

Modification of custody: establishing impact of change on welfare of child

[G.S. 50-13.7\(a\)](#) provides that “... an order ... for the 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.” However, case law supplements this statute to provide that an order may be modified only upon a showing of a *substantial* change in circumstances since the entry of the original order, *Savani v. Savani*, 102 NC App 496 (2001), and the substantial change must affect the welfare of the minor child. *Pulliam v. Smith*, 348 NC 616 (1998); *Shipman v. Shipman*, 357 NC 471 (2003).

The party requesting modification has the burden of showing a substantial change in circumstances affecting the welfare of the child, *Blacklley v. Blackley*, 285 NC 358 (1974), and evidence must demonstrate a connection between the change or changes and the welfare of the child. *Shipman*, 357 NC 471 (2003).

A significant number of trial court modification orders have been vacated by the appellate courts because of a lack of findings of fact specifically linking the changes identified to the physical and/or emotional well-being of the child. See e.g. *Brewer v. Brewer*, 139 NC App 222 (2000)(findings about mother’s improved lifestyle and ability to provide the children with a stable home life were insufficient where court failed to find how these changes would impact the children); *Browning v. Helff*, 136 NC App 420 (2000)(trial court failed to make sufficient findings to show impact on the child of custodial parent’s cohabitation with person of the opposite sex); *Ford v. Wright*, 170 NC App 89 (2005)(trial court’s finding that father frequently used alcohol was not sufficient to support modification when trial court made no findings as to impact of alcohol use on the child’s welfare); *Frey v. Best*, 189 NC App 622 (2008)(change in father’s work schedule and living arrangements and increase in the age of the children were insufficient to support an increase in father’s visitation time when findings failed to address how those changes affected the welfare of the children).

***Shipman* and “self-evident” impact**

While acknowledging the need for trial courts to explicitly state the link between the change in circumstances and the welfare of the child and warning that explicit findings are the only way to “avoid confusion”, the supreme court in *Shipman v. Shipman*, 357 NC 471 (2003), held that where the effects of the change or changes on the child are “self-evident” and supported by substantial evidence, a trial court order will be upheld even if the findings do not “present a level of desired specificity” regarding the impact of the changes on the child.

In *Shipman*, the original custody order awarded primary physical custody to mom and visitation to dad. Upon motion by dad, the trial court concluded there had been a substantial change of circumstances, and modified custody to grant dad primary physical custody. The court of appeals

upheld the trial court but a dissent argued that that the trial court order contained insufficient findings about the effect of the changes on the child.

The supreme court affirmed the court of appeals, holding that findings in the order supported the conclusion that there had been a substantial change of circumstances affecting the minor child even though the trial court did not make explicit findings about the effect of these changes on the minor child. (two Justices dissented on this issue).

The supreme court held there was substantial evidence in the record to support the trial court's findings that mom's living arrangements had been unstable during the nineteen months between the entry of the original order and the motion to modify, mom and child had lived with mom's boyfriend in violation of original custody order which prohibited either parent from allowing overnight guests of the opposite sex while the child was present, and mom had engaged in "deceitful denial of visitation" to father despite the fact that the child had a close relationship with the father and looked forward to seeing him. In addition, mom had failed to allow the child to maintain contact with the paternal grandparents, and dad had entered a stable relationship with a woman who could help care for the child and dad and the woman had bought a home with sufficient room for the child to reside.

According to the court, given the nature and cumulative impact of these changes, the link between the series of developments and the child was sufficiently "self-evident" to support the conclusion of the trial court that the changes affected the welfare of the child.

The court pointed out that most discreet changes, as opposed to a series of developments, do not have a self-evident impact on a child. Examples given by the court of changes where effect on a child is not "self-evident" include 1) a move on the part of one parent, 2) a parent's cohabitation, 3) a change in a parent's sexual orientation, 4) remarriage of one parent, and 5) improvement in a parent's financial status. When the effect of changes is not self-evident, the court held that a party must produce evidence demonstrating the connection between the changes and the welfare of the child. The court stated that such evidence might consist of assessments of the minor child's mental well-being by a qualified mental health professional, school records, or testimony from the child or a parent.

Court of appeals interpretation of self-evident impact

Two recent opinions from the court of appeals offer an opportunity to compare changes that have a self-evident impact to those that do not.

In [Fecteau v. Spier, 858 SE2d 123 \(April 20, 2021\)](#), the court held that father's evidence and the trial court findings of fact concerning the "series of developments" in his life were sufficient to show a substantial change that had a self-evident effect on the welfare of the child and "thus, evidence directly linking the changes and the welfare of the child was not required." The changes in father's

life included new and stable employment that provided health insurance, paid vacation leave and more flexibility for father to spend more time with the child, and his marriage and the child's close relationship with the stepmother and her child. *See also Lang v. Lang*, 197 NC App 746 (2009)(changes in child's medical needs and one parent's willingness to provide for child's needs was a change with a self-evident impact on child's welfare).

However, in [Henderson v. Wittig, NC App \(July 6, 2021\)](#), the court of appeals vacated and remanded the trial court order because the trial court failed to make findings directly linking the changes identified to the welfare of the child. The changes identified by the trial court all related to the parents and the relationship between the parents. Findings in the order identified extensive disagreements between the parents regarding the child's schooling and healthcare, an overall lack of communication, difficulties in exchanges of the minor child, disagreements over vacation time, and changes in the parents' living arrangements. According to the court, "the trial court findings focus on the parents' role in these changes" and do not show that this was a case "where the facts supporting a finding that a substantial change had occurred show there was an obvious effect on the minor child." The case was remanded to the trial court with the instruction that the trial court findings "must directly link the substantial change of circumstances and their effect on the minor child." *See also Davis v. Davis*, 229 NC App 494 (2013)(single incident of inappropriate discipline and conflicts between parents over visitation schedules did not have a self-evident impact on welfare of child).