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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 23-1166

Filed 2 July 2024

Nash County, No. 22 CVD 1142

WILLIAM J. FAIRLEY, V., Plaintiff,

v.

CANDICE MATELSKI, Defendant.

Appeal by Defendant from an Order entered 13 June 2023 by Judge Wayne S. Boyette in Nash County District Court. Heard in the Court of Appeals 30 April 2024.

Etheridge, Hamlett & Murray, LLP, by J. Richard Hamlett, II, for the Plaintiff-Appellee.

Mark Hayes, for the Defendant-Appellant.

WOOD, Judge.

Defendant (“Mother”) appeals from the trial court’s order granting Plaintiff (“Father”) sole legal and physical custody of the minor child on the grounds that it was in the child’s best interest. For the reasons below, we affirm the trial court’s order.

I. Factual and Procedural Background

Mother and Father have two children: Liam¹, born 23 May 2005; and Rudy², born 19 November 2007. This appeal concerns the custody of the minor child Rudy, who was diagnosed with Autism at age one, as Liam is now over the age of eighteen. Following the parties' divorce, on 19 July 2010 the Superior Court of Monterey County, California, entered a custody order which granted primary care and custody of the children to Mother. Following a move to North Carolina, the order was registered in Henderson County on 24 July 2012.

On 24 May 2013 an emergency custody order was entered granting Father temporary custody of Rudy. After a hearing on 17 and 18 March and 4 April 2014, the trial court granted joint legal custody with primary physical custody to Father by order entered 3 July 2014. On 20 May 2022, Mother filed motions to show cause and to modify child custody, seeking primary physical custody of Rudy. She alleged, among other things, that Father was not complying with the July 2014 custody order. On 5 April and 3 May 2023, hearings were held on Mother's motions.

At the hearings, Mother and Father agreed they were unable to co-parent and make decisions together. Mother and Father disagreed about many fundamental decisions, including the overall management of Rudy's well-being and diagnosis. Specifically, there were four prevailing issues that were addressed and disputed by the parties at the hearing: (1) a dental treatment for Rudy; (2) an application for an

¹ Pseudonyms have been used to protect the juvenile's identity.

² See n.1.

Early College program; (3) an accusation that Rudy spit on another student; (4) Mother's access to information concerning Rudy's treatments and activities. The trial court entered an order on 13 June 2023 concluding that it was in the best interest of Rudy to grant Father sole legal and physical custody. Mother filed a notice of appeal on 30 June 2023.

II. Analysis

On appeal, Mother challenges several findings of fact and argues the findings do not support the conclusion that full legal custody should be awarded to Father. Additionally, Mother argues that no competent evidence supports the once-a-day, fifteen-minute phone call limitation between Mother and Rudy. We address each argument in turn.

A. Standard of Review

"In a child custody case, 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." *Peters v. Pennington*, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 13, 707 S.E.2d at 733. "Whether those findings of fact support the trial court's conclusions of law is reviewable *de novo*." *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 904 (2008) (citation omitted). Unchallenged findings of fact are "presumed to be supported by competent evidence and [are] binding on appeal."

Koufman v. Koufman, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citations omitted). “Absent an abuse of discretion, the trial court’s decision in matters of child custody should not be upset on appeal.” *Everette v. Collins*, 176 N.C. App. 168, 171, 625 S.E.2d 796, 798 (2006) (citation omitted). Under an abuse of discretion standard, “the trial court’s ruling ‘will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.’” *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002) (citation omitted). “This Court has recognized that the trial judge is in the best position to make such a determination as he or she “can detect tenors, tones and flavors that are lost in the bare printed record read months later by appellate judges.” *Hall*, 188 N.C. App. at 530, 655 S.E.2d at 903 (citation omitted).

B. Challenged Findings of Fact

It is well established that “an order for custody can be made to the person who will best promote the interest and welfare of the child.” *Witherow v. Witherow*, 99 N.C. App. 61, 63, 392 S.E.2d, 627, 629 (1990) (citing N.C. Gen. Stat. § 50–13.2). Therefore, a custody order must include findings of fact which contemplate the child’s best interests, as it is the “paramount consideration” that guides the court. *Id.* (citation omitted).

Findings of fact regarding the competing parties must be made to support the necessary legal conclusions. These findings 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. However, the 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.

Carpenter v. Carpenter, 225 N.C. App. 269, 271, 737 S.E.2d 783, 785-786 (2013)

(citation omitted). Further, “[i]f the trial court’s uncontested findings of fact support its conclusions of law, we must affirm the trial court’s order.” *Respass v.*

Respass, 232 N.C. App. 611, 614-615, 754 S.E.2d 691, 695 (2014) (citations omitted).

On appeal, Mother challenges findings of fact 19, 28, 29, 32, 33, 48-50, and 64-66, respectively: findings concerning Rudy’s dental procedure; findings on Rudy’s Early College program; findings on Mother’s ability to access information regarding Rudy’s welfare; and findings on how Mother’s inability to compromise affects Rudy. However, Mother does not challenge the remaining findings, equaling fifty-nine unchallenged findings of fact. Thus, even if we were to conclude there was insufficient evidence to support the findings Mother challenges, we must examine whether the unchallenged findings of fact, which are *material to the resolution of the dispute*, support the legal conclusion that the best interest of Rudy will be served by granting Father sole legal and physical custody. *Carpenter*, 225 N.C. App. at 271, 737 S.E.2d at 785-786 (citation omitted). Here, the trial court made numerous unchallenged, therefore binding, findings of fact which support its conclusion:

4. [Rudy] has been in the physical custody of the Plaintiff Father and living with the Plaintiff in Nash County since

the entry of an emergency Custody Order on May 24, 2013.

6. During the time [Rudy] has resided in the physical custody of the [] Father he has gone from special needs classes into regular classes and is presently taking advanced placement classes and is doing very well in school. [Rudy] is currently in the 9th grade and has all A's in his classes.

8. The [Father's] home is a 5 bedroom, 2 story home with 3 full bathrooms. [Rudy] and [Liam] have their own bedrooms. [Rudy] gets along well with the other members of the family that reside in the home with him.

10. The [Father] has recently taken a job with Cummins Diesel in Whitakers, North Carolina. The [Father] presently works second shift.

11. The Defendant Mother currently resides in Buncombe County, North Carolina where she lives with her current husband. Both the Defendant Mother and her husband have disabilities that require the use by each of service animals. On both dates in which this matter was heard by the Court, the Defendant Mother and her husband were accompanied by their service animals to Court.

13. On average, [Rudy] sees [his therapist] once per month and has in the past seen [his therapist] more often when necessary.

14. The Defendant Mother has physically attended one of [Rudy's] therapy sessions with [his therapist] since October of 2019, which was in December of 2022, and the Defendant Mother also participated by telephone on two occasions. The Plaintiff Father has never missed any of [Rudy's] therapy appointments.

16. [His therapist] attributes [Rudy's] substantial progress in part to [Rudy's] own determination and to the strong family support [Rudy] receives.

44. The [Father] further communicated to [Mother] that he felt that it should be [Rudy's] decision whether to attend Early College, but that the [Mother] would ultimately get to decide the issue, as both the [Father] and [Mother] would need to consent for [Rudy] to attend Early College.

51. [Rudy's] therapist [] feels that [Rudy] was excited about attending Early College and is capable and prepared for Early College, both academically and socially.

52. [Rudy's] IEP team met to discuss the Early College opportunity for [Rudy]. No one on [Rudy's] IEP team except the [Mother] believed that Early College was inappropriate for [Rudy] or that he could not handle Early College both academically and socially.

53. When asked at the meeting what he wanted to do, [Rudy] stated that he wanted to attend Early College.

57. [Rudy] was very upset and disappointed at not being able to attend Early College and is aware that the [Mother] is the reason that he was not permitted to attend.

67. . . . The [prior] Order provides that if the [Mother] wishes to speak to [Rudy] she is to call him at 7:30 in the evening. For reasons unexplained to the Court, the [Mother] routinely calls well after 7:30 demanding to speak to [Rudy] at times other than permitted by the prior Order.

68. . . . The parties share joint legal custody, and them having adamantly differing opinions and ideas as to what is in [Rudy's] best interest, joint legal custody is no longer a workable and viable option in this case.

Furthermore, the trial court acknowledged the parties' inability to communicate and how their lack of communication affects Rudy's welfare and future endeavors. Accordingly, since joint legal custody was "no longer a workable

and viable option,” the trial court set out detailed and necessary parameters for the parties to follow. Such parameters include: a visitation schedule, including holidays and summer breaks; the pick-up and drop-off location for exchanges; Father’s duty to keep Mother informed of Rudy’s regular activities and doctor’s appointments via email; Mother’s free and equal access to all of Rudy’s medical, dental, mental health and educational records; and the procedure in the event of a medical emergency.

We conclude these unchallenged findings are sufficient to support the trial court’s determination of Rudy’s best interests. In light of the parties’ inability to co-parent, the court made findings which compared Mother and Father’s home environment, prior decisions as to Rudy’s care and well-being, Rudy’s mental and behavioral health, and Rudy’s overall progress and stability with Father since 2013. Additionally, finding of fact #70 states, “[t]he Court spoke with [Rudy] in chambers in the presence of the attorneys with the consent of the parties. The Court has considered [Rudy’s] wishes and desires as expressed during this meeting.” Although a child’s wishes are never controlling on the court, “the trial judge may consider the wishes of a child of suitable age and discretion.” *Johnson v. Lawing*, 289 N.C. App. 334, 338, 889 S.E.2d 500, 503-04 (2023) (citation omitted).

Despite certain disputes that were left unresolved, such as Rudy’s attendance at Early College, the trial court made adequate findings that were *material* to determine what served Rudy’s best interests. The court assessed how the parties are unable to make mutual decisions, how this inability affects Rudy’s life, and most

importantly, why awarding custody to Father best promoted Rudy's welfare. Therefore, even in the absence of Mother's challenged findings, the unchallenged findings support the trial court's conclusion that sole legal and physical custody with Father served Rudy's best interests. *Hall*, 188 N.C. App. at 533, 655 S.E.2d at 905.

C. Phone-Call Limitation

Next, Mother contends that "[t]here is no rational basis for limiting the [phone] calls to a particular hour and to [fifteen] minutes a day." If there is competent evidence to support this limitation, it should not be overturned "absent a manifest abuse of discretion." *Peeler v. Joseph*, 263 N.C. App. 198, 206, 823 S.E.2d 155, 161 (2018) (citation omitted). The prior custody order had a phone-call limitation provision, which permitted the parent who was not with Rudy to call at 7:30 p.m., for no longer than twenty minutes. Further, Mother conceded, and the trial court found that Mother missed calls because she called late. The new provision alters the previous limitation only slightly: fifteen instead of twenty minutes, but it expands the window of opportunity to call from 7:30 p.m. to between 7:00 – 8:00 p.m. Additionally, the limitation applies to both Mother and Father, as Father is only permitted to call within this period when Rudy is with Mother.

Mother's and Father's inability to communicate effectively is evidenced by the trial court's findings of fact, specific visitation schedules, and other procedures set in place to ensure the parties have minimal communication with one another. The

phone-call limitation is supported by the evidence that such measures and restrictions are necessary for Mother and Father to have a detailed plan to follow, and that a detailed plan serves Rudy's best interests.

Furthermore, this limitation does not alter Mother's in-person visitation time. The trial court set forth the following visitation schedule for her: one full weekend per month, with an additional weekend once in each calendar quarter; alternating Christmas and Thanksgiving holidays each year; Spring Break with Mother; almost a month during the summer with Mother, and Mother's Day. Therefore, the slight change in the phone-call limitation from the prior custody order does not amount to an abuse of discretion. Accordingly, the trial court did not abuse its discretion by incorporating the provision in the custody order.

III. Conclusion

For the foregoing reasons, we conclude that the trial court did not abuse its discretion in concluding that it was in Rudy's best interests for Father to have sole legal and physical custody to promote Rudy's overall interests and welfare. Accordingly, we affirm the trial court's 13 June 2023 custody order.

AFFIRMED.

Judges STROUD and COLLINS concur.

Report per Rule 30(e).