Back to Parenting Coordinators in Custody Cases

***NOTE: After the publication of this blog, the statute dealing with parenting coordinators was extensively amended. See S.L. 2019-172, effective October 1, 2019.

A few weeks ago, I posted blog about Parenting Coordinators ("PCs") in Child Custody Cases and noted the ambiguity concerning the court's authority to respond when a PC requests a hearing pursuant to GS 50-97 and identifies changes that need to be made to the existing custody order. Shortly thereafter, the Court of Appeals provided more guidance on this issue. In *Tankala v. Pithavadian,* NC App (July 19, 2016), the court held that the strict limitation on a court's authority to "tweak" custody orders – *see* Blog "No 'tweaking' of Custody Orders Allowed – does not necessarily mean the court cannot address problems identified by a PC.

Tankala

The first custody order in this case was entered when the child was 5 years old. Mom was awarded primary physical custody with dad having visitation every other weekend. When the child was 10 years old, dad filed a motion requesting mom be held in contempt for violating the visitation provisions in the order and requesting that custody be modified because mom had been "actively alienating" the child from father. The trial court modified the initial custody order. Findings of fact to support modification included findings that the child was not visiting the father and "did not appreciate the need to have a relationship with his father." In addition, the court found mother had "overly nurtured" the child and had "stunted his social and emotional development." The modified custody order granted the parents joint custody with mom continuing to have primary physical custody and dad having weekend and holiday visitation. The court also ordered reunification therapy for dad and son and specified that the "timing and methods of the therapy shall be at the discretion of the therapist." Mom and dad were ordered to "follow all recommendations" of the reunification therapist and a PC was appointed.

After almost one year of working with the parties, the reunification therapist concluded that "a more intensive treatment approach" was necessary. The therapist recommended that the parents and the child attend a four-day "divorce camp" for high-conflict cases. The camp is in California and costs $9,000 per week.

The PC agreed with the therapist and instructed the parties to attend the camp but the parties did not go. Approximately one year later, the PC filed a motion pursuant to GS 50-97 requesting that the court order the parties to follow the recommendation and attend camp.

Following the hearing, the court modified provisions of the custody order addressing father's visitation to provide that father would visit with the child in the home of his relatives. The goal was to increase the child's comfort level with the father gradually and away from the influence of the

mother. In addition, the amended order required that dad's visitation alternate between the D.C./Maryland area (closer to father's residence) and North Carolina. The order required that the child's visits with the paternal relatives and his father "take priority over any other activity" of the child and provided that if reunification did not "progress" as a result of the new visitation plan, the parties were ordered to attend the divorce camp.

Mom appealed the modified order, arguing in part that the court erred by modifying the order when neither party had filed a motion to modify and the court had not concluded there had been a substantial change in circumstances.

Changes were not a "modification"

The court of appeals rejected mom's contention that the trial court modified the custody order. Instead, the court held that the new order simply implemented the original order. The court stated:

"Disputes over variations in custody arrangements including timing, location, and treatment often lead to costly and time-consuming litigation that can hinder progress in child custody cases and cause delays which are detrimental to the best interests of the children involved. To avoid such delays, trial courts prepare comprehensive child custody orders, like the North Carolina Custody Order governing the parties in this case, and appoint parenting coordinators authorized to facilitate the parties' compliance with court orders without having to seek additional orders from the court in every instance. In cases involving minor children requiring mental health treatment, trial courts often delegate to therapists control over treatment and visitation, but remain available to assert the court's authority if needed.

The Order does not modify the terms of custody, but rather provides specific requirements within the scope of the North Carolina Custody Order. The Order does not modify the earlier award of primary custody to Mother and visitation to Father. The requirement that the parties and [the child] attend the high-conflict divorce camp as recommended by the reunification therapist and the parenting coordinator is consistent with the requirement in the earlier order that the parties abide by those professionals' recommendations for treatment and visitation scheduling. Although the North Carolina Custody Order did not mention an out-of-state therapeutic camp for the family, it specifically ordered reunification therapy and provided that the timing and methods of therapy were left to the reunification therapist to decide. Similarly, specific provisions for [the child's] visitation with Father and Father's family in the Order do not conflict with provisions in the North Carolina Custody Order. Accordingly, no motion for custody modification was required… ."

Tankala.

What about cases like *Davis v. Davis*, 229 NC App 494 (2013)?

As I said in the blog mentioned above, "No 'tweaking' of Custody Orders Allowed, case law before

Tankala is extremely restrictive. For example, in *Davis v. Davis*, 229 NC App 494 (2013), the court of appeals rejected a trial court's attempt to "clarify" an existing custody order by requiring father to attend anger management classes, authorizing telephone visitation and providing specificity to provision in original order that dad have holiday and school break visitation. The court stated:

"Plaintiff argues that the trial court was not required to make the findings necessary to support a modification because the changes to the visitation schedule here were mere "clarifications" rather than modifications. Plaintiff simply misstates the law when she claims trial courts may "clarify" orders without finding a substantial change in circumstances affecting the welfare of the children. The controlling authority is to the contrary: to justify any changes to an existing custody order, beyond those fixing mere clerical errors, *see* N.C. Gen.Stat. § 1A–1, Rule 60, North Carolina courts have required a showing of a substantial change in circumstances affecting the welfare of the children. To depart from this rule—that is, to allow parties to seek "clarification" from a court any time a custody order could be clearer or any time the parties disagree over its interpretation—would undermine the very purpose of the "changed circumstances" requirement: checking the tendency towards continuous, acrimonious litigation and providing stability for the minor children caught in the middle of such disputes."

Davis v. Davis, 229 NC App 494 (2013).

Because *Davis* is only one of a long-line of cases restricting the court's ability to "tweak" custody orders, it is important to limit the holding in Tankala to the situation in which it was decided. First, the original order did require the parties to follow all recommendations of the therapist. In this sense, the order to attend camp could be seen as an enforcement order rather than a modification. Second, and perhaps more importantly, the parties were back in court because the PC had filed a motion pursuant to GS 50-97. It is reasonable to assume that the legislature intended for the court to have authority to address issues raised by the PC in these hearings. Perhaps Tankala means that tweaking is allowed in these special high-conflict cases involving PCs.

What do others think?