

Modification of Child Custody Orders

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Public Policy

“A decree of custody is entitled to such stability as would end the vicious litigation so often accompanying such contests, unless it be found that some change of circumstances has occurred affecting the welfare of the child so as to require modification of the order.”

Shepherd v. Shepherd, 273 N.C. 71, 75, 159 S.E.2d 357, 361 (1968).



G.S. 50-13.7

- “An order of a court **of this State** for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested.”
- “ Subject to the provisions of G.S. 50A-201, 50A-202, and 50A-204, when an order for custody of a minor child has been entered by a court **of another state**, a court of this State may, upon gaining jurisdiction, and a showing of changed circumstances, enter a new order for custody which modifies or supersedes such order for custody.”



Case law

“[T]he modification of a custody decree must be supported by findings of fact based on competent evidence that there has been a **substantial change** of circumstances **affecting the welfare of the child**, and the party moving for such modification assumes the burden of showing such change of circumstances.”

Pulliam v. Smith, 348 NC 616 (1998).

Shipman v. Shipman, 357 N.C. 616 (2003).



Procedural Issues



Procedure

- Motion required?
 - *Catawba County ex. rel. Rackley v. Loggins*, 370 N.C. 83 (2017).
- Filing request to modify in county other than original county ??
 - See *Brooks v. Brooks*, 107 NC App 44 (1992)(a matter of venue).
- Out of state order: registration required?
- Trial court’s authority to enter temporary orders??



Temporary custody orders.....

- “Under appropriate circumstances, upon gaining jurisdiction of the child the court may enter orders for temporary custody and support.”
 - G.S. 50-13.5(d)(2)
- “Temporary orders establish a party’s right to custody ending the resolution of a claim for permanent custody.”
 - *Regan v. Smith*, 131 NC App 851 (1998).
- *Ex parte* temporary orders may be entered in appropriate circumstances.
 - *Regan v. Smith*, 131 N.C. App. 851 (1998)
 - *Brandon v. Brandon*, 10 N.C. App. 457 (1971)

Temporary Orders

- Only one appellate case:

Kozec v. Murphy, unpublished, 817 S.E.2d 629 (N.C. App. 2018)(trial court has no authority to enter a temporary order when a motion to modify is pending unless trial court concludes there has been a substantial change in circumstances).

Can we “tweak” custody orders?

Any change is a modification.....

- *Lewis v. Lewis*, 181 NC App 114 (2007)
 - No alteration of visitation schedule after relocation
- *Frey v. Best*, 189 NC App 622 (2008)
 - No alteration of visitation due to work schedule change
- *Hibshman v. Hibshman*, 212 NC App 113 (2011)
 - “no exception” to substantial change requirement”
- *Evans v. Evans*, 138 NC App 135 (2000)

But compare.....

- *Tankala v. Pithavadian*, 789 S.E.2d 31 (N.C. App. 2016)
 - Order entered in response to request from parenting coordinator was not a modification where primary custody remained unchanged but father’s visitation was amended to address concerns raised by PC.
- *Grissom v. Cohen*, (N.C. App., 2018)
 - Indicating court has authority to enter orders supplementing original custody order to enforce compliance with underlying custody order.

Substantial Change in Circumstances

Trial judge must make conclusion

Modification order must contain the conclusion of law that there has been a substantial change in circumstances affecting the welfare of the child since the entry of the last permanent custody order.

- *Davis v. Davis*, 229 N.C. App. 494 (2013)
- *Hatcher v. Matthews*, 789 S.E.2d 499 (N.C. App. 2016).
- *But see Kolczak v. Johnson*, (N.C. App., 2018)(findings of fact established substantial change so order was affirmed despite lack of conclusion by the court that there had been a substantial change affecting the children.)

Because it is a legal conclusion, parties cannot stipulate that there has been a substantial change.

Thomas v. Thomas, 233 NC App 736 (2014).



Change since last order

Change in the effects of circumstances existing at time of last order can be sufficient to support modification

- *Shell v. Shell*, 819 S.E.2d 566 (N.C. App., 2018)
- *Laprade v. Barry*, 800 SE2d 112 (N.C. App 2017)
- *Spoon v. Spoon*, 233 NC App 38 (N.C. App. 2014)



Effects can be negative or positive...

- *Pulliam v. Smith*, 348 NC 616 (1998)
- Substantial change must be related to the welfare of the child
- Impact or potential impact on child can be positive or negative
- **Rejected** holding that “it must be shown that circumstances have so changed that the welfare of the child *will be adversely affected* unless custody is modified.”
- Once there has been a substantial change that relates to the welfare of the child, the custody order can be modified to promote best interest of the child



Substantial change

- Change must be substantial but there is no requirement that the impact on the welfare of the child be substantial

Spoon v. Spoon, 233 NC App 38 (2014)

See also *Pulliam v. Smith*, 348 NC 616 (1998)(concurring opinion)



Findings to support conclusion

- Trial court should “pay particular attention in explaining whether any change in circumstances can be deemed substantial, whether the change affected the welfare of the minor child, and finally, why modification is in the child’s best interest.”
- Findings must demonstrate “nexus” between the substantial change and the effect on the welfare of the child.

Shipman v. Shipman, 357 NC 471 (2003)



Evidence to support findings.....

- Findings of fact must be supported by substantial evidence.
 - *Shipman v. Shipman*, 357 NC 616 (2003)
- Court of appeals must “afford sufficient weight and deference to the well-established law which severely limits appellate court review of custody orders, especially in the area of fact-finding.”
 - *Pulliam v. Smith*, 348 NC 616 (1998)



Pulliam v. Smith

- Trial judge concluded father's cohabitation with homosexual partner in home with children was a substantial change affecting the children.
- Court of appeals held trial court's conclusion was not supported by evidence of impact of the change on the children.
- Supreme court *reversed*, stating trial court entitled to deference in matters of custody.

Pulliam v. Smith

- "Self-evident" effect??
 - "We conclude that activities such as the regular commission of sexual acts in the home by unmarried people, failing and refusing to counsel the children against such conduct while acknowledging this conduct to them, allowing the children to see unmarried persons known by the children to be sexual partners in bed together, keeping admittedly improper sexual material in the home, and Mr. Tipton's taking the children out of the home without their father's knowledge of their whereabouts support the trial court's findings of "improper influences" which are "detrimental to the best interest and welfare of the two minor children."
- This finding along with finding that child cried and was emotionally distraught when told of his father's homosexuality was sufficient to support trial court's conclusion that "the activity of the Defendant will likely create emotional difficulties for the two minor children."

Shipman v. Shipman

- Some effects are "self-evident" and need no direct evidence to support a finding of fact
- Effects that are not self-evident need evidence "*directly* linking the change to the welfare of the child." (emphasis in opinion)
- Evidence might be:
 - Assessments of child's well-being by a qualified mental health professional
 - School records
 - Testimony from the child
 - Testimony from the parent

Shipman v. Shipman

- Self-evident negative impact:
 - Father's failure to pay support
 - (denied child benefits that attach to financial resources)
 - Mom's failure to provide stable home
 - (denied child benefit of security that comes from stability)
 - Mom's denial of father's visitation
 - (denied child benefits of contact with his father)
 - Mom's failure to maintain contact with paternal relatives
 - (denied child benefits of access to extended family)

Shipman v. Shipman

- Self-evident positive impact:
 - Father's new job
 - Father's new relationship and marriage
 - Father's new residence

Shipman v. Shipman

- Examples of changes that do not have self-evidence impact on child:
 - A move on the part of a parent
 - A parent's cohabitation
 - A change in a parent's sexual orientation

Best Interest

- Order can be modified only if modification is in the best interest of the child.
 - *Shipman*
- New custody order must be based on best interest of the child, considering all circumstances at the time of the new order.
 - *O'Connor v. Zelinske*, 193 NC App 683 (2008)(relocation)
- Must trial court explain “nexus” between changed circumstances and the new custody order?
 - *Mastny v. Mastny*, 816 S.E.2d 241 (2018)