Child Custody: Denying or Significantly Limiting a Parent's Visitation

In a recent blog post, I wrote about newly enacted legislation stating it is the public policy of North Carolina that custody determinations made pursuant to Chapter 50 of the General Statutes should encourage and supports a child's relationship with both parents. Kids Need Both Parents When Possible. But in a decision published this week, the court of appeals upheld a trial court order limiting a father to supervised visits with his children every other Sunday for two hours. Meadows v. Meadows, NC App (March 15, 2016).

Such limited access certainly doesn't sound like the type of 'equitable' sharing of parenting rights and responsibilities encouraged by the new legislation.

So when is it appropriate for a court to limit a parent's access to his child in such an extreme way?

Right to "Reasonable" Visitation

In addition to providing that strong bonds between children and both parents should be the goal in most custody cases, GS 50-13.01, and providing that "joint" custody must be considered by a court whenever it is requested, GS 50-13.2(a), GS Chapter 50 also states that "prior to denying a parent the right to reasonable visitation, [the court] shall make a written of finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child." GS 50-13.5(i).

The statute does not define 'reasonable' visitation. In *O'Connor v. Zalinske*, 193 NC App 683 (2008), father argued that a custody order limiting him to alternating weekends from Thursday through Sunday and requiring that the visitation always occur within a one hundred mile radius of the custodial mother's home was unreasonable. The court of appeals rejected his argument and held that the trial court did not abuse its discretion when it determined that this custodial arrangement was in the best interest of the child. Citing *In re Custody of Stancil*, 10 NC App 545 (1971), the appellate court stated that "the trial court is required to subordinate [father's] visitation privileges to the best interest of the children."

However, the court of appeals has made it clear that a parent cannot be restricted to supervised visitation unless the court makes the findings required by GS 50-13.5(i), meaning supervised visitation is not 'reasonable' visitation as a matter of law. In *Maxwell v. Maxwell*, 212 NC App 614 (2011), *Hinkle v. Hinkle*, 131 NC App 833 (1998), and *Cox v. Cox*, 133 NC App 221 (1999), the court held that an order for supervised visitation must be supported by findings showing the circumstances that warrant the restriction and that visitation would be detrimental to the child or that restricted access is necessary to protect the child.

No Need to Find Waiver of Constitutional Rights

In *Respess v. Respess*, 754 SE2d 691 (2014), father had pled guilty to multiple felony counts of indecent liberties with his oldest child, had engaged in inappropriate sexual conduct with his other children, and had ignored earlier visitation restrictions. The trial court denied all visitation to father after concluding that visitation was not in the best interest of the children.

On appeal, father cited *Petersen v. Rogers*, 337 NC 397 (1994), and argued that because the trial court decision implicated his fundamental liberty interest in the custody of his children protected by the federal due process clause, the trial court could not deny him access without first concluding, based on clear, cogent and convincing evidence, that he had waived his constitutional right by being unfit or by otherwise acting inconsistent with his protected status as a parent. The court of appeals disagreed, holding that the constitutional analysis set forth in *Petersen* and subsequently clarified by *Price v. Howard*, 346 NC 68 (1997), has no application in custody cases between two parents. In reaching this decision, the court of appeals explicitly rejected its earlier holding in *Moore v. Moore*, 160 NC App 569 (2003), wherein the court held that because a complete denial of visitation is 'tantamount to a termination of parental rights', the trial court must apply the constitutional analysis set forth in *Petersen* and *Price* before reaching a decision about a child's best interest.

The father's conduct in *Respess* was particularly egregious and the trial court decision was supported with numerous findings of fact. Such specific findings relating to the particular circumstances of the case are required when visitation is denied or significantly restricted; it is not sufficient to assume that some situations automatically will support restrictions. *See*, for example, *Bobbitt v. Eizenga*, 215 NC App 378 (2011)(fact that parent was a registered sex offender is important to consider in creating a custody arrangement but does not necessarily prohibit visitation); *Bobbitt v. Eizenga*, *unpublished*, 223 NC App 210(2012)(the same case after remand)(trial court erred in concluding that any visitation with an incarcerated parent is inappropriate as a matter of law); and GS 50-31.2(b)(when the court finds domestic violence, custody orders must include provisions to protect the safety of the child and victim of domestic violence but visitation may be considered).

Failure to Provide Evidence of Fitness

In the Meadows opinion issued this week, father argued that the trial court erred by allowing him only supervised visitation for 2 hours every other Sunday without finding either that he was unfit or that reasonable visitation would injuriously affect the welfare of the child. Acknowledging that the trial court did not make those findings and that such findings generally are required, the court of appeals nevertheless upheld the trial court order because father had refused to participate in the custody trial and to provide information to the court as to his fitness to parent the child. The trial court order contained findings of fact indicating that the court had no evidence at all about father's fitness or current circumstances that would support a conclusion that visitation between father and

the children would be in the best interest of the children. Due to this lack of information, the custody order simply continued the supervised visitation schedule originally set in a temporary custody order because there was no evidence indicating this visitation had not worked to the benefit of the child in the past.

In upholding the trial court order, the Meadows court relied upon *Qurneh v. Colie*, 122 NC App 553 (1996), wherein the court of appeals upheld a trial court's dismissal of a father's claim for custody after he invoked his Fifth Amendment right to avoid answering questions about his participation in illegal drug-related activities. According to *Meadows*, the *Qurneh* holding means that the "refusal by a parent to provide information that is necessary for a trial court to make custody-related determinations can serve as a basis to deny that parent certain rights."