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Modification of Child Custody Orders

I. Public Policy

- a. “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. To hold otherwise would invite constant litigation by a dissatisfied party so as to keep the involved child constantly torn between parents and in a resulting state of turmoil and insecurity. This in itself would destroy the paramount aim of the court, that is, that the welfare of the child be promoted and subserved.” *Pulliam v. Smith*, 348 NC 616 (1998), quoting *Shepherd v. Shepherd*, 273 N.C. 71, 75, 159 S.E.2d 357, 361 (1968).
- b. G.S. 50-13.7:
 - i. “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.”
 - ii. “ 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.”
- c. “[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; Shipman v. Shipman*, 357 N.C. 616 (2003).

II. Procedural Issues

- a. Motion required by GS 50-13.7

- i. Failure to file a motion does not deprive the court of subject matter jurisdiction. *Catawba County ex. rel. Rackley v. Loggins*, 370 N.C. 83 (2017).
 - ii. But modification without a motion is legal error. *Summerville v. Summerville*, 814 S.E.2d 887 (N.C. App. 2018)(judge cannot modify custody on his/her own motion). See also blog post UNC ON THE CIVIL SIDE, *Yes, we're still supposed to file a motion to modify* (October 6, 2017).
- b. Filing request for modification in a county other than original county
- i. Proper county is county of original action, but objection to proper venue is waived if not raised in a timely manner. *Brooks v. Brooks*, 107 NC App 44 (1992).
 - ii. Court cannot change venue *sua sponte*. *Zetino-Cruz v. Benitez-Zetino*, 791 S.E.2d 100 (N.C. App. 2016).
- c. Is there a need to register custody order from another state before a court has authority to modify it?
- i. Unlike a child support order entered in another state, nothing in statutes or case law explicitly requires registration of a custody order.
 - ii. Registration process in GS 50A-305 has another purpose. See Official Comment to that statute.
 - iii. See blog post UNC ON THE CIVIL SIDE, *Does a foreign custody order have to be registered before our court can enforce or modify it?* (March 6, 2015).
- d. Temporary orders
- i. G.S. 50-13.5(d)(2) states: "Under appropriate circumstances, upon gaining jurisdiction of the child the court may enter orders for temporary custody and support."
 - ii. "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). In *Brandon v.*

Brandon, 10 N.C. App. 457 (1971), the court cited 3 Lee, N.C. Family Law, Sec. 222, 1968 Cumulative Supplement, p. 15, to explain:

There may be occasions when there is considerable urgency for temporary order for the custody of a child. In such instances the judge may reach a decision on the basis of affidavits and other evidence produced at a preliminary hearing. The persons who have signed the affidavits are, of course, not present and there is no opportunity to cross examine them, but this is said not to be objectionable because the ultimate right of examination will be afforded the parties at the trial of the cause. The real reason is that the welfare and custody of a small child is an urgent matter in which substantial harm can be caused by unnecessary delay. Furthermore, all custody orders are from their very nature temporary and founded upon conditions and circumstances existing at the time of the hearing.'

- iii. The only appellate case on this issue held that a 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. *Kozec v. Murphy*, unpublished, 817 S.E.2d 629 (N.C. App. 2018).

III. What amounts to a modification?

- a. No tweaking
 - i. Appellate opinions repeatedly have held that trial courts cannot even make minor changes to a custody order unless court concludes there has been a substantial change in circumstances.
 - ii. See blog post "*Tweaking of Custody Orders Not Allowed*" UNC ON THE CIVIL SIDE (June 12, 2015)
- b. *But see 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).

- c. *See also 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). *See* blog UNC ON THE CIVIL SIDE, *Enforcing custody orders: civil contempt is not always the appropriate remedy* (November 1, 2018).
- d. Relocation cases are especially problematic
 - i. Relocation is not presumed to be a change in circumstances. *See Shipman v. Shipman*, 357 N.C. 616 (2003)(relocation does not have a “self-evident” effect on child).
 - ii. *Evans v. Evans*, 138 NC App 135 (2000)(where no substantial change, modification was improper even though mom moved to another state); *Cherry v. Thomas, unpublished*, 205 NC App 320 (2010)(where change in residence of father did not affect children, no modification even though move meant children were required to travel one hour each way to exchange visitation every four days).
 - iii. If trial court does not find substantial change, there is no way to address visitation problems that arise when relocation occurs.

IV. Substantial change since entry of last order

- a. Modification order must contain the conclusion of law that there has been a substantial change in circumstances since the entry of the last permanent custody order. *See Davis v. Davis*, 229 N.C. App. 494 (2013) and *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 and effects on the children so order was affirmed despite lack of conclusion by the court that there had been a substantial change affecting the children.)
- b. Parties cannot stipulate that there has been a change; trial court must make the conclusion of law. *Thomas v. Thomas*, 233 NC App 736 (2014).
- c. Change in the effects of circumstances existing at time of last order can be sufficient to support modification:
 - i. *Shell v. Shell*, 819 S.E.2d 566 (N.C. App., 2018)
 - ii. *Laprade v. Barry*, 800 SE2d 112 (N.C. App 2017)
 - iii. *Spoon v. Spoon*, 233 NC App 38 (N.C. App. 2014)
- d. *See* blog post UNC ON THE CIVIL SIDE *Custody Modification: the effects of the same circumstances can be the changed circumstances* (September 27, 2018)

- V. Substantial change: showing “nexus” between change and welfare of child
- a. Findings of fact must show how change affects the welfare of the child. *Carlton v. Carlton*, 354 N.C. 561 (2001); *Evans v. Evans*, 138 NC App 135 (2000). Findings of fact must be based on substantial evidence. *Shipman v. Shipman*, 357 N.C. 616 (2003)
 - b. How much detail is enough? How much evidence of impact is required?
 - i. Supreme Court guidance:
 1. *Pulliam v. Smith*, 348 N.C. 616 (1998)
 2. *Shipman v. Shipman*, 357 N.C. 616 (2003)
 - ii. Recent cases:
 1. *Booker v. Strege*, 807 S.E.2d 597 ((N.C. App. 2017)(fact that parents enrolled child in different schools was enough to establish impact of change on the child).
 2. *Summerville v. Summerville*, 814 S.E.2d 887 (N.C. App. 2018)(father’s interference with and failure to participate in child’s therapy found to have negative impact on child).
 3. *Kolczak v. Johnson*, 817 S.E.2d 861 (N.C. App. 2018)(exposure to felon and criminal activity established “negative” impact on children).
 4. *Mastney v. Mastney*, 816 S.E.2d 241 (N.C. App. 2018)(conduct of parents did not have a “self-evident” impact on child and findings failed to establish the required “nexus”).
- VI. Findings necessary to support new custody order
- a. After concluding there has been a substantial change affecting the welfare of the child, the trial court must determine whether modification of the order is in the best interest of the child. A custody order can be modified only if the trial court determines modification is in the best interest of the child. *Shipman v. Shipman*, 357 N.C. 616 (2003).
 - b. New custody order must be based on best interest of child, considering all of the circumstances relating to the welfare of the child at the time it is entered. See *O’Connor v. Zelinske*, 193 N.C. App. 683 (2008)(once court concludes parent’s proposed relocation is a substantial change affecting the welfare of the child, the court must decide best interest in light of all of the circumstances of the case).

- c. Must the modified custody order must specifically address the changed circumstances??
- i. *Mastny v. Mastny*, 816 S.E.2d 241 (N.C. App. 2018); *Mastny v. Mastny*, unpublished, 796 S.E.2d 402 (2017) (“Any modification of the existing consent custody order must be shown to be not only in [the best interest of the child, but in direct response to, or remedy of, any substantial changes that the trial court concludes have affected [the child’s] welfare.
 - ii. *See also Williams v. Chaney*, 802 SE2d 629 (N.C. App. 2018)(new custody order reversed because modification did not address problems with implementation of previous order).