THERE IS NO SUCH THING AS A "LITTLE CUSTODY CASE"

Tash & Kurtz, PLLC
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- Forms referenced in the body of this manuscript are not included.

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Authors and Contributors

This manuscript has been prepared and updated by the following attorneys:

Gary B. Tash
Jon B. Kurtz
Caleigh H. Evans
Elise M. Whitley
Susan S. Simos

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I. INTRODUCTION

The rules governing the determination of child custody and visitation privileges have been altered considerably over time, especially within the last few years. This evolution reflects the changes that have taken place in society, which have affected our views of the family, the child-parent relationship, men's and women's roles, and childhood itself. In addition, the courts have become increasingly free to exercise a broad range of discretion in making a child custody award.

The primary consideration in determining child custody and visitation cases today is the best interest of the child. This standard encompasses the numerous factors that may be relevant in the particular case, and is affected by a variety of presumptions, such as the presumption that siblings should not be separated, or that children are better off in the custody of a natural or adoptive parent rather than in the custody of a non-parent.

While there are guidelines and presumptions, the practitioner should note well that emotions run high in child custody cases and that each case is as different from any other child custody case as the people and personalities involved are different from one another. Patience, tolerance, compassion and a certain degree of firmness are essential traits for the family law practitioner who dares to be involved in child custody matters. However, the rewards are also great for those who venture more than tacitly into this most vital area of human relationships.

The scope of this paper will touch on the basic principles of custody and visitation, dealing with matters contained in Chapters 50 and 50A of the North Carolina General Statutes. It is the author's hope that the sample of pleadings and sample orders contained in the Appendix, also at the end of this manuscript and itemized on a guide preceding the samples, will be especially useful to the practitioner and will serve as the beginning for his or her own loose-leaf and tabbed go-by file.

II. STATUTORY BASIS

A. Custody

As with most areas of law, most of our guidelines in dealing with child custody determination come from case law. Nevertheless, North Carolina General Statutes Sections 50-13.1 through 50-13.8 provide the statutory basis for custody and related matters, subject to the jurisdictional requirements set out in Chapter 50A of the North Carolina General Statutes, known as the Uniform Child-Custody Jurisdiction and Enforcement Act, Sections 50A-101 through 50A-317, which will be discussed later in this paper.

North Carolina General Statutes Section 50-13.1 provides that any parent, relative, or other person, agency, organization, or institution claiming the right to custody of a minor child (who has not as yet attained the age of eighteen years) may institute an action or proceeding for the custody of such child. This may be done by instituting an independent action (see sample pleading forms A and B *infra*), by filing a counterclaim in an action for absolute divorce, divorce from bed and board, annulment, alimony, or postseparation support (see sample

pleading form C *infra*), by filing a crossclaim in one of the foregoing actions, by filing a motion in the cause in one of the foregoing actions (see sample pleading form E *infra*), or upon the court's own motion in one of the foregoing actions. N.C.G.S. 50-13.5(b).

1. Welfare of the Child

The welfare of the child is the paramount consideration in custody matters. Goodson v. Goodson, 32 N.C. App. 76, 231 S.E.2d 178 (1977). The **best interest and welfare** of the child are the paramount considerations in determining the right to custody, as well as in determining the right to visitation, and neither the right to custody nor the right to visitation should ever be permitted to jeopardize the best interest and welfare of the child. In re Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971). The welfare of the child is the "polar star" by which the discretion of the court is to be guided. Green v Green, 54 N.C. App. 571, 284 S.E.2d 171 (1981).

In determining the welfare of the child, our Supreme Court has said, with regard to custody decisions, that the trial judge is entrusted (since custody is not for consideration by a jury) with the delicate and difficult task of choosing an environment which will, in his/her judgment, best encourage full development of the child's (a) **physical**, (b) **mental**, (c) **emotional**, (d) **moral** and (e) **spiritual faculties**. Blackley v. Blackley, 285 N.C. 358, 204 S.E.2d 678 (1974).

In a custody proceeding, it is not the function of the court to punish or reward a parent by withholding or awarding custody of minor children; the function of the court in such a proceeding is to diligently seek to act for the best interest and welfare of the minor child. In re McCraw Children, 3 N.C. App. 390, 165 S.E.2d 1 (1969).

With regard to domestic violence actions pursuant to Chapter 50B, North Carolina General Statutes Section 50-13.2(a) provides: "In making the determination [of child custody], the court shall [emphasis added] consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party and shall make findings accordingly." Therefore, in actions in which domestic violence is involved, the court must consider such history in determining custody.

2. Right of Parents to Custody

(a) As against third persons

Parents have the legal right to have the custody of their children unless **clear and cogent** reasons exist for denying them this right. This right is not absolute, and it may be interfered with or denied, but only for the most substantial and sufficient reasons, and is subject to judicial control only when the interest and welfare of the children clearly require it. In re Jones, 14 N.C. App. 334, 188 S.E.2d 580 (1972).

When third parties challenge natural parents for custody of a minor child, the standard of proof required to overcome the presumption of parents to have custody of their

children is "**clear and convincing evidence**." When a trial court awards custody of a minor child to a non-parent over a parent, if the record does not indicate that the trial court applied the clear and convincing evidence standard, the appellate court must reverse the trial court's order and remand the case for findings of fact in accordance with the proper standard. Bennett v. Hawks, 170 N.C. App. 426, 613 S.E.2d 40 (2005). A trial court's finding of fact that a parent is a fit and proper person to care for a minor child does not preclude an additional finding of fact that the same parent has also engaged in conduct inconsistent with that parent's constitutionally protected status, but the trial court must utilize the clear and convincing standard with regard to the evidence of the inconsistent conduct. David N. v. Jason N., 359 N.C. 303, 608 S.E.2d 751 (2005).

What is clear and convincing evidence? The North Carolina Supreme Court, in Matter of Montgomery, 311 N.C. 101, 316 S.E.2d 246, 252 (1984) provided the following: "It is well established that "clear and convincing" and "clear, cogent, and convincing" describe the same evidentiary standard. See: 30 Am.Jur.2d, Evidence § 1167. This **intermediate standard** is **greater than the preponderance of the evidence** standard required in most civil cases, but **not as stringent as the requirement of proof beyond a reasonable doubt required in criminal cases**. Santosky 455 U.S. at 745, 102 S.Ct. at 1388, 71 L.Ed.2d at 599.

Prior North Carolina case law indicated that the welfare of the child is the paramount consideration to which all other factors, including common-law preferential rights of the parents, must be deferred or subordinated, and the trial judge's discretion is such that he/she is not required to find a natural parent unfit for custody as a prerequisite to awarding custody to a third person. Comer v. Comer, 61 N.C. App. 324, 300 S.E.2d 457 (1983); Best v. Best, 81 N.C. App. 337, 344 S.E.2d 363 (1986); Matter of Baby Boy Scearce, 81 N.C. App. 531, 345 S.E.2d 404 (1986).

However, in 1994, the North Carolina Supreme Court overruled Best, *supra*, and held that in an initial custody proceeding, absent a finding that parents (i) are **unfit** or (ii) have **neglected the welfare of their children**, that "**the constitutionally-protected paramount right of parents to custody, care and control of their children must prevail" over the custody claims of third parties**. Petersen v. Rogers, 337 N.C. 397, 403-404, 445 S.E.2d 901, 905 (1994).

In Price v. Howard, 122 N.C. App. 674, 471 S.E.2d 673 (1996), Justice Orr, writing for the Supreme Court, provided an expansion as to what constituted unfitness or neglect by holding:

> However, **conduct inconsistent with the parent's protected status, which need not rise to the statutory level warranting termination of parental rights . . . would result in application of the "best interest of the child" test without offending the Due Process Clause. Unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy. Other types of conduct, which must**

> **be viewed on a case-by-case basis, can also rise to this level so as to be inconsistent with the protected status of natural parents**. Price v. Howard, 346 N.C. 68, 74-75, 484 S.E.2d 528, 534-535 (1997), *rev'g*, 122 N.C. App. 674, 471 S.E.2d 673 (1996).

In sum, in custody disputes between parents and non-parents, where a trial court determines that a parent is unfit, has neglected the child, or acted inconsistently with the parent's protected interest, the best interests of the child test apply. Price, 346 N.C. at 79, 484 S.E.2d at 534.

In cases where initial permanent custody had been awarded to third parties (*e.g.*, grandparents), a natural parent seeking a **modification** of a custody order must still comply with the provisions of N.C.G.S. 50-13.7 and show that there has been a substantial change in circumstances affecting the welfare of the child. "Once the custody of a minor child is judicially determined, that order of the court cannot be modified until it is determined that (1) there has been a substantial change in circumstances affecting the welfare of the child; and (2) a change in custody is in the best interest of the child." Bivens v. Cottle, 120 N.C. App. 467, 469 462 S.E.2d 829 (1995), *disc. rev. allowed*, 342 N.C. 651, 467 S.E.2d 704 (1996), *appeal dism'd per curiam*, 346 N.C. 270, 485 S.E.2d 296 (1997).

The logic of the Bivens case is that where a trial court awards non-parents custody because the natural parents voluntarily surrendered custody in a consent order or the court removes the children by order, the court would have judicially determined that the best interests of the child lay with the nonparent third parties. A parent loses her Petersen presumption if he/she loses custody to a nonparty in a court proceeding or consent order. To hold otherwise, would ease the burden of proof on a parent in a modification proceeding who has lost custody to a non-parent in a prior proceeding. The natural parent, with the protection of Peterson could modify the order by simply showing fitness at a later date. The Court of Appeals rejected that reasoning by requiring that the parent to have lost custody show a substantial change of circumstances and that a change would be in the child's best interests. Brewer v. Brewer, 139 N.C. App. 222, 231, 533 S.E.2d 541 (2000).

By contrast, in the Brewer case, see *supra*, Plaintiffs (paternal aunt and uncle) and the Defendants (estranged father and mother) engaged in litigation over father and mother's two children. The Defendants had a history of drug use and criminal activity. After mother was arrested, father took the children and moved back to North Carolina, from Georgia. The father and mother entered into a consent order in 1997 granting the father custody of the two children.

Father kept the children until February 1998 when he decided that he could not properly care for the children and he unilaterally allowed the children to live with the plaintiffs. In October 1998, plaintiffs filed an action to obtain permanent legal custody of the children and were granted an ex parte temporary custody order.

In January 1999, mother filed a motion to vacate the *ex parte* order and asked for the court to grant her custody of the children. The court noted that the mother never surrendered

custody of her children to the non-parent plaintiffs and, through no fault of her own, mother was unaware where the children were. No court had ordered that it would be in the children's best interest to live in the plaintiff's custody. Instead, the mother voluntarily relinquished custody to the father, and he relinquished the children to the plaintiffs. The mother was never found to have been unfit, to have neglected her children, or to have acted inconsistently with her parental status.

The Court of Appeals initially agreed with the Bivens analysis insofar as it required a moving party to show a substantial change of circumstances affecting the welfare of the child in order to modify custody. This court held, however, that a natural parent should maintain her Petersen presumption against a non-parent where that parent has voluntarily relinquished custody to the other parent and has never been adjudicated unfit. This decision is very fact specific, but the court held that "To hold otherwise would violate a parent's due process rights to care, custody and control of their child… Absent a finding of unfitness or neglect by the natural parent, a best interest of the child test would violate the parent's constitutional rights." Id. at 548.

Therefore, to modify the custody order granting plaintiff's custody, mother first has to show that there has been a substantial change of circumstances affecting the welfare of the children. If she meets that burden, she is then entitled to a Petersen presumption against the plaintiffs so long as there is no finding that she was unfit, neglected her children, or acted inconsistent with her parental rights. Id.

The court found that the mother had made lifestyle improvements that constituted a substantial change in circumstances. The case, however, was remanded as the trial court failed to make specific findings as to how the relevant change in circumstances affected the children's well-being.

North Carolina Genera Statutes **§50-13.1(a)** provides that "any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided." Limitations exist, however, on the "other persons" who may bring action. "A conclusion otherwise would conflict with the constitutionally-protected paramount right of parents to custody, care, and control of their children." Mason v. Dwinnell, 190 N.C. App. 209, 219, 660 S.E.2d 58, 65 (2008).

"In a situation involving a third party characterized as an "other person" under N.C. Gen. Stat. § 50-13.1(a), this Court has held that "the **relationship between the third party and the child is the relevant consideration** for the standing determination." Myers v. Baldwin, 205 N.C.App. 696, 698, 316 S.E.2d 108 (2010) (citing Ellison v. Ramos, 130 N.C. App. 389, 394, 502 S.E.2d 891, 894 (1998)).

Although N.C.G.S § 50-13.1(a) on its face reads broadly, case law interprets the language more narrowly. A third-party who does not have a relationship with a child does not have standing under the aforementioned statute to seek custody from a natural parent, but

"**where a third party and a child have an established relationship in the nature of a parent-child relationship, the third party does have standing as an "other person"…** to seek custody. Myers at 698. (Citing Ellison at 394-95, 502 S.E.2d at 894-95).

In Myers, Defendant and Stephanie Baldwin were the parents of a minor child. Plaintiffs provided the minor child with the vast majority of his care for approximately 2 months. Defendant only visited with the child for short periods of time during those two months. Plaintiffs filed an action seeking custody of the child.

The court in Myers found that it was "impossible under the facts of the instant case to characterize those two months as the significant amount of time necessary for plaintiffs to have established a parent-child relationship with [the minor child]. This is especially true when considering that [the minor child] had contact with defendant for short periods of time during these two months… The facts alleged in plaintiff's' complaint fall short of establishing a significant relationship between plaintiffs and [the minor child]. Myers at 701. Consequently, the court held that there was no standing for the plaintiffs to seek custody of the minor child.

Therefore, in evaluating whether a third party has **standing to intervene** in a custody case against natural parents, the Myers case sets out an **analysis** that should be considered.

- North Carolina General Statutes § 50-13.1(a) states "Any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided… " Id. at 109,10.

- Although there are limits on "other persons" that can bring such an action, "the relationship between the third party and the child is the relevant consideration for the standing determination." Id. at 110, citing Ellison v. Ramos, 130 N.C. App. 389, 394, 502 S.E.2d 891, 894 (1998).

- Where a third party and a child have "an established relationship in the nature of a parent-child relationship, the third party does have standing as an "other person" under… 50-13.1(a) to seek custody." Myers at 110.

- The Meyers court identified several cases in which a third party was found to have standing to seek custody against a natural parent when there had been significant relationships over extensive periods of time. See:

    - Ellison v. Ramos, 130 N.C. App. 389, 502 S.E.2d 891 (1998). (Woman with no biological ties had standing when she lived with child over five-year period and was in a relationship with biological father. "A parent and child relationship, even in the absence of a biological relationship, will suffice to support a finding of standing." Id. at 394).

- Seyboth v. Seyboth, 147 N.C. App. 63, 554 S.E.2d 378 (2001). (Stepfather had standing to seek visitation rights when he lived with child for three years prior to divorcing natural mother).

- Mason Dwinnell, 190 N.C. App. 209, 660 S.E.2d 58 (2008). (Non-biological woman had standing to seek custody when she lived with the child for four years while in a relationship with biological mother and shared custody with her for more than two years after separation).

Where an action has been initiated between the natural parents, a third party may file a motion, in appropriate circumstances, pursuant to North Carolina General Statutes § 1A-1 **Rule 24** to intervene as a party. If an action has not been initiated previously by the natural parents, a third-party may file a custody action pursuant to **§50-13.1(a).**

Normally, in cases between a parent versus a nonparent the court has recognized "the **paramount right** of parents to [the] custody, care, and nurture of their children…." Seyboth at 381 (citing Peterson v. Rogers, 337 N.C. 397, 445 S.E.2d 901 (1994). The Supreme Court, subsequently in the case of Price v. Howard, 346 N.C. 68, 484 S.E.2d 528 (1997) refined the Peterson standard and stated that:

- A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child. Therefore, the **parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child. If a natural parent's conduct has not been inconsistent with his or her constitutionally protected status, application of the "best interest of the child" standard in a custody dispute with a nonparent would offend the Due Process Clause. However, conduct inconsistent with the parent's protected status, which need not rise to the statutory level warranting termination of parental rights, would result in the application of the "best interest of the child" test without offending the Due Process Clause.** Seyboth at 381 (citing Price, 346 N.C. at 79, 484 S.E.2d at 534. (citations omitted).

- Conduct inconsistent with the parent's protected status need not rise to the statutory level warranting termination of parental rights. Price at 534. **Unfitness**, **neglect** and **abandonment** clearly constitute conduct inconsistent with the protected status parents may enjoy. Other types of conduct which must be viewed on a case-by-case basis can also rise to this level so as to be inconsistent with the protected status of natural

parents. Where such conduct is properly found by the trier of fact, based on evidence in the record, custody should be determined by the "**best interest of the child**" test mandated by statute. Price at 534, 5.

- In Price Defendant "created the existing family unit that includes plaintiff and the child but not herself. Knowing that the child was her natural child, but not plaintiff's, she **represented to the child and to others that plaintiff was the child's natural father. She chose to rear the child in a family unit with plaintiff being the child's *de facto* father**. Price at 537.

- Where "defendant had represented that plaintiff was the child's natural father and voluntarily had given him custody of the child for an **indefinite** period of time with **no notice that such relinquishment of custody would be temporary, defendant would have not only created the family unit that plaintiff and the child have established, but also induced them to allow that family unit to flourish in a relationship of love and duty with no expectations that it would be terminated**." Price at 537.

"The focus is not on whether the conduct consists of good acts or bad acts. Rather, the **gravamen of inconsistent acts is the volitional acts of the legal parent that relinquish otherwise exclusive parental authority to a third party**." Rodriguez v. Rodriguez, 710 S.E.2d 235, 211 N.C. App. Lexis 736 (2011). "[T]he Court's **focus must be on whether the legal parent has voluntarily chosen to create a family unit and to cede to the third-party a sufficiently significant amount of parental responsibility and decision-making authority to create a permanent parent-like relationship with his or her child**. The parent's **intentions** regarding that relationship are **necessarily relevant** to the inquiry. By looking at both the legal parent's conduct and his or her intentions, we ensure that the situation is not one in which the third-party has assumed a parent-like status on his or her own without that being the **goal** of the legal parent." Id.

Therefore, if a parent is found to be **unfit**, or to have **taken action inconsistent with the parent's constitutionally protected status**, the **court should apply the best interest test** with regard to custody. See, Seyboth at 381. The determination as to whether or not a parent's conduct has been inconsistent with his or her constitutionally protected status is based upon a showing of clear and convincing evidence. Price at 534.

Additionally, the **intent of the legal parent**, in addition to his or her conduct should be considered. "It is appropriate to consider the legal parent's intentions regarding the relationship between his or her child and the third-party during the time that relationship was being formed and perpetuated." Davis v. Swan, 697 S.E.2d 473, 477, 2010 N.C.App Lexis 1566 (2010) (citing Estroff v. Chatterjee, 190 N.C. App. 61, 69, 660 S.E.2d 73, 78 (2008). That court went on to say that "**Intentions after the ending of the relationship between the parties are not relevant because the right of the legal parent [does] not extend to erasing a relationship**

between her partner and her child which she voluntarily created and actively fostered simply because after the party's separation she regretted having done so." Davis at 477 (citing Estroff at 70-71, 660 S.E.2d at 79) (citations and internal quotation marks omitted).

(b) As between parents

At one time under the common law, the father was generally entitled to the custody of his minor children. Brooks v. Brooks, 12 N.C. App. 626, 184 S.E.2d 417 (1971). Modern day courts instead have adhered to the principle that the welfare or best interest of the child is the paramount consideration. Id. In past decades, this newer approach often resulted in an "informal prejudice" in the minds of some judges in favor of the mother, whose temperament and general availability in the home seemed to make her the better custodian. Today, however, with more and more women in the work force, fathers have achieved a "new equality" in the eyes of judges and, as a practical matter, are prevailing in more custody actions. If any judicial prejudice still exists, it is with regard to mothers appearing better suited to meet the needs of infants and very young children. Nevertheless, North Carolina General Statutes Section 50-13.2(a) is very clear in stating that, between the mother and father, whether natural or adoptive, there is **no presumption** as to who will better promote the interest and welfare of the child.

If the court were to find one of the parents "unfit," it is obvious that the court would be proper in granting custody of minor children to the other parent. When the court finds that both parents are fit and proper persons to have custody of their minor children, and then finds that it is in the best interest of the children for one of the parents to have custody of said children, such a holding will be upheld on appeal when the decision by the judge is supported by competent evidence. Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966).

(c) Legal Custody

North Carolina General Statutes Section 50-13.2(b) allows a trial judge to grant joint legal custody to both parents. If a third party receives custodial rights to a child, he or she can also be granted legal custody rights. However, in drafting an order providing for "joint legal custody," the practitioner should be specific as to the parties' respective responsibilities and obligations, since the Court has determined that the term "joint custody" is ambiguous and does not in and of itself imply specifics without consideration of all relevant extrinsic evidence of intent being required. Patterson v. Taylor, 140 N.C. App. 91, 535 S.E.2d 374 (2000). **In other words, the term "joint legal custody" in an order only means what the order says that it means**, and, in the absence of such a specification as to what "joint legal custody" in an order means, the appellate courts may well conclude that the use of the phrase means nothing. A typical paragraph relating to joint legal custody is as follows:

> "The parties hereto shall discuss and shall reach a mutual agreement with regard to all major decisions affecting the best interest and general welfare of their aforesaid minor children, including, by way of illustration and not limitation, the said minor children's health, medical treatment, education, religious upbringing

> and extracurricular activities, *etc*. In the event that the parties' minor children are already engaged, for example, in a particular extracurricular activity, then it would be incumbent upon the party wishing to delete that extracurricular activity to convince the other party to agree before changing the status quo for the minor children. In order to enroll the parties' minor children in a new extracurricular activity, it would also be incumbent upon the party wishing to add that extracurricular activity to convince the other party to agree to add such extracurricular activity."

A trial court's custody order which awarded the parties "joint legal custody," while simultaneously granting the mother the "primary decision-making authority" was reversed by the North Carolina Court of Appeals because the trial court's custody award was inconsistent. Diehl v. Diehl, 177 N.C. App. 642, 630 S.E.2d 25 (2006).

Where a court determines that both parents are fit and proper persons for joint legal custody, the court must make specific findings as to why a deviation from a pure joint legal custody is necessary, if the court grants one parent more decision making authority. As an example, "past disagreements between the parties regarding matters affecting the children, such as where they would attend school or church, would be sufficient, but mere findings that the parties have a tumultuous relationship would not." Hall v. Hall, 188 N.C. App. 527, 655 S.E.2d 901, 907 (2008).

Pursuant to North Carolina General Statutes Section 50-13.2(b), 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 minor child, even if one parent has not been granted joint legal custody, but only visitation rights with the minor child.

(d) As between same-sex domestic partners

Child custody law with regard to same-sex domestic partners obviously includes evolving law, especially in states like North Carolina that do not recognize either same-sex marriages or same-sex civil unions.

Domestic partners can be awarded legal and physical custody rights of children in certain circumstances. The North Carolina Supreme Court, in the case of Price v. Howard, 346 N.C. 68, 484 S.E.2d 528 (1997) established that the best interest standard is applicable in a custody dispute between a legal parent and a nonparent when "clear and convincing evidence" demonstrates that **the legal parent's conduct has been inconsistent with his or her constitutionally protected status**." Id. at 79, 484 S.E.2d at 534.

The following acts, *inter alia*, were considered by the appellate court in Davis v. Swan, 206 N.C. App. 521, 697 S.E.2d 473, 478 (2010), in making a determination that a party had acted inconsistently with her constitutionally protected parental status in a domestic partner relationship:

- Intending to jointly create a family with a domestic partner.
- Intending to identify the domestic partner as a parent of the minor child.
- Biological parent and domestic partner jointly decided to have a child and decided which one would get pregnant.
- Domestic partner helped choose sperm donor.
- Both attended doctor's appointments.
- Domestic partner was present at delivery and birth.
- Birth announcements were sent out referring to the child as "our daughter" and listing both parties as "proud parents."
- The child's last name combined both parties' surnames with a hyphen.
- The parents of both parties were recognized as the minor child's grandparents.
- The parties functioned as if they were both parents;
- The minor child referred to one party as "Mom" and the other party as "Mama."
- Both were involved in day to day parenting and financial support of the child.
- After separation, the nonbiological parent continued to provide financial support.
- Most importantly, the parties jointly decided to create a family and intentionally took steps to identify the nonbiological party as a parent of the minor child. The biological parent encouraged, fostered, and facilitated the emotional and psychological bond between the nonbiological parent and the minor child up until the parties' separation… The biological parent, during the creation of the family unit, intended that this parent-like relationship would be permanent, such that she induced the nonbiological parent and the minor child to allow that family unit to flourish in a relationship of love and duty with no expectations that it would be terminated.

Id. at 478.

Based upon the aforementioned findings in the Davis case, the Court of Appeals upheld the trial court's order which made findings that the biological parent's conduct was inconsistent with her constitutionally protected parental right to the exclusive care and control of the minor child and consequently, the trial court was able to appropriately provide for **joint legal custody** and **secondary physical custody** for the benefit of the non-biological parent.

By contrast, however, another recent case, Myers v. Baldwin, 205 N.C. APP. 696, 698 S.E.2d 108 (2010) (see *supra*, for a more detailed analysis), provides an example as to when a third party does not have standing to seek custody rights of a child. In that case, the plaintiffs had provided care for the defendant's child for a period of approximately two months. This care

was informal and the minor child still had contact with defendant for short periods of time during those two months.

3. Rule 24, Motion to Intervene

Where an action is pending between parties to a custody action and a third party wishes to bring an action for the custody or visitation of a child, the third party may seek to Intervene in the pending action pursuant to N.C.G.S. § 1A-1 **Rule 24**. The third party chooses to request intervention in order to protect some right that he or she may have an interest in. Once a person has been allowed to intervene, he or she has the right to participate in the suit just as any other party.

There are **two forms of intervention**. Rule 24(a) sets forth grounds for **Intervention of Right** and Rule 24(b) sets forth grounds for **Permissive Intervention**. Intervention of Right will exist when a grandparent makes application pursuant to statute. For example, N.C.G.S. § 50-13.2(b1) permits a grandparent to intervene in an ongoing custody case. (See Smith v. Smith, *supra*, where the Court of Appeals found that in an ongoing custody dispute that a grandfather had a right to intervene and seek visitation under § 50-13.2(b1). Therefore grandfather had an unconditional right to intervene.

Where there is an ongoing custody dispute and grandparents seek to intervene, said intervention shall be of right. Once a grandparent is permitted to intervene, then the court performs a separate analysis to determine whether it is in the best interest of a child to have visitation with the grandparents. This second step is within the court's discretion.

Procedurally, "… a person wishing to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefore and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." See N.C.G.S. § 1A-1 Rule 24(c).

Intervention of Right: Rule 24(a) provides that:

"Upon timely application anyone shall be permitted to intervene in an action: (1) When a statute confers an unconditional right to intervene; or (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

Permissive Intervention: Rule 24(b) provides that:

"Upon timely application anyone may be permitted to intervene in an action. (1) When a statute confers a conditional right to intervene; or (2) When an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or State governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made

pursuant to the statute or executive order, such officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. "

In the case of Adams v. Wiggins, 174 N.C.App. 625, 621 S.E.2d 342 (2005) (unpublished), the North Carolina Court of Appeals discussed the issue of both intervention of right and permissive intervention in the context of a grandparent seeking to intervene and have visitation privileges with her paternal grandchild. In this case, the maternal grandparents had been awarded custody of a grandchild after the child's mother had been killed. The father had been implicated in the killing and was subsequently convicted of conspiracy to commit murder. Approximately 20 months after the maternal grandparents were awarded custody, Theodry Carruth (the paternal grandmother) moved to intervene and she filed a motion to modify the prior custody order pursuant to N.C.G.S. § 50-13.2 and 50-15.5(j). Movant alleged, *inter alia*, that repeated requests to spend time with her grandchild had been met with opposition and resistance and that neither she nor her family had the opportunity to develop a relationship with the child.

The trial court denied the movant's motion to intervene and she appealed. In analyzing whether or not the movant had the ability to intervene of right, the court noted that any such entitlement hinged upon whether §50-13.5 and 50-13.2 conferred rights upon her which would allow an intervention.

N.C.G.S. § 50-13.2 allows grandparents to receive visitation privileges as part of an ongoing custody dispute. As the maternal grandparent's custody had previously been established, this statutory provision did not apply, as there was no ongoing custody dispute. N.C.G.S. § 50-13.5(j) allows a grandparent to seek visitation after child custody has been determined upon a motion in the cause and a showing of changed circumstances; however, this claim was denied as the paternal grandmother was unable to show that the minor child was not in an intact family. "The lack of an intact family means that the child's family is already undergoing some strain on the family relationship, such as an adoption or an ongoing custody battle."… "However, an intact family may also exist where a single parent is living with his or her child… or where a natural parent has remarried and the natural parent, stepparent and child are living in a single residence…" 621 S.E.2d 342.

As the movant had failed to allege the absence of an intact family, she was not able to proceed and she was therefore not afforded a right of intervention. The court also noted, however, that the movant failed to allege a substantial change in circumstances warranting a modification of visitation pursuant to § 50-13.5(j) which would have also been required under that statutory provision. By failing to plead a substantial change of circumstances, she failed to plead a claim for visitation under that provision and failed to demonstrate that the statute vested her with the right to intervene pursuant to Rule 24(a)(2).

With regard to the issue of permissive intervention, the Court of Appeals affirmed the trial court's denial without analysis. This case does confirm, however, that for a grandparent

to intervene for the purpose of seeking visitation with a grandchild that the child must not be in an intact family or that there would otherwise need to be pending a custody dispute.

What type of hearing must the court have in determining whether to allow a party to intervene? The Court of Appeals in the case of Hedrick v. Hedrick, 90 N.C.App. 151, 368 S.E.2d 14 (1988), *appeal dismissed, disc. review denied*, 323 N.C. 173, 373 S.E.2d 108 (1988), provided that where grandparents move to intervene pursuant to N.C.G.S. § 50-13.2A (seeking visitation rights with a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child) that the trial court was **not required** to hold an evidentiary hearing on whether the grandparents had a "substantial relationship" prior to ruling on the grandparents' motion to intervene. The court stated "It is clear to this Court that the right to institute a suit mandated a right to intervene on behalf of the grandparents. Furthermore, in order for the court to grant visitation rights, it must be established that the grandparents have a substantial relationship with the grandchildren. That requirement is at least part of what the hearing is designed to establish. The trial judge addressed the issue of whether the grandparents had a right to intervene based on the pleadings before it. Without the necessity of a preliminary hearing, the record reveals that the trial court made a preliminary determination that the grandparents had a right to intervene pursuant to G.S. § 50-13.2A. Thus, respondent's assignment of error is overruled." 368 S.E.2d at 17.

In the case of Sloan v. Sloan, 164 N.C.App. 190, 595 S.E.2d 228 (2004), grandparents were found to have standing to intervene. A permanent custody order had been previously entered between the mother and father, however, said order provided that the "plaintiff and/or his parents shall be entitled to contact the minor child [by telephone] two times each week for thirty (30) minutes [sic] intervals. After the father died unexpectedly, the communication with the paternal grandparents ceased. The paternal grandparents filed a Motion to Intervene and requested a modification of the prior order for, *inter alia*, greater visitation rights. The mother sought to dismiss the claim on the basis that the proposed intervenors lacked subject matter jurisdiction pursuant to, *inter alia*, N.C.G.S. § 50-13.5(j).

The Court of Appeals noted, "Under limited circumstances, grandparents have standing to sue for visitation of their grandchild. Montgomery v. Montgomery, 136 N.C.App. 435, 436, 524 S.E.2d 360, 362 (2000). Those circumstances are set out as the grandparent custody/visitation statutes, *supra*.

The court noted that if the issue of grandparent visitation and/or custody had been raised "for the first time when intervenors filed their motions" that they may not have been permitted to intervene. In this particular case, however, the trial court had already awarded temporary custody and visitation to the intervenors by permitting "Plaintiff and/or his parents telephonic visitation with the child twice a week." 595 S.E.2d at 231. Although the grandparents were not originally parties to the action they did receive visitation rights which permitted them to proceed with their request for modification.

Therefore, "In *Sloan*, our Court found that the maternal grandparents, who were intervenors in a child custody action, had "been made ***de facto*** parties to the child custody action

when they were awarded temporary custody and telephonic visitation in the previous orders before plaintiff's death." Burns v. Burns, 209 N.C.App. 750, 709 S.E.2d 601 (2011) (Unpublished). In the case of Burns, paternal grandparents were not *de facto* parties where a trial court's order did not provide visitation rights for the grandparents. The grandparents were not awarded any kind of *de facto* custody nor were they even mentioned in the decretal portion of the order. The court held that just because paternal grandparents often cared for grandchildren does not amount to *de facto* custody.

Another case in which a request for intervention by a grandparent was denied can be found in the Court of Appeals case of McDuffie v. Mitchell, 155 N.C.App. 587, 573 S.E.2d 606 (2002). Here, the trial court entered an order awarding custody to the mother and visitation to the defendant, father. The mother suffered a medical emergency and went into a coma from which she was not expected to recover. The defendant filed an emergency motion to modify custody and three days later the mother died, prior to a hearing on that motion. Approximately one week later the Plaintiff (maternal grandmother) filed a motion to intervene in what had been the custody case between her daughter and the defendant. While those motions were pending, the maternal grandmother filed, as plaintiff, an action seeking custody and injunctive relief and, subsequently, a claim for visitation was included as well. The trial court denied the motion to intervene on the basis that there was no longer an ongoing custody action due to the death of the mother. Subsequently, the trial court denied and dismissed Plaintiff's claims for visitation, custody and injunctive relief.

The Court of Appeals held that "where one parent is deceased, the surviving parent has a natural and legal right to custody and control of the minor children. This right is not absolute, but it may be interfered with or denied "only for the most substantial and sufficient reasons, and is subject to judicial control only when the interests and welfare of the children clearly require it." 573 S.E.2d at 607-8. (citations omitted). Pursuant to N.C.G.S. § 50-13.1(a) a "grandparent may institute an action for custody of his or her grandchild, but the statute does not grant grand parents the right to sue for visitation when no custody proceeding is ongoing and the minor children's family is intact. 573 S.E.2d 608 (citing McIntyre v. McIntyre, 341 N.C. 629, 635, 461 S.E.2d 745, 750 (1995).

Where, as here, the custodial parent died, the ongoing case between the mother and the father ended such that there was no ongoing custody action when the Plaintiff filed her motion to intervene. 573 S.E.2d at 608. A "Grandparents' right to visitation is dependent on there either being an ongoing case where custody is an issue between the parents or a finding that the parent or parents are unfit. Id. (citing Price v. Breedlove, 138 N.C.App. 149, 530 S.E.2d 559, *rev. denied*, 353 N.C. 268, 546 S.E.2d 111 (2000).

The Court of Appeals also dismissed the grandmother's custody claim pursuant to Rule 12(b)(6) finding that "[t]he complaint "failed to sufficiently allege acts that would constitute (unfitness, neglect, [or] abandonment," or any other type of conduct so egregious as to result in defendant's forfeiture of his constitutionally protected status as a parent. Price v. Howard, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997). It merely alleges that defendant has been "estranged from the children for some time and currently only enjoys limited visitation with the

minor children." The rest of the complaint focuses on plaintiff's role in the children's lives,… Such allegations fall short of establishing that defendant acted in a manner inconsistent with his protected status. A best interest analysis is not appropriate absent such a finding." Id. at 608-9. See N.C.G.S. § 50-13.2(a); Price v. Howard, 346 N.C. 68, 484 S.E.2d 528 (1997).

A case which held that a third party was permitted to **intervene permissivly** pursuant to Rule 24(b)(2) can be found in the case of In the Matter of Baby Boy Scearce, 81 N.C.App. 531, 345 S.E.2d 404 (1986). Here, the trial court awarded legal custody of a 13-month-old boy to foster parents with whom the baby had been placed when the child was two days old. The Department of Social Services instituted action by filing a petition asking the court to take jurisdiction for the purpose of terminating the parental rights of the biological father. The unwed 16-year-old mother had released the baby to DSS for adoptive placement. When the matter came on for hearing, DSS took the position that custody should be granted to the 18-year-old father who had since been identified and he requested custody of the baby. DSS appealed the district court's award of custody to the foster parents alleging, *inter alia,* a lack of subject matter jurisdiction and error in allowing the foster parents to intervene. The Court of Appeals affirmed the trial court's decision permitting the foster parents to intervene permissibly and to grant the foster parents custody.

Rule 24 (b) provides for permissive intervention within the discretion of the trial court. The trial court's order allowing intervention included findings of fact, such as "The participation of the movants, who have been Baby Boy Scearce's exclusive caretakers to date, as parties to this action will enhance the Court's knowledge and judgment as to the issues before this Court, including the best interests of Baby Boy Scearce… "[I]ntervention by movants will not unduly delay or prejudice the adjudication of the rights of the original parties." 345 S.E.2d at 409.

The court made a **distinction** between **permissive intervention** and **standing** to bring an action. It held that "Standing is a requirement that the plaintiff have been injured or threatened by injury or have a statutory right to institute an action… An intervenor by permission need not show a direct personal or pecuniary interest in the subject of the litigation… It is in the court's discretion whether to allow permissive intervention pursuant to Rule 24(b)(2); and, absent a showing of abuse, the court's decision will not be overturned. Id. at 410. (Citations omitted).

A case in which the Department of Social Services was involved as a third-party is that of Hill v. Hill, 121 N.C.App. 510, 466 S.E.2d 322 (1996). DSS filed a motion to appeal from the trial court's denial of its motion to intervene. The mother had applied for AFDC and received AFDC on behalf of her child. The mother then filed a petition to terminate the parental rights of the father and the father failed to answer the petition.

Subsequently, DSS filed a motion to intervene in the termination action. DSS set forth its claim for reimbursement of child support expenditures from the father. Prior to the filing of the petition to intervene, DSS had filed a civil action against the father seeking to recover AFDC benefits expended for the care of the child and to obtain an order of support for future

payment. The trial court denied DSS' motion to intervene and terminated the father's parental rights.

DSS claimed that it was entitled to intervene in the termination proceeding **as of right** pursuant to Rule 24(a)(2). "The prospective intervenor must establish the following prerequisites for **non-statutory intervention of right**: "(1) an interest relating to the property or transaction; (2) practical impairment of the protection of that interest; and (3) inadequate representation of that interest by existing parties." Intervention of right is an absolute right and denial of that right is reversible error, regardless of the trial court's findings." Hill at 466 S.E.2d 322. (Citations omitted).

"To satisfy the first and second elements, DSS must establish it had an interest in the outcome of the termination proceeding and the practical impairment of that interest. DSS' interest "must be of such direct and immediate character that [it] will either gain or lose by the direct operation and effect of the judgment…" Id at 323.

As a consequence of the mother's receipt of AFDC benefits, the court found that:

> [The mother] partially assigned her right "to any child support owed for the child" to DSS. Prior to the filing of the instant petition, DSS had already pursued its rights as assignee by filing an action against Mr. Hill to recover AFDC benefits expended on behalf of the child. Because of the trial court's subsequent termination of Mr. Hill's parental rights, however, DSS has forever lost its right to recover AFDC benefits expended on behalf of the child from the date of the order until the child reaches the age of majority. Accordingly, we believe DSS' status as assignee gives it a direct interest in the termination proceeding which will be forever impaired absent its ability to intervene under N.C.R.Civ.P.24(a)(2)." Id. at 323-4.

Accordingly, DSS was found to have a direct interest in the termination proceeding which would be impaired if it were not permitted to intervene.

Additionally, in order to intervene of right, DSS "must also establish its interests are not adequately represented by existing parties." Id. at 324. Mr. Hill did not file an answer nor contest the petition. The court also found that the mother would continue to receive AFDC regardless of whether the father's parental rights are terminated and that she may not be in a position to adequately protect DSS' interests which would ensure that child support be recovered from the child's father. The court therefore concluded that DSS' interests "are not adequately protected by the existing parties in the present proceeding." Id. at 324. The Court of Appeals found that the trial court erred by denying DSS' motion to intervene of right pursuant to Rule 24(a)(2).

4. Wishes of the Child

Most states that have enacted statutory provisions outlining the factors to be considered by the court in determining who shall be awarded custody of a minor child include consideration of the child's wishes as to his or her custodian. Depending upon the statute in a particular jurisdiction, consideration of the child's preference by the trial judge may be either mandatory or discretionary. In North Carolina, the only statutory guidance, contained in N.C.G.S. 50-13.2(a), is that which shall "best promote the interest and welfare of the child." In North Carolina, we must look to the appellate decisions which indicate that the trial judge may properly consider the preference or wishes of a child of suitable age and discretion. In re Peal, 305 N.C. 640, 290 S.E.2d 664 (1982); and Mintz v. Mintz, 64 N.C. App. 338, 307 S.E.2d 391 (1983).

The wishes of a child of sufficient age to exercise discretion in choosing a custodian are entitled to considerable weight when the contest is between the parents, but are not controlling. Hinkle v. Hinkle, *supra*. A child may be a competent witness and ought to be examined in that character. Indeed, being the party mainly concerned, the child has a right to make a statement to the court as to the child's feelings and wishes upon the matter. This ought to be allowed serious consideration by the court, in the exercise of its discretion. Kearns v. Kearns, 6 N.C. App. 319, 170 S.E.2d 132 (1969), overruled on other grounds; Stephenson v. Stephenson, 55 N.C. App. 250, 285 S.E.2d 281 (1982); Griffin v. Griffin, 81 N.C. App. 665, 344 S.E.2d 828 (1986).

Where the contest for custody is between a parent and one not connected by blood to the child, the desire of the child will not ordinarily prevail over the natural right of the parent, unless it is essential to the child's welfare. In re Stancil, *supra*.

Although there has been much speculation about at what age a child should be considered of sufficient age to exercise discretion in choosing a custodian, some saying twelve, and others fourteen, chronological age may not necessarily be determinative of the child's ability to express an enlightened and independent judgment. The test is whether the child has the mental capacity and comprehension to make a reasoned opinion. Hinkle v. Hinkle, *supra*.

While a child has a right to have his/her testimony heard, the weight to be attached to such testimony is within the discretion of the trial judge, in light of all of the surrounding circumstances. Kearns v. Kearns, *supra*.

In an initial custody action, the children's wishes are entitled to consideration, but are not controlling. Brooks v. Brooks, *supra*. In a modification of custody action, the children's wishes are not a sufficient change in circumstances, where there is no evidence that either parent's ability or fitness to provide a suitable home had changed. In re Harrell, 11 N.C. App. 351, 181 S.E.2d 188 (1971). In either type of custody action, the failure of the trial court to include in its findings of fact the preferences of the minor children is insufficient to upset its order of custody on appeal. Brooks v. Brooks, *supra*. However, see the case of

Kowalick v. Kowalick, 129 N.C. App. 781, 501 S.E.2d 671 (1998), where the North Carolina Court of Appeals affirmed the trial court's changing custody based solely upon the adamant and consistent wishes of a 13-year old daughter to live with her mother after the custody of her and her two siblings had previously been granted to her father.

As a matter of personal preference, I always seek a stipulation in a child custody hearing to have the trial judge interview minor children separately and privately in chambers, without the presence of counsel or the parties. This procedure not only allows the children to make their preferences known, but permits them to do so candidly without fear of hurting either parent or of being intimidated by either parent. If my client is in a position to know and has related the preferences of the children to me, I usually prefer not to interview the children myself before the hearing in order that I can argue to the court that I have not attempted to influence the children's decision, which is especially helpful in cases when I am contending that the opposing party has demonstrated his or her unsuitability to be selected as the custodial parent because he or she has been applying "pressure" on the children. While the input of children is important and should be considered, I believe that it is vital for their healthy relationship with both parents that children understand that it is the judge and not they the children who must make the ultimate choice. [See Annot., Child's Wishes as Factor in Awarding Custody, 4 A.L.R.3d 1396]

5. Discretion of the Trial Court

Determining the custody of minor children is never within the province of a jury, but is a matter solely within the discretion of the trial judge and exclusively in the civil jurisdiction of the District Court Division of the General Court of Justice, subject only to appellate review. Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221 (1967).

The trial judge, who has the opportunity to see and hear the parties and the witnesses, is vested with broad discretion in cases involving the custody of minor children. Blackley v. Blackley, *supra*.

Where the trial judge enters a custody order that, in his/her judgment, is in the best interest of the child, the appellate division should not reverse that judgment and hold, as a matter of law, that the trial judge was obliged to have reached a different opinion, in the absence of a clear showing of abuse of discretion. Decisions in custody cases are never easy, and the trial judge has the opportunity to see the parties in person and to hear the witnesses. He/she can detect tenors, tones and flavors that are lost in the bare printed record read months later by appellate judges. Newsome v. Newsome, 42 N.C. App. 416, 256 S.E.2d 849 (1979); Glesner v. Dembrosky, 73 N.C. App. 594, 327 S.E.2d 60 (1985).

The trial court's findings of fact modifying a child custody order are conclusive on appeal if supported by competent evidence, even though there is evidence to the contrary. Vuncannon v. Vuncannon, 82 N.C. App. 255, 346 S.E.2d 274 (1986); Hamilton v. Hamilton, 93 N.C. App. 639, 379 S.E.2d 93 (1989).

To support an award of custody, the order of the trial court should contain findings of fact which sustain the conclusion of law that custody of the child is awarded to the person who will best promote the interest and welfare of the child. Story v. Story, 57 N.C. App. 509, 291 S.E.2d 923 (1982). A custody order is fatally defective where it fails to make detailed findings of fact from which the appellate court can determine that the order is in the best interest of the child, and custody orders are routinely vacated where the findings of fact consist of mere conclusional statements that the party being awarded custody is a fit and proper person to have custody and that it is in the best interest of the child to award custody to that person. Dixon v. Dixon, 67 N.C. App. 73, 312 S.E.2d 669 (1984).

Because of the wide discretion granted to District Court judges in child custody proceedings, thorough preparation in advance of the hearing and adequate knowledge of the judge's attitudes in such matters by counsel is perhaps more important in child custody cases than in any other type of civil litigation. Because adequate findings of fact supporting appropriate conclusions of law will withstand almost any appeal, counsel's time and diligence in preparing orders after hearings are essential to the maintenance of an effective family law practice in custody cases.

For cases where our appellate courts have affirmed trial court determinations based upon "sufficient" findings of fact, see: Dreyer v. Smith, 163 N.C. App. 155, 592 S.E.2d 594 (2004); In re Rholetter, 162 N.C. App. 653, 592 S.E.2d 237 (2004); Jordan v. Jordan, 162 N.C. App. 112, 592 S.E.2d 1 (2004); Shipman v. Shipman, 357 N.C. 471, 586 S.E.2d 250 (2003); Pass v. Beck, 156 N.C. App. 597, 577 S.E.2d 180 (2003). For cases were our appellate courts have reversed trial court determinations based upon "insufficient" findings of fact, see: Moore v. Moore, 160 N.C. App. 569, 587 S.E.2d 74 (2003); Lamond v. Mahoney, 159 N.C. App. 400, 583 S.E.2d 656 (2003).

Although a parent's obligation to provide child support may be extended, per the provisions of N.C.G.S. 50-13.4(c)(2), beyond the child's eighteenth birthday until the child graduates from secondary school (although not normally beyond the child's twentieth birthday), the trial court loses jurisdiction to make an initial or modification determination with regard to custody of or visitation with a child as soon as that child ceases to be a "minor" on the child's eighteenth birthday, even though the child may still be enrolled in secondary school. N.C.G.S. 50-13.1 and 50-13.7.

Prior to the May 2011 decision in Baumann-Chacon v. Baumann, 212 N.C.App. 137, 710 S.E.2d 431 (2011), it was not uncommon to see negative pleading in the context of child custody cases where the parents of child(ren) were still residing together and the child custody issue was joined with a claim for divorce from bed and board. Prior to Baumann-Chacon, it was commonly believed that a party could not file an action for custody until the parties' physically separated. Baumann-Chacon brought much needed clarity to this issue holding that a trial court has subject matter jurisdiction over a parent's action for temporary and permanent custody and support even when the parents have not physical separated from one another and where no complaint from bed and board has been filed. The court ruled that the statutes governing child custody and child support do not require physical separation or a

complaint for divorce from bed and board to be filed prior to the trial court addressing the issues of child custody and child support. Further, the legislative history of the applicable statutes did not reveal any intent to require physical separation of the parents or a pending divorce from bed and board complaint before the court could address custody or support.

B. Visitation

1. In General

The trial court has discretionary power either to divide custody between contending parents for alternating periods, or to award general custody to one parent, subject to reasonable visitation privileges in favor of the non-prevailing parent. Griffin v. Griffin, 237 N.C. 404, S.E.2d 133 (1953).

The cases, statutes and principles discussed hereinabove with regard to custody are equally applicable to the determination of visitation privileges, that is: the statutory guideline in establishing visitation is whatever will promote the welfare of the child; parents have a right to visit with their children generally; the wishes of the child involved should be taken into consideration by the court and weighed in the court's discretion; and the court has wide discretion in determining visitation which will not be disturbed on appeal if adequate findings of fact support appropriate conclusions of law and there is no clear showing of abuse of discretion.

Visitation privileges are but a lesser degree of custody. Clark v. Clark, 294 N.C. 554, 243 S.E.2d 129 (1978); Hackworth v. Hackworth, 87 N.C. App. 284, 360 S.E.2d 472 (1987). The same standards that apply to changes in child custody determinations are also applied to changes in visitation determinations. Simmons v. Arriola, 160 N.C. App. 671, 586 S.E.2d 809 (2003).

2. Denial

At least once in every practitioner's family law career, a client will appear requesting, if not demanding, that his or her spouse be prohibited from visiting with the minor children of the parties. This expectation on the part of the client should be immediately dispelled by the attorney who wishes the attorney-client relationship to flourish beyond the initial interview. While the court may be quick to grant custody of the children to the client, and may even be persuaded to severely restrict the visitation privileges of the other parent with regard to place and time or by requiring supervision, my experience is that the court will balk at an absolute denial of visitation privileges. The only avenue in that regard would be through adoption proceedings, with or without the consent of the other parent, or in the event that grounds exist for terminating the parental rights of the other parent pursuant to Chapter 7B of the North Carolina General Statutes, and Sections 7B-1100 through 7B-1112 in particular.

A parent's right of visitation with his or her child is a natural and legal right, and, when awarding custody of a child to another, the court should not deny a parent's right

of visitation at appropriate times unless the parent has by conduct forfeited the right or unless the exercise of the right would be detrimental to the best interest and welfare of the child. In re Stancil, *supra*. (see sample order forms N, Q and X *infra*)

Courts are generally reluctant to deny all visitation rights to the divorced parent of a child of tender age, but it is generally agreed that visitation rights should not be permitted to jeopardize a child's welfare. Swicegood v. Swicegood, 270 N.C. 278, 154 S.E.2d 324 (1967); Hedrick v. Hedrick, 90 N.C. App. 151, 368 S.E.2d 14 (1988); Correll v. Allen, 94 N.C. App. 464, 380 S.E.2d 580 (1989).

The trial court has wide discretion in protecting the welfare of minor children, and, in an appropriate factual situation, the court may condition visitation upon consultation by a parent with a psychologist or psychiatrist. Rawls v. Rawls, 94 N.C. App. 670, 381 S.E.2d 179 (1989).

3. Determination

Although separation agreements and consent orders frequently employ broad general language in establishing visitation privileges for the noncustodial parent, such as "at such times as the parties hereto may determine upon mutual agreement in advance," the court, as a result of presiding over a contested hearing, should never delegate the responsibility and authority for determining visitation privileges to the custodial parent, but should instead safeguard the visitation privileges of the noncustodial parent by specific provisions in its order. To give the custodial parent such authority or "veto power" would be tantamount in some cases to denying visitation privileges when such was not the intent of the court. In re Stancil, *supra*. Although every order determined by the court should define and establish the times, days, places and conditions under which such visitation privileges may be exercised, in situations where the parties have demonstrated by their prior actions that they are incapable of being flexible or cooperating with one another, it may be necessary to be very explicit by dotting all of the "i's" and crossing all of the "t's" (see sample order forms R and S *infra*).

4. Relation to Child Support

Despite the fact that most clients see a direct correlation between the exercise of visitation privileges and the payment of child support, the simple fact is that the two are not dependent upon each other as a matter of law. If a noncustodial parent is failing to pay child support, the custodial parent is not justified in suspending visitation privileges. Likewise, if a custodial parent is interfering with the exercise of normal visitation privileges, the noncustodial parent is not justified in withholding child support payments. Both child support and visitation are deemed to be in the best interest of the child, and for one parent to terminate one of those benefits in an attempt to punish the other parent for terminating the other benefit only serves to doubly punish the innocent child. In each case, the remedy is to bring the noncomplying parent before the court in a contempt proceeding. Appert v. Appert, 80 N.C. App. 27, 341 S.E.2d 342 (1986). However, for a case holding that the trial court may use reduction in

the amount of child support to enforce visitation rights, see Mather v. Mather, 70 N.C. App. 106, 318 S.E.2d 548 (1984).

C. Joinder of Multiple Claims and Venue

A civil action for determination of child custody and visitation privileges may be brought at any time during the minority of the child, either as an independent action or joined with actions for absolute divorce, divorce from bed and board, annulment and alimony without divorce, and may be instituted before or after, as well as during the pendency of, an action for absolute divorce. In this regard, see N.C.G.S. 50-13.5 and 50-19, as well as 58 N.C.L. Rev. 1471 (1980) and 61 N.C.L. Rev. 991 (1983). Also, see sample pleading forms A, B, C and E *infra*. The better practice in joining a request for custody with other causes of action previously listed is to set out the child custody request as a separate identifiable claim for relief within the complaint.

The venue of a child custody action in North Carolina, pursuant to the provisions of Chapter 50 of the North Carolina General Statutes, is set out with specificity in N.C.G.S. 50-13.5(f), and the practitioner would be well advised to read such subsection in its entirety. However, the general statutory provisions state that the venue of an action or proceeding for custody and support of a minor child may be maintained in the county where the child resides or is physically present or in a county where a parent resides, although N.C.G.S. 50-13.5(f) lists several exceptions thereto.

D. Mediation

Most states, including North Carolina, have established mandatory court mediation programs with regard to the determination of child custody and visitation privileges. While striving to achieve a level of compromise and cooperation between parents would only serve to improve the environment for children, the court never should and never will relinquish its role of looking out for the best interest and general welfare of minor children. If the practitioner represents a client who is involved in a court mediation program, the attorney should monitor the situation by checking periodically with his or her client to make certain that the client's legal rights are at least remembered, if not insisted upon. Some attorneys may elect to participate in person in the court mediation process with their clients, but, in so doing, great care should be exercised by the practitioner to avoid making the mediation session as litigious as the courtroom. Most court-mandated child custody mediators recommend that counsel for the parties to the mediation not attend the court-mandated child custody mediation sessions, and many mediators (supported by local rules) actually prohibit counsel from participation.

In addition to court mandated mediation programs, many North Carolina practitioners are appearing with their clients in private mediation sessions, with the parties selecting and paying a third family law practitioner to mediate the custody dispute. See sample mediation agreement Form HH and sample memorandum of mediated consent order Form II *infra*. The experience of the author of this manuscript is that well over ninety percent (90%) of custody cases that are referred to private mediation are in fact successfully resolved!

The Court of Appeals of North Carolina has held that it was error for the trial court to rule on the custody issue in an action before allowing the parties to attend custody mediation. In vacating the trial court's order, the Appellate Court stated, pursuant to N.C.G.S. 50-13.1, that mediation was mandatory unless, upon motion of either party or on the trial court's own motion, good cause was shown to waive mediation. Chillari v. Chillari, 159 N.C. App. 670, 583 S.E.2d 367 (2003).

E. Relation to Equitable Distribution

Although a judicial determination of the equitable distribution of the parents' marital property would probably not affect the outcome of a child custody action (except possibly with regard to each parent's ability to provide for the "physical" needs of the children), it does appear that child custody provisions may have an impact on subsequent equitable distribution determinations.

In Patterson v. Patterson, 81 N.C. App. 255, 343 S.E.2d 595 (1986), the Court of Appeals held, pursuant to N.C.G.S. 50-20(c)(4), that the wife's status as the parent with custody of the parties' minor child alone justified an unequal distribution of the parties' marital property without requiring the trial judge to simply recite other statutory factors to be considered in determining whether an equal division of the marital property upon divorce is equitable.

However, see Geer v. Geer, 84 N.C. App. 471, 353 S.E.2d 427 (1987), wherein the Court of Appeals held that the trial court did not abuse its discretion in requiring the wife to execute a deed of the marital residence to the husband, notwithstanding the fact that the wife, and not the husband, was the custodial parent, upon the trial judge determining that an unequal distribution of the marital property was required due to the husband's direct and indirect contributions to the wife's medical education during their marriage.

F. Relation to Chapter 50B Domestic Violence Actions

Although the trial court in a Chapter 50 child custody action may enter an order providing for a different custodial arrangement for a minor child than the custodial arrangement that was previously decreed in a separate Chapter 50B domestic violence order, the doctrine of collateral estoppel precludes the trial court in the subsequent Chapter 50 action from rejecting the findings of fact and the conclusions of law in the previous Chapter 50B order (entered as the result of a 10-day hearing in the previous Chapter 50B action) and basing its decision on findings of fact at odds with the prior 50B order. In other words, although it appears that subsequent Chapter 50 child custody orders supersede and take priority over previous Chapter 50B domestic violence orders that deal with physical custody issues, with the Chapter 50 trial court not being required to find a substantial and material change in circumstances in order to provide for a different custodial arrangement for a minor child, it does appear that the Chapter 50 trial court at a subsequent hearing will be bound by the findings of fact and the conclusions of law as set out in the previous order of the Chapter 50B trial court. Doyle v. Doyle, 176 N.C. App. 547, 626 S.E.2d 845 (2006). See also, Simms v. Simms, 195 N.C. App. 780, 673 S.E.2d 753 (2009) in which the doctrine of collateral estoppel precluded the trial court in a custody case from making

findings in its custody order which were contrary to the findings made in a prior order for domestic violence.

G. Relation to Chapter 7B Juvenile Proceedings

North Carolina General Statutes Section 7B-200(c) provides: When the District Court obtains jurisdiction over a juvenile as the result of a petition alleging that the juvenile is abused, neglected, or dependent:

> (1) Any other civil action in this State in which the custody of the juvenile is an issue is automatically stayed as to that issue, unless the juvenile proceeding and the civil custody action or claim are consolidated pursuant to N.C.G.S. 7B-200(d) or the court in the juvenile proceeding enters an order dissolving the stay.
>
> (2) If an order entered in the juvenile proceeding and an order entered in another civil custody action conflict, the order in the juvenile proceeding controls as long as the court continues to exercise jurisdiction in the juvenile proceeding.

The foregoing two subsections of N.C.G.S. 7B-200, which may or may not be influenced by legislation regarding pilot programs for holding family court within District Court judicial districts, appears to be contrary to what many family law attorneys (including the author of this manuscript) and family law professors at North Carolina law schools had previously believed was the status of the law in this State with regard to whether or not Chapter 50 child custody civil actions and orders take priority over Chapter 7B juvenile proceedings and orders.

Notwithstanding the provisions of N.C.G.S. 50-13.5(f) dealing with the proper venue for a Chapter 50 child custody action, the court in a juvenile proceeding, pursuant to N.C.G.S. 7B-200(d), may order that any Chapter 50 civil action or claim for child custody is filed in the same judicial district be consolidated with the juvenile proceeding. If a Chapter 50 civil action or claim for child custody is filed in a different judicial district of North Carolina, the court in the juvenile proceeding for good cause and after consulting with the court in the other judicial district, may: (1) order that the Chapter 50 civil action or claim for custody be transferred to the county in which the Chapter 7B juvenile proceeding is filed; or (2) order a change of venue in the Chapter 7B juvenile proceeding and transfer the juvenile proceeding to the county in which the Chapter 50 civil action or claim or custody is filed. The court in the Chapter 7B juvenile proceeding may also proceed in the juvenile proceeding while the Chapter 50 civil action or claim for custody remains stayed or dissolve the stay of the Chapter 50 civil action or claim for custody and stay the Chapter 7B juvenile proceeding pending the resolution of the Chapter 50 civil action or claim for custody.

H. Effect of Military Temporary Duty

The practitioner should be aware that NCGS 50-13.7A entitled “Custody and visitation upon military temporary duty, deployment, or mobilization” was repealed in 2013 and has been replaced by NCGS 50A-350 through and including 50A-396 entitled “Uniform Deployed Parents Custody and Visitation Act.”

I. Effect of Guardianship

Chapter 35A of the North Carolina General statutes establishes the exclusive procedure for adjudicating a person to be an incompetent adult or child and grants the Clerk of Superior Court original jurisdiction over such competency proceedings. After a person has been adjudicated an incompetent, the Clerk of Superior Court has original jurisdiction for the appointment of guardians. The Clerk may conduct hearings and consider evidence. Modifications to guardianship can be made by filing a motion in the cause with the Clerk of Superior Court.

Occasionally, both Chapter 35A and Chapter 50 will appear to be viable avenues for a custody type determination. In the case of McKoy v. McKoy, 202 N.C. App. 509, 689 S.E.2d 590 (2010), after the child's 18th birthday, the parties jointly petitioned the clerk of Superior Court to declare their child an incompetent and to appoint both the plaintiff and the defendant as her guardians under Chapter 35A. This request was granted and, at the time, the parties were still living together as husband and wife.

Subsequently, the parties separated and litigation commenced regarding custody of the aforementioned child who was incapable of caring for herself. Litigation was initiated pursuant to Chapter 50. Subsequently, plaintiff obtained new counsel who filed a motion to dismiss the chapter 50 action for lack of subject matter jurisdiction on the grounds that Chapter 35A provided for exclusive jurisdiction with the Clerk of Superior Court since guardianship had already been adjudicated. The trial court disagreed, proceeded with a hearing on custody and awarded plaintiff 60% and defendant 40% of the time with the child.

On appeal, the Court of Appeals held that the “Clerk of Superior Court is the proper forum for determining custody disputes regarding a person previously adjudicated an incompetent adult and who has been provided a guardian under Chapter 35A.” Id. at 689 S.E.2d 593. As the parties had already been granted guardianship of their child, the issue was a "matter pertaining to the guardianship." Id. therefore, a motion in the cause should have been filed under §35A-1207 (a) with the clerk in order to resolve the dispute in accordance with §35A-1203 (c). Here, the trial court was found not to have had subject matter jurisdiction under Chapter 50.

It is important to note, however, that under §50-13.8, "For the purposes of custody, the rights of a person who is mentally or physically incapable of self-support upon reaching his majority shall be the same as a minor child for so long as he remains mentally or physically incapable of self-support." The District Court would otherwise have jurisdiction to enter a custody order involving a disabled adult child. McKoy at 689 S.E.2d 594. The district

court has "concurrent jurisdiction with the Clerk of Superior Court with respect to custody of disabled adult children." Id. Had the parties decided not to have their child declared an incompetent adult, then, under Chapter 50, the court would have had jurisdiction under §50-13.8. Once they had, however, sought action under Chapter 35A, the Clerk retained the exclusive jurisdiction over guardianship matters. Therefore, it is important to remember the "general rule" that "where there are courts of concurrent jurisdiction, the court which first acquires jurisdiction retains it." McKoy at 689 S.E.2d 594.

III. VOLUNTARY AGREEMENTS

A. Separation Agreements

Custody and visitation are proper subjects to be included among the terms and conditions of a written separation agreement between married parents who are separating. Parents, as the natural custodians of their children, have the right to enter into contracts providing for the welfare of those minor children. Because such a determination of custody and visitation minimizes the stress between parents and maximizes the cooperation level between them, the minor children are the obvious beneficiaries of such settlements. As circumstances change, the parents can modify their agreement by signing written amendments thereto. While actions for specific performance and breach of contract would be applicable with regard to the issue of child support, they would not be appropriate with regard to custody and visitation issues. Instead, if the parents are unwilling to follow the terms of their agreement with regard to custody and visitation, or if they cannot agree on changes desired by one of the parties, court involvement would be in the nature of an initial custody and visitation determination, with the court considering the terms of the separation agreement, but not being bound thereby, and always maintaining for itself the right to determine what will promote the welfare of the children. By their terms, separation agreements may or may not be incorporated into subsequent decrees of absolute divorce, or in "friendly lawsuits" filed for such incorporation purposes. If they are so incorporated, these separation agreements, like initial consent orders, become orders of the court and are modifiable and enforceable as any court orders would be that had been entered by the court as the result of contested hearings concerning custody and visitation. Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1983). If such separation agreements are not incorporated into subsequent decrees of absolute divorce or are not incorporated into subsequent consent orders in a "friendly lawsuit," then such separation agreements remain simply as contracts between the parties.

B. Effect of Separation Agreement on Subsequent Court Action

As discussed hereinabove, if a separation agreement is incorporated in a subsequent decree of absolute divorce, or is incorporated in a subsequent consent order in a "friendly lawsuit," its terms and conditions with regard to custody and visitation become like any other court-ordered provisions and are enforceable through the contempt powers of the court and are modifiable without the consent of the parties upon a showing of changed circumstances. *Id*. It should be noted, when a motion is filed to modify the custody provisions of an agreement that was previously incorporated in a court order, that the circumstances to be compared with the

current circumstances are those that existed on the date that the agreement was incorporated and not on the date that the agreement was executed. Cavenaugh v. Cavenaugh, 317 N.C. 652, 347 S.E.2d 19 (1986).

If, however, a separation agreement is never incorporated into a subsequent decree of absolute divorce or in a subsequent consent order filed in a "friendly lawsuit" and therefore remains simply a contract between the parties, and if one of the parties should bring the matters of custody and visitation before the court through a proper pleading (either a complaint in an independent action or a motion in an already existing action), then the court would deal with those issues as it would otherwise in an initial custody determination without needing to find a substantial and material change in circumstances in order to determine provisions that may differ from the original separation agreement terms. Boyd v. Boyd, 81 N.C. App. 71, 343 S.E.2d 581 (1986).

While the marital and property rights of the parties under the provisions of a valid separation agreement cannot be ignored or modified by the court without the consent of the parties, such separation agreements are not final and binding as to the custody and visitation privileges of minor children. Soper v. Soper, 29 N.C. App. 95, 223 S.E.2d 560 (1976). It is the court's duty to award custody in accordance with the best interest of the child in accordance with N.C.G.S. 50-13.2(a), and no agreement, consent, or condition between the parents can interfere with this duty or bind the court. Spence v. Durham, 283 N.C. 671, 198 S.E.2d 537 (1973), *cert. denied*, 415 U.S. 918, 94 S. Ct. 1417, 39 L. Ed. 2d 473 (1974).

The existence of a valid separation agreement containing provisions relating to the custody, visitation and support of minor children does not prevent one of the parties to the agreement from instituting an action for a judicial determination of those same matters. Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640, *cert. denied*, 298 N.C. 305, 259 S.E.2d 918 (1979).

While the court is not bound by the terms of a valid separation agreement with regard to provisions for child custody and visitation privileges, the trial court should at least consider that the agreement represents what the parties believed at the time of its execution was in the best interest of their children, just as the court would consider other evidence in the case in making its own determination.

IV. COURT ACTION

A. Strategy

1. Preliminary Discussion with Client

Initial client interviews and case evaluations play a crucial role in all types of matrimonial litigation. This is especially true in the area of child custody and visitation disputes. Clearly, if the practitioner preliminarily fails to adequately build a proper foundation

and elicit the client's trust for the subsequent litigation phases, it will usually lead to mounting problems, which could have been avoided, or, at least, readily ameliorated.

Although there are many viable approaches to the effective handling of initial client interviews and case evaluations, practitioners should strive to maintain an overall flexible approach, keyed to the needs and capacities of the individual client and the special circumstances of each case.

First of all, during an initial client interview, I attempt to ascertain whether custody is genuinely in issue, or whether one party is using custody as a threat to gain some other advantage, or perhaps one party who is asking for custody is really asking for just extended visitation. After determining the status of the parents (divorced, separated or separating, and whether other family law actions may be involved), and after exploring the possibilities of reconciliation or at least a negotiated settlement, I next attempt to determine whether the client's expectations and goals, considering his or her particular set of circumstances, are realistic. While it is and will always remain the client's case and not mine, meaning that the decisions should be his or hers based upon advice from me, I generally consider strategy to be the province of the practitioner, and I am not interested in simply being a "mouthpiece" for someone's unrealistic expectations.

After determining such factors as the client's accommodations for children, his/her time availability to supervise children and his/her past experiences and present relationship with the children, and comparing those with the other parent's circumstances, I next attempt to determine if it is advisable to interview the children themselves and the most effective approaches to interviewing them, in order to ascertain their preferences if they are of sufficient age and discretion.

Finally, the matter of counsel fees and payment should be candidly and frankly discussed with the client during the initial conference. I use a written retainer agreement, which provides for a non-refundable reservation fee to be paid before any work is commenced and establishing an hourly rate for itemized time expended on behalf of the client thereafter. The North Carolina State Bar has addressed what these agreements must contain in various ethics opinions, and your agreement should comply with the Bar’s requirements. A realistic discussion of counsel fees at the beginning of the relationship will avoid the client getting in over his/her head and will minimize later misunderstandings.

2. Best Interest of Child/Fitness of Parents

As discussed hereinabove, the welfare of the child is the paramount consideration in custody matters. Goodson v. Goodson, *supra*. When conflict exists between parents, the right of a parent to have custody of his or her child must yield to what will promote the best interest of the child. N.C. Gen. Stat. §50-13.2(a).

When the welfare of the child and the goals of the parent-client are in accord, all is well, and I can enthusiastically represent such a client at the negotiating table or in

the courtroom. When however, the two appear to be in conflict, then perhaps it is time for attorney and client to sit down together in order to re-evaluate the circumstances and redefine goals. The "polar star" in custody cases should be the motivation for the practitioner, as well as for the court.

3. Proof

In persuading the court in custody cases, the burden of proof, as in most civil cases, is by the greater weight of the evidence. In determining what evidence to introduce at a custody hearing, the practitioner should remember that the trial judge will be striving to choose an environment which will, in his/her judgment, best encourage full development of the child's (a) physical, (b) mental, (c) emotional, (d) moral and (e) spiritual faculties. Blackley v. Blackley, *supra*. Witnesses that can establish the parent-client's suitability for meeting these enumerated needs of the child should be sought and interviewed in organizing testimony to be offered at the hearing. While witnesses should not be "coached" or rehearsed for the hearing, the practitioner should know firsthand what they will say before they are called to the witness stand.

With regard to evidence that may be introduced, it is interesting to note that the vicarious consent doctrine with respect to the North Carolina Electronic Surveillance Act, specifically N.C.G.S. 15A-287, permits a custodial parent to vicariously consent to the recording of a minor child's conversations with the other parent, as long as the custodial parent has a good faith, objectively reasonable belief that the interception of the conversations is necessary for the best interest of the minor child (*e.g.*, to protect the child). Kroh v. Kroh, 152 N.C. App. 347, 567 S.E.2d 760 (2002).

4. Psychological Evaluation

Since two of the five factors enumerated in the Blackley case above involve mental and emotional fitness of a parent to provide care and supervision for minor children, it would appear desirable, particularly in close cases, to obtain a child custody evaluation by a duly licensed psychologist who would be willing to offer testimony in court if necessary concerning the fitness of each party to parent the minor child. Whenever possible and feasible, one psychologist should evaluate all parties involved so that legitimate comparisons and conclusions can be developed. If opposing counsel will not cooperate, or if the two of you cannot agree on one psychologist, then it may be advisable to file a motion, pursuant to the provisions of Rule 706 of the North Carolina Rules of Evidence, requesting that the court order such an evaluation and select its own psychologist, dividing the cost therefor equally between the parties or otherwise as appropriate, perhaps waiting until after the hearing to tax the expenses as part of the court costs. There are different opinions in the legal community on whether a hearing for the appointment of such a psychologist pursuant to the provisions of Rule 706 of the North Carolina Rules of Evidence could be or should be in the nature of an evidentiary hearing with witnesses. This is a matter that likely may vary from jurisdiction to jurisdiction and which may be impacted by the a jurisdiction’s local rules.

5. Pleadings

Since specificity of allegations is not required in child custody actions as it is in alimony actions, and because the court, upon request, will make a custody determination between parents without having to find either parent "unfit," I strongly recommend keeping pleadings general and alleging only that the practitioner's client is a fit and proper person to have the exclusive care custody and control of the minor children, without alleging a lot of negative things about the other parent which may weaken the case if they are not proved at the hearing to the satisfaction of the trial judge. An exception to this general procedure of not pleading "unfitness" would, of course, be when the practitioner is representing a non-parent against a parent [see Petersen v. Rogers, *supra*].

Prior to the May 2011 decision in Baumann-Chacon v. Baumann, 212 N.C.App. 137, 710 S.E.2d 431 (2011), it was not uncommon to see negative pleading in the context of child custody cases where the parents of child(ren) were still residing together and the child custody issue was joined with a claim for divorce from bed and board. Prior to Baumann-Chacon, it was commonly believed that a party could not file an action for custody until the parties' physically separated. Baumann-Chacon brought much needed clarity to this issue holding that a trial court has subject matter jurisdiction over a parent's action for temporary and permanent custody and support even when the parents have not physical separated from one another and where no complaint from bed and board has been filed. The court ruled that the statutes governing child custody and child support do not require physical separation or a complaint for divorce from bed and board to be filed prior to the trial court addressing the issues of child custody and child support. Further, the legislative history of the applicable statutes did not reveal any intent to require physical separation of the parents or a pending divorce from bed and board complaint before the court could address custody or support.

6. Orders

Whether by consent or as the result of a contested hearing, all child custody orders should include adequate findings of fact to support appropriate conclusions of law. Such explicit findings of fact establish a basis for determining at a later date whether or not a substantial and material change in circumstances has occurred which would justify a modification of the previous court order. When in doubt, it is better to have too many findings of fact rather than not enough. In contested cases, an order replete with findings of fact will more likely than not be affirmed on appeal. When a settlement is reached on the day of the hearing, the provisions thereof should immediately be reduced in the form of handwritten memorandum of order to be signed right then and there by both parties, by their respective counsel and by the trial judge, with an express condition that the parties authorize their attorneys to execute the more formal typed consent order to be drafted at a later date without requiring their signatures in order to avoid changes of mind before the typing can be done. As previously mentioned, but worthy of reiteration, I strongly recommend that practitioners maintain sample orders (and pleadings) in notebooks or forms database for easy future reference.

B. Children Born Out-Of-Wedlock

Historically, as seen in the case of Jolly v. Queen, 264 N.C. 711, 142 S.E2d 592 (1965), the North Carolina Supreme Court found that there was a common law presumption that the custody of an illegitimate child should be awarded to the mother unless the mother is unfit or is otherwise unable to care for the child. During that time under the holding of this case, it became incumbent upon the fathers of children born out-of-wedlock to legitimate the minor child, pursuant to North Carolina General Statute Section 49-10, before filing an action for either custody or visitation in the District Court pursuant to N.C.G.S. § 50-13.1 et seq. Paternity, legitimation, custody and visitation issues have always, of course, been possible to establish in one consent order entered by the District Court (see sample order form W *infra*).

However, in the subsequent case of Rosero v. Blake, 357 N.C. 193, 581 S.E.2d 41 (2003), *rev'g* 150 N.C. App. 251, 563 S.E.2d 248 (2002), the North Carolina Supreme Court held that the trial court did not err in using the best-interest-of-the-child standard to determine custody between the mother and the father of a child born out-of-wedlock, even though the father had not previously legitimated the child pursuant to North Carolina General Statutes Section 49-10 or had not previously obtained a judicial determination of paternity pursuant to North Carolina General Statues Section 49-14 [but had only previously signed an acknowledgment of paternity pursuant to N.C.G.S. § 100-132(a)], stating that case law and statutory amendments since the 1965 Jolly case have abrogated the common law presumption in favor of mothers of illegitimate children. Also see the following cases: David v. Ferguson, 106 N.C. App. 89, 584 S.E.2d 102 (2003), Greer v. Greer, 175 N.C.App. 464, 624 S.E.2d 423 (2006).

In Conley v. Johnson, 24 N.C. App. 122, 210 S.E.2d 88 (1974), the Court of Appeals held that the District Court was authorized to grant the father of an illegitimate child visitation privileges and to punish the mother for refusing to allow the father to visit with his illegitimate child.

In all cases where there is any doubt whatsoever as to the paternity of the child, a blood grouping or DNA print identification test should be sought and obtained (see sample pleading form D *infra*).

For other decisions involving paternity and/or legitimation issues, please see the following cases: In re Papathanassiou, 195 N.C. App. 278, 671 S.E.2d 572 (2009)(the sole factual issue before the court in a legitimation proceeding pursuant to N.C.G.S. § 49-10 and 49-12.1 is the determination of whether or not the petitioner is the biological father of the minor child, and an inquiry into whether or not the legitimation proceeding is in the "best interest of the child" is not required); Guilford County ex rel. Lisa Manning v. Richardson, 149 N.C. App. 663, 562 S.E.2d 67 (2002); Bright v. Flaskrud, 148 N.C. App. 710, 559 S.E.2d 286 (2002); and Rice v. Rice, 147 N.C. App. 505, 555 S.E.2d 924 (2001).

A note of particular concern when you are representing the father of a child born (or to be born) out-of-wedlock: While the subject matter of this paragraph goes beyond the scope of this manuscript, it is quite possible you will meet such a client whose constitutionally

protected parental rights are in jeopardy of being permanently lost. The ground rules for preserving that father's rights are stringent, and the resulting consequences of a failure to follow those rules are extremely harsh. When you are representing the putative father of an unborn child (conceived and to be born out-of-wedlock) or a child who has already been born out-of-wedlock, it is extremely critical that you be familiar with and advise your client on the steps he must take to preserve his constitutionally protected status as the baby's natural parent. If your putative father does not timely take the requisite steps, then he is at risk of his parental rights being permanently terminated, thereby precluding him from ever having the opportunity to raise or otherwise have a parental role in his own child's life. This scenario typically arises when the mother of the child is contemplating placing the child for adoption. If the putuative father has not acted in a timely manner, then the child may be placed for adoption even without his consent. N.C.G.S. § 48 e*t seq*. addresses adoptions and includes provisions concerning whose consent to an adoption is (and is not) required. For instructive cases that discuss this particular issue, including the steps a biological father should take, see In re Adoption of Byrd, 354 N.C. 188, 552 S.E.2d 142 (2001); In re Adoption of Anderson, 360 N.C. 271, 624 S.E.2d 626 (2006); In re A.C.V., 692 S.E.2d 158 (N.C. Ct. App. 2010); and any subsequent cases that cite these specific cases.

According to Professor Suzanne Reynolds in Lee's North Carolina Family Law, Section 16.8e, North Carolina General Statutes Sections 110-132(b) (acknowledgement of paternity and agreement to support) and 52C-6-607 (Uniform Interstate Family Support Act) limit a putative father's ability to attack a prior finding of paternity in certain instances. N.C.G.S. Section 110-132 provides that a father's written acknowledgement of paternity, when accompanied by the mother's sworn affirmation, has the effect of a judgment of paternity for purposes of establishing the father's support obligation and is *res judicata* to the issue of paternity. The courts have interpreted this statute as prohibiting an attack on the acknowledgement of paternity in a proceeding related "solely to [the] support" of the child who was the subject of the acknowledgement. Leach v. Alford, 63 N.C. App. 118, 123, 304 S.E.2d 265, 268 (1983). However, this statute does not bar a challenge to the underlying judgment of paternity. *Id.* In Leach v. Alford, the North Carolina Court of Appeals upheld the putative father's right to seek relief from the underlying judgment of paternity by filing a motion in the cause pursuant to Rule 60(b)(6) of the North Carolina Rules of Civil Procedure. *Id.* In other words, if the acknowledgement of paternity was simply ancillary to the primary purpose of establishing a child support obligation in a court action (which is typically done by the child support enforcement units of local DSS offices), that the "G.S. § 110-132(b) provision that the 'judgment as to paternity shall be *res judicata* to that issue and shall not be reconsidered by the court' applies to child support proceedings thereunder, and does not establish an absolute bar to relief, pursuant to G.S. § 1A-1, Rule 60(b)(6), from the underlying acknowledgement (judgment) of paternity," because paternity was not the primary purpose of the action. *Id.*, at 124, 304 S.E.2d at 269. This challenge should enable the family law practitioner to obtain a DNA print test to establish scientifically the paternity of a child for whom a child support order is already in place following an ancillary acknowledgement of paternity.

After a minor child has been declared to be the legitimate offspring of the putative father, pursuant to the provisions of North Carolina General Statutes Section 49-10 or otherwise

by consent order, the provisions of N.C.G.S. Section 49-13 provide that a certified copy of the order of legitimation shall be sent by the Clerk of Superior Court under official seal to the State Registrar of Vital Statistics who shall then make the new birth certificate bearing the full name of the father, and changing the surname of the minor child so that it will be same as the surname of the father. In the case of Jones v. McDowell, 53 N.C. App. 434, 281 S.E.2d 192 (1981), the North Carolina Court of Appeals declared that the procedures in N.C.G.S. Section 49-13 are constitutionally deficient because "it denies such mothers [of children born out-of-wedlock] a protected liberty interest without due process of law."

Author's Note: Because the statute remains in our statute books unchanged in 2010, despite the ruling in 1981 of the Court of Appeals (without subsequent review by the Supreme Court), I contacted the UNC School of Government about the apparent inconsistency. Although my inquiry did not result in a definitive answer, thanks to John L. Saxon I have been able to argue successfully in district court that N.C.G.S. Section 49-13 was not removed from the statute books because the Court of Appeals only struck down the "automatic" provision of the statute, and not the rest of the statute. In other words, if the family law practitioner (representing the father who has legitimated his minor child) files a motion alleging a sufficient "justification" for the change in the surname of the minor child and provides the mother of a child born out-of-wedlock with proper notice for a hearing in court, then the district court judge may grant the relief suggested in N.C.G.S. Section 49-13 because the mother's "due process rights" have been protected.

C. Grandparents' Rights

One relatively common occurrence, with regard to intervention, relates to grandparents seeking visitation rights with their grandchildren. There are four statutes that address a grandparent's right to visitation with their grandchildren.

- **NCGS § 50-13.1(a)** which states "Any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the **custody** of such child, as hereinafter provided… Unless a contrary intent is clear, the word "custody" shall be deemed to include custody or visitation or both."

- **NCGS § 50-13.2(b1)** which states "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. As used in this subsection, "grandparent" includes a biological grandparent of a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child…

- **NCGS § 50-13.2A** A biological grandparent may institute an action or proceeding for **visitation** rights with a child **adopted** by a stepparent or a relative of the child where a **substantial relationship** exists between the grandparent and the child. Under no circumstances shall a biological

grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights. A court may award visitation rights if it determines that visitation is in the best interest of the child. An order awarding visitation rights shall contain findings of fact which support the determination by the judge of the best interest of the child. Procedure, venue, and jurisdiction shall be as in an action for custody.

- **NCGS § 50-13.5(j)** which states "Custody and Visitation Rights of Grandparents. - In any action in which the **custody of a minor child has been determined**, upon a motion in the cause and a showing of **changed circumstances** pursuant to G.S. 50-13.7, the grandparents of the child are entitled to such custody or visitation rights as the court, in its discretion, deems appropriate…

Although the aforesaid "grandparent" statutes provide for custody, "it appears that the Legislature intended to grant grandparents a right to **visitation** only in those situations specified in N.C. Gen. Stat. §§ 50-13.2 (b1), 50-13.5 (j), and 50-13.2A." Smith v. Smith, 2006 N.C. App. Lexis 1972 (p. 6). The Supreme Court in McIntyre v. McIntyre, 341 N.C. 629, 461 S.E.2d 745 (1995) held that NCGS § 50-13.1(a) **does not grant Plaintiffs the right to sue for visitation when no custody proceeding is ongoing and the minor children's family is intact**." Id. at 750.

In applying McIntyre, the Court of Appeals has stated "it follows that under a broad grant of **§ 50-13.1(a)**, grandparents have **standing to seek visitation with their grandchildren when the children are not living in a McIntyre "intact family.**" Additionally, there are **three** specific statutes that grant grandparents standing to seek visitation with their grandchildren. N.C.G.S. § 50-13.2(b1)(1995) (**when "custody of minor child" at issue**;…N.C.G.S. §50-13.5 (1995) (**after custody of the minor child has been determined**); N.C.G.S. § 50-13.2A (1995) (**when child adopted by stepparent or a relative of the child**). Smith, at p. 11. (Citing, Fisher v. Gayden, 124 N.C. App. 442, 444, 477 S.E.2d 251, 253 (1996), disc. review denied, 345 N.C. 640, 483 S.E.2d 706 (1997)).

In the Smith case (which is unpublished), *supra*, the Plaintiff and the Defendant had two children. They entered into a consent order in 1997 regarding the custody of their minor children. At that time the Defendant was disabled and was applying for social security benefits. The order provided for joint decision-making with Plaintiff having physical custody.

In 2005, Defendant filed a motion to modify the consent order. She alleged that there had been change in circumstances, including "an improvement in her medical condition and income level and the restoration of her driving privileges…" [O]n the same day, the Defendant's father ("the grandfather"), moved to intervene to obtain visitation rights with his grandchildren. The grandfather's motion was denied and he appealed.

In analyzing the case, the Court of Appeals noted that the grandchildren were living in a McIntyre intact family, and that they were therefore, required to address whether the grandfather had standing to seek visitation under one of the three specified statutes.

The court held that the pertinent statute in this case is North Carolina General Statutes § 50-13.2(b1). This statute applies only when custody of the minor children is an ongoing issue and this requirement is met only when the custody of a child is "in issue" or "being litigated." Smith at 7-8.

As a **result of Defendant's motion to modify, custody is in issue** and being litigated. Therefore, under North Carolina General Statutes § 50-13.5(j) the grandfather's motion was based on an existing custody dispute between the parents. Therefore, the statute authorized the grandfather to file a motion to intervene so long as he showed a basis for granting visitation and a change of circumstances. Id. at 12-13. The trial court was reversed.

In addition to qualifying under the provisions of North Carolina General Statutes Section 50-13.1, along with other "third parties," to institute an action or proceeding for the custody of a minor child, subject to the priority given to the right of natural and adoptive parents as previously discussed herein, grandparents have expressly been granted visitation privileges by N.C.G.S. 50-13.2(b1) with their grandchildren in the discretion of the trial judge, except with regard to biological grandparents of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated. Also see N.C.G.S. 50-13.5(j).

The North Carolina Supreme Court held in an initial custody proceeding, absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, that "the constitutionally-protected paramount right of parents to custody, care and control of their children must prevail" over the custody claims of third parties. Petersen v. Rogers, *supra*. Those Petersen exceptions were expanded by the subsequent North Carolina Supreme Court decision in Price v. Howard, *supra*.

Decisions of our appellate courts treat third-party requests (by grandparents and others) concerning minor children differently, based upon whether they are actions initiated pursuant to N.C.G.S. 50-13.1(a) for custody, or whether they are motions to intervene for visitation privileges pursuant to N.C.G.S. 50-13.5(j). In the former situation, **grandparents would have standing to seek custody** if they are able to show that a custodial parent is either **unfit** or has taken **action inconsistent with a parent's constitutionally protected right** to the care, custody and control of the minor child. However, in the latter situation, a grandparent's **right to visitation** arises either in the context of an **ongoing custody proceeding** or where the **minor child is in the custody of a stepparent or a relative**, and the **grandparent's request for visitation that does not allege that the minor child is not part of an "intact" family will be dismissed for failure to state a claim upon which relief can be granted**. Eakett v. Eakett, 157 N.C. App. 550, 579 S.E.2d 483 (2003).

It is also respectfully submitted by the author of this manuscript, once paternal grandparents have been permitted to intervene in an ongoing custody action between the two natural parents, that the grandparents are in the case to stay, and the paternal grandparents do not have to reestablish their standing for purposes of seeking custody or visitation if the natural father of the children should die before the conclusion of the ongoing action between the two natural parents.

A grandparent seeking custody/visitation of a minor child will not be successful in the following situations: (1) Pursuant to the provisions of N.C.G.S. 50-13.2(a) if there is no proof that the natural parent(s) is/are unfit or have engaged in such conduct as to forfeit their constitutionally protected priority claim to custody of their child, (2) pursuant to the provisions of N.C.G.S. 50-13.2(b1) if there is not an ongoing custody dispute, and (3) pursuant to the provisions of N.C.G.S. 50-13.5(j) if the grandparent fails to allege and prove a substantial and material change in circumstances pursuant to N.C.G.S. 50-13.7. Adams v. Wiggins, 174 N.C. App. 625, 621 S.E.2d 342 (2005). However, the North Carolina Court of Appeals has held that a grandparent could intervene in a case after a child custody order had been entered when one of the natural parents filed a motion in the cause several years later to modify the custody provisions of that order pursuant to the provisions of N.C.G.S. 50-13.7. Smith v. Smith (North Carolina Lawyers Weekly October 2, 2006, No. 06-16-1062, 10 pages), 179 N.C. App. 652, 634 S.E.2d 641 (2006) (*unpublished*).

Once the trial court has granted a motion of grandparents to intervene in a child custody action, those grandparents become a "party" for all purposes and thus have standing to seek relief in that action under Rule 60(b) of the North Carolina Rules of Civil Procedure, as well as other forms of relief. Williams v. Walker, 185 N.C. App. 393, 648 S.E.2d 536 (2007).

An example of a case in which a natural parent trumps the right of a grandparent can be found in Sides v. Ikner, No. COA12-165, 730 S.E.2d 844 (2012). This case presented the following fact scenario:

- Father and mother entered into a Consent Order in 2007 to share joint legal custody and for Mother to have primary physical custody. Plaintiff, father, exercised secondary physical custody.
- Mother and child had resided at Intervenor's home since July 2004 and they had mainly resided there since that date.
- Since the 2007 Order, father has exercised his secondary physical custody as set forth by the Order.
- In May 2009, mother informed father she was joining the Air Force Reserves and traveling to Georgia for basic training for approximately 8 weeks. The child continued to reside with Intervenor and father continued to see the child every other weekend.
- August 2009, father asked Intervenor when defendant would return from basic training. It was only then that he was informed that mother had actually joined the Air Force, not the Reserves, and was to be stationed in Germany with her husband. Mother requested to take the child to Germany and father refused.
- May 2010, grandmother filed a motion to intervene and a motion for custody.

- Father objected and filed a motion to dismiss.
- Trial court concluded that both father and grandmother were fit and proper persons to exercise custody, however, it found that "Father had "acted inconsistently with [his] parental rights and responsibilities and [his] constitutionally protected status as demonstrated by clear and convincing evidence." The trial court also concluded that "[i]t is in the best interests of the minor child that the Intervenor and the [Father] share joint legal custody of the minor child with the Intervenor having primary physical custody…" Father appealed.

The court looked to the father's intentions. It found that the relationship with the Intervenor grandmother was formed when the 2007 custody Order was entered. This Order granted primary physical custody of the child to the mother who mainly resided at the grandmother's home since 2004. The order indicated that the primary family unit was clearly intended to be father, mother and minor child, with grandmother being part of the extended family. The court held that as father was merely following the 2007 Order and that the court could not determine that the father chose to create a parental relationship between grandmother and child.

Additionally, during mother's absence, the grandmother primarily cared for the minor child, not through any voluntary act by father, but because mother left the home with the intent for grandmother (rather than father) to assume primary care of the minor child. The father did not fail to maintain contact and was involved to the extent allowed by the prior order. In fact, he did not know that mother would be moving to Germany permanently until December 2009. He then asked for custody. Accordingly, "Father did not voluntarily relinquish custody of Luke to Grandmother during the time that Defendant was gone."

The court looked at both the legal parent's conduct and his intentions to ensure that the situation is not one in which the third-party has assumed a parent-like status on his or her own without that being the goal of the legal parent. Father never intentionally chose to create a parental role for Grandmother, nor did he voluntarily relinquish primary custody of the minor child to her. Instead, Grandmother assumed a parent-like status on her own without that being the goal of the father. As such, the court could not conclude that Father acted inconsistently with his constitutionally protected paramount parental status.

D. Temporary Orders

If the circumstances of the case render it appropriate, North Carolina General Statutes Section 50-13.5(d)(2) authorizes the court, upon gaining jurisdiction of a minor child, to enter orders for the temporary custody and support of the minor child, pending the service of process or notice as herein provided. Such temporary orders may be entered *ex parte* (and I recommend doing so only if the opposing party is not represented by counsel) and, in situations where the temporary custody order does not change the living arrangements or custody of a child, the strict allegations that are required in N.C.G.S. § 50-13.5(d)(3) are not necessary.

Such temporary custody orders are appropriate when their entry would promote the welfare of the minor child and when they are necessary to preserve the status quo, to provide stability for the minor child, to prevent the questionable removal of the child from the jurisdiction, to return the child to the rightful custodian(s), or to protect the child from harm. (see sample order forms K, L, M and N *infra*)

However, North Carolina General Statutes Section 50-13.5(d)(3) provides that a temporary order for custody which changes the living arrangements of a child, or which changes custody, shall not be entered *ex parte* and prior to service of process or notice, unless the court finds that the child is exposed to a substantial risk of bodily injury or sexual abuse or that there is a substantial risk that the child may be abducted or removed from the State of North Carolina for the purpose of evading the jurisdiction of North Carolina courts.

Temporary child custody orders that are entered *ex parte* upon a verified affidavit or pleading do not need to be reviewed by the court within ten days (as this author had previously thought). Campen v. Featherstone, 150 N.C. App. 692, 564 S.E.2d 616 (2002). Writing for the unanimous panel of the Court of Appeals, Judge Loretta C. Biggs states "Chapter 50 does not limit the duration of a temporary custody order to a specific length of time, such as ten days; nor does our case law establish a definite period of viability for temporary custody orders." *Id.* at 696, 564 S.E.2d at 618. See also Cox v. Cox, 133 N.C. App. 221, 515 S.E.2d 61 (1999). However, preliminary injunctions or restraining orders that have been entered *ex parte* by the court pursuant to the provisions of Rule 65 of the North Carolina Rules of Civil Procedure must be reviewed within ten days and continued in effect, or they automatically expire.

Temporary child custody orders which do not determine the ultimate issues but simply direct some further proceeding preliminary to a final decree are "interlocutory" in nature and, as such, are nonappealable. Dunlap v. Dunlap, 81 N.C. App. 675, 344 S.E.2d 806 (1986); Grandy v. Midgett, 191 N.C. App. 250, 662 S.E.2d 404 (2008). However, even where an order grants only temporary custody, it is not necessarily interlocutory unless the trial court states a clear and specific reconvening time in the order and the time interval between the two hearings is reasonably brief. McRoy v. Hodges, 160 N.C. App. 381, 585 S.E.2d 441 (2003).

A temporary child custody order becomes a "permanent" order when an "unreasonable" amount of time passes. In LaValley v. LaValley, 151 N.C. App. 290, 564 S.E.2d 913 (2002), the North Carolina Court of Appeals held that "twenty-three months is not reasonable." *Id.* at 293, 564 S.E.2d at 916. However, the Court of Appeals of North Carolina has also held that a temporary consent order was not converted into a "permanent" order due to the lapse of twenty (20) months between the entry of the order and the subsequent motion to modify the provisions thereof. Senner v. Senner, 161 N.C. App. 78, 587 S.E.2d 675 (2003). Also see Miller v. Miller, 686 S.E.2d 909 (2009)(an order entered twenty-nine months earlier may still be a “temporary” order.) Apparently, when a temporary child custody order becomes a permanent child custody order based upon the passage of time being "unreasonable" must be addressed on a case-by-case basis. LaValley at 293, 564 S.E.2d at 916.

The North Carolina Court of Appeals has held, "An order is temporary if either (1) it is entered without prejudice to either party; (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues. Woodring v. Woodring, 745 S.E.2d 13, 2013 N.C. App. LEXIS 609, (2013). This court further clarified that a temporary custody order that does not set an ongoing visitation schedule cannot become permanent by operation of time. *Id* at 19.

If a child custody or visitation order is considered "temporary," the applicable standard of review for any proposed modifications is simply the best interest of the child, and not a substantial change in circumstances (which is required when seeking modification of a "permanent" order.) Simmons v. Arriola, *supra*; Baker v. Dunlap, 177 N.C. App. 810, 630 S.E.2d 256 (2006).

E. Right to a Hearing and Required Notice

North Carolina General Statutes Sections 50A-205 and 50A-108 provide that, before the court can make a decree of custody, reasonable notice and opportunity to be heard must be given to the contestants, to any parent whose parental rights have not been previously terminated, and to any person who has physical custody of the child.

North Carolina General Statutes Section 50-13.5(d)(1) provides that service of process in civil actions for the custody of minor children shall be as in other civil actions. In this regard, see Rules 4(j)(1), 4(j)(2), 4(j1) and 4(j3) of the North Carolina Rules of Civil Procedure.

Rule 6(d) of the North Carolina Rules of Civil Procedure requires that all written motions be served before a hearing. North Carolina General Statutes Section 50-13.5(d)(1) requires that motions for custody of a minor child in a pending action may be made on 10 days notice to the other party or parties and after compliance with N.C.G.S. § 50A-205, and further that motions for support of a minor child in a pending action may be made on 10 days notice to the other party or parties and compliance with N.C.G.S. § 50-13.5(e).

The minimum 10-day notice period is applicable regardless of whether the opposing party resides in-state or resides out-of-state, although N.C.G.S. § 50A-108 authorizes notice and proof of service to be made by any method allowed by either the state which issues the notice or the state where the notice is received.

Rule 6(e) of the North Carolina Rules of Civil Procedure, in effect, extends the minimum 10-day notice period to 13 days when notice is served by mail. See Wilson, North Carolina Civil Procedure, 3rd ed., LexisNexis Group (Charlottesville, VA) (2007) ch. 6 at page 6-16.

Although North Carolina General Statutes Section 50A-105 requires that foreign countries are to be treated as states for the purposes of the Uniform Child-Custody Jurisdiction and Enforcement Act, attorneys should be cautioned about service and notice in foreign countries. Countries have their own rules on service which must usually be followed. Attorneys

should consult the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 36, T.I.A.S. 6638 (1965). See "Official Comment" printed below N.C.G.S. 50A-108 on page 369 of Volume 8 of the General Statutes of North Carolina, Annotated, 2005 edition. For a convenient "quick reference guide" to the Hague Convention, also see the manuscript prepared by Caleigh H. Evans, Esquire, of the law firm of Tash & Kurtz, PLLC in Winston-Salem, Forsyth County, North Carolina, entitled "Child Custody Jurisdiction Issues" for the North Carolina Bar Foundation continuing legal education seminar Testing the Limits: Jurisdictional and Ethics Issues in Family Law, which was presented in Asheville, NC, on Friday, September 26, 2008.

F. Reports from Third Parties

Whenever the trial court is determining the best interest of a child, any evidence which is competent and relevant to a showing of the best interest of the child must be heard and considered by the trial court, subject to the court's discretionary powers to exclude cumulative testimony. In the Matter of Loretta Diane Shue, 311 N.C. 586, 319 S.E.2d 567 (1984); N.C.G.S. § 7A-640 and 7A-657.

l. Guardian Ad Litem

Considering the importance of custody decisions and their virtual finality as rendered by the District Court, trial judges are becoming more agreeable to obtaining and considering testimony and input from as many informed and objective sources as possible. See In the Matter of Gwaltney, 68 N.C. App. 686, 315 S.E.2d 750 (1984), where the Court of Appeals held that, in child custody matters, the trial court may consider the recommendation of the child's Guardian Ad Litem concerning the needs of the minor child. Also, see Matter of Baby Boy Scearce, *supra*.

In juvenile abuse, neglect and dependency cases, as well as in termination of parental rights cases, a Guardian Ad Litem is appointed by the court to champion the best interest of the juvenile pursuant to the provisions of North Carolina General Statutes Sections 7B-1200 through 7B-1204.

In Chapter 50B domestic violence cases, a Guardian Ad Litem is appointed by the court to champion the best interest of any minor children that are potentially vulnerable to such domestic violence pursuant to the provisions of North Carolina General Statutes 50B-3(a1)(3)(h).

Although the authority to do so is not quite as clear as in the two classes of cases above, in Chapter 50 civil child custody cases, it appears that a Guardian Ad Litem is being appointed by the court to champion the best interest of the minor children who are the subject of the case pursuant to Rule 17(b)(3) of the North Carolina Rules of Civil Procedure.

Although the amounts are not set by statute, Guardian Ad Litems are entitled to compensation by the parents of the children for whom they are advocating.

2. Department of Social Services

Rather than hear testimony from a parade of traditional witnesses including neighbors, relatives and friends with regard to such matters as the physical residence of the parties and their reputations in the community, many judges are granting motions filed by the parties requesting that the local Department of Social Services conduct a "home study" of all persons involved in custody actions. Such reports condense the relevant facts in a concise, objective and professional manner that provide the trial court with a more accurate picture of all the surrounding circumstances than would otherwise be possible. By stipulation, such reports may be received by the court in writing only, with copies being made available to counsel for both of the parties prior to the hearing. Absent a stipulation to the contrary, the social worker who compiled the report would be required to appear in person in court to testify and be subject to cross-examination by counsel for the parties. If the practitioner believes that such a report would benefit his or her client, then he or she may wish to obtain a stipulation for the admissibility of the written report from opposing counsel before the "home study" is undertaken. However, given that most Departments of Social Services around the state are understaffed and are overwhelmed with work in other kinds of cases involving children, it is submitted that this may be a last resort method of obtaining objective third party evidence.

3. Psychologist

It is now accepted that the best interest of the child standard encompasses a consideration of the psychological and emotional welfare of the child as well as the child's physical well-being. Therefore, the legal profession has turned to experts in the field in order to obtain insight into the perceived needs of children generally, as well as the psychological factors actually involved in a particular custody dispute, such as the psychology of the children and the parties involved as well as the dynamics of the relationships between them (see sample order form V *infra*).

In a custody case in which I represented the mother, testimony from a social worker and a detective about allegations of sexual abuse by the father with his three-year-old daughter alone could not convince a District Court judge in Forsyth County to suspend visitation privileges by the father with the girl, pending the full hearing on the merits the following month, although the judge did require supervised visitation at the home of the paternal grandmother. It was not until I offered the testimony of a psychologist with regard to the psychological harm that could result from forcing the girl to visit with her father pending the completion of the DSS and criminal investigations in defense of a contempt proceeding against my client that the judge modified his order and suspended further visitation privileges (see sample order form N *infra*).

Please note that a psychologist may not ethically talk with a minor child without the custodial parent's permission when the minor child is brought into the psychologist's office by the noncustodial parent. White v. State Board, 97 N.C. App. 144, 388 S.E.2d 148 (1990). It is also my understanding that psychologists prefer to have the consent of both parents before talking with a minor child when the parents have been granted joint legal custody.

4. Parenting Coordinator

Effective on the 1st day of October 2005, the General Assembly created the position of a parenting coordinator, an individual holding a masters or doctorate degree in psychology, law, social work, counseling, medicine, or a related subject area, to assist the Court, counsel for the parties and the parties themselves in high-conflict child custody cases. See North Carolina General Statutes Sections 50-90 through 50-100. These parenting coordinators may be appointed at any time during the proceedings of a child custody action if all of the parties consent to the appointment. The Court may appoint a parenting coordinator without the consent of the parties upon the entry of a custody order (other than an *ex parte* order), or upon the entry of a parenting plan only if the Court also makes specific findings of fact that the action is a high-conflict case, that the appointment of the parenting coordinator is in the best interest of any minor child in the case, and that the parties are able to pay for the cost of the parenting coordinator.

For a case illustrating that the findings of fact required by North Carolina General Statutes Section 50-91 have to be made in an order to appoint properly a parenting coordinator in a child custody action, see Hall v. Hall, 188 N.C. App. 527, 655 S.E.2d 901 (2008).

G. Continuing Jurisdiction of Court

Once the District Court obtains jurisdiction over a minor child, its jurisdiction continues until terminated by court order or until the minor attains the age of eighteen years or is sooner emancipated as a matter of law. In the Matter of Botsford, 75 N.C. App. 72, 330 S.E.2d 23 (1985).

For purposes of the rule that once jurisdiction of the court attaches it exists for all time until the cause is fully and completely determined, in actions for child custody and support, only the majority of the child or the death of a party fully and completely determines the cause, and nothing in the statutory scheme providing for the election of procedures in actions for child custody or support alters this rule. Latham v. Latham, 74 N.C. App. 722, 329 S.E.2d 721 (1985).

Likewise, once jurisdiction is acquired, it is generally not divested by subsequent events. Neal v. Neal, 69 N.C. App. 766, 318 S.E.2d 255 (1984).

Although parents have the right to determine the custody and visitation privileges with regard to their minor children by a written separation agreement, once the court is asked to assume jurisdiction and does so with regard to those issues, the parties are no longer free to determine such matters between themselves without court approval in the form of a consent order. In other words, only the court can modify a court order, and, once an order is entered by the court with regard to child custody, the parents lose their right to contract with regard to that issue subsequently throughout the minority of their children.

The trial court of original venue which enters the divorce decree and the initial order of child custody and support has the discretion to transfer the venue of the ongoing action for custody or support to the county to which the ex-wife and the children move, for the convenience of witnesses and the parties, and in the best interests of justice and the parties. Broyhill v. Broyhill, 81 N.C. App. 147, 343 S.E.2d 605 (1986).

H. Enforcement of Orders in General

North Carolina General Statutes Section 50-13.3(a) provides that an order providing for the custody of a minor child is enforceable by proceedings for civil contempt, and its disobedience may be punished by proceedings for criminal contempt, as provided in Chapter 5A, Contempt, of the North Carolina General Statutes, and the same is true with regard to the enforcement of court-ordered visitation privileges. Appert v. Appert, *supra*.

A trial judge has the power to enter an order forcing a minor child to visit with the noncustodial parent. However, before the drastic action of incarceration of the custodial parent may be utilized, the circumstances must be compelling, and due process requires the court to do the following: afford the parties a hearing upon proper notice in advance; create a proper court order based on findings of fact and conclusions of law determined by the judge to justify and support the order; and make findings that include at a minimum that such incarceration of the custodial parent is reasonably necessary for the promotion and protection of the best interest and welfare of the minor child. Mintz v. Mintz, *supra*.

In situations where older children (who are capable of forming their own opinions and of articulating their own reasons therefor) refuse to visit with the noncustodial parent, the trial court may not find the custodial parent to be in contempt of the visitation order where there is no evidence that the custodial parent encouraged the children's refusal to visit or attempted in any way to prevent the visitation. In other words, the mere failure of the custodial parent to use physical force or threat of punishment to make the children visit with the noncustodial parent does not rise to the level of willful contempt. Hancock v. Hancock, 122 N.C. App. 518, 471 S.E.2d 415 (1996). Where the custodial parent does not prevent visitation, but takes no action to force visitation when the children refuse to visit, the proper method to force visitation is not a contempt proceeding, but is for the noncustodial parent to ask the trial court to modify its order to compel visitation. *Id*.

However, in an unpublished opinion where the custodial mother did not prevent visitation, the Court of Appeals of North Carolina affirmed a finding of civil contempt against her by the trial court and held that the custodial mother was not excused from complying with a visitation order because her fifteen-year-old son refused to go see his father (even where the evidence revealed that the teenager locked himself in his bedroom to avoid one of the visits), because the custodial mother had previously "poisoned the mind" of the minor child against his father. Anderson v. Lackey, 163 N.C. App. 246, 593 S.E.2d 87 (2004). In so ruling, the Supreme Court distinguished its 1996 holding in Hancock *supra* by stating that the custodial mother's sex abuse accusations against the boy's father in Anderson took the case outside the rule

in Hancock, that contempt is a "fact-specific inquiry" and that the holding in Anderson was limited "to the facts of the case before us."

Beware: Your client's genuinely mistaken belief that his or her actions are in compliance with a court order does not prevent the court from finding that your client nonetheless willfully violated the court order and is in contempt. See, for example, Rain Tree v. Bradford, 698 S.E.2d 557, 2010 N.C. App. LEXIS 1501 (2010)(*unpublished*).

In contempt proceedings, the trial court's findings of fact are conclusive on appeal when supported by any competent evidence and are reviewable on appeal only for the purpose of passing on their sufficiency to warrant the judgment entered. Glesner v. Dembrosky, *supra*.

I. Enforcement of Orders During Appeal

North Carolina General Statutes Section 50-13.3(a) provides that, notwithstanding the provisions of North Carolina General Statutes Section 1-294, an order pertaining to child custody (and therefore also with regard to visitation privileges) which has been appealed to the appellate division is enforceable in the trial court by proceedings for civil contempt during the pendency of the appeal. Said statute further provides, upon motion of an aggrieved party, that the court of the appellate division in which the appeal is pending may stay any order for civil contempt entered for child custody until the appeal is decided, if justice so requires.

The trial court has the power to issue, while a previous order awarding custody of minor children to the father was on appeal, an *ex parte* order requiring the mother to relinquish custody of the children to the father and to appear before the trial court and show cause why she should not be held in contempt of court for violating the previous order, where the father made a showing that the mother was in violation of such order and wrongfully had custody of the children. Wolfe v. Wolfe, 67 N.C. App. 752, 314 S.E.2d 132 (1984).

Although an order pertaining to child custody may be enforceable in the trial court during the pendency of an appeal (absent a stay order), this writer is aware of at least one unpublished opinion of the Court of Appeals of North Carolina indicating that the trial court has no jurisdiction to modify a child custody order during the pendency of an appeal from that order.

The North Carolina Supreme Court discusses the scope of N.C.G.S. § 7B-1003 regarding the ability and jurisdiction of a trial court to issue temporary orders affecting custody during the pendency of appeals from custody orders entered in juvenile court proceedings in the case of In re R.T.W., 359 N.C. 539, 614 S.E.2d 489 (2005).

J. Modification of Orders

North Carolina General Statutes Section 50-13.7 provides that an order of a court of this State for custody of a minor children may, subject to the provisions of North Carolina General Statutes 50A-3, be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested. More specifically, an order of the court for child custody may be modified only if it is determined that (1) there has

been a substantial change in circumstances affecting the welfare of the child; *and* (2) a change in custody is in the best interest of the child. Ramirez-Barker v. Barker, 107 N.C. App 71, 418 S.E.2d 675 (1992).

An order awarding custody of minor children is based upon conditions found to exist at the time that it is entered. The order is subject to such change as is necessary to make it conform to changed conditions when they occur. Owen v. Owen, 31 N.C. App. 230, 229 S.E.2d 49 (1976).

The phrase "changed circumstances" has been held to mean such a change as affects the welfare of the minor child. In re Harrell, *supra*.

There must generally be a substantial change of circumstances before an order of child custody is changed. Todd v. Todd, 18 N.C. App. 458, 197 S.E.2d 1 (1973). The question of whether or not there has been a substantial change of circumstances is a question of law that must be supported by findings of fact. The parties cannot stipulate that a substantial change in circumstances has occurred as is not a personal right possessed by a litigant but is instead a legislatively mandated limitation on the authority of the courts to modify prior custody orders. Hibshman v. Hibshman, 212 N.C. App. 113, 710 S.E.2d 438 (2011).

A trial court may not *sua sponte* modify a prior custody order. In the Jackson case, neither party had a pending motion to modify custody. Rather, various motions for contempt, to dismiss, for sanctions, and for attorney's fees were before the court. In ruling on those motions, the court modified provisions contained in the original custody order and imposed new custodial provisions. In so doing, the trial court impermissibly modified the original custody order. Jackson v. Jackson, 192 N.C. App. 455; 665 S.E.2d 545 (2008).

Where the court found that there had indeed been a substantial change in circumstances, but that the change in circumstances was to the moving party's detriment, the court did not need to conduct an inquiry into the best interest of the child. McKyer v. McKyer, 691 S.E.2d 767, 2010 N.C. App. LEXIS 458 (2010)(*unpublished*).

The moving party has the burden of showing a substantial change of circumstances affecting the welfare of the minor child. Barnes v. Barnes, 55 N.C. App. 670, 286 S.E.2d 586 (1982); Warner v. Brickhouse, 189 N.C. App. 445, 658 S.E.2d 313 (2008). The burden of proof, as in most civil actions, with regard to a change of circumstances is by the preponderance of the evidence. Allen v. Allen, 7 N.C. App. 555, 173 S.E.2d 10 (1970).

In order to modify a custody order, even for clarification, there must be a finding of a substantial change in circumstances. Davis v. Davis, 748 S.E.2d 594 (2013); Gary v. Bright, 750 S.E.2d 912 (2013).

Traditionally, before the court would modify a custody order, a long line of Court of Appeals decisions had held that it must be shown that the circumstances have so changed that the welfare of the minor child would be adversely affected unless the custody provision was modified. Rothman v. Rothman, 6 N.C. App. 401, 170 S.E.2d 140 (1969); Perdue v. Perdue, 76

N.C. App. 600, 334 S.E.2d 86 (1985). However, this rather strict burden of requiring a showing of adversity to the child as a result of changed circumstances to justify a change in custody has been expressly disapproved by our Supreme Court in Pulliam v. Smith, 124 N.C. App. 144, 476 S.E.2d 446 (1996), 348 N.C. 616, 501 S.E.2d 898 (1998) *[although this writer speculates that the disapproval in the Pulliam opinion is driven more by the particular set of facts in that case than by a conscious intention on the part of the Supreme Court to make all custody orders easier to modify in the future.]* For a case granting a modification of the original custody order based on a change in circumstances that was beneficial to the children, see Mitchell v. Mitchell, 681 S.E.2d 520; 2009 N.C. App. LEXIS 1484 (2009).

Visitation privileges are but a lesser degree of custody. Therefore, the word "custody," as used in Chapter 50 of the North Carolina General Statutes, was intended to encompass visitation rights as well as general custody. Simmons v. Arriola, *supra*; Clark v. Clark, *supra*.

Interference with visitation of the noncustodial parent which had a negative impact on the welfare of the minor child (poisoning the mind of the child) could constitute a substantial change of circumstances sufficient to warrant the court granting a change of child custody. Woncik v. Woncik, 82 N.C. App. 244, 346 S.E.2d 277 (1986); Jordan v. Jordan, *supra.*

A child's poor health and conduct when with the mother, and the child's improved state when with the father, if supported by competent evidence, could justify the trial court in changing the custody arrangement then in force from the mother to the father. Teague v. Teague, 84 N.C. App. 545, 353 S.E.2d 242 (1987). In child custody matters, the child's welfare, rather than the conduct of the parties, is the controlling factor. *Id*.

In a case wherein the mother admitted that she had had two illegitimate children since her divorce and currently had insufficient income to provide for herself and the three children, the Court of Appeals of North Carolina held that there was a substantial change in circumstances affecting the welfare of the parties' child which warranted modification of the previous order by transferring custody from the mother to the father. White v. White, 90 N.C. App. 553, 369 S.E.2d 92 (1988). But see also, Kelly v. Kelly, 77 N.C. App. 632, 335 S.E.2d 780 (1985); Dean v. Dean, 32 N.C. App. 482, 232 S.E.2d 470 (1977).

A parent’s unreasonable behavior based on unsubstantiated sexual abuse allegations against the other parent is a substantial change in circumstances affecting the welfare of the minor child and warrants a modification of the previous custody order by transferring custody to the falsely accused parent. Rogers v. Black, 655 S.E.2d 16, 2008 N.C. App. LEXIS 291 (2008)(*unpublished*); Mooney v. Mooney, 676 S.E.2d 669, 2009 N.C. App. LEXIS 1812 (2009)(*unpublished*).

Furtherance of a child’s educational growth can be a basis for modification of a custody order. Primary physical custody was transferred to the father because the mother repeatedly caused the child to be tardy to preschool and exacerbated the child’s separation anxiety, which was particularly troubling given the child’s upcoming enrollment in kindergarten.

By modifying the previous custody order and placing primary physical custody of the minor child with the father, a day-to-day custody arrangement was created that would give the child the structure and consistency during the school week needed to maximize the child's school performance. Nemchin v. Nemchin, 667 S.E.2d 340, 2008 N.C. App. LEXIS 1929 (2008)(*unpublished*).

For a case finding that the unstable living arrangement of the custodial parent constitutes a substantial and material change in circumstances that would justify the modification of a child custody order, see Johnson v. Johnson, 175 N.C. App. 247, 623 S.E.2d 89 (2005) (*unpublished*).

For a case finding that parental disagreement or lack of communication between the parents does not constitute a substantial and material change in circumstances justifying the modification of a child custody order where the evidence is not "substantial," and where the use of alcohol by the custodial parent does not constitute a substantial and material change in circumstances justifying the modification of a child custody order where there is no evidence that such alcohol use "affects" the minor children, see Ford v. Wright, 170 N.C. App. 89, 611 S.E.2d 456 (2005).

For a case affirming the existence of a substantial and material change in circumstances affecting a minor child that would justify the modification of a child custody order if the findings of fact include a change that implicitly affects the welfare of the minor child and recite that there has been an effect on the minor child even if neither the findings of fact nor the conclusions of law draw a connection between the "change" and the "effects," see Karger v. Wood, 174 N.C. App. 703, 622 S.E.2d 197 (2005).

With regard to the wishes of minor children, although the children's wishes are entitled to consideration (albeit not controlling) in an initial custody action [Brooks v. Brooks, *supra*], in a modification of custody action the children's wishes are not a sufficient change in circumstances where there is no evidence that either parent's ability or fitness to provide a suitable home had changed. In re Harrell, *supra*. However, see the case of Kowalick v. Kowalick, *supra*, where the North Carolina Court of Appeals affirmed the trial court's changing custody based solely upon the adamant and consistent wishes of a 13-year old daughter to live with her mother after the custody of her and her two siblings had previously been granted to her father.

Where the trial court concludes that a substantial change in circumstances has occurred affecting the welfare of the minor child and that a modification of the existing child custody order was in the best interest of the child, on appeal the appellate courts will defer to the trial court's judgment and will not overturn the court's decision in the absence of a clear showing of an abuse of discretion. Calhoon v. Golian, 186 N.C. App. 132, 650 S.E.2d 67 (2007).

If you are successful in obtaining a modification of a prior custody order and are charged with the task of drafting the order for modification, bear in mind that our appellate courts have urged trial courts, when memorializing their findings of fact, to pay particular

attention in explaining whether any change in circumstances can be deemed substantial, whether that change affected the welfare of the minor child, and, finally, why modification is in the child's best interest. Otherwise, a lack of specificity could result in an appellate reversal of a modification order. Patten v. Werner, 2010 N.C. App. LEXIS 1814 (2010)(*unpublished*).

Although a change of residence of the custodial parent does not in and of itself amount to a substantial change in circumstances, the effect of the move on the welfare of the minor child may constitute a change in circumstances requiring modification of the original child custody order. O'Briant v. O'Briant, 70 N.C. App. 360, 320 S.E.2d 277 (1994), *rev'd on other grounds,* 313 N.C. App. 432, 329 S.E.2d 370 (1985). The practitioner involved in a parental relocation case must also consider Ramirez-Barker v. Barker, 107 N.C. App. 71, 418 S.E.2d 675 (1992), in which Judge Greene, who authored the opinion, noted that it would be a rare case where a relocation would not adversely affect the minor child, indicating that a custodial parent who wishes to move may indeed have a heavy burden. *Id*. at 79, 418 S.E.2d at 680.

Although relocation of a custodial parent in and of itself does not constitute a material and substantial change in circumstances, the North Carolina courts consider various factors in determining whether or not a modification of custody may be appropriate when a custodial parent relocates: (1) the advantages of the relocation in terms of its capacity to improve the life of the child; (2) the motives of the custodial parent in seeking the move; (3) the likelihood that the custodial parent will comply with visitation orders when the custodial parent is no longer in North Carolina; (4) the integrity of the non-custodial parent in resisting the relocation; and (5) the likelihood that a realistic visitation schedule can be arranged which will preserve and foster the parental relationship with the non-custodial parent. Evans v. Evans, 138 N.C. App. 135, 530 S.E.2d 576 (2000).

For additional cases finding that a move may in fact constitute a material and substantial change in circumstances warranting modification of a child custody order, see Morrill v. Morrill, 175 N. C. App. 794, 625 S.E.2d 204 (2006) (*unpublished*); and Carpenter v. Ratliff, 174 N. C. App. 625, 621 S.E.2d 340 (2005) *(unpublished)*.

For an additional case finding that a move does not constitute a material and substantial change of circumstances warranting modification of a child custody order, see Najjar v. Najjar, 175 N.C. App. 247, 623 S.E.2d 89 (2005) (*unpublished*).

For a case finding that the remarriage of one of the parties does not, in and of itself, constitute a material and substantial change in circumstances warranting a modification of a child custody order, see Dreyer v. Smith and Smith, 163 N.C. App. 155, 592 S.E.2d 594 (2004).

While allegations concerning adversity to the child are acceptable factors for the trial court to consider and will support modification, a showing of a change in circumstances that is, or is likely to be, beneficial to the child may also warrant a change in custody. Shipman v. Shipman, *supra*. For purposes of modifying child custody, in situations where a substantial change in circumstances involves a discrete set of circumstances such as a move on the part of

the custodial parent, the custodial parent's cohabitation, or a change in the custodial parent's sexual orientation, the effects of the change on the welfare of the child are not self-evident and therefore necessitate a showing of the evidence directly linking the change to the welfare of the child. *Id*. For a recent case discussing the effects of a substantial change in circumstances on a minor child as being self-evident and therefore no evidence directly linking the change to the effect on the child was required, see Patten v. Werner, *supra*.

Although evidence may be introduced during a hearing to modify custody that would support a finding of changed circumstances, the trial court is not required to find and/or to conclude that there has occurred a "substantial" change in circumstances that would justify the trial court's modification of the existing custody order. Scott v. Scott, 157 N.C. App. 382, 579 S.E.2d 431 (2003). Also see Frey v. Best, 189 N.C. App. 622, 659 S.E.2d 60 (2008).

Although the introduction of evidence at a modification hearing is generally restricted solely to events that have transpired since the entry of the order for which the moving party is seeking modification, see Newsome v. Newsome, *supra*, and consider how the holding in this case might enable the moving party to introduce into evidence events that transpired prior to the entry of a consent order that was entered in a child custody action without the court hearing any evidence or "adjudicating" those issues.

Although if a child custody or visitation order is considered "final" or "permanent," the court may not make any modifications to that order without first determining that there has been a substantial change in circumstances in the case, if a child custody or determination order is considered "temporary," the applicable standard of review for proposed modifications is the best interest of the child and not a substantial change in circumstances. Simmons v. Arriola, *supra*.

Although an order pertaining to child custody may be enforceable in the trial court during the pendency of an appeal (absent a stay order), this writer is aware of at least one unpublished opinion of the Court of Appeals of North Carolina indicating that the trial court has no jurisdiction to modify a child custody order during the pendency of an appeal from that order.

The trial court's findings of fact in modifying a child custody order are conclusive on appeal if they are supported by competent evidence, even though there is some evidence to the contrary. Vuncannon v. Vuncannon, *supra*; Hamilton v. Hamilton, *supra*.

Rule 41(b) of the North Carolina Rules of Civil Procedure provides for the entry of an involuntary dismissal by the court of any action or of "any claim" therein brought by a plaintiff against a defendant "for failure of the plaintiff to prosecute" or to comply with these rules or any order of court. This writer respectfully contends that a motion in the cause filed by either party to modify a child custody order is also subject to dismissal pursuant to the provisions of Rule 41(b) if such motion is not calendared for hearing within a reasonable period of time, because the defending party is not put on proper notice of any events or circumstances occuring after the motion is filed, but before the hearing is eventually heard, if the delay is substantial. This writer has successfully argued this position in district court where the motion to modify a

2006 child custody order was filed by the mother on the 7th day of May 2007, but the mother did not attempt to calendar her motion for hearing until the 17th day of July 2008 *(in response to the father's motion for recalucation of child support and for wage garnishment that was filed by the father on the 16th day of June 2008)*. The district court judge dismissed the mother's motion for failure of the moving party to prosecute her motion after the unreasonable delay of fourteen (14) months, although the judge's order did so "without prejudice" to the mother's right to file a new motion for modification, provided that she did so within thirty (30) days of the date of the entry of the dismissal order. See the non-custody case of Newton v. Nicholson, 149 N.C. App. 232, 562 S.E.2d 304 (2002) *(unpublished)*, wherein the Court of Appeals states that a trial court's authority to dismiss an action [or, as I contend, a motion] on such grounds is "essential to the prompt and efficient administration of justice." *Id.* at 233, 562 S.E.2d 305.

In analyzing the impact of military temporary duty, deployment, or mobilization on custody and any potential modifications of a custodial arrangement as a result, it is crucial to review the Uniform Deployed Parents Custody and Visitation Act at N.C.G.S. § 50A-350 *et seq.*

The family law practitioner should also take into consideration in evaluating the merits of his or her client's case, although a particular event or circumstance may not in and of itself constitute a substantial change in circumstances, a combination of such events or circumstances together may in fact result in a finding and conclusion of a substantial change in circumstances warranting a modification of a child custody order.

With regard to modification of child custody orders, please see sample pleading forms F and G and sample order forms Y, Z, AA and BB *infra*.

K. Attorney Fee Awards

North Carolina General Statutes Section 50-13.6 provides that, in an action or proceeding for the custody of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody, the trial court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expenses of the suit.

Unlike alimony actions, the award of attorney fees in child custody cases is not limited to the prevailing party; and, unlike child support cases, the award of attorney fees in custody cases does not depend upon some unreasonable refusal by the other party.

The preparation of a written affidavit for counsel fees (which itemizes the time expended) generally produces better results. Please refer to the sample affidavit for counsel fees attached at the end of this manuscript as form GG.

V. UNIFORM CHILD-CUSTODY JURISDICTION AND ENFORCEMENT ACT (UCCJEA)

All fifty states and the District of Columbia had previously adopted the Uniform Child Custody Jurisdiction Act (UCCJA), which became effective in North Carolina on July 1, 1979, and comprised Chapter 50A of the North Carolina General Statutes § 50A-1 through 50A-25.

Effective October 1, 1999, and applicable to causes of action arising on or after that date, North Carolina adopted the new Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), which still comprises Chapter 50A of the North Carolina General Statutes, but which substitutes for former Sections 50A-1 through 50A-25 new Sections 50A-101 through 50A-317.

The practitioner in interstate child custody actions should immediately confirm that the other state is operating under the UCCJEA and not the former UCCJA. (Visit the Uniform Law Commission website to find a list of the adopting states and their respective statutory references.) In dealing with the laws of the other state the practitioner should also realize that the other state may have made some of its own modifications, so that any differences that exist between North Carolina law and the other state in question should be identified and compared at the outset. McCahey, Kaufman, Kraut, Zett and Bailey, Child Custody & Visitation Law and Practice, Matthew Bender (1986).

The purposes of the former UCCJA were set out in Section 50A-1(a), but are not contained in the UCCJEA. However, the official comment to North Carolina General Statutes Section 50A-101 makes it clear that the UCCJEA should be interpreted according to the same purposes set out in former North Carolina General Statutes Section 50A-1(a), as follows:

> (1) Avoid jurisdictional competition and conflict with courts of other States in matters of child custody which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being;
>
> (2) Promote cooperation with the courts of other States to the end that a custody decree is rendered in that State which can best decide the case in the interest of the child;
>
> (3) Discourage the use of the interstate system for continuing controversies over child custody;
>
> (4) Deter abductions of children;
>
> (5) Avoid relitigation of custody decisions of other States in this State; [and]

(6) Facilitate the enforcement of custody decrees of other States.

To oversimplify the purposes of both the former UCCJA and the current UCCJEA would be to state that the Act attempts to avoid jurisdictional competition and conflicts with courts of other states in matters of child custody. The entire Uniform Child-Custody Jurisdiction and Enforcement Act is quite detailed and should be read and studied in its entirety. The best way to become familiar with the Act is to become involved in a child custody case involving the court of another state and therefore to discover its application in a practical and realistic situation. For now, it is sufficient to know that the Act exists and to remember where it can be found.

Although the intent of the current UCCJEA is to bring North Carolina law more in accordance with the Federal Parental Kidnapping Prevention Act (PKPA) *infra*, this presenter is of the opinion that some differences still exist between North Carolina's current UCCJEA and the federal PKPA.

The Uniform Child-Custody Jurisdiction and Enforcement Act basically provides four grounds for determining jurisdiction: (1) home state; (2) best interest of the child based upon a significant connection or available substantial evidence concerning the child and the family; (3) abandonment or emergency; and (4) no state having or exercising jurisdiction. The UCCJEA is intended to prevent forum shopping for the convenience of competing parents to the detriment of the real interest of the minor child. Holland v. Holland, 56 N.C. App. 96, 286 S.E.2d 895 (1982); Davis v. Davis, 53 N.C. App. 531, 281 S.E.2d 411 (1981).

In compliance with the Act, practitioners must provide certain information in any initial pleading raising the issue of child custody in accordance with the provisions of North Carolina General Statutes Section 50A-209.

The jurisdictional prerequisites of the Uniform Child-Custody Jurisdiction and Enforcement Act only govern in permanent child custody situations (as opposed to juvenile court proceedings). In the Matter of Arends, 88 N.C. App. 550, 364 S.E.2d 169 (1988). Interstate adoption matters are governed by the provisions of the Interstate Compact on the Placement of Children (N.C.G.S. 110-57.1 *et seq.*), and not by the Uniform Child-Custody Jurisdiction and Enforcement Act. However, it has been suggested that any apparent conflicts in the application of these two acts to any particular situation should be resolved in favor of applying the provisions of the Interstate Compact on the Placement of Children (ICPC) over the conflicting provisions of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA). Adoption Law And Practice, section 3-A.11, at page 3A-16, Matthew Bender (1988).

If a wife/mother residing in the State of North Carolina files a complaint for absolute divorce and child custody in North Carolina, and if the husband/father residing in another state files an answer in the North Carolina action in which he does not contest the court's personal jurisdiction, then the husband/father has made a general appearance such that the husband/father has waived his challenge to the North Carolina court's exercise of personal jurisdiction in the

wife's/mother's subsequent motion in the cause for child support. Stern v. Stern, 89 N.C. App. 689, 367 S.E.2d 7 (1988); N.C.G.S. 1-75.7.

Pursuant to North Carolina General Statutes Section 50A-208(b), a North Carolina trial court may properly decline to exercise jurisdiction to modify a foreign child custody decree, despite the physical presence of the mother and the child in the State of North Carolina, if the North Carolina court determines that the mother is guilty of misconduct in removing the child from the foreign jurisdiction in violation of the provisions of the foreign child custody decree. Danna v. Danna, 88 N.C. App. 680, 364 S.E.2d 694, *cert. denied*, 322 N.C. 479, 370 S.E.2d 221 (1988).

In a case involving an initial custody determination dispute between two states, where one state was the child's home state, and where the other state had a significant connection with the child and at least one contestant, the Court of Appeals of North Carolina, in an opinion written by Judge John, has held that "home state" jurisdiction [N.C.G.S. 50A-201(a)(1)] takes priority over "significant connection" jurisdiction [NCGS 50A-201(a)(2)]. Potter v. Potter, 131 N.C. App. 1, 505 S.E.2d 147 (1998).

For a discussion of what constitutes a "temporary absence" under the provisions of the UCCJEA for the purpose of determining the "home state" of minor children, see the case of Chick v. Chick, 164 N.C. App. 444, 596 S.E.2d 303 (2004) and Hammond v. Hammond, 209 N.C. App. 616, 708 S.E.2d 74 (2011.)

For a UCCJEA case wherein the court declined jurisdiction based upon a finding and conclusion that North Carolina was an "inconvenient forum" for a child custody proceeding and transferring jurisdiction of the matter to Ohio, see In the Matter of: M.E., a minor child, 181 N.C. App. 322, 638 S.E.2d 513 (2007).

Where a simultaneous child custody action is pending in another state, the trial court must stay the proceeding and determine whether the other state has substantially the same type of jurisdiction that North Carolina has. Jones v. Whimper, 366 N.C. 367, 736 S.E.2d 170 (2013).

For a UCCJEA case discussing modification in North Carolina of Michigan custody order, see Crenshaw v. Williams, 211 N.C.App. 136, 710 S.E.2d 227 (2011).

A court must make sufficient findings of fact to support its conclusion that it has subject matter jurisdiction under the UCCJEA. A court cannot invoke “temporary emergency” jurisdiction under the UCCJEA if the order does not state a period of time in which the order will expire. In re E.J., 738 S.E.2d 204 (2013).

In connection with the Uniform Child-Custody Jurisdiction and Enforcement Act, please see sample pleading forms H and I(a) and sample order forms DD, EE and FF *infra*.

For an excellent discussion of the UCCJEA, please see the manuscript prepared by the Honorable Clarence E. Horton, Jr., and by Mary Nell Craven, Esquire, of the law firm of

Womble Carlyle Sandridge & Rice in Winston-Salem, Forsyth County, North Carolina for the North Carolina Bar Foundation in the continuing legal education seminar entitled "Family Law Practice in the New Millennium," which was presented in Cary, NC on Friday, September 15, 2000.

Also, for an excellent and convenient "quick reference guide" to the Uniform Child-Custody Juridiction and Enforcement Act (UCCJEA), see the manuscript prepared by Caleigh H. Evans, Esquire, of the law firm of Tash & Kurtz, PLLC in Winston-Salem, Forsyth County, North Carolina, entitled "Child Custody Jurisdiction Issues" for the North Carolina Bar Foundation continuing legal education seminar Testing the Limits: Jurisdictional and Ethics Issues in Family Law, which was presented in Asheville, NC, on Friday, September 26, 2008.

VI. PARENTAL KIDNAPPING PREVENTION ACT (PKPA)

Following the promulgation in 1968 of the Uniform Child Custody Jurisdiction Act (UCCJA), 9 U.L.A. 115 (1988) [as adopted by North Carolina in 1979 as Chapter 50A of the North Carolina General Statutes], it became clear that the UCCJA had not accomplished its purpose. In 1980, Congress enacted the Parental Kidnapping Prevention Act (PKPA), Pub. L. No. 96-611, Sec. 7(b), 94 Stat. 33568, 3568-69 (1980), reprinted in 28 U.S.C.A. Section 1738A (West Supp. 1992), with the intent to federalize child custody jurisdiction law. Under the supremacy clause of the United States Constitution, this federal Act preempts any inconsistent provisions of the UCCJA. Meade v. Meade, 812 F.2d 1473, 1475 (4th Cir. 1987).

The substantive terms of the PKPA are similar to those of the UCCJA, but the drafters expanded the exclusive jurisdiction rule to cover initial as well as modification cases. Amazingly, however, a number of state court decisions (including North Carolina) still ignore the PKPA entirely. In addition, some states have even reached the untenable holding that the PKPA does not preempt state law at all. The United States Supreme Court has added to the problem by refusing to recognize a federal cause of action under the Act and by refusing to accept certiorari when the highest courts of two states issue competing custody decisions. The end result is that the law of the child custody jurisdiction continues to be in a state of chaos, with state courts interpreting the UCCJA and the PKPA loosely (and frequently inaccurately) to accomplish what they believe is in the best interest of the minor children involved in a particular case, although the adoption of the newer UCCJEA has helped somewhat.

The specific jurisdictional test for determining where an action should be heard consists of two parts. First, the court must consider whether or not it has jurisdiction under the terms of the relevant statutes. Secondly, if the court has jurisdiction, the Court must determine whether or not to exercise that jurisdiction. The first part of the test involves a question of law, while the second part of the test involves a question of discretion.

In determining whether or not a court has jurisdiction, both the PKPA and the UCCJA [and now the UCCJEA] divide actions into two groups: (1) actions seeking an initial custody order, and (2) actions seeking a modification. An action seeking an initial custody order is an action commenced at a time when there is neither a pending foreign custody action nor a prior

foreign custody decree. A modification action is defined to be any case which is filed when there is an outstanding custody order from another state or there is a pending custody action in another state. In other words, if a foreign action is pending, the local action must be treated for jurisdictional purposes as a modification action, even if there is no order as yet in place in the other state. For a case determining that a temporary order in another state is an "initial determination" for UCCJEA purposes, see In re A.A.R., a minor child, 184 N.C. App. 377, 646 S.E.2d 443 (2007).

Under both the PKPA and the UCCJA [and now the UCCJEA], there are four separate and independent bases for jurisdiction for obtaining initial jurisdiction: (1) home state jurisdiction; (2) significant connection jurisdiction; (3) emergency jurisdiction; and (4) default jurisdiction. If the requirements for any one of the foregoing four requirements are met, then the local court has initial jurisdiction over the case, and there is little if any difference between the PKPA and the UCCJA in this regard. In modification cases, both the PKPA and the UCCJA [and now the UCCJEA] involve two elements. The first element, which must be considered before the second element, provides simply that a state shall not exercise jurisdiction over a modification action if the initial decretal state retains jurisdiction over the case. If the answer to this first element does not prevent the state from exercising jurisdiction, then the local court must then consider the second element that lists the same four bases for jurisdiction as the test for initial jurisdiction: (1) home state jurisdiction; (2) significant connection jurisdiction; (3) emergency jurisdiction; and (4) default jurisdiction. If one state presently has jurisdiction over a child custody action, then no other state can exercise concurrent jurisdiction, even if that second state meets one of the foregoing four jurisdictional bases.

It is with regard to the exercise of jurisdiction in modification actions where most states reach divergent conclusions, and also where the UCCJA and the PKPA "appear" most to be in conflict. Under the PKPA and the UCCJEA, it appears clear that the initial decretal state would retain jurisdiction for modification purposes for as long as the minor child or either of the contestants continues to reside in such state. On the other hand, most state court decisions interpreting the former UCCJA tend to be guided (blindly) by the home state jurisdictional test and tend to conclude (erroneously) that the decretal state "loses" jurisdiction once the minor child has been absent from the decretal state for more than six months, even though one of the contestants continues to reside in the initial decretal state, and even though the minor child continues to have a significant connection with the initial decretal state.

Although the current UCCJEA is designed to be more in accord with the PKPA than was the former UCCJA, some differences still exist, and it is submitted that the PKPA would therefore still preempt any inconsistent provisions of the UCCJEA. Meade v. Meade, *supra*.

For cases correctly holding that the initial decretal state retained jurisdiction to modify its prior custody order(s) [despite the fact that the child(ren) no longer resided in such state], see: Meade v. Meade, *supra*; Wilson v. Wilson, 121 N.C. App. 292, 465 S.E.2d 44 (1996); Beck v. Beck, 123 N.C. App. 629, 473 S.E.2d 789 (1996); Gasser v. Sperry, 93 N.C. App. 72, 376 S.E.2d 478 (1989); Danna v. Danna, *supra*; Neal v. Neal, *supra*; Jerson v. Jerson, 68 N.C. App. 738,

315 S.E.2d 522 (1984); Naputi v. Naputi, 67 N.C. App. 351, 313 S.E.2d 179 (1984); and Nabors v. Farrell, 53 N.C. App. 345, 280 S.E.2d 763 (1981).

For an excellent overview of international custody issues, the Hague Conventions, and PKPA, see the manuscript prepared by Irene King, Esquire, of the law firm of James, McElroy, & Diehl, PA in Charlotte, North Carolina, and Ann Laquer Estin, Professor at the University of Iowa College of Law entitled "International Family Law Issues" for the North Carolina Bar Foundation 2012 Family Law Section Annual Meeting It's a Small World After All, which was presented at the Francis Marion Hotel in Charleston, SC, on May 4-5, 2012.

In connection with the Parental Kidnapping Prevention Act, please see sample pleading form I(b) and sample order form CC *infra*.

VII. CONCLUSION

The art of representing a client in a child custody case is one that develops over time with experience, knowledge of the bench and commitment to the "polar star" of constantly striving to accomplish what is in the best interest and what would promote the general welfare of the minor child involved. The trial practitioner's reputation with the bench for honesty, candor, sincerity, ethical conduct and genuine interest in and concern for the minor children involved will pay dividends to his or her clients in those "close" cases. In judicial districts where selecting particular judges is possible, it is submitted that it is almost malpractice not to do so. In judicial districts where selection of particular judges is not possible, there can be no substitute for the trial practitioner "knowing" all about his or her hearing judge. The hearing judge in a child custody case determines the trial techniques at the hearing more than any other single factor.

There is no such thing as a "little custody case," and, if the family law practitioner believes in the importance of such cases, and will spend as much time in preparation before the hearing and in drafting the Order following the hearing as continuing to hone his or her trial techniques during the hearing, then his or her child custody practice, although frequently somewhat frustrating, will also always be ultimately rewarding!

In addition to the specific trial techniques and strategies discussed in more detail in the main body of this manuscript, below, in summary, are listed some suggested general guidelines to be followed in most child custody actions that must go to court:

(1) Know your judge (and opposing counsel)!

(2) Utilize your client as a resource for gathering background information, developing evidence and obtaining witnesses for the hearing (but retain control of the strategy in court for yourself). Interview personally all witnesses in advance (in person, if feasible, and certainly by telephone) in order to ascertain and evaluate their demeanor, as well as the substance and relevance of their testimony.

(3) Make certain that your client understands in advance what will be happening and why, as well as what your strategy is in his or her particular case and why. Also, always have a follow-up conference with your client after the hearing, and after the Order has been entered, to make certain that your client understands the Court's decision and what the client's rights and obligations are pursuant to the Order.

(4) Consider utilizing an impartial court-ordered psychologist, either by consent with opposing counsel or as the result of a court order following a motion made pursuant to Rule 706 of the North Carolina Rules of Evidence.

(5) Plan in advance if your client comes to you before the parties separate and utilize *ex parte* orders to obtain temporary custody for your client before there is an attorney on the other side. If the shoe is on the other foot, insist on equal custody time for your client "without prejudice" pending the full hearing on the merits, either by consent or as the result of a temporary hearing, in order to insure "fairness" to both parties at the child custody hearing in chief.

(6) Utilize marked calendars and client journals to develop a pattern of custody and involvement by your client in the life of his or her minor child.

(7) Rule of thumb for all clients: "Don't do anything you would not be proud to have the judge hear all about!" Also attempt to keep in regular contact with your client to avoid "situations" developing.

(8) Consider advising your client to counsel confidentially with his or her own separate psychologist (or to enroll in an appropriate parenting class) in order that the client may learn or improve his or her own child-rearing skills.

(9) Utilize private investigators to establish the "lifestyle" of the opposing party as that lifestyle may impact on the general welfare of the minor children.

(10) Urge your client to be involved with his or her child's school, church, medical/dental treatment and extracurricular activities. Also have your client prepared to testify in detail about the "plan" that he or she has developed for the benefit of the child (e.g., school attendance, daycare provisions, daily schedule, extracurricular activities, contact with the other parent and relatives, etc.).

IX. SUGGESTED REFERENCE MATERIALS

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Children's Rights

Children, whose divorcing parents are involved in a custody dispute, should have the right

< Not to be asked to choose sides

< Not to be told the nasty details of the legal proceedings

< Not to be told "bad things" about the other parent

< Not to be quizzed about the other parent

< Not to be used as a messenger between parents

< Not to be asked to tell lies about the other parent

< Not to be a parent's legal confidant

< To express their feelings, but to choose not to express all of their feelings

< To be shielded from parental "warfare"

< Not to feel guilty for loving both parents

Source: Parent Education and Custody Effectiveness