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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-43

Filed 18 July 2023

Pasquotank County, No. 20 CVD 370

OWEN P. BLIZZARD, Plaintiff,

v.

COURTNEY L. JOYNER, Defendant.

Appeal by plaintiff from order entered 12 September 2022 by Judge Jennifer K. Bland in Pasquotank County District Court. Heard in the Court of Appeals 6 June 2023.

*Pritchett & Burch, PLLC, by L. Clifton Smith, III, for Plaintiff-Appellant.*

*No brief filed for pro se Defendant-Appellee.*

CARPENTER, Judge.

Owen P. Blizzard (“Plaintiff”) appeals from an “Amended Order,” which decided the issue of permanent child custody and denied Plaintiff’s motion for civil contempt and attorney’s fees. On appeal, Plaintiff argues the “Temporary Consent Order” converted to a permanent order by operation of law. Plaintiff further argues that because the Temporary Consent Order was a permanent order, the trial court

erred by modifying child custody in the Amended Order without first making a finding of a substantial change in circumstances affecting the welfare of the minor child. After careful review, we affirm the Amended Order.

### **I. Factual & Procedural Background**

This action was commenced by Plaintiff’s filing of a “Complaint for Child Custody” (the “Complaint”) and issuance of a summons. The Complaint alleged that Plaintiff and Courtney L. Joyner (“Defendant”) engaged in an intimate relationship—but were never married—and had one child, K.B., during their relationship. K.B. was born in March 2019, and the parties separated in June 2020. In the complaint, Plaintiff sought joint legal and physical custody of K.B.

On 28 September 2020, Plaintiff filed an “Amended Complaint for Child Custody,” in which he alleged Defendant: (1) “[h]as an unstable family life”; (2) often denies Plaintiff visitation with K.B.; and (3) “has an unsecure work history.” Plaintiff sought primary physical custody of K.B. and requested that Plaintiff and Defendant share joint legal custody of K.B., while allowing Defendant to continue exercising visitation privileges.

On 10 December 2020, the trial court entered the Temporary Consent Order, awarding Plaintiff and Defendant joint legal and physical custody according to certain terms and conditions, including a custody and visitation schedule. The Temporary Consent Order expressly stated it was temporary and would “automatically convert to a permanent order by operation of law on August 1, 2021 if

neither party requests a hearing on or prior to that date on the issue of permanent custody.”

On 20 September 2021, Plaintiff filed a “Request for Civil Action Hearing” on the issue of permanent custody, and the matter was assigned to the Honorable Jennifer K. Bland. On 8 December 2021, Plaintiff filed a motion for civil contempt, alleging Defendant had violated the Temporary Consent Order and sought Defendant be adjudged in willful civil contempt of the trial court for her failure to comply with the terms of the Temporary Consent Order, including failing to inform Plaintiff of K.B.’s health and well-being. A hearing was scheduled for 20 December 2021 to decide the issue of permanent custody and Plaintiff’s motion for civil contempt.

The hearing before Judge Bland was ultimately continued until 11 February 2022. A great deal of the testimony at the 11 February hearing addressed the concerns raised in Plaintiff’s motion for contempt. At no point did either party argue the Temporary Consent Order was a permanent order—even though the hearing occurred after 1 August 2021—the deadline on which the Temporary Consent Order would become a permanent order under its conditional mandate. On the contrary, on direct examination, Plaintiff’s trial counsel asked her client about a “change[ ] since entry of the temporary order” and stated later that she had “addressed the temporary order” during her direct line of questioning.

At the conclusion of the hearing, the trial court announced it would be dismissing Plaintiff’s motion for contempt and ordering a “tiebreaker clause” in

Defendant's favor, in part because the allegations in Plaintiff's motion for contempt were "petty" and unsupported by the evidence. On 15 August 2022, the trial court entered its written order (the "Order"), denying Plaintiff's motion for civil contempt and continuing joint legal and physical custody between the parties. Also in the Order, the trial court made a conclusion of law, providing that in the event there was a disagreement between the parties on a major decision affecting K.B., Defendant would "make the final decision" on the issue.

On 15 September 2022, the trial court entered the Amended Order. The Amended Order modified the Order to deny Plaintiff's request for attorney's fees in his motion for civil contempt. On the same date, Plaintiff filed timely, written notice of appeal from the Amended Order.

## **II. Jurisdiction**

This Court has jurisdiction to address Plaintiff's appeal from the Amended Order, a permanent custody order, pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2021).

## **III. Issues**

The issues before this Court are whether: (1) the Temporary Consent Order became a permanent custody order by operation of law; and (2) the trial court erred in entering the Amended Order without making findings of fact regarding any substantial change in circumstances to support its modification of the Temporary Consent Order.

## **IV. Standard of Review**

Whether a custody order is temporary or permanent in nature is a question of law, which this Court reviews *de novo* on appeal. *Peters v. Pennington*, 210 N.C. App. 1, 13, 707 S.E.2d 724, 733 (2011). “Under a *de novo* review, th[is C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citations and quotation mark omitted).

“The findings of fact [in a custody order] are conclusive on appeal if there is evidence to support them, even if evidence might sustain findings to the contrary.” *Everette v. Collins*, 176 N.C. App. 168, 170, 625 S.E.2d 796, 798 (2006) (citation omitted); see *Pulliam v. Smith*, 348 N.C. 616, 625, 501 S.E.2d 898, 903 (1998) (“The trial court’s findings need only be supported by substantial evidence to be binding on appeal.”). Findings of fact not challenged “are deemed . . . supported by the evidence and are binding on appeal.” *In re K.B.*, 378 N.C. 601, 607, 862 S.E.2d 663, 670 (2021) (citation omitted). “Absent an abuse of discretion, the trial court’s decision in matters of child custody should not be upset on appeal.” *Everette*, 176 N.C. App. at 171, 625 S.E.2d at 798 (citation omitted).

## V. Analysis

On appeal, Plaintiff does not challenge the findings of fact that were made in the Amended Order; thus, the findings “are deemed supported by [substantial] evidence and are binding on appeal.” See *In re K.B.*, 378 N.C. at 607, 862 S.E.2d at 670. Rather, he argues the trial court erred by modifying the provisions of custody

set out in the Temporary Consent Order without making a finding to show that a substantial change of circumstances affecting the welfare of the minor child had occurred. Plaintiff maintains the Temporary Consent Order became a permanent custody order by operation of law. We disagree.

The distinction between a temporary custody order and a permanent custody order determines the standard that the trial court applies in deciding child custody. *See Woodring v. Woodring*, 227 N.C. App. 638, 643, 745 S.E.2d 13, 18 (2013). “Permanent child custody or visitation orders may not be modified unless the trial court finds there has been a substantial change in circumstances affecting the welfare of the child.” *Id.* at 643, 745 S.E.2d at 18 (citation omitted); *see Pulliam*, 348 N.C. at 619, 501 S.E.2d at 899 (“The welfare of the child has always been the polar star which guides the courts in awarding custody.”). In contrast, “temporary orders may be modified by proceeding directly to the best-interests analysis.” *Woodring*, 227 N.C. App. at 643, 745 S.E.2d at 18 (citation omitted). A “trial court’s designation of an order as ‘temporary’ or ‘permanent’ is not binding on an appellate court.” *Smith v. Barbour*, 195 N.C. App. 244, 249, 671 S.E.2d 578, 582 (citation omitted), *disc. rev. denied*, 363 N.C. 375, 678 S.E.2d 670 (2009).

This Court has explained that “[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.” *Peters*, 210 N.C. App. at 13–14, 707

S.E.2d at 734 (citation omitted). “Where a party is attempting to have the matter heard within a reasonable period of time, that party should not lose the benefit of a temporary order.” *Miller v. Miller*, 201 N.C. App. 577, 579, 686 S.E.2d 909, 912 (2009). Nevertheless, a temporary order may “become permanent by operation of time.” *Woodring*, 227 N.C. App. at 643, 745 S.E.2d at 18. In determining whether a temporary order has become a permanent order, our Court has considered whether one of the parties set the matter for hearing within a reasonable time. *See, e.g., Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003) (affirming the trial court’s ruling that the temporary custody order did not become permanent where twenty months passed before the defendant sought modification of the temporary order, during which time the parties were negotiating a new custody arrangement); *Lavalley v. Lavalley*, 151 N.C. App. 290, 292–93, 564 S.E.2d 913, 915 (2002) (concluding the temporary order converted into a permanent order because “neither party requested the calendaring of the matter for a hearing within a reasonable time” where the matter was not set for a hearing until almost two years after the entry of the temporary order); *Brewer v. Brewer*, 139 N.C. App. 222, 228, 533 S.E.2d 541, 546 (2000) (concluding one year was “too long a period to be considered as ‘reasonably brief,’” where there were no unresolved issues between the parties, and therefore, holding the custody order was permanent in nature).

Here, the trial court ordered that the Temporary Custody Order would become permanent “by operation of law on August 1, 2021” if a condition was satisfied: that

neither Plaintiff or Defendant request a hearing on or prior to 1 August 2021. Plaintiff did not request a hearing until 20 September 2021—*after* 1 August 2021. Nonetheless, a trial court’s designation of an order is not binding on this Court, and we decline to conclude the Temporary Consent Order became permanent based solely on this condition imposed by the trial court. *See Smith*, 195 N.C App. at 249, 671 S.E.2d at 582. Rather, we consider the factors set out in *Peters* and whether the parties calendared the matter for a hearing within a reasonable time after entry of the Temporary Consent Order. *See Peters*, 210 N.C. App. at 13, 707 S.E.2d at 734; *Woodring*, 227 N.C. App. at 643, 745 S.E.2d at 18.

In this case, the trial court specifically found in the Temporary Consent Order that it was “entered without prejudice to either party.” Thus, the Temporary Consent Order was a temporary order at the time it was entered. *See Peters*, 210 N.C. App. at 13, 707 S.E.2d at 734. Approximately nine months passed after the entry of the Temporary Consent Order and Plaintiff’s filing of the motion to set the matter for a hearing. Based on this Court’s precedent, we conclude Plaintiff set the matter for hearing within a reasonable time period. *See Senner*, 161 N.C. App. at 81, 587 S.E.2d at 677; *Lavalley*, 151 N.C. App. at 292–93, 564 S.E.2d at 915; *Brewer*, 139 N.C. App. at 228, 533 S.E.2d at 546. Furthermore, during her direct examination at the hearing on permanent custody, Plaintiff’s trial counsel presented the Temporary Consent Order as a temporary order; hence, Plaintiff may not now argue before this Court that the Temporary Consent Order is permanent. *See In re W.I.M.*, 374 N.C. 922,



927, 845 S.E.2d 77, 81 (2020) (“The law does not permit parties to swap horses between courts in order to get a better mount[.]”).

Because the Temporary Consent Order was entered without prejudice to either Plaintiff or Defendant, a reasonable time passed between the entry of the Temporary Consent Order and Plaintiff’s motion, and Plaintiff acknowledged the Temporary Consent Order was temporary at the hearing on permanent custody, we hold it is a temporary order. *See Peters*, 210 N.C. App. at 13, 707 S.E.2d at 734. Therefore, the trial court did not err by “proceeding directly to the best-interests analysis” and concluding it was in K.B.’s best interests for the parties to continue to share in joint legal and physical custody and for Defendant to make final determinations pertaining to major decisions relating to K.B. *See Woodring*, 227 N.C. App. at 643, 745 S.E.2d at 18; *Everette*, 176 N.C. App. at 171, 625 S.E.2d at 798.

## **VI. Conclusion**

We conclude the Temporary Consent Order did not convert into a permanent custody order because it was entered without prejudice to either party, Plaintiff set the matter for a hearing within a reasonable time, and Plaintiff did not argue at the hearing to decide permanent custody that the Temporary Consent Order became a final order. Moreover, the trial court properly considered the best interests of the child without making findings of fact as to a substantial change in circumstances. Accordingly, we affirm the Amended Order.

**AFFIRMED.**

BLIZZARD V. JOYNER

*Opinion of the Court*

Judges GORE and RIGGS concur.

Report per Rule 30(e).