

## **Custody Modification: the effects of the same circumstances can be the changed circumstances**

Child custody orders can be modified upon a showing that there has been a substantial change in circumstances affecting the welfare of the child(ren) since the entry of the last custody order and upon a showing that modification is in the best interest of the child(ren). [GS 50-13.7](#); *Shipman v. Shipman*, 357 NC 471 (2003). Three relatively recent opinions from the court of appeals clarify that the required substantial change does not necessarily need to be the development or occurrence of a new circumstance; the required substantial change can be a change in the way an existing circumstance impacts the welfare of the child(ren).

### [Shell v. Shell, NC App \(August 21, 2018\)](#)

The original custody order in this case granted primary physical custody to father and visitation to mother. At the time of the entry of the original order, mom had a history of alcohol and drug abuse, was unable to maintain employment and moved frequently. Father had limited intellectual abilities, struggled with literacy and relied heavily on his parents to manage his affairs and help him care for the children. He lived with his parents at the time of the original custody order and he and the children continued to reside with them when mother filed a motion to modify four years later. The trial court modified custody after concluding there had been a substantial change in circumstances and granted primary physical custody to mother and visitation to dad. On appeal, among other things, father argued that the trial court erred in considering circumstances considered by the court at the time it entered the original custody order four years earlier.

Mother's sobriety. Father first argued that the trial court should not have considered the positive impact of the improvements in mother's life resulting in large part from her sobriety because mom had been sober for four months at the time of the original custody order. The court of appeals held that the improvement in mother's ability to care for her children resulting from her continued sobriety during the four years between entry of the original order and the motion to modify was an appropriate change for the trial court to consider. The findings of fact in the order clearly showed that the mother's improvement affected the welfare of the children.

Father's limited abilities. Father also argued that the trial court erred in considering his limited intellectual abilities and struggles with literacy because he had those same issues at the time of the original order. The court of appeals held that the trial court findings established that the impact of father's condition on the children had changed since the original order because as the children aged, their needs became more complex. The trial court appropriately considered that father was less able to meet many of the needs of the children than he was at the time of the original order.

Parents' inability to communicate. Similarly, father argued that the trial court should not have considered the inability of the parents to interact with each other without arguing and their inability

to cooperate with each other to parent the children because they had the same relationship at the time of the original order. Again, the court of appeals held that even though the relationship of the parents was bad at the time of the original order, the findings by the trial court clearly established that the impact of this relationship on the children had worsened in the time between the original order and the modification hearing

### [Laprade v. Barry, 800 SE2d 112 \(NC App 2017\)](#)

The trial court entered the first custody order in this case in 2011 when the child was 3 years old. The court modified the original order in 2012 due in part to the parties' inability to communicate about the needs of the child. In 2014, mother filed another motion to modify and in 2015, the trial court concluded there had been a substantial change in that, in addition to other things, the father's inability to communicate with mother was causing the child to experience high levels of anxiety.

Father appealed, arguing that the problem concerning communication identified by the court in 2015 existed at the time of the previous order and therefore could not support the conclusion that there had been a substantial change in circumstances. The court of appeals disagreed, holding that while the evidence clearly established that the parties had demonstrated a complete inability to communicate about the child from the time they originally separated, the trial court's findings of fact in the 2015 order focused on how "father's *present* actions had adversely affected the child...". Even though the basic problems existed at the time of the last order, the negative impact of the problems on the child worsened due to the conduct of the father and due to the age of the child. The court noted that it is "foreseeable" that communication difficulties between parents will affect a child "more and more as she becomes older and is engaged in activities which require parental cooperation and as she is more aware of the conflict between her parents."

### [Spoon v. Spoon, 233 NC App 38 \(2014\)](#)

In this case, mother appealed a trial court order modifying a custody order to give father primary custody of the minor children based on the conclusion that the impact of mother's relocation on the children constituted a substantial change in circumstances. Mother argued that her relocation could not be the basis for the modification because she had moved before the entry of the last custody order entered in the case. The court of appeals affirmed the trial court after concluding that the trial court findings of fact established that the impact of the move on the children did not manifest and become apparent until after the entry of the previous order and therefore were appropriate for the trial court to consider as a basis for modification. The trial court modification order included findings that the grades of the children dropped after they changed schools, the children had become "clingy, tearful and upset" since the move, and they were unable to spend as much time with their father as before the move. The appellate court held that these findings clearly established that the move had a negative impact on the welfare of the children that became apparent only after the entry of the previous custody order.

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