THIRD PARTY CUSTODY & VISITATION[1]

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[1] This manuscript incorporates portions of the manuscript, "*Managing a Child Custody Case*" by Gary Tash, of Tash & Kurtz, PLLC.

As with most areas of law, most of our guidelines in dealing with child custody determinations 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.

North Carolina General Statutes Section 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 (who has not as yet attained the age of eighteen years) may institute an action or proceeding for the custody of such child. Notwithstanding the broad language of this statute, case law has limited the scope of said statutory application.

Biological parents have a paramount right to the custody and control of their children; however, there are circumstances that justify third party action by nonparents, such as grandparents, stepparents, and others who have an established relationship with a minor child.

This manuscript will address child custody actions in general and it will also explore when and how third parties may take action to seek visitation or custodial rights of a minor child.

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.

(e) 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.

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. 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.

(a) Guardian Ad Litem

Considering the importance of custody decisions and their virtual finality as rendered by the District Court, trial judges are frequently 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 may be 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.

(b) 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.

5. Modification of Orders

Third parties, once made a party to a custody order and granted custody or visitation rights have the same rights as parents to seek modification of orders under North Carolina General Statutes Section 50-13.7. This statute provides that an order of a court of this State for custody of a minor child 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.

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 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).

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, 348 N.C. 616, 501 S.E.2d 898 (1998). Subsequently, the court in Shipman v. Shipman, 357 N.C. 471, 586 S.E.2d 250 (2003), noted:

> It is well established in this jurisdiction that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a " 'substantial change of circumstances affecting the welfare of the child' " warrants a change in custody. Pulliam v. Smith, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998) (quoting Blackley v. Blackley, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974)); see also N.C.G.S. § 50-13.7(a) (2001) (establishing that custody orders "may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party"). The party seeking to modify a custody order **need not allege that the change in circumstances had an adverse effect** on the child. Pulliam, 348 N.C. at 619, 501 S.E.2d at 899. While allegations concerning adversity are "acceptable factor[s]" for the trial court to consider and will support modification, "a showing *474 of a change in circumstances that is, or is **likely to be, beneficial to the child** may also warrant a change in custody." Id. at 620, 501 S.E.2d at 900. (emphasis added).
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> Id. at 473.

> The trial court's examination of whether to modify an existing child custody order is twofold. The trial court must determine whether there was a change in circumstances and then must examine whether such a change affected the minor child. If the trial court concludes either that a substantial change has not occurred or that a substantial change did occur but that it did not affect the minor child's welfare, the court's examination ends, and no modification can be ordered. If, however, the trial court determines that there has been a substantial change in circumstances and that the change affected the welfare of the child, the court must then examine whether a change in custody is in the child's best interests. If the trial court concludes that modification is in the child's best interests, only then may the court order a modification of the original custody order.
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> Id.

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).

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).

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 to a child custody action 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*.

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*.

North Carolina General Statutes Section 50-13.7A(c)(2) enacted in 2007 provides that the temporary duty, mobilization, or deployment and the temporary disruption to the child's schedule shall not be a factor in a determination of a change in circumstances if a motion is filed to transfer custody from the service member.