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The NC Court of Appeals addresses "self-executing" modification provisions in custody orders

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The North Carolina Supreme Court has stated that "[a] judgment awarding custody is based upon conditions found to exist at the time it is entered …." *Stanback v. Stanback*, 266 N.C. 72, 76 (1965). *See also Kellanos v. Kellanos, 251 N.C. App. 149 (2016)*(a district court must consider the pros and cons of ordering primary custody with each parent, contemplating the two options as *they exist [*at the time of the hearing*]*, and then choose which one is in the child's best interest.").

A custody order can be modified only upon a showing of a substantial change in circumstances affecting the welfare of the child that occurred after the entry of the custody order. G.S 50-13.7; *Shipman v. Shipman*, 357 N.C. 471 (2003). "Evidence of speculation or conjecture that a … change may take place sometime in the future will not support a change in custody." *Benedict v. Coe*, 117 N.C. App, 369, 378 (1994), quoting *Ramirez-Barker v. Barker,* 107 N.C. App. 71, 78 (1992).

But what if it seems very likely, at the time the custody order is entered, that circumstances will change? Can the court anticipate the change in the custody order and provide for a change in the custodial arrangement upon the occurrence of the change?

The court of appeals addressed this issue yesterday in *Madison v. Gonzalez-Madison,* (N.C. App, August 6, 2024). That opinion, as well as earlier decisions of the appellate court, indicate that a trial court's authority to include "self-executing" modification provisions is extremely limited.

Madison v. Gonzalez-Madison

Both parents are active-duty members of the U.S. Army. While both were stationed in North Carolina when the custody action was initiated, both had been re-stationed in Hawaii by the time of the permanent custody trial. The trial court granted mother primary physical custody of the child and joint legal custody to both parents. However, the court also included provisions in the order that would take effect if either or both parents are relocated by the Army from Hawaii. The trial court found that each parent was expected to have a permanent change of station in 2025 and that mother planned to relocate to Texas at that time. The court created an alternative

visitation schedule for the father that would commence if the parents left Hawaii and that included alternative visitation provisions that would apply depending on whether the parties lived further than 100 miles from each other.

On appeal, the father argued that the trial court abused its discretion by including this "self-executing modification provision" in the custody order, and the court of appeals agreed.

The appellate court first noted that several other states have held that self-executing modification orders are generally illegal, and that their legality is unclear in other states, citing Helen R. Davis, *Self-Executing Modification of Custody Orders: Are They Legal?* 24 Am. Acad. Matrim. Laws 53 (2021).

The appellate court then held that the change anticipated by the court was much too speculative to allow the trial court to determine the appropriate visitation schedule before the change occurs. The court of appeals stated:

"Here, the trial court made a call regarding visitation in the future without knowing when either parent may be transferred from Hawaii or where either may be transferred or how far apart Mother and Father would be living from each other. A [station change] could create either a slight change or a drastic change which could uproot [the child] to any United States Army base. We therefore conclude the trial court abused its discretion by incorporating the "self-executing" provisions in the order, provisions which do not take effect until after either parent [transfers] from Hawaii, where the time and place of such transfer is unknown."

Burger v. Smith

The court in *Madison* acknowledged the contrary result in *Burger v. Smith,* 243 N.C. App. 233 (2015). In that case, the court of appeals affirmed an order providing for visitation of an 18-month-old child with mother for two months, then with father for one month, until the child started kindergarten, at which time father's visitation would change and thereafter take place over spring, summer, and Christmas breaks. The court of appeals held that this order was within the trial court's discretion, was supported by a finding that both parents were excellent parents who had provided exceptional care and had strong support systems and was an "appropriate response to the parties' unusual living situation." The mother lived in North Carolina and was a U.S. citizen, but father was not a U.S. citizen and lived sometimes in Canada and sometimes in Africa. Rather than an abuse of discretion, the court in *Burger* held that "[t]he trial court's findings of fact and conclusions of law demonstrate an intention to fashion a custody plan that would foster the development of a close and meaningful relationship between the minor child and both of his parents."

The court in *Madison* distinguished *Burger* by stating that "the changes in circumstances which may occur based on a [military station change for either or both parents] are much more speculative than that in *Burger*," pointing to the fact that there was no way to know whether a station change would result in a "slight or drastic" change for the child.

Cox v. Cox

Although not mentioned by the court in *Madison*, the court of appeals also rejected a "self-executing modification" in the case of *Cox v. Cox,* 238 N.C. App. 22 (2014). In that case, due to concerns regarding the father's mental health, the trial court's custody order required that father reside with his mother when exercising visitation with the child. However, the order also provided that this restriction on father's visitation would be lifted upon a showing that his therapist no longer had concerns about father's mental health or his ability to care for the children on his own. The order specifically provided that this showing would constitute a substantial change in circumstances that would result in the modification of the custody order to lift the restriction on father's visitation.

The court in *Cox* held that the provision violated the requirements of G.S. 50-13.7, stating "[t]o predetermine that a future event will amount to a substantial change in circumstances warranting a modification of child custody is to predetermine a legal conclusion absent any finding of fact."

The court reached similar conclusions in *Hibshman v. Hibshman*, 212 N.C. App. 113 (2011) (agreement by parties in initial custody order that order was subject to modification without a showing of changed circumstances was ineffective); *Thomas v. Thomas*, 233 N.C. App. 736 (2014) (stipulation by parties at the beginning of modification hearing that there had been a substantial change in circumstances was ineffective; changed circumstances is a legal conclusion of law that must be made by the trial judge); and *Spoon v. Spoon*, 233 N.C. App. 38 (2014)(noting that the trial court would have erred had it relied on a stipulation that the parties made before the entry of the original custody order that a move by mother in the future would constitute a substantial change in circumstances).

This entry was tagged with the following terms: changed circumstances, child custody, custody orders, modification of custody.

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