§ 50-13.1. Action or proceeding for custody of minor child.

(a) 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. Any person whose actions resulted in a conviction under G.S. 14-27.21, G.S. 14-27.22, G.S. 14-27.23, or G.S. 14-27.24 and the conception of the minor child may not claim the right to custody of that minor child. Unless a contrary intent is clear, the word "custody" shall be deemed to include custody or visitation or both.

(a1) Notwithstanding any other provision of law, any person instituting an action or proceeding for custody ex parte who has been convicted of a sexually violent offense as defined in G.S. 14-208.6(5) shall disclose the conviction in the pleadings.

(b) Whenever it appears to the court, from the pleadings or otherwise, that an action involves a contested issue as to the custody or visitation of a minor child, the matter, where there is a program established pursuant to G.S. 7A-494, shall be set for mediation of the unresolved issues as to custody and visitation before or concurrent with the setting of the matter for hearing unless the court waives mediation pursuant to subsection (c). Issues that arise in motions for modifications as well as in other pleadings shall be set for mediation unless the court waives mediation pursuant to subsection (c) of this section. Custody or visitation issues that arise in motions for contempt or motions to show cause may be set for mediation. Alimony, child support, and other economic issues may not be referred for mediation pursuant to this section. The purposes of mediation under this section include the pursuit of the following goals:

(1) To reduce any acrimony that exists between the parties to a dispute involving custody or visitation of a minor child;

(2) The development of custody and visitation agreements that are in the child's best interest;

(3) To provide the parties with informed choices and, where possible, to give the parties the responsibility for making decisions about child custody and visitation;

(4) To provide a structured, confidential, nonadversarial setting that will facilitate the cooperative resolution of custody and visitation disputes and minimize the stress and anxiety to which the parties, and especially the child, are subjected; and

(5) To reduce the relitigation of custody and visitation disputes.

(c) For good cause, on the motion of either party or on the court's own motion, the court may waive the setting under Article 39A of Chapter 7A of the General Statutes of a contested custody or visitation matter for mediation. Good cause may include, but is not limited to, the following: a showing of undue hardship to a party; an agreement between the parties for voluntary mediation, subject to court approval; allegations of abuse or neglect of the minor child; allegations of alcoholism, drug abuse, or domestic violence between the parents in common; or allegations of severe psychological, psychiatric, or emotional problems. A showing by either party that the party resides more than fifty miles from the court may be considered good cause.

(d) Either party may move to have the mediation proceedings dismissed and the action heard in court due to the mediator's bias, undue familiarity with a party, or other prejudicial ground.

(e) Mediation proceeding shall be held in private and shall be confidential. Except as provided in this Article, all verbal or written communications from either or both parties to the mediator or between the parties in the presence of the mediator made in a proceeding pursuant to this section are absolutely privileged and inadmissible in court. The mediator may assess the needs and interests of the child, and may interview the child or others who are not parties to the proceedings when he or she thinks appropriate.

(f) Neither the mediator nor any party or other person involved in mediation sessions under this section shall be competent to testify to communications made during or in furtherance of such mediation sessions; provided, there is no privilege as to communications made in furtherance of a crime or fraud. Nothing in this subsection shall be construed as permitting an individual to obtain immunity from prosecution for criminal conduct or as excusing an individual from the reporting requirements of Article 3 of Chapter 7B of the General Statutes or G.S. 108A-102.

(g) Any agreement reached by the parties as a result of the mediation shall be reduced to writing, signed by each party, and submitted to the court as soon as practicable. Unless the court finds good reason not to, it shall incorporate the agreement in a court order and it shall become enforceable as a court order. If some or all of the issues as to custody or visitation are not resolved by mediation, the mediator shall report that fact to the court.

(h) If an agreement that results from mediation and is incorporated into a court order is referred to as a "parenting agreement" or called by some similar name, it shall nevertheless be deemed to be a custody order or child custody determination for purposes of Chapter 50A of the General Statutes, G.S. 14-320.1, G.S. 110-139.1, or other places where those terms appear.

(i) If the child whose custody is the subject of an action under this Chapter also is the subject of a juvenile abuse, neglect, or dependency proceeding pursuant to Subchapter 1 of Chapter 7B of the General Statutes, then the custody action under this Chapter is stayed as provided in G.S. 7B-200. (1967, c. 1153, s. 2; 1989, c. 795, s. 15(b); 1998-202, s. 13(p); 2004-128, s. 10; 2005-320, s. 5; 2005-423, s. 4; 2007-462, s. 1; 2011-411, s 4; 2013-236, s. 13; 2015-181, s. 35; 2022-48, s. 2.)

§ 50-13.2. Who entitled to custody; terms of custody; visitation rights of grandparents; taking child out of State; consideration of parent's military service.

(a) An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child. In making the determination, the court shall 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. An order for custody must include written findings of fact that reflect the consideration of each of these factors and that support the determination of what is in the best interest of the child. Between the parents, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child. Joint custody to the parents shall be considered upon the request of either parent.

(b) An order for custody of a minor child may grant joint custody to the parents, exclusive custody to one person, agency, organization, or institution, or grant custody to two or more persons, agencies, organizations, or institutions. Any order for custody shall include such terms, including visitation, as will best promote the interest and welfare of the child. If the court finds that domestic violence has occurred, the court shall enter such orders that best protect the children and party who were the victims of domestic violence, in accordance with the provisions of G.S. 50B-3(a1)(1), (2), and (3). If a party is absent or relocates with or without the children because of an act of domestic violence, the absence or relocation shall not be a factor that weighs against the party in determining custody or visitation. Absent an order of the court to the contrary, each parent shall have equal access to the records of the minor child involving the health, education, and welfare of the child.

(b1) 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. 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.

(b2) Any order for custody, including visitation, may, as a condition of such custody or visitation, require either or both parents, or any other person seeking custody or visitation, to abstain from consuming alcohol and may require submission to a continuous alcohol monitoring system, of a type approved by the Division of Community Supervision and Reentry of the Department of Adult Correction, to verify compliance with this condition of custody or visitation. Any order pursuant to this subsection shall include an order to the monitoring provider to report any violation of the order to the court and each party to the action. Failure to comply with this condition shall be grounds for civil or criminal contempt.

(c) An order for custody of a minor child may provide for such child to be taken outside of the State, but if the order contemplates the return of the child to this State, the judge may require the person, agency, organization or institution having custody out of this State to give bond or other security conditioned upon the return of the child to this State in accordance with the order of the court.

(d) If, within a reasonable time, one parent fails to consent to adoption pursuant to Chapter 48 of the General Statutes or parental rights have not been terminated, the consent of the other consenting parent shall not be effective in an action for custody of the child.

(e) An order for custody of a minor child may provide for visitation rights by electronic communication. In granting visitation by electronic communication, the court shall consider the following:

(1) Whether electronic communication is in the best interest of the minor child.

(2) Whether equipment to communicate by electronic means is available, accessible, and affordable to the parents of the minor child.

(3) Any other factor the court deems appropriate in determining whether to grant visitation by electronic communication.

The court may set guidelines for electronic communication, including the hours in which the communication may be made, the allocation of costs between the parents in implementing electronic communication with the child, and the furnishing of access information between parents necessary to facilitate electronic communication. Electronic communication with a minor child may be used to supplement visitation with the child. Electronic communication may not be used as a replacement or substitution for custody or visitation. The amount of time electronic communication is used shall not be a factor in calculating child support or be used to justify or support relocation by the custodial parent out of the immediate area or the State. Electronic communication between the minor child and the parent may be subject to supervision as ordered by the court. As used in this subsection, "electronic communication" means contact, other than face-to-face contact, facilitated by electronic means, such as by telephone, electronic mail, instant messaging, video teleconferencing, wired or wireless technologies by Internet, or other medium of communication.

(f) In a proceeding for custody of a minor child of a service member, a court may not consider a parent's past deployment or possible future deployment as the only basis in determining the best interest of the child. The court may consider any significant impact on the best interest of the child regarding the parent's past or possible future deployment. (1957, c. 545; 1967, c. 1153, s. 2; 1977, c. 501, s. 2; 1979, c. 967; 1981, c. 735, ss. 1, 2; 1985, c. 575, s. 3; 1987, c. 541, s. 2; c. 776; 1995 (Reg. Sess., 1996), c. 591, s. 5; 2004-186, s. 17.1; 2009-314, s. 1; 2012-146, s. 10; 2013-27, s. 1; 2015-278, s. 2; 2017-186, s. 2(pppp); 2021-180, s. 19C.9(t).)

§ 50-13.2A. Action for visitation of an adopted grandchild.

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. (1985, c. 575, s. 2.)

§ 50-13.5. Procedure in actions for custody or support of minor children.

(a) Procedure. – The procedure in actions for custody and support of minor children shall be as in civil actions, except as provided in this section and in G.S. 50-19. In this G.S. 50-13.5 the words "custody and support" shall be deemed to include custody or support, or both.

(b) Type of Action. – An action brought under the provisions of this section may be maintained as follows:

(1) As a civil action.

(2) Repealed by Session Laws 1979, c. 110, s. 12.

(3) Joined with an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(4) As a cross action in an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(5) By motion in the cause in an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(6) Upon the court's own motion in an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(7) In any of the foregoing the judge may issue an order requiring that the body of the minor child be brought before him.

(c) Jurisdiction in Actions or Proceedings for Child Support and Child Custody. –

(1) The jurisdiction of the courts of this State to enter orders providing for the support of a minor child shall be as in actions or proceedings for the payment of money or the transfer of property.

(2) The courts of this State shall have jurisdiction to enter orders providing for the custody of a minor child under the provisions of G.S. 50A-201, 50A-202, and 50A-204.

(3) to (6) Repealed by Session Laws 1979, c. 110, s. 12.

(d) Service of Process; Notice; Interlocutory Orders. –

(1) Service of process in civil actions for the custody of minor children shall be as in other civil actions. Motions for support of a minor child in a pending action may be made on 10 days notice to the other parties and compliance with G.S. 50-13.5(e). Motions for custody of a minor child in a pending action may be made on 10 days notice to the other parties and after compliance with G.S. 50A-205.

(2) If the circumstances of the case render it appropriate, upon gaining jurisdiction of the minor child the court may enter orders for the temporary custody and support of the child, pending the service of process or notice as herein provided.

(3) A temporary order for custody which changes the living arrangements of a child or 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. A temporary custody order that requires a law enforcement officer to take physical custody of a minor child shall be accompanied by a warrant to take physical custody of a minor child as set forth in G.S. 50A-311.

(e) Notice to Additional Persons in Support Actions and Proceedings; Intervention. –

(1) The parents of the minor child whose addresses are reasonably ascertainable; any person, agency, organization or institution having actual care, control, or custody of a minor child; and any person, agency, organization or institution required by court order to provide for the support of a minor child, either in whole or in part, not named as parties and served with process in an action or proceeding for the support of such child, shall be given notice by the party raising the issue of support.

(2) The notice herein required shall be in the manner provided by the Rules of Civil Procedure for the service of notices in actions. Such notice shall advise the person to be notified of the name of the child, the names of the parties to the action or proceeding, the court in which the action or proceeding was instituted, and the date thereof.

(3) In the discretion of the court, failure of such service of notice shall not affect the validity of any order or judgment entered in such action or proceeding.

(4) Any person required to be given notice as herein provided may intervene in an action or proceeding for support of a minor child by filing in apt time notice of appearance or other appropriate pleadings.

(f) Venue. – An action or proceeding in the courts of this State 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, except as hereinafter provided. If an action for annulment, for divorce, either absolute or from bed and board, or for alimony without divorce has been previously instituted in this State, until there has been a final judgment in such case, any action or proceeding for custody and support of the minor children of the marriage shall be joined with such action or be by motion in the cause in such action. If an action or proceeding for the custody and support of a minor child has been instituted and an action for annulment or for divorce, either absolute or from bed and board, or for alimony without divorce is subsequently instituted in the same or another county, the court having jurisdiction of the prior action or proceeding may, in its discretion direct that the action or proceeding for custody and support of a minor child be consolidated with such subsequent action, and in the event consolidation is ordered, shall determine in which court such consolidated action or proceeding shall be heard.

(g) Custody and Support Irrespective of Parents' Rights Inter Partes. – Orders for custody and support of minor children may be entered when the matter is before the court as provided by this section, irrespective of the rights of the wife and the husband as between themselves in an action for annulment or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(h) Court Having Jurisdiction. – When a district court having jurisdiction of the matter shall have been established, actions or proceedings for custody and support of minor children shall be heard without a jury by the judge of such district court, and may be heard at any time.

(i) District Court; Denial of Parental Visitation Right; Written Finding of Fact. – In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.

(j) 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. 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. 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. (1858-9, c. 53, s. 2; 1871-2, c. 193, ss. 39, 46; Code, ss. 1292, 1296, 1570, 1662; Rev., ss. 1567, 1570, 1854; 1919, c. 24; C.S., ss. 1664, 1667, 2242; 1921, c. 13; 1923, c. 52; 1939, c. 115; 1941, c. 120; 1943, c. 194; 1949, c. 1010; 1951, c. 893, s. 3; 1953, cc. 813, 925; 1955, cc. 814, 1189; 1957, c. 545; 1965, c. 310, s. 2; 1967, c. 1153, s. 2; 1971, c. 1185, s. 24; 1973, c. 751; 1979, c. 110, s. 12; c. 563; c. 709, s. 3; 1981, c. 735, s. 3; 1983, c. 587; 1985, c. 575, s. 4; 1987 (Reg. Sess., 1988), c. 893, s. 3.1; 1999-223, ss. 11, 12; 2017-22, s. 2.)

THIRD PARTY CUSTODY AND GRANDPARENT VISITATION

Judge A. Elizabeth Keever

1

TYPES OF CUSTODY NCGS 50-13.1

- PARENT V PARENT
- STANDARD BEST INTEREST

- THIRD PARTY (NONPARENT) V PARENT
- STANDARD - WAIVER OF CONSTUTIONAL RIGHT TO CUSTODY BY PARENT
- AND ONLY THEN BEST INTEREST

- THIRD PARTY(NONPARENT) V THIRD PARTY (NONPARENT)
- STANDARD BEST INTEREST

2

JURISDICTION UCCJEA CHAPTER 50A

- **INITIAL DETERMINATION**
- HOME STATE - CHILD IS RESIDENT OF STATE FOR AT LEAST 6 MONTHS BEFORE FILING
- **MODIFICATION**
- INITIAL ORDER ENTERED IN NC AND ONE OR MORE OF PARTIES OR CHILD REMAIN IN NC
- NO OTHER STATE HAS JURISDICTION AND NC IS HOME STATE OF CHILD FOR AT LEAST 6 MONTHS BEFORE FILING
- STATE WITH JURISDICTION FINDS NC SHOULD ASSUME JURISDICTION

3

STANDING

- NCGS 50-13.1(a)
- "any parent, relative, or other person, agency, organization, or institution claiming a right to custody of a minor child may institute an action or proceeding for the custody of such child"
- STANDING DETERMINED AT TIME OF FILING

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STANDING – CONTINUED

- RELATIVE - CASES SEEM TO SAY THAT ANY RELATIVE CAN BRING ACTION REGARDLESS OF RELATIONSHIP WITH CHILD (YUREK V SHAFFER 198 NC App 67 (2009)
- OTHER PERSON - NONPARENTS AND NONRELATIVES MUST ALLEGE RELATIONSHIP WITH CHILD
  - CUSTODY FOR ONE WEEK INSUFFICIENT (TILLEY V DIAMOND unpub 7/17/2007)
  - CUSTODY FOR TWO MONTHS INSUFFICIENT (MYERS V BALDWIN 205 NCApp 696 2010)
  - CUSTODY FOR SIX MONTHS INSUFFICIENT (BOHANNAN V McMANAWAY 208 NCApp 572 (2011)
  - STEPPARENT TREATED AS OTHER PERSON NOT RELATIVE (SEYBOTH V SEYBOTH 147 NCApp 63 2001)

5

STATEMENT OF CLAIM – THIRD PARTY V PARENT

- MUST ALLEGE FACTS SUFFICIENT TO DEMONSTRATE THAT THE PARENT IS UNFIT OR HAS ENGAGED IN CONDUCT INCONSISTENT WITH THEIR PARENTAL STATUS
- SUFFICIENCY OF THE CLAIM IS DETERMINED BASED ON THE **PLEADINGS ALONE** AND FACTUAL ALLEGATIONS ARE REVIEWED IN THE LIGHT MOST FAVORABLE TO THE MOVANT AND GRANTING THE MOVANT ANY REASONABLE INFERENCES
- **NO EVIDENCE PRESENTATION IS NECESSARY**
- THOMAS V OXENDINE 208 NCApp 526 (2021)

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BURDEN OF PROOF

- IN A THIRD-PARTY CASE, THE BURDEN OF PROOF IS ON THE THIRD PARTY TO SHOW THAT THE PARENT HAS ACTED INCONSISTENTLY WITH OR WAIVED THEIR CONSTITUTIONAL RIGHT TO CUSTODY

7

STANDARD OF PROOF

- WAIVER OF THE CONSTITUTIONAL RIGHT TO CUSTODY MUST BE PROVEN BY CLEAR, COGENT AND CONVINCING EVIDENCE
- ADAMS V TESSENER (354 NC 57 (2001)
- PARENT'S CONDUCT IS CONSIDERED CUMULATIVELY - BOTH PAST AND PRESENT CONDUCT
- IN RE: B.R.W.,B.G.W. (381 NC 61 (2022)

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BEST INTEREST

- EVIDENCE IS GENERALLY PRESENTED ON THE ISSUES OF WAIVER AND BEST INTEREST TOGETHER
- BUT THE COURT COULD ELECT TO HEAR THE EVIDENCE ON WAIVER AND THEN MOVE TO THE ISSUE OF BEST INTEREST
- IF WAIVER IS FOUND, BEST INTEREST ANALYSIS MAY RESULT IN CUSTODY TO PARENT AND VISITATION IN THIRD PARTY, CUSTODY TO THIRD PARTY AND VISITATION IN PARENT, OR CUSTODY TO EITHER AND NO VISITATION

9

MODIFICATIONS OF CUSTODY ORDER

- IF THIRD PARTY AND PARENT ENTER INTO CONSENT ORDER WITHOUT A FINDING THAT PARENT HAS WAIVED CONSTITUTIONAL RIGHTS TO CUSTODY
- ORDER IS **NOT** SUBJECT TO BE SET ASIDE FOR LACK OF FINDING
- ON MOTION TO MODIFY CONSENT ORDER, THIRD PARTY DOES NOT HAVE TO PROVE WAIVER BUT ONLY A SIGNIFICANT CHANGE OF CIRCUMSTANCES AND BEST INTEREST OF CHILD

- FECTEAU V SPIERER 277 NCApp 1 (2021)

10

GRANDPARENT VISITATION

- 3 SPECIFIC STATUTES GRANT RIGHTS TO GRANDPARENTS TO SEEK VISITATION ONLY AND NOT CUSTODY
- NCGS 50 –13.2(b1) GRANDPARENT CAN **INTERVENE** IN A PENDING CUSTODY CASE BETWEEN PARENTS AND REQUEST VISITATION
- NCGS 50 –13.5(j) GRANDPARENT CAN **INTERVENE** IN PENDING MODIFICATION CASE BETWEEN PARENTS AND REQUEST VISITATION
- NCGS 50 -13.2A GRANDPARENT MAY FILE AN ACTION REQUESTING VISITATION WHEN CHILD HAS BEEN ADOPTED BY STEPPARENT OR OTHER RELATIVE
- GRANDPARENT MAY NOT FILE ACTION FOR VISITATION WHEN CHILD HAS BEEN ADOPTED BY NON-RELATIVE

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MCINTYRE V MCINTYRE 341 NC 629 (1995)

- GRANDPARENTS HAVE NO RIGHT TO SUE FOR CUSTODY OR VISITATION WHEN:

- THE FAMILY IS INTACT
- NO CUSTODY PROCEEDING IS ON-GOING
- THERE IS NO ALLEGATION THAT THE PARENTS ARE UNFIT OR HAVE OTHERWISE LOST THEIR CONSTITUTIONAL RIGHT TO CUSTODY AND TO DETERMINE WITH WHOM THEIR CHILDREN ASSOCIATE

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MOTION TO INTERVENE RCP 24

- A. INTERVENTION OF RIGHT – UPON TIMELY APPLICATION ANYONE SHALL BE PERMITTED TO INTERVENE IN AN ACTION:

  1. WHEN A STATUTE CONFERS AN UNCONDITIONAL RIGHT TO INTERVENE

- C. A PERSON DESIRING TO INTERVENE SHALL SERVE A MOTION TO INTERVENE UPON ALL PARTIES …. THE MOTION SHALL STATE THE GENERAL GROUNDS THEREFOR AND SHALL BE ACCOMPANIED BY A PLEADING SETTING FORTH THE CLAIM…FOR WHICH INTERVENTION IS SOUGHT

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ALEXANDER V ALEXANDER 276 NCApp 148 (2021) QUESINBERRY V QUESINBERRY 196 NCApp 118 (2009) LINKER V LINKER COA (NOV 2023)

- ONCE A GRANDPARENT HAS INTERVENED OR FILED A MOTION TO INTERVENE IN THE CASE SEEKING VISITATION THEN:

- THE DEATH OF ONE PARENT DOES NOT CUT OFF THEIR RIGHT TO SEEK VISITATION

- THE FILING OF A CONSENT ORDER BETWEEN THE PARENTS DOES NOT CUT OFF THEIR RIGHT TO SEEK VISITATION

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PARENT'S RIGHT TO DETERMINE WITH WHOM THEIR CHILDREN ASSOCIATE

- TROXLER v Granville 530 US 557 (2000) - PARENTS HAVE A FUNDAMENTAL LIBERTY INTEREST IN THE CARE CUSTODY AND CONTROL OF THEIR CHILDREN

- PETERSON V ROGERS 337 NC 397 (1994) - PARENTS WITH LAWFUL CUSTODY OF A CHILD HAVE THE PREROGATIVE OF DETERMINING WITH WHOM THEIR CHILDREN ASSOCIATE

15

ALEXANDER V ALEXANDER 276 NCApp 148 (2021)

- COURT MUST PRESUME THAT PARENT'S DECISION ON VISITATION IS IN THE BEST INTEREST OF THE CHILD
- ONLY IF THE PRESUMPTION IS OVERCOME CAN THE COURT CONSIDER GRANTING VISITATION
- BUT VISITATION CANNOT INTERFERE WITH PARENT/CHILD RELATIONSHIP

16

QUESTION

What is the burden of proof necessary to overcome the presumption?

1. Waiver of constitutional right to custody? Acting inconsistently with the constitutional right to custody?
2. Greater weight of the evidence?

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CHAPTER XII
Grandparents' Rights

This manuscript was presented at the NCBA Family Law Intensive "Gray Divorce" in November 2023 and January 2024.

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Grandparent custody and visitation claims are increasingly common, as parents may attempt to limit the grandparents' contact with children or may be unable to safely provide care for children themselves — leading grandparents to step in. In North Carolina, the statewide average of grandparents caring for their grandchildren is 1.6% (compared to the national average of 1.3%.[1] Additionally, many grandparents are requesting visitation rights as part of the parents' custody claims when the family is involved in an ongoing custody matter or when the family is facing change such as a relative adoption. Currently, ALL states have statutes recognizing some type of visitation rights for grandparents. This manuscript[2] will explore the statutes which provide for grandparent visitation (or custody), the procedure for requesting same, and the Constitutional challenges and limits of grandparent visitation in light of recent case law and the uncertainty left from the decades-old *Troxel* opinion.

1. THE STATUTES

There are 4 statutes that address grandparent's rights for custody or visitation in North Carolina:

a. Third party custody: **50-13.1(a) Action or proceeding for custody of minor child**

(a) 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. [emphasis added]

**McIntyre v. McIntyre*, 341 N.C. 629, 461 S.E.2d 745 (1995) held that this statute is NOT a grandparent visitation statute, like the 3 statutes below, but is a custody statute which may be available to grandparents who have standing as third parties.*

b. Visitation (as part of an order for custody): **50-13.2(b1) Who entitled to custody; terms of custody; visitation rights of grandparents; taking child out of State; consideration of parent's military service**

[1] Carolina Demography (UNC-Chapel Hill)
[2] Manuscript by Katie King with thanks to Amy Britt and Alicia Jurney for drafting the portion about the *Alexander* case.

(b1) 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. 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.

c. Visitation (after a motion to modify): **50-13.5(j) Procedure in actions for custody or support or minor children**

(j) 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. 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. 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.

d. Visitation (an action following a stepparent or relative adoption): **50-13.2A.—Action for visitation of adopted grandchild**

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.

2. **THE PROCESS**

a. **Motion to Intervene in an existing custody action—when a grandparent is requesting visitation (not an adopted grandchild):**

i. Motions to intervene are governed by Rule 24 of the N.C. Rules of Civil

Procedure. There are two types of interventions: (1) an intervention of right, and (2) a permissive intervention. In an intervention of right under Rule 24(a)(1), an intervention must be permitted if there is a statute that confers an *unconditional* right for the person to intervene. In the case of grandparents, for example, there are several statutes that address grandparent visitation and give grandparents an unconditional right to intervene to seek the visitation set forth in the statutes in the appropriate cases. For purposes of intervention of right, the initial question is not whether the grandparent would be successful on the claim for visitation (or even what's in the child's best interests) but whether the grandparent has made sufficient allegations in his/her motion to demonstrate that he/she is entitled to intervene to advance the claim.

ii. The other type of intervention, a permissive intervention under Rule 24(b)(1), gives the trial court the discretion to allow an intervention where a statute confers a *conditional* right to intervene. There should not be a question that a grandparent who makes a *timely* application for intervention under Rule 24(a) should be permitted to intervene regardless of whether the grandparent is ultimately successful on his/her claim. However, in the grandparent context, if the court finds that the grandparents do not have an unconditional right to intervene, they should at the very least have a conditional right to intervene. The court may also allow a permissive intervention in its discretion under Rule 24(b)(2) where the applicant's claim and the main action have a question of law or fact in common, which would be the case in a grandparent's claim for visitation. Finally, a permissive intervention *only* (not intervention of right) requires that the court, in exercising its discretion, consider whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties. Where an application for intervention is timely filed, the person who arguably would be prejudiced would be the grandparent if not allowed to intervene.

iii. A motion to intervene must include the proposed pleading setting out the grandparent's claim for visitation (or for custody). The proposed pleading, however, is not filed until such time as intervention is granted.

iv. ***A motion to intervene (along with a request for grandparent visitation) may only be filed when the parents are in an ongoing custody dispute (prior to a permanent order having been entered) and the family must not be intact or after a motion to modify has been filed by a parent, creating again an ongoing custody dispute.*** [See, for example, *McIntyre v. McIntyre*, 341 N.C. 629, 461 S.E.2d 745 (1995) in which the N.C. Supreme Court held that

grandparents do not have a cause of action for visitation where a family is intact and where no custody proceeding is ongoing.]

v. The parental preference doesn't apply when a grandparent is only seeking visitation.

vi. Once the grandparent is in the case and is awarded visitation, the grandparent has the ability to file a motion to modify for a substantial change of circumstances.

b. **When a grandparent is requesting visitation for a child adopted by a relative or stepparent.**

i. Unlike 50-13.2(b1) visitation which requires a grandparent visitation claim to be brought as part of the custody dispute between the parents, 50-13.2A indicates that *new action* for visitation can be filed by a biological grandparent requesting visitation with a child adopted by a stepparent or relative so long as a substantial relationship exists between the grandparent and child.

ii. As the procedure, venue, and jurisdiction are to be the same as an action for custody, this does not appear to contemplate that the grandparent would intervene or file an action within the adoption filing (a special proceeding).

c. **When a grandparent is requesting custody**

i. *Where there is <u>no</u> existing custody lawsuit*, a third party requesting custody (including a grandparent) would file a "normal" custody complaint against the legal parent(s), BUT for purposes of proving standing would also add facts sufficient to show the Court that the parent(s) are unfit or have waived their Constitutionally-protected rights. Since parents have the Constitutional right to the care, custody, and control of their minor children, the Court must conclude that the parent(s) have waived or lost these rights before the Court can consider awarding custody to a non-parent (i.e., the parental preference). [See, for example, *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 and the extensive case law regarding the parental preference.]

ii. *In an existing custody claim between the parents in which no permanent order has been entered*, the third party seeking custody would file a Motion to Intervene (with a proposed pleading requesting custody and alleging standing) and go through the process as set out above. This would most

likely be an intervention as of right under Rule 24(a)(1), as 50-13.1(a) creates the claim for the third party to request custody. Case law about the "intact family" (i.e., when a visitation claim can be brought by a grandparent during an ongoing custody action between the parents) does not apply in third party custody claims brought under 50-13.1(a), but the grandparent still must procedurally enter the case.

iii. *In an existing custody claim between the parents where there is a permanent order*, if a parent files a motion to modify, this will create an ongoing custody dispute and allow the grandparent to file a motion to intervene to bring a claim for custody or visitation and go through the process above. However, it is likely that if circumstances warrant a grandparent bringing a claim for custody against the parents, a parent is probably *not* going to file a motion to modify. Under those circumstances, one approach (YMMV[3]) may be to file a separate Complaint for Modification of Custody by a grandparent which alleges the existence of the prior custody order and alleging conduct giving the grandparent standing to bring the action along with a request to consolidate the claim with the other custody claim.

3. INTERESTING GRANDPARENT SCENARIOS

a. Who are "grandparents" for purposes of the statutes?

i. Visitation for an *adopted* grandchild specifically references a "biological" (and not legal) grandparent. That is the only reference in the statutes to biology and grandparents although the emphasis seems to be children in the bloodline.

ii. Step grandparents are probably excluded from visitation rights if relationships are based on kinship under other law, which would suggest a genetic or legal connection:

N.C.G.S. 104A-1 Degrees of kinship; how computed

In all cases where degrees of kinship are to be computed, the same shall be computed in accordance with the civil law rule, as follows:
(1) The degrees of lineal kinship of two persons is computed by counting one degree for each person in the line of ascent or descent, exclusive of the person from whom the computing begins; and

[3] Your Mileage May Vary, i.e., the author is unaware of any case law regarding the procedurally efficacy of such a filing.

(2) The degree of collateral kinship of two persons is computed by commencing with one of the persons and ascending from him to a common ancestor, descending from that ancestor to the other person, and counting one degree for each person in the line of ascent and in the line of descent, exclusive of the person from whom the computation begins, the total to represent the degree of such kinship.

iii. See also *Yurek v. Shaffer*, 198 N.C. App. 67, 678 S.E.2d 738 (2009) discussing who are "relatives" as it relates to 50-13.1(a): "A 'relative' has been defined as a 'person connected with another by blood or affinity; a person who is kin with another.' Black's Law Dictionary 1315 (7th ed. 2004)."

iv. However, some may read the language of the statute: "An order for custody of a minor child may provide visitation rights for <u>any grandparent</u> of the child…" as more broadly allowing for visitation by step grandparents and not emphasizing genetic or legal relationships.

b. **Court's jurisdiction to award visitation if parents settle their custody case after intervention is allowed:**

i. *Quesinberry v. Quesinberry* 196 N.C. App. 118, 674 S.E.2d 775 (2009): the parents resolved custody in a consent order after the grandparents had intervened, but the consent order did not resolve the grandparents' visitation claim. The Court of Appeals held that the court still had jurisdiction to consider the grandparents' claim for visitation, which vested when the claim was filed, even if the parents were no longer involved in an ongoing custody dispute. Standing is measured at the time the pleadings were filed (i.e., whether an actual controversy existed when the party filed the relevant pleading). [*Query—if a separate order can be entered for visitation rights for a grandparent later, is that order a modification of the earlier order?*]

c. **Death of one parent after custody order entered**:

i. In a custody action between parents, the death of a parent typically divests the court of jurisdiction such that grandparents can no longer file a motion to intervene even if it was the custodial parent who died. *McDuffie v. Mitchell*, 155 N.C. App. 587, 573 S.E.2d 606 (2002). UPDATE--NOVEMBER 2023: In *Linker v. Linker* (COA23-328), the Court of Appeals affirmed a trial court decision allowing a grandparent to intervene in a custody matter to request visitation after the death of a parent—where the <u>motion to intervene</u> had been timely filed, *but not adjudicated*, prior to the

parent's death. The authors of this manuscript believe this opinion could lend itself to abuse and the filing (and latency) of frivolous motions to intervene and that the opinion is inconsistent with *Alexander,* which requires the motion to intervene to have been *granted* prior to the death of a parent for the claim to survive. A PETITION FOR DISCRETIONARY REVIEW WAS FILED ON DECEMBER 21, 2023, SO STAY TUNED FOR WHAT HAPPENS WITH THIS OPINION.]

PDR denied 2/6/24

ii. See, however, *Sloan v. Sloan* 164 N.C. App 190, 595 S.E.2d 228 (2004), in which the grandparents had been awarded visitation in the custody order between the parents and were allowed to intervene after the death of one parent. The Court of Appeals held that the grandparents could file a motion to modify the custody order because the trial court retained jurisdiction over the surviving parent and because they had been awarded visitation in the custody order. "While it is clear that statutory authority and case law would support defendant's contention if the issue of grandparent visitation and/or custody had been raised for the first time when intervenors filed their motions, the mother's arguments did not apply when the trial court had already made the grandparents *de facto* parties to the action by granting them visitation at the time the mother was awarded custody." *Id.* This case goes on to suggest that a custody order entered before the death of a parent granting visitation rights to grandparents remains valid following the death of the parent if rights were awarded to the grandparent.

iii. See also *Alexander v. Alexander*, 276 N.C. App. 148, 856 S.E.2d 136 (2021) in which the trial court retained authority to adjudicate the grandparents' request for visitation following the death of the father where the grandparents had intervened prior to the death. UPDATE—NOVEMBER 2023: Or, as in *Linker*, above, where the motion to intervene was pending at the time of the death (NOTE: PETITION FOR DISCRETIONARY REVIEW PENDING, AND THIS CASE MAY NOT REMAIN PRECEDENTIAL.).

PDR denied 2/6/24

d. **Termination of parental rights of one parent after custody order entered**:

i. Similar to *Sloan* above, the Court of Appeals has held that when a grandparent has intervened in a custody action and is granted visitation rights, the termination of a parent's rights do not affect the grandparent's court-ordered visitation. See *Adams v. Langdon*, 264 N.C. App. 251, 826 S.E. 2d 236 (2019). Likewise, a stepparent adoption does not affect visitation rights previously awarded to a biological grandparent. N.C.G.S. 48-4-105

48-4-105. Visitation awards to grandparents pursuant to Chapter 50 of

the General Statutes. (a) An adoption under this Article does not terminate or otherwise affect visitation rights awarded to a biological grandparent of a minor pursuant to G.S. 50-13.2.

e. **Death of <u>both</u> parents after custody order entered--where a grandparent has custody**:

i. While the death of one parent in a custody case between the parents would typically result in the abatement of the action, the death of a party in a custody action where a non-parent has custody does not abate the action because there is no surviving parent with Constitutional rights. See *Rivera v. Matthews*, 263 N.C. App. 652, 824 S.E.2d 164 (2019) in which paternal grandfather argued that the custody case pending between mom and maternal grandparents abated when mom died. The Court of Appeals held that while the action would have abated upon mom's death if the action involved only two parents, the custody action in which paternal grandparents were awarded custody did not abate and could proceed against mom's estate. "While the death of one parent in a custody case between the parents would typically result in the abatement of the action, the death of a party in a custody action where a non-parent has custody does not abate the action." *Id.* The proper process for maternal grandfather to request custody would be to file a motion to intervene and motion for custody within the existing custody case. [This case has some really interesting language about substituting estates for parties…]

f. **Grandparents can't create the custody dispute to request visitation**:

i. In *Eakett v. Eakett*, 157 N.C. App. 550, 579 S.E.2d 486 (2003), paternal grandfather filed a motion to intervene and requested visitation where he alleged he had been refused access to the grandchild <u>after</u> the parents' custody order was entered. The trial court dismissed his claim, and the Court of Appeals affirmed holding that the family was "intact" because the custody dispute had been resolved a year earlier.

ii. Bringing a custody claim to create an action where the grandparent really just wants visitation could subject the grandparent to Rule 11 sanctions.

iii. Consequently, N.C.G.S. § 50-13.5(j) does not actually mean what it says in that, as interpreted by *Eakett*, it requires a parent to create the ongoing dispute by filing his/her own motion to modify before a grandparent can seek to intervene and proceed under N.C.G.S. § 50-13.5(j).

g. **The prerequisite requirement of a "substantial relationship" only applies to grandparent visitation under N.C.G.S. 50-13.2 for *adopted* grandchildren. What relationship must the grandparent have with the child?**

i. While all three grandparent visitation statutes reference a "substantial relationship," that explicit language is only used in the definition of the biological parent in a visitation claim regarding an *adopted* grandchild.

ii. BUT SEE *Sullivan v. Woody*, 271 N.C. App. 172, 843 S.E.2d 306 (2020) in which the Court of Appeals states that to qualify for visitation rights under the plain language of 50-13.2(b) the grandparent "must have a substantial relationship with the minor child." (…which is not actually what the statute says…)

iii. A request for visitation rights under N.C.G.S. 50-13.2(b1) qualifies as an action for custody by operation of N.C.G.S. 50-13.1(a) [See *Sullivan* above], but does the prohibition against a stranger requesting custody change if that person is a grandparent? N.C.G.S. 50-13.1(a)—regarding custody/third party custody-- has been *interpreted* to require that a person have an actual relationship with the child to bring an action for custody. "…we conclude that a third party who has no relationship with a child does not have standing under N.C. Gen. Stat. § 50-13.1 to seek custody of a child from a natural parent." *Ellison v. Ramos,* 130 N.C. App. 389, 502 S.E.2d 891 (1998). However, the language of 50-13.1(a) regarding a "relative" bringing an action for custody may suggest that alleging a genetic relationship is enough to have standing (along with allegations overcoming the parental preference). See, for example, *Rodriguez v. Rodriguez*, 211 N.C. App. 267, 710 S.E. 2d 235 (2011) in which the Court of Appeals held that grandparents had standing to proceed in a custody action where they alleged they were the grandparents and had also alleged facts regarding the parent's unfitness and conduct inconsistent.

h. **Grandparents can be awarded attorney's fees in a visitation action or ordered to pay fees**.

i. The trial court has the discretion to award reasonable attorney's fees to a grandparent under N.C.G.S. 50-13.6 if the statutory requirements are met (interested party, acting in good faith, insufficient means to defray the expense of the suit, etc.). *Smith v. Barbour*, 195 N.C. App. 244, 671 S.E.2d 578 (2009).

ii. Grandparents may also be ordered to pay attorney's fees to a parent

associated with a visitation claim. "If an action by intervening grandparents to secure visitation rights falls within the scope of Section 50-13.6 as an 'action or proceeding for the custody or support, or both, of a minor child' for the purposes of awarding attorney fees to the grandparents, then such an action must also fall within the scope of the statute for the purposes of ordering the grandparents to pay fees." *Sullivan v. Woody*, 271 N.C. App. 172, 843 S.E.2d 306 (2020) [a case in which the Court of Appeals held that an award of attorney's fees against grandparents may be authorized but remanded to the trial court for further findings about the specific fees.]

4. ***TROXEL*—A REFRESHER**

a. In *Troxel v. Granville*, 530 U.S. 57 (2000), the U.S. Supreme Court considered the Constitutionality of grandparent visitation. Troxel held that parents have a fundamental liberty interest in the care, custody, and control of their children protected by the Fourteenth Amendment and are presumed to act in the best interests of their children. Applying the best interests test without showing deference to the parents or special factors, thus, violates Due Process.

5. **THE *ALEXANDER* CASE & THE AFTERMATH**

In the *Alexander* opinion (276 N.C. App. 148, 856 S.E.2d 136) issued on March 16, 2021, the North Carolina Court of Appeals held that a trial court's award of visitation to paternal grandparents pursuant to North Carolina's grandparent visitation statutes violated the mother's constitutional right to control with whom her children associate.

a. Background.

The biological parents shared equal physical custody of their only son by consent order entered in 2014, the same year as their divorce. Pursuant to the consent order, both parents also had a right of first refusal. Approximately three years later, father received a terminal cancer diagnosis.

Father moved in with his parents after the parties' date of separation in 2011, meaning the child had spent 50% of his time with his father and paternal grandparents in grandparents' home in the 5 years preceding the cancer diagnosis. In 2017, father filed a motion to modify custody citing, among other things, his terminal cancer diagnosis as well as other co-parenting difficulties with mother, as a substantial change in circumstances affecting the welfare of the minor child. Immediately after an "ongoing dispute" was created by the filing of father's motion to modify, paternal grandparents filed a motion seeking to intervene in the case.

Upon being allowed to intervene, they filed a motion for grandparent visitation and

alternative motion for custody. After the intervention and entry of a temporary order preserving *status quo* preventing any party from changing the minor child's living arrangements prior to a permanent custody hearing, father died. The temporary order preserving *status quo* survived father's death by its terms. The grandparents' motion for grandparent visitation and alternative motion for custody remained pending.

After the permanent hearing, the trial court entered a Permanent Order Granting Grandparent Visitation, which modified the parents' 2014 Consent Order and granted the paternal grandparents visitation with the child every other weekend, alternating Thanksgiving and Christmas holidays, and every Father's Day. They also received one (1) week of summer vacation. Mother retained sole legal custody.

b. **The Appeal.**

On appeal, mother contended (1) that the trial court impermissibly allowed grandparents to intervene; (2) that, even if the intervention was proper, they lost the right to seek visitation when Defendant died; and (3) that NC's grandparent visitation statutes are facially unconstitutional. Mother made the following **Constitutional Challenges:**

i. **Due Process Violation.** Mother's counsel argued the grandparent visitation statutes failed "strict scrutiny review" by depriving parents of a "fundamental liberty interest" to make decisions concerning custody of his/her child.

ii. **Violation of Equal Protection Clause**. Mother's counsel argued the "ongoing dispute rule" was being abused to justify the exercise of judicial power in violation of the equal protection rights of fit parents, i.e., by distinguishing the fundamental rights of parents involved in an ongoing custody dispute with those who are not involved in an ongoing custody dispute.

Intervenors contended (1) that they were properly allowed to intervene due to the grandparent relationship and ongoing dispute between the parents; (2) that father's death did not abate the action as to intervenors' claim for grandparent visitation; (3) that mother did not follow the statutory procedure for challenging the facial unconstitutionality of the grandparent visitation statutes, and, that the statutes are neither facially unconstitutional or unconstitutional as applied to the facts of this case.

c. **The Opinion.**

In its opinion issued March 16, 2021, the Court of Appeals held:

i. **Intervenors properly intervened**. After *McIntyre,* grandparents only have standing to sue for visitation when custody is being litigated between the parents. However, here, grandparents sought to intervene while father's motion to modify was pending and, therefore, it was timely.

ii. **Intervenors had standing to seek visitation after father's death.** Once grandparents became parties, the Court retained jurisdiction over their pending visitation claim even if no custody dispute remained ongoing between the parents at the time due to the abatement of father's claim upon death. See *Quesinberry v. Quesinberry* 196 N.C. App. 118, 674 S.E.2d 775 (2009) discussion above.

iii. **NC's grandparent visitation statutes are not facially unconstitutional.**[4]

iv. **The grandparent visitation statutes were unconstitutional "as applied" in this case.**

1. Citing *Troxel*[5], the Court of Appeals states that the paramount right to custody "includes the right to determine with whom their children shall associate": however, it is not absolute. The Court of Appeals then holds, for the first time, that the trial court **must presume that a [fit] parent's determination regarding the appropriateness of grandparent visitation is correct.** This presumption is rebuttable. For example, where the child has a significant bond with a grandparent and parent denies all visitation without justification.

2. The Court goes onto say that an award of grandparent visitation **must not "impermissibly interfere with the parent-child relationship"** reasoning that the mother has the right to determine

[4] Punting an issue on which both mother and intervenors sought clarification from the COA, the Court does not address the proper procedure for preserving a facial challenge to the constitutionality of the grandparent visitation statutes or any other statute and, instead, simply states that mother preserved her argument at prior hearings and in her brief, but they found mother's arguments "unconvincing" (citing, in support of its rationale, third party standing cases unrelated to the grandparent visitation statutes).

[5] In *Troxel,* the US Supreme Court refused to hold the Washington grandparent visitation states *facially* unconstitutional and recognized that all 50 states have grandparent visitation statutes; but held Washington statutes unconstitutional "as applied" where they failed to give weight to a fit parent's determination regarding with whom his/her child should associate.

with whom the child spends these major holidays and should not be deprived of spending these holidays, as well as a "large majority" of the weekends (actually half), with the child – deeming the visitation award "*unconstitutionally generous.*"[6]

Both mother and Intervenors filed Petitions for Discretionary Review of the opinion to the North Carolina Supreme Court, both of which were summarily denied.

d. **Impact and Implications of *Alexander***

After *Alexander*, the following is clear, at a minimum:

i. Grandparents must now overcome a rebuttable presumption that a parent's determination regarding visitation is in the best interests of the child; and

ii. An award of grandparent visitation must not adversely interfere with the parent-child relationship.

However, in its application, the meaning of the second statement above is yet to be determined. In attempting to provide guidance to the trial courts on what grandparent visitation it may consider "unconstitutionally generous," the Court of Appeals may have inadvertently invited more litigation and confusion than clarity as to what impermissible interference with the parent-child relationship looks like.

For example, after *Alexander*, trial judges are seemingly divested of their discretion to determine what grandparent visitation is in the best interest of a child for fear the award may be too "generous," even after a grandparent has rebutted the presumption that a parent has determined the issue correctly.

Although at least one author of this manuscript believes the trial court's award of grandparent visitation in *Alexander* was thoughtful and well-reasoned (see footnote 6 above), the Court of Appeals concluded, without any analysis of the trial court's findings or explanation as to how the trial court abused its discretion, that the grandparent visitation schedule awarded by the trial court was unconstitutional, amounting to a *per se* abuse of discretion.

[6] In doing so, the COA seemingly creates a rule that a grant of grandparent visitation every other weekend and/or every other Thanksgiving and Christmas is *per se* unconstitutional without further explanation of why such a determination should not be made on a case-by-case basis and left in the trial court's discretion to determine what is appropriate based on the specific facts and evidence of the case as stated in N.C.G.S. § 50-13.2(b1). In this case, for instance, the grandparents' alternating weekend schedule was intended to correspond with the child's deceased father's custodial weekends and was a drastic reduction from the alternating weekly time the child had spent together with grandparents in grandparents' home in the preceding 6 years; and the alternating holidays were to correspond with those traditionally spent with father and his extended family, something father stated he wished to preserve before his death in deposition testimony.

It is of some concern that the *Alexander* opinion seemingly fails to afford the trial court the discretion authorized by 50-13.2(b1) and 50-13.5(j) by disallowing a case-by-case evaluation of what grandparent visitation is in the best interests of a child where it includes visitation every other weekend or alternating Thanksgiving or Christmas holidays, for example.

As a result, important questions likely to arise as a result of the decision include, but are not limited to, the following:

- What is a "major" holiday and what is the standard for determining whether a holiday is "major"? Is it/should it be limited to western and/or protestant holidays like Thanksgiving or Christmas? What about other ethnic and religious holidays? Who decides what holidays are "major" – and why shouldn't that be a case/family specific determination rather than one left to the Court of Appeals?

- If every other weekend is considered "too extensive" and, therefore, unconstitutional, what is the upper limit of constitutional grandparent visitation? Is one weekend per month safe under *Alexander*? What is a "large majority" of weekends? Is it 70%, 60% or is a "large majority" now defined as 50% after *Alexander*?

- How are trial judges reading and interpreting this opinion? Do they believe the portion of the decision regarding the unconstitutionality of grandparent visitation including every other weekend and alternating Thanksgiving/Christmas holidays is limited to facts of this case or do they see and apply it as a *per se* rule? If the latter, which seems quite possible, what other limits are they reading between the lines? Are the limits arbitrary – and how does a standard of appellate review of "abuse of discretion" work, or not work, anymore in these types of cases?

- Should North Carolina consider legislation that applies differently in the event of a parent who is unavailable due to death, incapacity, or incarceration?[7]

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[7] Many states, including Alaska, Arizona, Florida, Georgia, Iowa, Kansas, Kentucky, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Vermont and Virginia have grandparent visitation statutes addressing some or all of these special circumstances.