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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-657

Filed 21 May 2024

Moore County, No. 20-CVD-532

JOHN P. COX, Plaintiff,

v.

JESSICA SADOVNIKOV (Now Impson), Defendant.

Appeal by defendant from orders entered 16 December 2022, 6 October 2021, and 17 August 2021 by Judge Warren McSweeney, order entered 20 April 2021 by Judge Shelly Holt, and orders entered 28 September 2020 by Judge Tiffany Bartholomew in Moore County District Court. Heard in the Court of Appeals 20 February 2024.

Fox Rothschild LLP, by Troy D. Shelton, for defendant-appellant.

Foyles Law Firm, PLLC, by Jody Stuart Foyles, for plaintiff-appellee.

DILLON, Chief Judge.

This case arises from a child custody dispute between a biological mother, Jessica Sadovnikov (“Mother”), and her former husband, John Cox.

I. Background

Ralph¹ was born during Mother's marriage to Mr. Cox. Though Mr. Cox was listed as Ralph's father on the birth certificate, it has been established in this proceeding that Mr. Cox is not Ralph's biological father. (The parental rights of Ralph's biological father were previously terminated through a separate proceeding. The biological father is not a party to this action). Mr. Cox has, otherwise, never formally adopted Ralph.

Mother and Mr. Cox separated and eventually divorced early in Ralph's life. In their respective briefs, Mother and Mr. Cox present remarkably different characterizations of Mr. Cox's relationship with Ralph. Mother asserts that Mr. Cox was minimally involved in Ralph's life and was akin to a babysitter. Mr. Cox asserts that he was a father figure. He notes that Ralph was under the impression that Mr. Cox was his biological father until this child custody action commenced.

Mr. Cox commenced this proceeding seeking child custody. The trial court entered a "Temporary Child Custody Order" granting him visitation with Ralph and ordering the parties and child to participate in counseling and reunification therapy.

¹ We employ a pseudonym for the protection of the minor child's privacy.

Mother appeals.²

II. Grounds for Appellate Review

Mr. Cox filed motions to dismiss Mother's appeal, contending the Temporary Custody Order is interlocutory in nature. Although the Temporary Custody Order was entitled as a temporary order and specifically states it was "entered without prejudice to either party," Mother argues that the order is immediately appealable because it is actually a permanent custody order and also affects a substantial right, namely, her constitutional right to control the raising of her son.

Typically, a temporary child custody order is an interlocutory order and not immediately appealable. *Brewer v. Brewer*, 139 N.C. App. 222, 227, 533 S.E.2d 541, 546 (2000). The custody order on appeal does not include any reconvening date, but it does provide limited visitation coupled with "counseling that provides services related to high conflict custody cases and reunification therapy" for the child as well as counseling with a "focus on reunification therapy" for the parties. But even if the custody order is truly a temporary order, Mother is correct that the custody order grants custodial rights to Mr. Cox, who is not a parent, thus affecting her

² Mother noticed appeal from six orders from the trial court; the most recent order was the "Temporary Child Custody Order." The other orders on appeal, as relevant to Mother's arguments on appeal, include the "Order Denying Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction" and the "Order Denying Defendant's Motion to Dismiss" regarding standing, Mother's constitutional right to the child's custody, collateral estoppel, and waiver. Mother timely filed her notice of appeal after entry of the most recent order but also included notice of appeal from the earlier orders. "[W]here a party is entitled to an interlocutory appeal based on a substantial right, that party may appeal but is not required to do so." *Dep't of Transp. v. Rowe*, 351 N.C. 172, 176, 521 S.E.2d 707, 710 (1999).

constitutionally protected rights as a parent. Because the custody order grants Mr. Cox “access to and visitation with” the child, the order affects Mother’s “fundamental right to make decisions concerning the care, custody, and control of her child, including the child's association with third parties.” *Graham v. Jones*, 270 N.C. App. 674, 682, 842 S.E.2d 153, 160 (2020). Mother has demonstrated this order is immediately appealable based upon her substantial rights. *See id.*

III. Analysis

Mother presents multiple arguments on appeal, which we address in turn.

A. Jurisdiction Under UCCJEA

The trial court ruled upon subject matter jurisdiction under the UCCJEA in its 28 September 2020 order, and Mother’s arguments address this order. Mother argues the trial court lacked subject-matter jurisdiction because North Carolina was not Ralph’s “home state” as defined by N.C. Gen. Stat. § 50A-201(a)(1). She contends the trial court found Ralph had not “lived” in North Carolina for months prior to Mr. Cox’s commencement of this proceeding. She contends the trial court applied the wrong standard in determining jurisdiction because it made findings about Ralph’s “residency” and “citizenship,” rather than findings about where Ralph “lived.”

We review *de novo* whether the trial court had jurisdiction. *In re M.R.J.*, 378 N.C. 648, 654, 862 S.E.2d 639, 643 (2021).

Under North Carolina’s version of the Uniform Child Custody Jurisdiction Enforcement Act (“UCCJEA”), our courts have jurisdiction over a child custody

dispute if North Carolina

is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State[.]

N.C. Gen. Stat. § 50A-201(a)(1) (2023). Under the UCCJEA, the term “home state” refers to

the state in which the child *lived* with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of the child-custody proceeding. ... A period of temporary absence of any of the mentioned persons is part of the period.

N.C. Gen. Stat. § 50A-102(7) (emphasis added).

Here, the trial court found:

5. [Mother] continuously resided in North Carolina until sometime in February 2020. Beginning in February 2020 [Mother] and the subject minor child went on an extended trip to Oklahoma with [Mother]’s fiancé, at some point in March 2020 spent approximately two weeks in Clarksville, Tennessee staying at a home with some of her fiancé’s friends and then returned to North Carolina until on or about May 20, 2020 and stayed at her fiancé’s residence in Spring Lake, North Carolina. Beginning on or about May 20, 2020 [Mother] and the minor child along with [Mother’s new husband] have been residing in Clarksville, Tennessee.

* * *

11. The minor child, [Ralph], has been a citizen and resident of the State of North Carolina his entire life until sometime in May of 2020.

Mother does not challenge these findings of fact, so they are binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

We conclude that Mother’s contentions about the trial court’s terminology (“reside” and “citizen” versus “live”) are inconsequential in this case. In a recent appeal, our Court concluded we did not need to decide that issue because the trial court “use[d] its Findings as to residency not to define jurisdiction under the UCCJEA but to resolve the critical *factual* dispute between the parties central to the issue—when did the parties actually begin living in North Carolina.” *Halili v. Ramnishta*, 273 N.C. App. 235, 244, 848 S.E.2d 542, 548 (2020). Similarly in this case, the trial court’s residency findings were used to determine the factual dispute about when Ralph moved out of North Carolina, not to define jurisdictional terms.

The trial court’s findings establish that Ralph lived in North Carolina leading up to the commencement of Mr. Cox’s action on 11 May 2020. Ralph returned with Mother from trips to other states, and they were living in Spring Lake, North Carolina, at the time Mr. Cox filed this suit. Ralph did not move to Tennessee until later in May—after the action’s commencement. Moreover, Mother’s plan to move to Tennessee has no bearing on the jurisdictional determination here. *See Malone-Pass v. Schultz*, 280 N.C. App. 449, 461, 868 S.E.2d 327, 338 (2021) (“The UCCJEA does not base jurisdiction on where a parent plans or intends to reside in the future, but on the actual residence.”).

We conclude Ralph’s home state was North Carolina at the time this action

was filed. Accordingly, the trial court appropriately exercised jurisdiction under the UCCJEA and North Carolina law.

B. Mr. Cox's Standing

Mother argues that Mr. Cox lacks standing to bring this child custody action. We review *de novo* whether a party has standing to initiate a custody proceeding. *Tillman v. Jenkins*, 289 N.C. App. 452, 459, 889 S.E.2d 504, 510 (2023).

Section 50-13.1 of our General Statutes provides, in pertinent part, that “[a]ny parent, relative, or other person, agency, or organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child[.]” N.C. Gen. Stat. § 50-13.1(a) (2023). Despite this broad language, in the context of a third party seeking custody of a child from a natural (biological) parent, our Supreme Court has held that there are limits on the “other persons” who can bring such an action. *See Peterson v Rogers*, 337 N.C. 397, 406, 445 S.E.2d 901, 906 (1994). Our Court has concluded that “a relationship in the nature of a parent and child relationship, even in the absence of a biological relationship, will suffice to support a finding of standing.” *Ellison v. Ramos*, 130 N.C. App. 389, 394, 502 S.E.2d 891, 894 (1998). Furthermore, a non-parent who institutes an action seeking “custody against a natural parent must also allege some act inconsistent with the parent's constitutionally protected status.” *Chávez v. Wadlington*, 261 N.C. App. 541, 546, 821 S.E.2d 289, 293 (2018), *aff'd*, 373 N.C. 1, 832 S.E.2d 692 (2019) (cleaned up).

The trial court ruled upon Mother's motion to dismiss for lack of standing in its order entered on 28 September 2020. We first note that the determination of standing is made as of the time of filing of the complaint and is based upon the allegations of the complaint. *See Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008). *See also Simeon v. Hardin*, 339 N.C. 358, 369, 451 S.E.2d 858, 866 (1994).

"A [trial] court's subject matter jurisdiction over a particular case is invoked by the pleading." *Boseman v. Jarrell*, 364 N.C. 537, 546, 704 S.E.2d 494, 501 (2010). At the motion to dismiss stage, all factual allegations in the pleadings are viewed in the light most favorable to the plaintiff, granting the plaintiff every reasonable inference. *Grindstaff v. Byers*, 152 N.C. App. 288, 293, 567 S.E.2d 429, 432 (2002). We review *de novo* whether a plaintiff has standing to bring a claim. *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001).

We conclude Mr. Cox's complaint adequately alleged his relationship with Ralph and that Mother had acted inconsistently with her constitutionally protected rights as a parent. In the complaint, Mr. Cox alleged he was the "legal father" of the child, as the child was born during the marriage, and he was on the birth certificate as the child's father. As noted above, the trial court later determined Mr. Cox is not the child's legal father, a ruling not challenged on appeal. However, Mr. Cox's complaint also alleged he had a "parent-child relationship" with Ralph, provided financial support "throughout his life," and spent "a lot of time" with Ralph even after

the parties' separation, including having Ralph "liv[e] primarily with [Mr. Cox] for long periods of time." Mr. Cox also alleged Mother had waived her constitutionally protected rights as a parent by "allowing him to enter into a parent-child relationship" with Ralph and allowing him to "fulfill parental responsibilities".

Mother argues on appeal that the trial court "measure[d] standing at the wrong time." She contends the trial court found that "meaningful contact between [Ralph] and Mr. Cox ended in summer 2019," while he filed the complaint in May 2020. Mother is correct that standing is determined based upon the time of filing of the complaint, but standing is also determined based upon the allegations of the complaint, viewed in the light most favorable to the plaintiff. Thus, we need not address the trial court's findings of fact in the Order Denying Defendant's Motion to Dismiss based upon Mr. Cox's standing, as this determination can be made based upon the pleadings, and it is not necessary for the trial court to receive evidence or make findings of fact to rule upon a motion to dismiss based upon standing. Mother, like the mother in *Thomas v. Oxendine*, "confuses two distinct but related stages in a custody dispute between a parent and a non-parent." 280 N.C. App. 526, 534, 867 S.E.2d 728, 735 (2021). In *Thomas*, this Court explained the stages:

Mother asserts that "the trial court must find that a parent has acted inconsistent with his or her constitutionally protected status as a parent by clear and convincing evidence for grandparents to have standing to seek custody of a minor child." (Original in all capital letters). Mother argues that Grandparents lacked standing to bring this action because the trial court's determination that Mother

acted inconsistent with her constitutionally protected status as a parent was not supported by the evidence.

Mother confuses

two distinct but related stages in a custody dispute between a parent and non-parent, namely: (1) the standing and pleading requirements of the complaint at the motion to dismiss stage, and (2) the burden of producing evidence at the custody hearing sufficient to prove that a parent has waived the constitutional protections guaranteed to them.

Gray v. Holliday, 2021-NCCOA-178, ¶19, 2021 WL 1749955 (unpublished). Where, as here, the pleading alleges sufficient facts to show that plaintiffs are the grandparents of the minor child and that the parent is unfit or has engaged in conduct inconsistent with their parental status, Grandparents had standing, and the trial court had subject matter jurisdiction to hear the case.

Thomas, 280 N.C. App. at 533–34, 867 S.E.2d at 735. Accordingly, we conclude Mr. Cox had standing to bring this suit.

C. Visitation Order – Mother’s “Constitutionally Protected Status”

Mother contests the trial court’s award of visitation rights to Mr. Cox.

Generally, where a custody dispute is between a natural parent and a non-parent third party, “only after the trial court has determined by clear and convincing evidence that the natural parent has lost her paramount right as a result of unfitness or acting in a manner inconsistent with her constitutionally-protected status may the trial court proceed with the ‘best interest of the child’ analysis.” *Dunn v. Covington*, 272 N.C. App. 252, 263, 846 S.E.2d 557, 566 (2020).

Here, in the Temporary Custody Order, the trial court did find that Mother has acted inconsistently with her constitutionally protected status:

... [Mother] has acted inconsistent with her constitutionally protected status as the biological mother of the subject minor child when it comes to [Mr. Cox] by allowing [Mr. Cox] to form a parent/child relationship with the subject minor child with the intent to make that a permanent parent/child relationship and [Mr. Cox] has taken on the responsibilities of a father to the subject minor child.

We held in *Dunn* that the failure of a trial court to articulate that it was basing this finding using the “clear and convincing” standard is reversible error, as this standard “is a higher evidentiary standard than the ‘greater weight of the evidence’ standard used in ordinary child custody cases between natural parents where the ‘best interest of the child’ is the sole test.” *Id.* at 264, 846 S.E.2d at 567 (citation omitted).

And, here, the trial court did not explicitly state that it used the “clear and convincing” standard in finding Mother acted inconsistently with her constitutionally protected status. Accordingly, we must vacate the Temporary Child Custody Order and remand for entry of a new order. *See id.* at 277, 846 S.E. at 575 (“We remand this case to the trial court with instructions to enter a new permanent custody order and first conduct the proper constitutional analysis, consistent with this opinion and the precedents of our courts, employing the ‘best interest of the child’ test only if the movant first establishes, by clear and convincing evidence, that Ms. Cole acted inconsistent with her constitutionally-protected status as Tracy’s natural parent.”).

Because the trial court must hold a new hearing on remand, we need not address Mother’s other arguments on appeal regarding the trial court’s findings of fact in the Temporary Child Custody Order.

IV. Conclusion

We affirm the trial court’s “Order Denying Defendant’s Motion to Dismiss for Lack of Subject Matter Jurisdiction” and “Order Denying Defendant’s Motion to Dismiss.”³ We vacate the trial court’s Temporary Child Custody Order and remand for entry of a new order making findings of fact regarding whether Mother had acted inconsistently with her constitutionally protected rights as a parent *by clear and convincing evidence*. We also note that the trial court judge who entered the order from which this appeal is taken is no longer on the bench. We, therefore, remand to the trial court for a new child custody hearing to determine whether Mother has acted inconsistently with her constitutionally protected status and, if so, to enter a child custody order addressing the best interests of the child.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judges STROUD and STADING concur.

Report per Rule 30(e).

³ Mother did not raise any arguments on appeal regarding the trial court orders noted in the notice of appeal entered on 6 October 2021, 17 August 2021, and 20 April 2021. Her appeal is therefore dismissed as to those orders.