

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-1164

Filed 31 December 2024

Franklin County, No. 22 CVD 689

TERRILL WILLIAMSON, Plaintiff,

v.

TEAH SMITH, Defendant.

Appeal by Plaintiff-Father from order entered 3 May 2023 by Judge Caroline S. Burnette in Franklin County District Court. Heard in the Court of Appeals 27 August 2024.

The Law Office of Colon & Associates, PLLC, by Arlene L. Velasquez-Colon and Kendra R. Alleyne, for Plaintiff-Father.

Vitrano Law and Mediation, by Sean P. Vitrano, for Defendant-Mother.

CARPENTER, Judge.

Terrill Williamson (“Father”) appeals from the trial court’s 3 May 2023 custody order regarding the child of Father and Teah Smith (“Mother”). On appeal, Father argues the trial court violated his right to due process by not providing either party the opportunity to present evidence at the 15 February 2023 hearing and erred by modifying a prior 5 January 2023 custody order without a showing of a substantial

change in circumstances. After careful review, we disagree with Father. We lack jurisdiction to review Father's due process argument because he did not appeal from the 23 February 2023 order. Next, the 5 January 2023 order was temporary, therefore its modification in the 3 May 2023 order did not require a showing of a substantial change in circumstances. Because the trial court applied the proper standard in its 3 May 2023 custody modification, we affirm.

I. Factual & Procedural Background

Father and Mother are the unmarried parents of a minor child, born in December 2021. Father and Mother lived together from the date of the child's birth until June 2022, when Mother moved out with the child. Mother and the child resided with the child's maternal grandmother in Kinston, North Carolina until 24 August 2022, when Mother and the child moved into the child's great-grandmother's home in Knightdale, North Carolina. During this time, Mother did not communicate her whereabouts to Father.

On 15 July 2022, Father filed a complaint seeking temporary and permanent custody of the child. Father served Mother with the summons and complaint by sheriff on 16 August 2022 at the Kinston address. On 3 November 2022, Father mailed a notice of hearing to Mother at the Kinston address, advising that the matter was scheduled for a hearing on 16 November 2022. Mother claimed she did not receive the notice, as she was then living in Knightdale, even though she arranged for her mail to be forwarded. On 16 November 2022, the trial court conducted a

hearing in Mother's absence, and on 29 November 2022, entered a "Permanent Custody Order" awarding Father full legal and physical custody of the child, due in large part to Mother residing, "upon information and belief," with the child's maternal grandmother and her fiancé, a registered sex offender. According to the "Permanent Custody Order,"

[f]or a period of eight (6) months [sic], [Mother] can file a motion to revis[i]t this issue without the need to show a substantial change in circumstances necessary to modify this order to review visitation or other custodial time, however, after eight 68) [sic] months, that [Mother] will need to show proof of a substantial change in order to prove that the order should be modified.

On 5 January 2023, the trial court entered an "Amended Permanent Custody Order" with additional findings of fact. Further, the "Amended Permanent Custody Order" directed law enforcement to enforce the order and any accompanying order or warrant for a change in child custody. On the same day, the trial court issued warrants directing law enforcement in three counties to take immediate physical custody of the child and to transfer the child to Father's custody. On 6 January 2023, the Wake County Sheriff served the warrant and brought the child to Father.

On 31 January 2023, Mother filed an answer and counterclaims for custody and attorney fees; a motion to set aside the previous custody orders and to stay their provisions pending the disposition of the motion; and a motion to modify custody. The matter came on for a hearing on 15 February 2023, with both parties in attendance with their attorneys. The trial court, however, was "unable to reach the matter and,

therefore, heard no testimony but did review the file and heard preliminary arguments by the parties' attorneys."

On 23 February 2023, the trial court entered a "Temporary Custody Order." Among other things, the trial court ordered that Mother have visitation with the child every other weekend. The trial court stated that "[t]his is a temporary order, entered without prejudice to either party," and that the matter would be fully considered at a later date.

One month later, on 24 March 2023, Father and Mother both appeared and testified at a contested custody hearing. On 3 May 2023, the trial court entered a "Permanent Custody Order" finding and concluding that both parties were fit and proper persons to have care, custody, and control of the child, and that joint legal and physical custody was in his best interest. The trial court granted joint legal custody of the child to the parties and directed them to alternate physical custody of the child weekly.

On 7 July 2023, Father filed notice of appeal from the 3 May 2023 custody order, explaining that he was not served with the order until on or about 12 June 2023. Father's notice of appeal reads, in relevant part, "[Father] hereby gives Notice of Appeal from the Order entered by this Court on May 3, 2023 heard before the Honorable Caroline S. Burnette in Franklin County District Court pursuant to N.C.G.S. §§ 1-270, 1-277 and 7A-27(b)(2) and (b)(3)."

II. Jurisdiction

This Court has jurisdiction over Father’s appeal from the 3 May 2023 custody order pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2023).

Conversely, we lack jurisdiction to review Father’s constitutional argument that the trial court violated his due process rights by modifying custody in the 23 February 2023 order without hearing testimony. Rule 3 of our Rules of Appellate Procedure provides, in relevant part, that “[t]he notice of appeal required to be filed . . . shall designate the judgment or order from which appeal is taken[.]” N.C. R. App. P. 3(d). Rule 3 is jurisdictional. *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) (“In order to confer jurisdiction on the state’s appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure.”).

Here, Father complied with Rule 3 in that his notice of appeal exclusively designated the trial court’s 3 May 2023 order as the judgment from which his appeal was taken. *See* N.C. R. App. P. 3(d). Father did not give notice of appeal from the interlocutory 23 February 2023 order, and it is therefore binding. *See In re J.M.W.*, 179 N.C. App. 788, 795, 635 S.E.2d 916, 921 (2006) (“Because the order was not appealed, it is valid and binding in every respect.”) (citing *Hayden v. Hayden*, 178 N.C. 259, 263, 100 S.E. 515, 517 (1919)).¹

¹ Section 1-278 does not serve to preserve Father’s appeal from the interlocutory 23 February 2023 order. Section 1-278 provides: “Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment.” N.C. Gen. Stat. § 1-

Accordingly, our discussion of prior custody orders is limited to the extent they are relevant to Father’s argument concerning the validity of the 3 May 2023 order.

III. Issue

The sole issue properly before us is whether the trial court erred by modifying child custody in the 3 May 2023 order. Specifically, whether the trial court erred by modifying the custody provisions of the 5 January 2023 order under the best interests of the child standard, rather than the substantial change in circumstances standard.

IV. Analysis

Father asserts that the 5 January 2023 order was a permanent custody order, and, as a result, the trial court erred by modifying it on 3 May 2023 without a showing of a substantial change in circumstances. Mother, on the contrary, maintains that the 5 January 2023 order was temporary, and therefore, the trial court did not err by modifying custody in the 3 May 2023 order under the best interests of the child standard. After careful review, we agree with Mother that the 5 January 2023 order was temporary. Because the trial court applied the proper standard in its custody modification, we affirm.

“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. If there has been a substantial change in circumstances, the

278 (2023). Here, the temporary 23 February 2023 order was expressly entered without prejudice to the parties and, thus, did not necessarily affect the judgment.

court may modify the order if the modification is in the best interests of the child.” *Woodring v. Woodring*, 227 N.C. App. 638, 643, 745 S.E.2d 13, 18 (2013) (citations omitted). Temporary orders, on the other hand, may be modified without a showing of a substantial change in circumstances if the modification is in the best interest of the child. *Senner v. Senner*, 161 N.C. App. 78, 80–81, 587 S.E.2d 675, 677 (2003); *LaValley v. LaValley*, 151 N.C. App. 290, 292, 564 S.E.2d 913, 915 (2002).

The determination as to “whether an order is temporary or permanent in nature is a question of law, reviewed on appeal de novo.” *Smith v. Barbour*, 195 N.C. App. 244, 249, 671 S.E.2d 578, 582 (2009). “The trial court’s designation of [a custody] order as ‘temporary’ or ‘permanent’ is not binding on an appellate court.” *Id.* at 249, 671 S.E.2d at 582 (quoting *Lamond v. Mahoney*, 159 N.C. App. 400, 403, 583 S.E.2d 656, 658–59 (2003)).

“There is no absolute test for determining whether a custody order is temporary or [permanent].” *LaValley*, 151 N.C. App. at 292, 564 S.E.2d at 915. “Temporary custody orders resolve the issue of a party’s right to custody pending the resolution of a claim for permanent custody.” *Brewer v. Brewer*, 139 N.C. App. 222, 228, 533 S.E.2d 541, 546 (2000). “[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.” *Senner*, 161 N.C. App. at 81, 587 S.E.2d at 677. “If the order does not meet any of these criteria, it is permanent.”

Peters v. Pennington, 210 N.C. App. 1, 14, 707 S.E.2d 724, 734 (2011) (quoting *Senner*, 161 N.C. App. at 81, 587 S.E.2d at 677).

Here, in the 5 January 2023 order, the trial court set a reasonably brief reconvening window of six to eight months, during which if no motion was filed by Mother, the 5 January 2023 order would transform from temporary to permanent, at which point the substantial change in circumstances standard would take effect. In other words, the 5 January 2023 order was temporary for a period of six to eight months, at which point it would become permanent if Mother failed to seek relief. This reasonably brief filing window evidences the trial court's intent to enter a temporary custody order, including the conditions under which it would become permanent. Mother promptly filed responsive pleadings after service of the 5 January 2023 order and custody warrants, within the temporary window.

Father's arguments concerning the lack of clarity or specificity due to the trial court's clerical errors concerning the duration of the filing window elevate form over substance. We must focus on the substance of the 5 January 2023 order, with due consideration to the trial court's intent, which is readily apparent when considered alongside its oral ruling.

This Court will allow the respondent mother to, within six months, provide evidence to the contrary of this order, without showing a substantial change in circumstances. However, this will be a fully enforceable order by the powers of contempt. And as soon as an address can be located, this court will also enter an order -- or a warrant, rather, directing the change of custody to the plaintiff in

this action. So, if you will prepare an order to that effect, counselor, and I will sign it.

Because the 5 January 2023 order was temporary, the trial court did not err by applying the best interests standard in its 3 May 2023 custody modification. *See Peters*, 210 N.C. App. at 14, 707 S.E.2d at 734. Although the trial court's findings of fact present as somewhat conclusory, failing to resolve the open question concerning Mother's purported residence with a sex offender, for example, Father's arguments concerning the validity of the 3 May 2023 order are limited to whether the trial court applied the proper standard in its modification of custody. *See Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) ("It is not the role of the appellate courts . . . to create an appeal for an appellant."). Having resolved this question in the affirmative, we affirm the trial court's 3 May 2023 order.

V. Conclusion

In sum, because the 5 January 2023 order was temporary, the trial court applied the proper custody modification standard in the 3 May 2023 order.

AFFIRMED.

Judges HAMPSON and GRIFFIN concur.

Report per Rule 30(e).