

Scope of Authority in Custody cases

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APRIL 2017

What are you trying to do in these cases??

GS 50-13.2

"An order for custody ... shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child."

"An order for custody of a minor child may grant joint custody to the parents, exclusive custody to one person, agency, organization, or institution, or grant custody to two or more persons, agencies, organizations, or institutions."

GS 50-13.2

"Any order for custody shall include such terms, including visitation, as will best promote the interest and welfare of the child."

What is custody?

"Physical custody" means the physical care and supervision of a child

- GS 50A-102(14)
- "Visitation" simply is a lesser form of physical custody
 - *Davis v. Davis*, 229 NC App 494 (2013)
- Physical custody allows party to make decisions about the child's routine but not matters with "long-range consequences"
 - *Diehl v. Diehl*, 177 NC App 642 (2006)

"Legal custody" means the right and responsibility to make decisions with important and long-term implications for a child's best interest and welfare. *Diehl*

"Joint custody" means "a relationship where each party has a degree of control over , and a measure of responsibility for, the child's best interest and welfare." *Diehl*

It really is just about *custody*.....

While GS 50-13.2 gives the court broad discretion –

"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, ... whether an order for child custody or support shall be modified or vacated based on a change in circumstances, and certain other related matters."

- *Appert v. Appert*, 80 NC App 27 (1986)
- *Kanellos v. Kanellos*, 795 NC App 225 (NC App 2016)

Kanellos

"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 is in the child's best interest. ... However, a court cannot ... create a "new and improved" third option, even if the district court sincerely believes it would be in the child's best interest."

"A judgment awarding custody is *based upon the conditions found to exist at the time it is entered*," quoting Stanback v. Stanback, 266 N.C. 72, 76, 145 S.E.2d 332, 335 (1965)

Other stuff in GS 50-13.2

"An order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate"

"Any order for custody, including visitation, may, as a condition of such custody or visitation, require either or both parents, or any other person seeking custody or visitation, to abstain from consuming alcohol and may require submission to a continuous alcohol monitoring system."

"An order for custody of a minor child may provide for such child to be taken outside of the State"

Other stuff in GS 50-13.2

"If the court finds that domestic violence has occurred, the court shall enter such orders that best protect the children and party who were the victims of domestic violence, in accordance with the provisions of G.S. 50B-3(a1)(1), (2), and (3)."

"An order for custody of a minor child may provide for visitation rights by electronic communication."

"Absent an order of the court to the contrary, each parent shall have equal access to the records of the minor child involving the health, education, and welfare of the child."

Kanillos

What else has been approved

Provisions to facilitate the custody and visitation plan

- Location of supervised visitation
- Payment of visitation expenses
- Order party to deliver child to other for visitation

Provisions to resolve disputes that "directly implicate a child's relationship with each parent or academic or other activities"

- Prohibit use of specific babysitter when babysitter interfered with parent's relationship with child
- Prohibit home schooling when home schooling amounts to neglect or significantly interferes with other parent's ability to visit

It's also okay to order parties not to make negative comments about the other
Watkins, 120 NC App 475 (1995)

Custody provision or allocation of decision-making authority???

Burger v. Smith, 776 SE2d 886 (2015)

- Visitation to dad
- Dad can decide whether to take child to Africa during visits
- Okay for judge to allow dad to make this decision
- Judge did *not* decide child should go to Africa

MacLagan v. Smith, 123 NC App 557 (1996)

- Order that Dad decides religious training for child is allocation of legal custody
- Judge did not decide religion of child

Allocation of Legal Custody

Legal custody includes:

- Authority to make decisions about child's education, health care, and religious training
- Authority to make decisions as to discipline and matters of major significance concerning child's life and welfare

Joint Legal Custody

- Parties share authority to make major decisions
- Cannot split joint legal absent compelling reason related to best interest of child
 - *Diehl, 177 NC App 642 (2006)*
 - Inability to effectively communicate is not compelling reason
 - Inability to communicate supports allocation of sole legal to one parent. *Thomas v. Thomas, 233 NC App 736 (2014)*
- *MacLagan, 123 NC App 557 (1996)*
 - Emotional harm to child resulting from disagreement over religion was compelling reason
- *Hall v. Hall, 188 NC App 527 (2008)*
 - "mere tumultuous relationship" is not sufficient

What we know you can't do.....

Order a parent to relocate or not to relocate
◦ *Kanellos*

Prohibit father from possessing firearms absent evidence of threat to safety of children
◦ *Martin v. Martin*, 167 NC App 365 (1995)

Order psychological testing or treatment of a party in a permanent custody order
◦ *Jones v. Patience*, 121 NC App 434 (1996)
◦ *But cf. Maxwell v. Maxwell*, 212 NC App 614 (2011)(okay when dad committed domestic violence)

Order child support placed in escrow if child doesn't comply with visitation schedule
◦ *Appert v. Appert*, 80 NC App 27 (1986)
