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NO. COA01-1118

NORTH CAROLINA COURT OF APPEALS

Filed: 21 May 2002

JAMES D. SKINNER,
Plaintiff,

v.

Durham County
No. 96 CVD 4139

LYNNE M. SKINNER,
Defendant.

Appeal by defendant from order entered 10 May 2001 by Judge Elaine O'Neal in Durham County District Court. Heard in the Court of Appeals 29 April 2002.

No brief filed for plaintiff-appellee.

Judith K. Guibert for defendant-appellant.

MARTIN, Judge.

Plaintiff James D. Skinner (plaintiff) and defendant Lynne M. Skinner (defendant) were married on 7 September 1986. One minor child was born during the marriage on 18 January 1988. On 5 December 1996, the trial court entered a judgment granting plaintiff an absolute divorce from defendant. The judgment incorporated the parties Separation and Property Settlement Agreement, which provided for joint legal custody of the minor child, primary physical custody of the minor child to defendant, and visitation to plaintiff.

Defendant filed a motion to modify child support on 6 May 1999. Eight months later, plaintiff moved to modify child support. The child support and custody actions were heard together in November and December of 2000. The trial court entered a temporary order in April of 2001. Upon review of the temporary order, the trial court entered a final custody order on 10 May 2001. In its order, the trial court ordered that the parties would continue their alternating weekend schedule with the minor child, that the minor child would spend alternating Tuesday and Wednesday overnights with his father and that the parties would evenly split the minor child's summer vacations. The order also ordered:

5. A copy of this Order shall be transmitted to Dr. David Smith who shall be free to discuss the terms of the order and the implementation of the order with Mathew Skinner. If, after discussing the terms of this order with Mathew, Smith and Mathew conclude that Mathew desires to add an additional overnight on alternating Thursdays, Smith shall so notify the parties, preferably in writing, and that schedule shall be immediately implemented.

Defendant appeals.

The sole issue on appeal is whether the trial court erred by including paragraph five in the 10 May 2001 custody order. Defendant argues that the disputed provision improperly delegated to the minor child modification of the child custody order without any showing of a change in circumstances. We agree.

A judgment awarding custody may only be modified by first finding that there has been a substantial change of circumstances affecting the welfare of the child. *Metz v. Metz*, 138 N.C. App.

538, 530 S.E.2d 79 (2000). Furthermore, a custody award must be based upon conditions found to exist at the time the judgment is rendered. *Smithwick v. Frame*, 62 N.C. App. 387, 303 S.E.2d 217 (1983). "'Custody' as used in G.S. 50-13.7 was intended to encompass visitation rights as well as general custody." *Clark v. Clark*, 294 N.C. 554, 576, 243 S.E.2d 129, 142 (1978). This Court has stated that "the award of visitation rights is a judicial function," which the trial court may not delegate to a third-party. *Brewington v. Serrato*, 77 N.C. App. 726, 733, 336 S.E.2d 444, 449 (1985), (citing *In re Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971)). In *Brewington*, this Court held that a provision in the trial court's order permitting visitation "at such times as the parties may agree" was improper. *Id.* Our Court reasoned that the provision "effectively gives [father] the exclusive power to deny [mother] reasonable visitation with the child by withholding his consent." *Id.* This Court remanded the case with instructions that the trial court be required to include a provision in the order specifying the times the mother may visit the child in the father's home. *Id.*

In the present case, the trial court specified the times the father would visit with the minor child as required by *Brewington*. The final order stated that the minor child would spend alternating Tuesday and Wednesday overnights with his father. However, in paragraph five the trial court allowed a Thursday overnight in the future based upon the minor child's desires. Paragraph five delegates visitation decisions to the minor child. In addition,

adding the Thursday overnight essentially modifies the order without a finding of a change of circumstances based upon conditions found to exist at the time the 10 May 2001 judgment was rendered. Because paragraph five improperly delegates visitation decisions to the minor child without a finding of a change of circumstances, we must remand this case to the Durham County District Court for an additional hearing, if necessary, and entry of a new order.

Remanded.

Judges HUNTER and BRYANT concur.

Report per Rule 30(e).