Child Custody Order Cannot Tell a Parent Where to Live

Many appellate opinions explain that judges are vested with wide discretion in matters concerning child custody. G.S. 50-13.2(a) gives the court broad authority to allocate physical and legal custody of a child as the court believes will "best promote the interest and welfare of the child" and GS 50-13.2(b) allows the court to include in any custody order "such terms, including visitation, as will best promote the interest and welfare of the child". Recently, however, the North Carolina Court of Appeals made it clear that there are limits on the court's authority in custody cases. In Kanellos v. Kanellos, 795 S.E.2d 225 (N.C. App., 2016), the court reminded us that custody cases are primarily about determining who has physical care and control of a child and who has decision-making authority regarding a child and not as much about controlling the details of the lives of the child or the parties.

Kanellos

Before they separated, Stacie and John Kanellos lived with their children in Union County. After separation, Stacie and the children moved to Forsyth County and John moved to Mecklenburg County, but the parties continued to own the marital residence in Union County at the time of the custody trial. The trial court awarded joint legal custody to Stacie and John and awarded primary physical custody to Stacie with John having visitation on alternate weekends. In addition, the trial court determined that it was in the best interest of the children to live in Union County and therefore ordered Stacie and the children to move back to the marital residence. Stacie appealed, arguing that the trial court abused its discretion in ordering her to move. The court of appeals agreed with Stacie, holding that compelling a parent to reside in a specific county and house fell "outside the scope of authority granted to the district court in a child custody action."

Statutory Authority

Acknowledging that GS 50-13.2 vests judges with broad discretion, the appellate court quoted *Appert v. Appert*, 80 N.C. App. 27, 34, 341 S.E.2d 342, 346 (1986), to explain that the discretion is not unlimited:

[t]he . . . judge's discretion . . . can extend no further than the bounds of the authority vested in the . . . judge. *In proceedings involving the custody . . .of a minor child, the . . . judge is authorized to determine the party or parties to whom custody of the child shall be awarded, whether and to what extent a noncustodial person shall be allowed visitation privileges, . . ., and certain other related matters*.

Kanellos, (emphasis in original).

The court further explained that the trial court's authority to determine "certain other related matters" comes from the provision in G.S. 50-13.2(b) allowing the court to include in custody orders

"such terms, including visitation as will best promote the interest and welfare of the child." Such "certain other provisions," therefore, must be supported by findings of fact sufficient to show why the provisions are necessary for the child's welfare.

Court generally must take the parties as they are

To support the conclusion that ordering a parent to live in a certain place exceeded this authority to order "certain other related matters," the court in Kanellos explained that courts are required to determine custody based upon the circumstances of the parties that exist at the time of the custody hearing.

"Our courts may consider *where each parent lives*, along with any other pertinent circumstances, in determining which parent should be awarded primary custody to facilitate the child's best interest. (citations omitted). Put simply, a district court must consider the pros and cons of ordering primary custody with each parent, contemplating the two options as *they exist*, and then choose which one is in the child's best interest. (citations omitted). However, a court cannot order a parent to relocate in order to create a "new and improved" third option, even if the district court believes it would be in the child's best interest."

Kanellos (emphasis in original)

So what is included in "certain other related matters"?

The Kanellos opinion does not provide clear guidance about how to determine whether a particular provision is one that can be included in a custody order. The court states that just as a parent cannot be ordered to move, a court also cannot order a parent to refrain from relocating. However, the court acknowledged existing case law approving provisions that:

- Facilitate the ordered custody and visitation plan. For example, the court has approved orders of supervised visitation and orders that specify where the visitation will take place; orders that allocate responsibility for the payment of visitation expenses; and orders allowing a parent to take a child out of the country during visitation.
- Resolve disputes "that directly implicate a child's relationship with each parent or academic and other activities." For example, the court has approved orders barring a parent from using a specific babysitter who had been interfering with child's relationship with other parent, prohibiting home schooling when home schooling interfered with visitation with the other parent, and allocating responsibility for the religious training of a child and prohibiting the other parent from providing religious training that conflicted with that provided by the other parent.

GS 50-13.2 specifically authorizes the court to:

- Protect children and parties who have been victims of domestic violence by including as part of the custody order any of the relief provisions authorized in GS 50B-3(a)(1), (2) or (3).
- Require any party to abstain from consuming alcohol and require a party to submit to a continuous alcohol monitoring system.
- Provide that a child can be taken out of the state and require that a person allowed to take a child out of the state post a bond or other security conditioned upon the return of the child to the state; and
- Provide for visitation by electronic communication and allocate the cost between the parties.

In addition to the case law cited in the Kanellos opinion, there also is case law upholding reciprocal provisions ordering both parties to refrain from making negative comments about the other and interfering with the other's relationship with the child. *See e.g. Watkins v. Watkins*, 120 NC App 475 (1995);

However, there also are opinions other than Kanellos wherein the appellate court concluded the trial court exceeded its authority. For example:

- In *Martin v. Martin*, 167 NC App 365 (2004), a trial court order prohibiting father from owning or possessing firearms was vacated due to lack of findings indicating that the safety of the children was affected by father's possession or ownership of guns; and
- In *Jones v. Patience*, 121 NC App 434 (1996), the court held that a trial court does not have authority to order the appointment of experts or to order psychological testing or treatment of a parent as part of a permanent custody order, concluding that these provisions are allowed only in temporary orders. *But cf. Maxwell v. Maxwell*, 212 NC App 614 (2011)(upholding provision in permanent custody order that father submit to a mental health evaluation when court concluded that he had committed acts of domestic violence). See also GS 50-91(authorizing the appointment of a parenting coordinator as part of any temporary or permanent custody order).