court recounted the dispute over the applicable standard for the permanent custody hearings:

12. On January 16, 2020, prior to the outset of this trial, Defendant[-Mother] made a motion *in limine* seeking a ruling from this Court as to the legal standard to be applied at this hearing for permanent custody. Defendant[-Mother] contended that Judge Holliday's earlier finding that Defendant[-Mother] was unfit and had otherwise acted inconsistently with her constitutionally[]protected status as a biological parent was unnecessary and inappropriate at the temporary custody level. Defendant[-Mother] further argued that Judge Holliday's findings regarding fitness were not binding on this Court in a hearing for permanent custody.

13. This Court denied Defendant[-Mother]'s motion, and through an Order entered on March 9, 2020, ruled that this permanent custody hearing should be conducted based upon a determination of the best interests of [H.D.], as both [D]efendants' constitutionally[]protected rights as parents have been deemed waived by prior Order of the Court.

The trial court then made 28 dispositive findings of fact regarding Defendant-Mother and her relationship with H.D. and Plaintiff-Grandmother; only one of these findings mentions Defendant-Father, and it does not concern his relationship with

H.D. The trial court reiterated its conclusions of law from its oral ruling and provided extensive details concerning the gradual transition of custody from Plaintiff-Grandmother to Defendant-Mother, before adding that Defendant-Father “may visit with [H.D.] during the times he is in the physical custody of” Plaintiff-Grandmother.

After obtaining new counsel, Defendant-Father timely filed notice of appeal.⁴

II. Discussion

On appeal, Defendant-Father argues that “the trial court improperly held that the findings and conclusions from the prior [T]emporary [O]rder were binding in future orders and improperly refused to make its own independent determination of this threshold issue in the permanent custody hearing.” We agree.

A. Applicable Legal Principles

“A parent has an interest in the companionship, custody, care, and control of his or her children that is protected by the United States Constitution.” *Boseman v. Jarrell*, 364 N.C. 537, 549, 704 S.E.2d 494, 502 (2010) (citation and internal quotation marks omitted). “So long as a parent has this paramount interest in the custody of his or her children, a custody dispute with a nonparent regarding those children may not be determined by the application of the ‘best interest of the child’ standard.” *Id.* at 549, 704 S.E.2d at 503 (citation omitted).

⁴ Defendant-Mother has not filed a brief in this appeal. Further, although Plaintiff-Grandmother’s counsel successfully moved for an extension of time to file her appellate brief with this Court, no such brief was filed.

Our Supreme Court has thus held that “a natural parent may lose his constitutionally protected right to the control of his children in one of two ways: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent’s conduct is inconsistent with his or her constitutionally protected status.” *David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005). “The decision to remove a child from the custody of a natural parent must not be lightly undertaken. Accordingly, a trial court’s determination that a parent’s conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence.” *Id.* at 307, 608 S.E.2d at 753–54 (citation omitted).

B. Analysis

At multiple points in the permanent custody proceedings below, the trial court relied upon Judge Holliday’s findings and conclusions in the Temporary Order that Defendant-Father “ha[d] acted inconsistently with and waived his constitutionally protected rights as parent of” H.D., and therefore was “not fit and proper to exercise custody of” H.D. Indeed, the Permanent Order does not contain a “determination that [Defendant-Father]’s conduct is inconsistent with his . . . constitutionally protected status” at all, let alone such a finding “supported by clear and convincing evidence.” *Id.* at 307, 608 S.E.2d at 754 (citation omitted).

Instead, as quoted above, the trial court merely recounted Defendant-Mother’s motion to clarify the legal standard for the permanent custody hearing, and then noted “Judge Holliday’s earlier finding that Defendant[-Mother] was unfit and had

otherwise acted inconsistently with her constitutionally[]protected status as a biological parent”; the court omitted any restatement of the same finding regarding Defendant-Father. In fact, the sole reference to Defendant-Father’s fitness—or unfitness—in the Permanent Order beyond the procedural or jurisdictional findings of fact is the trial court’s conclusion that Defendant-Father “is a fit and proper person to have visitation with [H.D.] on the same schedule as Plaintiff[-Grandmother].” The only plausible reference to any “determination that [Defendant-Father]’s conduct is inconsistent with his . . . constitutionally protected status[.]” *id.* (citation omitted), is in the trial court’s declaration that “both [D]efendants’ constitutionally[]protected rights as parents have been deemed waived by prior Order of the Court.” Absent such a necessary determination, it was reversible error for the trial court to proceed to “determine[] custody of [H.D.] based upon application of the best interest standard.”

In addition, the trial court erred by considering itself bound by the Temporary Order’s findings and conclusions for the purposes of its Permanent Order. On a fundamental level, a temporary custody hearing differs significantly from a permanent custody hearing in terms of the due process accorded to the parties. For instance, “[a]ffidavits may be used as a basis for” temporary custody orders, *Story v. Story*, 57 N.C. App. 509, 514, 291 S.E.2d 923, 926 (1982), whereas “an award of permanent custody may not be based upon affidavits[.]” *id.* at 515, 291 S.E.2d at 927. Consequently, this Court has recognized that the same findings of fact that may suffice to support an order of temporary custody may nevertheless be insufficient to

support an order of permanent custody in the same case. *See id.* (affirming the trial court’s award of temporary custody based upon the plaintiff’s verified pleadings, but remanding the trial court’s award of permanent custody where the trial court relied on the same verified pleadings and “fail[ed] to hear any testimony in the matter”).

In the case at bar, although the trial court heard evidence in the temporary custody hearing, Judge Holliday limited the parties’ presentation of evidence to “one hour per party[.]” As Defendant-Father notes, this meant that “[n]ot all relevant witnesses were allowed to testify.”

Moreover, while it is generally proper for a trial court to consider the findings of fact and conclusions of law in a previous order entered in a child-custody matter, this Court has cautioned that a trial court should not rely *solely* upon a prior determination of a parent’s unfitness without making its own inquiry. For instance, in *Davis v. McMillian*, the trial court “took judicial notice of findings [of parental unfitness] from a prior custody action between the biological parents to support an award of custody to a non-parent[.]” 152 N.C. App. 53, 55, 567 S.E.2d 159, 160–61 (2002), *disc. review denied*, 356 N.C. 669, 577 S.E.2d 114 (2003). On appeal, this Court affirmed the trial court’s conclusion that the parent in that case was unfit because, *inter alia*, “the trial court did not solely rely on the determination of unfitness from the 1999 custody case *but made additional findings based on present circumstances supported by competent evidence.*” *Id.* at 64, 567 S.E.2d at 166 (emphasis added).

By contrast, not only did the trial court in this case rely *solely* upon Judge

Holliday’s determinations of unfitness and behavior inconsistent with Defendant-Father’s constitutionally protected status as a parent, the trial court concluded that it was *bound* by those prior determinations, at least as to Defendant-Father.⁵ At the permanent custody hearing, the trial court prohibited the parties from introducing evidence on this issue and expressly declined to make “additional findings based on present circumstances supported by competent evidence[,]” *id.*, in support of its decision to remove H.D. from the custody of his natural parent, *see David N.*, 359 N.C. at 307, 608 S.E.2d at 753.

Defendant-Father was denied an adequate opportunity to present evidence and make arguments concerning his fitness to exercise legal and physical custody of H.D., or whether his conduct was inconsistent with his constitutionally protected parental status. The trial court’s order must be reversed, and Defendant-Father is entitled to a new permanent custody hearing on remand.

Because we reverse and remand on this issue, we need not reach Defendant-Father’s other issues on appeal.

III. Conclusion

For the foregoing reasons, the trial court’s permanent custody order is reversed, and this matter is remanded for further proceedings.

⁵ Despite its order to the contrary, the trial court revisited Judge Holliday’s determination that Defendant-Mother was unfit, making extensive findings as to Defendant-Mother’s ability to parent H.D., and concluding that Defendant-Mother had become “a fit and proper person to have primary physical custody and primary legal custody of” H.D.

DUNCAN V. TRANSEAU

Opinion of the Court

REVERSED AND REMANDED.

Judges WOOD and GORE concur.

Report per Rule 30(e).