“Tweaking” of Custody Orders Not Allowed

Custody orders can be modified only when there has been a **substantial** change in circumstances **affecting the welfare of the child**. So what can be done when there is a change that is not actually substantial or that has little or no impact on the welfare of the child but which makes the existing parenting plan inconvenient or more expensive for the parents? For example, the work schedule of one parent changes in a way that makes the existing plan very inconvenient or significantly increases that parent’s childcare costs? Or, a child starts playing a new sport where the games are scheduled during the time child is supposed to visit the parent living in another state? Is there any room in the law for allowing minor “tweaks” to custody orders to accommodate normal life changes?

North Carolina law says **no**. Appellate opinions make it clear that while courts must be able to modify custody orders to protect the welfare of children, modification is not encouraged. In a frequently cited opinion, the Supreme Court explained:

[a] decree of custody is entitled to such stability as would end the vicious litigation so often accompanying such contests, unless it be found that some change of circumstances has occurred affecting the welfare of the child so as to require modification of the order. To hold otherwise would invite constant litigation by a dissatisfied party so as to keep the involved child constantly torn between parents and in a resulting state of turmoil and insecurity. This in itself would destroy the paramount aim of the court, that is, that the welfare of the child be promoted and subserved.

Shepherd v. Shepherd, 273 N.C. 71, 75, 159 S.E.2d 357, 361 (1968)

This Means No Tweaking

If the court does not conclude there has been a substantial change affecting the children, the court cannot change any part of a custody order. This means a court cannot make minor adjustments to visitation details or any other minor change, even if necessary for the existing parenting plan to work. *See* Lewis v. Lewis, 181 NC App 114 (2007)(court could not alter one week of summer visitation after concluding there had been no changed circumstances); Frey v. Best, 189 NC App 622 (2008)(court erred in modifying dad’s visitation due to a change in his work schedule and because the kids were older and could spend more time away from their mother); Cherry v. Thomas, unpublished, 205 NC App 320 (2010)(court could not modify alternating visitation schedule when work schedules of both parents changed and the schedule became very inconvenient for both parties); Hibshman v. Hibshman, 212 NC App 113 (2011)(there are no exceptions to rule requiring a showing of changed circumstances).

Not Even When Parents Move

Relocation cases are especially problematic. Case law provides that relocation – even a relocation

involving a very long distance – is not presumed to be a substantial change in circumstances. The party seeking modification has the burden of showing that the move will be substantial and will impact the welfare of the child. If there is no such impact, a court may not modify the existing order even if the visitation provisions in the existing order are impractical given the new circumstances. *See* Shipman v. Shipman, 357 NC 471 (2003)(relocation does not have a 'self-evident' impact on the welfare of children*);* Cherry v. Thomas, unpublished, 205 NC App 320 (2010)(court could not modify visitation schedule even though dad's relocation meant children needed to travel one hour each way for exchange every four days). *See* Carlton v. Carlton, 354 NC 561 (2001)(allowing modification of joint custody arrangement when dad moved with child from North Carolina to Hawaii but only because trial court incorporated report from child's therapist wherein therapist stated that the move would be good for the child); Evans v. Evans, 138 NC App 135 (2000)(no modification allowed even though mom remarried and relocated to Maryland).

Stipulations

What if parents are willing to stipulate there has been changed circumstances? They both agree the order needs to be modified, but they can't agree on a new parenting plan?

Again, case law says no. Because it is a legal conclusion, a stipulation by the parties that there has been a substantial change in circumstances is "ineffective and invalid." Thomas v. Thomas, 757 SE2d 375 (NC App 2014); Gary v. Bright, 750 SE2d 912 (2013). The parties can stipulate to facts but only the court can conclude the legal standard for modification has been met.

Can A Custody Order Anticipate Change?

In the recent case of Cox v. Cox, 768 SE2d 308 (NC App 2014), the court said no to this as well. The order in that case allowed father visitation with the children only if he resided with his mother. Acknowledging that the father was being treated for the mental health issues that lead to the restriction on his visitation, the court included a provision that the restriction could be removed when dad's therapist decided there no longer were concerns about his ability to care for the children. The order stated that such a decision by the therapist "is hereby deemed to be a substantial change in circumstances affecting the well-being of the minor children and warranting the lifting of the residency requirement."

The court of appeals ordered the trial court to strike this provision because it is "contrary to law," explaining that "to predetermine that a future event will amount to a substantial change in circumstances … is to predetermine a legal conclusion absent any findings of fact."

Alternative Approach

Courts in other states have allowed minor "adjustments", "clarifications", or "accommodations" to be made without a showing of changed circumstances. These cases simply conclude that

"tweaking" is not actually a modification so no showing of changed circumstances is required. *See e.g. McAllister v. Price,* 562 So.2d 517 (Ala. Civ. App. 1990)(order was only a "clarification"); *In re Marriage of Tisckos/Stewart*, 514 N.E.2d 523 (1987)(visitation change was an "accommodation" made for the child); *Hughes v. Browne,* 459 S.E.2d 170 (Ga. Ct. App. 1995)(increasing father's visitation from every fourth Sunday to every Saturday or Sunday was not significant enough to be a 'modification').

The law in North Carolina does not appear to allow our trial courts that kind of flexibility.