Discussion Scenarios: Third Party Custody

Scenario 1:

The parents of a 3-year-old child are involved in custody litigation. After a temporary order was entered giving mother primary physical custody and dad supervised visitation due to his history of domestic violence, paternal grandmother files a motion to intervene requesting visitation pursuant to GS 50-13.2(b1).

Both parents oppose grandmother's request. They argue the child does not have a close relationship with the grandmother because they have not allowed the child to spend time with her due to conflicts between the parents and the grandmother. Grandmother argues that she should be able to establish a relationship with the child.

What should the court order?

Would your opinion be different if father supported grandmother's request for visitation, and only mother opposed? Mother argues that she and the grandmother have had a very contentious relationship for many years, and she believes it would not be good for the child to experience that conflict.

Scenario 2:

Paternal grandparents file a motion to intervene in a custody case between the parents of two boys, ages 10 and 13, requesting visitation pursuant to GS 50-13.2(b1). After the motion is filed but before it is granted, dad dies. The grandparents live in New York. They have visited with the children on holidays and other occasions throughout their lives, but they have not spent extensive time with the boys due to the distance between their homes. The mother opposes court-ordered visitation, arguing that while she has no general opposition to the grandparents spending time with the children, the boys have very busy lives with school, sports, and other activities. She will have enough trouble handling their schedules on her own without having to worry about complying with a mandated visitation schedule.

What should the court order?

Scenario 3:

Plaintiff is the stepfather of a 12-year-old child. He is married to the mother of the child, but they have been separated for 6 months. Mother and stepfather have been married since the child was 2 years old. The father of the child left the mother shortly after the birth of the child, and neither the child nor the mother have had any contact with the father since he left. Plaintiff requests shared custody of the child, arguing that he is the only father the child has known, they have a close relationship, and it is best for the child to maintain that relationship with him. His complaint alleges mother lost her constitutional right to custody by allowing him to live with the child and act as a father to the child while they were married.

Mother argues that plaintiff is not the child's father, the child knows he is not her father, and as the child's mother, she has the right to control with whom her child spends time.

What should the court do?

Same facts, except Mother and Plaintiff never married. They only lived together. Does that make a difference to you? Why or why not?

Scenario 4:

Grandparents' complaint for custody alleges that both parents have felony convictions arising out of their involvement with a gun trafficking scheme, that both parents abuse alcohol and drugs, that they cannot provide safe housing for the children, and that the parents have left the children in the care of the grandparents for extensive periods of time without providing financial support for the children.

Evidence at trial shows that the parents were convicted of felonies before the children were born. As a result of their convictions, they struggle to find consistent employment. Because of their lack of consistent employment, they cannot always afford housing. On two occasions, the parents moved into shelters and left the children in the care of the grandparents because they did not want to keep the children in the shelter. Other times, they frequently changed residences due to their

inability to consistently pay rent. The children have changed schools numerous times due to the frequent residential changes.

Evidence also shows that the father does not abuse alcohol or drugs, but the mother formed an addiction to opioids after she broke her hip and was prescribed pain medicine. She attended a rehabilitation program for treatment and was successful. While she was in the treatment program, the children stayed with the grandparents. Neither parent paid any support for the children while they were in the care of the grandparents but both parents kept close contact with the children any time the children were left in the care of the grandparents.

What should the court do?

Scenario 5:

Mother has one child, age 10. The father died when the child was an infant. Mother is in the military where she specializes in intelligence. She has been in the military since before the child was born and she frequently deploys overseas. When she deploys, she usually is away from home for months at a time and once was gone for more than a year. Her mother has cared for the child whenever mother has been out of the country.

After the last deployment, mother and grandmother had a serious disagreement and mother decided that grandmother should not care for the child anymore. Grandmother filed for custody, arguing that she has acted as a parent to the child since the child was born. The child and the grandmother have a close relationship.

What should the court do?

Same facts, except the plaintiff is not the child's grandparent. Instead, the plaintiff was a close friend of mother. Does this make a difference to you? Why or why not?

Scenario 6:

The parents of the child were 16 (mom) and 17 (dad) years old when the child was born. The child and the mother lived with her parents. The father moved with his parents to another town and did not have contact with the child. The mother had substance abuse issues and left the child with the grandparents when the child was 2 years old. The child is now 10 years old. The child has not seen his mother since he was 2 and he has only seen his father twice in his life.

Father contacted the grandparents and asked to spend time with the child. The father finished high school, attended college, and now is working as an accountant in a town located about an hour from the grandparents' home. He is married and owns a nice home. The grandparents filed a custody action, alleging dad waived his constitutional right to custody and asking for sole physical and legal custody. Dad counterclaimed for custody, arguing that he is now a fit and proper parent, able to care for his child.

What should the court do?

Chapter 4, Child Custody

A. Actions between a Parent and a Nonparent (Third-Party Custody)

1. Summary.

   a. Parents have a constitutional right to the exclusive care, custody and control of their minor children. [*Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997); *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994).]

   b. Because of the constitutional rights of parents, a trial court cannot consider the best interest of the child in a case between a parent and a nonparent unless the trial court concludes that the parent has waived his constitutional rights. [*Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997) (parent waives constitutional protection by being unfit, neglecting the welfare of the child, or other acts inconsistent with her protected status as a parent).]

   c. In a case between two parents and a nonparent, a trial court cannot apply best interest test to determine custody unless both parents have waived their constitutional right to custody. [*See Chávez v. Wadlington*, 261 N.C. App. 541, 821 S.E.2d 289 (2018), *aff'd per curiam*, 373 N.C. 1, 832 S.E.2d 692 (2019).]

   d. A third party must allege and prove a relationship with the child sufficient to establish standing before the third party can challenge the constitutional rights of the parents. [See Section III.C.2, below, dealing with standing.]

   e. Due to statutes specifically addressing the visitation rights of grandparents, the law in North Carolina grants grandparents expanded rights to request visitation in limited circumstances. [See Section III.C.12, below, dealing with grandparent visitation.]

2. Standing.

   a. Standing in custody disputes is governed by G.S. 50-13.1(a), which states that "[a]ny 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."

   b. Despite the broad language of G.S. 50-13.1, in the context of a third party seeking custody of a child from a parent, there are limits on the "other persons" who can bring such an action. [*Mason v. Dwinnell*, 190 N.C. App. 209, 219, 660 S.E.2d 58, 65 (2008) (quoting *Ellison v. Ramos*, 130 N.C. App. 389, 392, 502 S.E.2d 891, 893, *appeal dismissed*, *review denied*, 349 N.C. 356, 517 S.E.2d 891 (1998)).]

      i. A nonparent claiming standing must show that she has a relationship with the child. [*Mason v. Dwinnell*, 190 N.C. App. 209, 220, 660 S.E.2d 58, 65 (2008) (facts establishing a relationship "in the nature of a parent-child relationship" were sufficient to find standing to bring custody action); *Ellison v. Ramos*, 130 N.C. App. 389, 502 S.E.2d 891 (standing requires a showing that third party is not a "stranger" to the child), *appeal dismissed*,

review denied, 349 N.C. 356, 517 S.E.2d 891 (1998); *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994) (G.S. 50-13.1(a) not intended to confer upon strangers the right to bring custody or visitation actions).]

ii. Plaintiff had standing to seek custody where she had relationship with child "in the nature of a parent/child relationship." [*Ellison v. Ramos*, 130 N.C. App. 389, 396, 502 S.E.2d 891, 895, *appeal dismissed*, *review denied*, 349 N.C. 356, 517 S.E.2d 891 (1998). *Cf. Bohannan v. McManaway*, 208 N.C. App. 572, 587, 705 S.E.2d 1, 11 (2011) (citing *Ellison*) (simply alleging a "parent and child relationship" is insufficient for complaint to show standing).]

iii. Grandmother qualified as an "other person" under G.S. 50-13.1(a) because she had been the primary caregiver of the minor child since birth and had a close familial relationship with the child. [*Perdue v. Fuqua*, 195 N.C. App. 583, 673 S.E.2d 145 (2009) (while a grandparent may satisfy the definition of "other person," a grandparent initiating a custody proceeding against a parent also must allege conduct sufficient to support a finding that the parent is unfit, has neglected the welfare of the child, or has acted inconsistently with his parental status).] *But see* Section III.C.12, below, regarding grandparent requests for visitation.

iv. A stepparent had standing as an "other person" under G.S. 50-13.1(a) to seek visitation rights with his ex-stepchild. [*Seyboth v. Seyboth*, 147 N.C. App. 63, 554 S.E.2d 378 (2001).]

v. Sister and brother-in-law of child's father had standing to bring custody action under G.S. 50-13.1(a) as "relatives." [*Yurek v. Shaffer*, 198 N.C. App. 67, 678 S.E.2d 738 (2009) (setting out definition of "relative" from BLACK'S LAW DICTIONARY 1315 (7th ed. 2004) as a "person connected with another by blood or affinity; a person who is kin with another"; also concluding, while determining standing issue, that mother had waived her protected status even though trial court made no such finding). *See also Rodriguez v. Rodriguez*, 211 N.C. App. 267, 710 S.E.2d 235 (2011) (grandmother had standing as a relative).]

vi. Plaintiffs who were essentially strangers to the child had no standing to bring a custody action against the child's natural father; consent custody order entered in case held to be void. [*Tilley v. Diamond*, 184 N.C. App. 758, 646 S.E.2d 865 (2007) (**unpublished**) (plaintiffs met the child for the first time at her mother's funeral, had no prior relationship with the child, and filed their custody suit against father a mere week after maternal grandfather "gave" the child to them). *See also Bohannan v. McManaway*, 208 N.C. App. 572, 705 S.E.2d 1 (2011) (nonparents' allegation that child had lived with them for six months and that they had "bonded with" the child was insufficient to show standing), *and Myers v. Baldwin*, 205 N.C. App. 696, 698 S.E.2d 108 (2010) (plaintiffs had no standing when they had known and cared for the child for only two months prior to filing the complaint).]

vii. A parent who has consented to the adoption of his children does not have standing under G.S. 50-13.1 to seek custody or visitation. [*Quets v. Needham*, 198 N.C. App. 241, 682 S.E.2d 214 (2009) (biological mother lost right to seek custody of or visitation with her children when she consented to their adoption); *Kelly v. Blackwell*, 121 N.C. App. 621, 468

S.E.2d 400 (parent loses all rights to seek custody or visitation following a termination of parental rights by her consent to adoption), *review denied*, 343 N.C. 123, 468 S.E.2d 782 (1996).]

viii. Foster parents had no standing to institute a custody proceeding pursuant to G.S. 50-13.1 after mother had surrendered the child to the Department of Social Services (DSS) for adoptive placement and father had given consent for DSS to place the child for adoption. Controlling statute in effect at the time (G.S. 48-9.1) gave legal custody to DSS. [*Oxendine v. Catawba Cty. Dep't of Soc. Servs.*, 303 N.C. 699, 281 S.E.2d 370 (1981) (G.S. 48-9.1(1) was narrowly drawn to address a specific custody situation and was intended to be an exception to the general grant of standing in G.S. 50-13.1(a)).]

ix. A parent whose parental rights have been terminated for abuse and neglect does not have standing under G.S. 50-13.1 as an "other person" to seek custody of his child. Controlling statute in effect at the time (G.S. 7A-289.33(1)) gave legal custody to DSS. [*Krauss v. Wayne Cty. Dep't of Soc. Servs.*, 347 N.C. 371, 493 S.E.2d 428 (1997) (G.S. 7A-289.33(1) was a narrow statute, intended to apply only to situations where DSS has legal custody and the parents' rights are later terminated, and was an exception to the general grant of standing to seek custody under G.S. 50-13.1(a)).]

c. Standing of a nonparent is measured at the time the nonparent files pleadings seeking custody of or visitation with a minor child. [*Perdue v. Fuqua*, 195 N.C. App. 583, 673 S.E.2d 145 (2009) (standing is a threshold issue decided before merits of the case); *Chávez v. Wadlington*, 261 N.C. App. 541, 821 S.E.2d 289 (2018) (even though plaintiff had a "parent-like" relationship with the child while plaintiff lived with the child's mother, plaintiff did not have standing because that relationship ended when she and mother separated approximately 18 months before plaintiff filed for custody; standing must exist at the time the request for custody is filed), a*ff'd per curiam*, 373 N.C. 1, 832 S.E.2d 692 (2019).]

d. See Section II.B, above, for more on standing generally, and Section III.C.11, below, for more on grandparent custody.

3. Parental preference.

a. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, along with the common law of North Carolina, grants parents a superior right to the care, custody, and control of their children. [*Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997); *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994). S*ee also Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054 (2000) (parents have a fundamental liberty interest in the care, custody, and control of their children that must be protected in custody proceedings between parents and nonparents); *Heatzig v. MacLean*, 191 N.C. App. 451, 664 S.E.2d 347 (Fourteenth Amendment Due Process Clause protects fundamental rights of parents to make decisions about the care, custody, and control of their children), *appeal dismissed, review denied*, 362 N.C. 681, 670 S.E.2d 564 (2008).]

b. A parent may lose the constitutionally protected right to custody and control of her children by either:

i. A finding that the parent is unfit or has neglected the welfare of the child or

ii. Conduct inconsistent with her constitutionally protected status as a parent. [*David N. v. Jason N.*, 359 N.C. 303, 608 S.E.2d 751 (2005); *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997); *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994); *Mason v. Dwinnell*, 190 N.C. App. 209, 222, 660 S.E.2d 58, 66 (2008) (referring to the "disjunctive nature of the test").]

(a) Findings to support conclusion that parent has waived his or her constitutional right to custody must be supported by clear, cogent, and convincing evidence. [*Moriggia v. Castelo*, 256 N.C. App. 34, 805 S.E.2d 378 (2017) (citing *Adams v. Tessener*, 354 N.C. App. 57, 550 S.E.2d 499 (2001)).]

c. If the court finds one or more of the above circumstances, the parental preference is lost and the court determines custody under the best interest of the child standard. [*Mason v. Dwinnell*, 190 N.C. App. 209, 660 S.E.2d 58 (2008); *Owenby v. Young*, 357 N.C. 142, 579 S.E.2d 264 (2003) (if court finds parent has actually engaged in conduct inconsistent with his protected status, "best interest" test is applied); *Speagle v. Seitz*, 354 N.C. 525, 557 S.E.2d 83 (2001) (a finding of inconsistent conduct does not by itself determine custody but triggers the best interest of the child analysis), *cert. denied*, 536 U.S. 923, 122 S. Ct. 2589 (2002); *cf. Dunn v. Covington*, 272 N.C. App. 252, 846 S.E.2d 557 (2020) (trial court order remanded where findings in order addressed best interests of the child before the order concluded mother had waived her constitutional right to custody; the trial court cannot consider best interest until the court concludes the parent has lost her constitutionally protected status).]

d. If the court does not find one of the above circumstances, the parental preference is not lost and third parties are not entitled to custody or visitation. [*Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994); *Seyboth v. Seyboth*, 147 N.C. App. 63, 554 S.E.2d 378 (2001).] *Petersen* and *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997), appear to require that the complaint be dismissed. [*See Penland v. Harris*, 135 N.C. App. 359, 520 S.E.2d 105 (1999); *Ellison v. Ramos*, 130 N.C. App. 389, 502 S.E.2d 891, *appeal dismissed*, *review denied*, 349 N.C. 356, 517 S.E.2d 891 (1998). See discussion dealing with modification in Section IV, below.]

e. The parental presumption only applies to the initial custody determination between the parent and a specific nonparent. [*Fecteau v. Spierer*, 277 N.C. App. 1, 858 S.E.2d 123 (2021); *Warner v. Brickhouse*, 189 N.C. App. 445, 658 S.E.2d 313 (2008) (citing *Brewer v. Brewer*, 139 N.C. App. 222, 533 S.E.2d 541 (2000)). *See Sides v. Ikner*, 222 N.C. App. 538, 730 S.E.2d 844 (2012) (applying parental presumption to father in custody dispute with maternal grandmother; custody between mother and father determined by earlier consent order).]

f. The parental presumption has not been applied when the court orders temporary custody to a nonparent. [See Section II.G, above, on temporary orders, and *In re B.S.*, 225 N.C. App. 654, 738 S.E.2d 453 (2013) (**unpublished**) (in neglect proceeding awarding temporary custody to Department of Social Services, it was both improper and unnecessary for trial court to find that

father was unfit and had acted inconsistently with his protected parental rights; such a finding is proper only when determining permanent custody).]

g. The analysis used to determine whether a parent has waived his constitutional right to exclusive custody is the same regardless of the nature of the relationship between the parent and the nonparent. [*Mason v. Dwinnell*, 190 N.C. App. 209, 660 S.E.2d 58 (2008) (noting that although the appeal here arose in the context of a same-sex domestic partnership, the constitutional standards applicable to all custody disputes between legal parents and third parties were applicable).]

h. The court of appeals has declined to adopt the theory of parent by estoppel and has instead reaffirmed the framework in *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997), to determine custody claims of a nonparent. [*Heatzig v. MacLean*, 191 N.C. App. 451, 664 S.E.2d 347 (a district court is without authority to confer parental status upon a person who is not the biological parent of a child; trial court erred when it did so), *appeal dismissed, review denied*, 362 N.C. 681, 670 S.E.2d 564 (2008); *Estroff v. Chatterjee*, 190 N.C. App. 61, 660 S.E.2d 73 (2008) (a third party may not be considered a parent by estoppel or a de facto parent, as those doctrines have not been recognized in North Carolina).]

i. The determination of whether a parent has acted in a manner inconsistent with her constitutionally protected status must be made on a case-by-case basis. [*Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997). *See also Heatzig v. MacLean*, 191 N.C. App. 451, 456, 664 S.E.2d 347, 351 (citing *Mason v. Dwinnell*, 190 N.C. App. 209, 660 S.E.2d 58 (2008)) (stating that there is no "specific set of factors" which must be present for the standard in *Price* to be met), *appeal dismissed, review denied*, 362 N.C. 681, 670 S.E.2d 564 (2008).]

j. Both conduct and intent are relevant in determining whether a parent has acted inconsistently with his protected status. [*Estroff v. Chatterjee*, 190 N.C. App. 61, 660 S.E.2d 73 (2008) (rejecting argument that only conduct should be considered); *Heatzig v. MacLean*, 191 N.C. App. 451, 664 S.E.2d 347 (trial court erred when it failed to focus upon intent of biological parent), *appeal dismissed, review denied*, 362 N.C. 681, 670 S.E.2d 564 (2008).]

k. A parent's conduct does not need to be "bad" or harmful to the child to be inconsistent with her protected status. [*Heatzig v. MacLean*, 191 N.C. App. 451, 664 S.E.2d 347 (relationship parent created with nonparent third party was beneficial to child), *appeal dismissed, review denied*, 362 N.C. 681, 670 S.E.2d 564 (2008).]

l. A parent's execution of a valid consent judgment granting exclusive care, custody, and control of a child to a nonparent may be a factor upon which the trial court could base a conclusion that the parent has acted inconsistently with his constitutionally protected status. [*Yurek v. Shaffer*, 198 N.C. App. 67, 678 S.E.2d 738 (2009) (citing *Cantrell v. Wishon*, 141 N.C. App. 340, 540 S.E.2d 804 (2000)). *Cf. Weideman v. Shelton*, 247 N.C. App. 875, 787 S.E.2d 412 (2016) (in a custody action in which one nonparent intervened seeking custody based on mother's agreement in a consent custody order to grant custody to another nonparent, the child's maternal grandmother, mother's execution of the consent custody order did not constitute

clear and convincing evidence that mother had acted inconsistently with her protected status when both mother and grandmother testified that they intended a temporary arrangement, during which mother would have the opportunity to be an active participant in child's care and to assume her role as parent in the future), *review denied*, 369 N.C. 481, 795 S.E.2d 367 (2017).] For more on *Weideman*, see Cheryl Howell, *Third Party Custody: Does a Parent Lose Constitutionally Protected Status by Signing a Consent Custody Order Granting Custody Rights to a Non-parent?*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (July 15, 2016), http://civil.sog.unc.edu/third-party-custody-does-a-parent-lose-constitutionally-protected-status-by-signing-a-consent-custody-order-granting-custody-rights-to-a-non-parent.

m. A trial court should view evidence of a parent's conduct cumulatively [*Owenby v. Young*, 357 N.C. 142, 579 S.E.2d 264 (2003) (citing *Speagle v. Seitz*, 354 N.C. 525, 557 S.E.2d 83 (2001), *cert. denied*, 536 U.S. 923, 122 S. Ct. 2589 (2002)).] and may consider past misconduct that does not exist at the time of trial if it could impact either the present or the future of the child. [*Speagle*; *Davis v. McMillian*, 152 N.C. App. 53, 567 S.E.2d 159 (2002), *review denied*, 356 N.C. 669, 577 S.E.2d 114 (2003); *Cantrell v. Wishon*, 141 N.C. App. 340, 540 S.E.2d 804 (2000) (error for trial court to specifically refuse to hear evidence on mother's past conduct, which was compounded by court's indication that it did not matter how inconsistent that conduct might have been with mother's rights and responsibilities as a parent).]

n. Trial court erred when it did not consider birth mother's conduct before the birth of the child when determining whether birth mother waived her constitutional rights to the care, custody, and control of the child. [*Moriggia v. Castelo*, 256 N.C. App. 34, 805 S.E.2d 378 (2017).]

4. Persons entitled to the parental preference. The following individuals have been found entitled to the parental preference:

a. A biological parent in a same-sex relationship. [*Boseman v. Jarrell*, 364 N.C. 537, 704 S.E.2d 494 (2010); *Mason v. Dwinnell*, 190 N.C. App. 209, 660 S.E.2d 58 (2008); *Estroff v. Chatterjee*, 190 N.C. App. 61, 660 S.E.2d 73 (2008); *Heatzig v. MacLean*, 191 N.C. App. 451, 664 S.E.2d 347, *appeal dismissed, review denied*, 362 N.C. 681, 670 S.E.2d 564 (2008).]

b. Single parents and parents of children born out of wedlock. [*See Sharp v. Sharp*, 124 N.C. App. 357, 477 S.E.2d 258 (1996); *Lambert v. Riddick*, 120 N.C. App. 480, 462 S.E.2d 835 (1995).]

c. An adoptive parent. [*Best v. Gallup*, 215 N.C. App. 483, 715 S.E.2d 597 (2011), *appeal dismissed, review denied*, 724 S.E.2d 505 (N.C. 2012).]

d. Some children born into a same-sex marriage are considered the natural children of both spouses in some circumstances. *See* Cheryl Howell, *New Legislation Acknowledges Same-Sex Marriage*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (Aug. 8, 2017), https://civil.sog.unc.edu/new-legislation-acknowledges-same-sex-marriage.

e. A parent "very limited in her intellectual functioning." [*Davis v. McMillian*, 152 N.C. App. 53, 61, 567 S.E.2d 159, 164 (2002), *review denied*, 356 N.C. 669, 577 S.E.2d 114 (2003).]

f. A father in an action against the maternal grandmother, when mother and father had entered into a consent custody order. [*Sides v. Ikner*, 222 N.C. App. 538, 730 S.E.2d 844 (2012).]

g. A mother in an action against a nonparent intervenor, when mother and another nonparent, the child's maternal grandmother, had entered into a consent custody order. [*Weideman v. Shelton*, 247 N.C. App. 875, 787 S.E.2d 412 (2016), *review denied*, 369 N.C. 481, 795 S.E.2d 367 (2017).]

h. The surviving parent after the death of the other parent. [*See Owenby v. Young*, 357 N.C. 142, 579 S.E.2d 264 (2003); *McDuffie v. Mitchell*, 155 N.C. App. 587, 573 S.E.2d 606 (2002), *review denied*, 357 N.C. 165, 580 S.E.2d 368 (2003).]

i. The surviving parent after the death of the other parent when the surviving parent was a noncustodial parent. [*See McDuffie v. Mitchell*, 155 N.C. App. 587, 573 S.E.2d 606 (2002) (noncustodial parent has the same constitutional right to the care, custody, and control of her children as a custodial parent; court rejected grandmother's argument that grandparents should have an expanded right to custody and visitation when a custodial parent dies), *review denied*, 357 N.C. 165, 580 S.E.2d 368 (2003); *Graham v. Jones*, 270 N.C. App. 674, 842 S.E.2d 153 (2020) (same).]

5. Persons not entitled to the parental preference.

a. A stepparent. [*See Seyboth v. Seyboth*, 147 N.C. App. 63, 554 S.E.2d 378 (2001) (stepparent must rebut the parental preference before judge can consider whether it is in child's best interest to visit stepparent).]

b. A parent after a third party has been awarded custody in a case between that parent and the third party. [*Bivens v. Cottle*, 120 N.C. App. 467, 462 S.E.2d 829 (1995), *appeal dismissed*, 346 N.C. 270, 485 S.E.2d 296 (1997); *Speaks v. Fanek*, 122 N.C. App. 389, 470 S.E.2d 82 (1996), *overruled on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998).] For discussion of the parental preference in modification cases, see Section IV.C.2, below.

6. Sufficiency of the complaint.

a. A complaint for custody filed by a nonparent against a parent is subject to dismissal pursuant to:

i. G.S. 1A-1, Rule 12(b)(6) if the complaint does not allege facts sufficient to allow the trial court to conclude that the parent has waived his constitutional rights. [*Penland v. Harris*, 135 N.C. App. 359, 520 S.E.2d 105 (1999); *Yurek v. Shaffer*, 198 N.C. App. 67, 678 S.E.2d 738 (2009) (noting that in custody actions brought by a nonparent against a parent, allegations of acts inconsistent with the parent's constitutionally protected status are required); *Ellison v. Ramos*, 130 N.C. App. 389, 502 S.E.2d 891, *appeal dismissed*, *review denied*, 349 N.C. 356, 517 S.E.2d 891 (1998). *But cf. Perdue v. Fuqua*, 195 N.C. App. 583, 673 S.E.2d 145 (2009) (holding that failure to plead facts sufficient to support a finding of waiver was a matter of "standing").]

ii. G.S. 1A-1, Rule 12(b)(1) if the complaint does not allege or establish clear and convincing evidence that the parent was unfit or engaged in conduct inconsistent with the parent's constitutionally protected status. [*Chávez v. Wadlington*, 261 N.C. App. 541, 821 S.E.2d 289 (2018) (also dismissed for lack of standing where plaintiff alleged mother had engaged in conduct inconsistent with her protected status but failed to allege father had acted inconsistent with his protected status) *aff'd per curiam*, 373 N.C. 1, 832 S.E.2d 692 (2019); *Moriggia v. Castelo*, 256 N.C. App. 34, 805 S.E.2d 378 (2017) (standing concerns subject matter jurisdiction and thus is properly challenged by a Rule 12(b)(1) motion to dismiss).]

7. Intervention by nonparents into existing custody case.

   a. Rule 24 of the North Carolina Rules of Civil Procedure provides the process for intervention. [G.S. 1A-1, Rule 24.]

   b. A motion to intervene must be accompanied by a pleading setting forth the claim or defense for which intervention is sought. [G.S. 1A-1, Rule 24(c).]

   c. For more on intervention, see Cheryl Howell, *Intervention in Custody and Child Support Cases*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (May 16, 2018), https://civil.sog.unc.edu/intervention-in-custody-and-child-support-cases.

8. Rebutting the parental preference: unfitness.

   a. Unfitness.

      i. Allegations that mother had not provided safe and suitable housing for her children, that she had not contributed to their support, that the fathers of the children had not been involved, and that the children were at substantial risk of harm in mother's custody were sufficient for the district court to assume jurisdiction and make findings as to the fitness of the parents. [*Sharp v. Sharp*, 124 N.C. App. 357, 477 S.E.2d 258 (1996) (error for trial court to dismiss grandparents' custody complaint for lack of subject matter jurisdiction).]

      ii. Conclusion that mother was unfit was supported by findings that she had convictions for driving while impaired (DWI); she failed to recognize or treat child's developmental problems; she willfully violated court orders for drug screening, substance abuse counseling, and for a home study; she suffered blackouts and had a volatile temper; she failed to visit child unless transportation was provided for her; and she had been openly rude and hostile to grandparent who had temporary custody. [*Raynor v. Odom*, 124 N.C. App. 724, 478 S.E.2d 655 (1996).]

      iii. Trial court did not err when it took judicial notice of an earlier proceeding in which mother was found unfit based on evidence that she failed to recognize and care for child's many medical conditions and failed to restrain child in a car seat while driving with child; additional findings supporting unfitness included that mother was very limited in intellectual ability and was unable to take on normal adult responsibilities. [*Davis v. McMillian*, 152 N.C. App. 53, 567 S.E.2d 159 (2002), *review denied*, 356 N.C. 669, 577 S.E.2d 114 (2003).]

iv. A trial court erred when it did not address maternal grandmother's counterclaim that father was unfit after grandmother and a "number of witnesses" testified as to father's heavy use of alcohol and DWI convictions. [*Hunt v. Long*, 235 N.C. App. 217, 763 S.E.2d 338 (2014) (**unpublished**) (not paginated on Westlaw) (citing *Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675 (2005)) (a trial court must resolve all issues raised by the evidence that directly concern a party's fitness to have custody).]

v. Absent a showing that a parent is unfit, allegations that a nonparent would be a better caregiver for the child than the parents cannot be considered by the court. [*Perdue v. Fuqua*, 195 N.C. App. 583, 673 S.E.2d 145 (2009).]

9. Rebutting the parental preference: conduct inconsistent.

a. Sufficiency of the evidence/findings of fact.

i. For a detailed explanation of the analysis used to determine whether a parent has engaged in conduct inconsistent with her protected status, see *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997).

ii. Conduct that is inconsistent with a parent's protected status need not rise to the statutory level warranting termination of parental rights. [*Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997).]

iii. A trial court should view evidence of a parent's conduct cumulatively [*Owenby v. Young*, 357 N.C. 142, 579 S.E.2d 264 (2003) (citing *Speagle v. Seitz*, 354 N.C. 525, 557 S.E.2d 83 (2001), *cert. denied*, 536 U.S. 923, 122 S. Ct. 2589 (2002)).] and may consider past misconduct that does not exist at the time of trial if it could impact either the present or the future of the child. [*Speagle; Davis v. McMillian*, 152 N.C. App. 53, 567 S.E.2d 159 (2002), *review denied*, 356 N.C. 669, 577 S.E.2d 114 (2003); *Cantrell v. Wishon*, 141 N.C. App. 340, 540 S.E.2d 804 (2000) (error for trial court to specifically refuse to hear evidence on mother's past conduct, which was compounded by court's indication that it did not matter how inconsistent that conduct might have been with mother's rights and responsibilities as a parent).]

(a) Evidence of mother's alleged participation in the murder of child's father, even if mother is acquitted of criminal charges related to the murder, may be considered by the trial court in custody dispute between mother and paternal grandparents. [*Speagle v. Seitz*, 354 N.C. 525, 557 S.E.2d 83 (2001), *cert. denied*, 536 U.S. 923, 122 S. Ct. 2589 (2002).]

(b) A determination of unfitness in a prior custody proceeding between parents may be considered in a later custody proceeding between the unfit parent and a nonparent. [*Davis v. McMillian*, 152 N.C. App. 53, 567 S.E.2d 159 (2002), *review denied*, 356 N.C. 669, 577 S.E.2d 114 (2003).]

iv. A court may find a parent to be a fit and proper person to have custody and yet conclude that the parent has acted in a manner inconsistent with his constitutionally protected status as a parent. [*David N. v. Jason N.*, 359 N.C. 303, 608 S.E.2d 751 (2005). *See also*

Heatzig v. MacLean, 191 N.C. App. 451, 664 S.E.2d 347 (even parents who have been good parents and have not committed "bad acts" with regard to their children nevertheless can be found to have acted inconsistent with their protected status), *appeal dismissed, review denied*, 362 N.C. 681, 670 S.E.2d 564 (2008). For a case finding that a father had not acted inconsistently with his protected status but remanding for determination of father's fitness, *see Hunt v. Long*, 235 N.C. App. 217, 763 S.E.2d 338 (2014) (**unpublished**) (citing *David N.*) (trial court awarded sole legal custody to father in case with maternal grandmother based on determination that father had not engaged in conduct inconsistent; matter remanded when trial court did not address father's fitness, which was raised in testimony of grandmother and a "number of witnesses" as to father's heavy use of alcohol and DWI convictions).]

v. It is the conduct and/or intent of the parent that determines whether parental protection has been waived. The conduct of the third party is not relevant. [*See Estroff v. Chatterjee*, 190 N.C. App. 61, 660 S.E.2d 73 (2008) (the fact that a third party provides caretaking and financial support, engages in parent-like duties and responsibilities, and has a substantial bond with the children does not necessarily meet the requirements of *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997), *and Mason v. Dwinnell*, 190 N.C. App. 209, 660 S.E.2d 58 (2008)); *Sides v. Ikner*, 222 N.C. App. 538, 554, 730 S.E.2d 844, 854 (2012) (when findings showed that father never intentionally chose to create a parental role for grandmother and did not voluntarily relinquish primary custody to her but instead grandmother "assumed a parent-like status . . . on her own without that being the goal of" father, father did not act inconsistently with his protected status).]

vi. Raising a child out of wedlock does not constitute conduct inconsistent with a parent's protected status. [*Penland v. Harris*, 135 N.C. App. 359, 520 S.E.2d 105 (1999).]

vii. That the nonparent is able to offer the minor child a higher standard of living is not relevant to the issue of a parent's constitutionally protected status. [*Perdue v. Fuqua*, 195 N.C. App. 583, 673 S.E.2d 145 (2009) (citing *Penland v. Harris*, 135 N.C. App. 359, 520 S.E.2d 105 (1999)).]

viii. While a parent's socioeconomic factors such as the quality of a parent's residence, job history, or other aspects of their financial situation may be relevant to a best interest determination, socioeconomic facts are not appropriate considerations when determining whether a parent is unfit or has waived her constitutionally protected status. [*Dunn v. Covington*, 272 N.C. App. 252, 846 S.E.2d 557 (2020) (trial court should not have considered the fact that mother was temporarily homeless and had a history of not maintaining consistent employment when determining whether mother had waived her constitutional right to custody).]

ix. A trial court's determination that a parent has acted in a way inconsistent with his constitutionally protected status must be supported by clear and convincing evidence. [*Estroff v. Chatterjee*, 190 N.C. App. 61, 660 S.E.2d 73 (2008) (clear, cogent, and convincing

evidence); *David N. v. Jason N.*, 359 N.C. 303, 608 S.E.2d 751 (2005); *Owenby v. Young*, 357 N.C. 142, 579 S.E.2d 264 (2003); *Heatzig v. MacLean*, 191 N.C. App. 451, 664 S.E.2d 347, *appeal dismissed, review denied*, 362 N.C. 681, 670 S.E.2d 564 (2008).] The trial judge must indicate in the order that the judge applied the clear and convincing standard in determining whether a parent's conduct is inconsistent with her constitutionally protected status. [*Dunn v. Covington*, 272 N.C. App. 252, 846 S.E.2d 557 (2020); *Bennett v. Hawks*, 170 N.C. App. 426, 613 S.E.2d 40 (2005); *Moriggia v. Castelo*, 256 N.C. App. 34, 43–44, 805 S.E.2d 378, 383 (2017) (vacating an order dismissing a custody complaint for lack of standing based, in part, on trial court's failure to indicate that it applied the clear, cogent, and convincing standard of proof; application of the standard is "integral to the jurisdictional determination" and should be "affirmatively state[d] . . . in the order on remand").]

x. Findings in a consent judgment, and in an order denying mother's motion to set the judgment aside under G.S. 1A-1, Rule 60(b), were sufficient to support the conclusion that mother's conduct was inconsistent with her protected status when findings demonstrated that mother acknowledged substance abuse and domestic violence issues, agreed that it was in the best interest of the child for relatives to have custody, had placed child with other relatives prior to placement pursuant to the consent judgment, and there was no evidence that mother had a substantial degree of personal, financial, or custodial contact with the child after these placements. [*Yurek v. Shaffer*, 198 N.C. App. 67, 678 S.E.2d 738 (2009) (addressing waiver by mother of her protected status even though trial court made no such finding).]

b. Specific conduct.

i. Voluntary relinquishment of physical custody to a nonparent may, depending upon the circumstances, constitute conduct inconsistent with a parent's protected status.

(a) To preserve the parental preference, a parent who temporarily relinquishes custody should notify the custodian that the relinquishment is temporary and should avoid conduct inconsistent with the protected parental interests, such as failing to maintain personal contact with the child or failing to resume custody when able. [*Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997). *See also Quevedo-Woolf v. Overholser*, 261 N.C. App. 387, 820 S.E.2d 817 (2018) (mother acted responsibly when she turned her child over to her mother for temporary care but acted inconsistently with her protected status when she failed to maintain even minimal contact with her child for several years after leaving the child in her mother's care), *writ and review denied, appeal dismissed*, 372 N.C. 359, 828 S.E.2d 164 (2019).]

(b) The two specific examples of inconsistent conduct cited by the court in *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997), are not exhaustive. [*Grindstaff v. Byers*, 152 N.C. App. 288, 567 S.E.2d 429 (2002).]

(c) Trial court erred when it found that father had acted inconsistently with his constitutionally protected status when there was evidence that custody arrangement with grandmother was temporary; father maintained or attempted to maintain contact with, and support for, his children during period children were with grandmother; and he resumed custody when his circumstances permitted. [*Grindstaff v. Byers*, 152 N.C. App. 288, 567 S.E.2d 429 (2002); *Penland v. Harris*, 135 N.C. App. 359, 520 S.E.2d 105 (1999) (mother did not waive her rights by allowing grandparents to provide and care for child while she finished school). *See also Sides v. Ikner*, 222 N.C. App. 538, 730 S.E.2d 844 (2012) (trial court erred in concluding that father had acted inconsistently with his protected status when he allowed child to live with grandmother pursuant to terms of a custody order entered between him and the child's mother; father's only intent was to abide by the custody order, not to give grandmother custodial rights).]

(d) In a custody action in which one nonparent intervened seeking custody based on mother's agreement in a consent custody order to grant custody to another nonparent, the child's maternal grandmother, mother's execution of the consent custody order did not constitute clear and convincing evidence that mother had acted inconsistently with her protected status when both mother and grandmother testified that they intended a temporary arrangement, during which mother would have the opportunity to be an active participant in child's care and to assume her role as parent in the future. [*Weideman v. Shelton*, 247 N.C. App. 875, 787 S.E.2d 412 (2016) (consent custody order did not address whether the arrangement was to be temporary), *review denied*, 369 N.C. 481, 795 S.E.2d 367 (2017).]

(e) Case remanded for findings as to whether mother acted inconsistently with her constitutionally protected status when trial court in original order failed to consider that mother had voluntarily relinquished custody to nonparents; failed to make findings on the effect, if any, of document that mother signed relinquishing custody of her children to the nonparents; and failed to make findings on mother's role in building the relationship between her children and the nonparents. [*Cantrell v. Wishon*, 141 N.C. App. 340, 540 S.E.2d 804 (2000). *See also Powers v. Wagner*, 213 N.C. App. 353, 716 S.E.2d 354 (2011) (case remanded for further findings about mother's intent when she left child in custody of grandparents for period of fifteen months; simply showing that a parent has left a child in custody of others is not sufficient to support the conclusion that the parent has acted inconsistent with his protected status).]

ii. Legal parent voluntarily cedes a measure of parental decision-making authority to a third party.

(a) The 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 her child. [*Boseman v. Jarrell*, 364 N.C. 537, 704 S.E.2d 494 (2010) (focus is on the intent of the natural parent at the time the relationship is formed); *Mason v. Dwinnell*, 190 N.C. App. 209, 660 S.E.2d 58 (2008) (focus is not on whether the conduct consists of "good acts" or "bad acts"); *Estroff v. Chatterjee*, 190 N.C. App. 61, 660 S.E.2d 73 (2008) (focus is not on what others thought of the couple or what responsibility third party elected to assume).]

(b) A parenting agreement may provide evidence of a parent's intent. [*Mason v. Dwinnell*, 190 N.C. App. 209, 660 S.E.2d 58 (2008) (provisions in parenting agreement constituted admissions by mother regarding her intentions and conduct in creating a permanent parent-like relationship between her partner and her biological child). *Cf. Davis v. Swan*, 206 N.C. App. 521, 697 S.E.2d 473 (2010) (finding of waiver on similar facts, except there was no written agreement between the parties), *review denied*, 365 N.C. 76, 706 S.E.2d 239 (2011).]

(c) Similarly, a natural parent's attempt to obtain a "second-parent adoption," wherein the court would declare the nonparent to be an adoptive parent, indicated the intent of the natural parent to create a permanent relationship between the child and the nonparent, even though the "second-parent adoption" was eventually declared void. [*Boseman v. Jarrell*, 364 N.C. 537, 704 S.E.2d 494 (2010).]

(d) The legal parent's "intent during the formation and pendency of the parent-child relationship" between the third party and the child is the relevant period for the court's consideration, not the period after the relationship between the parties has ended. [*Estroff v. Chatterjee*, 190 N.C. App. 61, 70, 660 S.E.2d 73, 79 (2008). *See also Moriggia v. Castelo*, 256 N.C. App. 34, 805 S.E.2d 378, 386 (2017) (when mother clearly had the intent to create a permanent parent-child relationship between the child and her partner when she conceived the child and during her pregnancy, fact that mother changed her mind after the birth of the child did not support the trial court's conclusion that mother did not act inconsistently with her protected status as a parent; although "events prior to birth alone are not controlling, they must be considered along with actions after the child's birth"); *cf. Chávez v. Wadlington*, 261 N.C. App. 541, 821 S.E.2d 289 (2018) (trial court finding that plaintiff's relationship with the children ended in July 2015 defeated plaintiff's standing as an "other person" to file a complaint seeking custody in November 2016), *aff'd per curiam*, 373 N.C. 1, 832 S.E.2d 692 (2019).]

(e) The intentions of the legal parent need not be disclosed to the third party. [*Estroff v. Chatterjee*, 190 N.C. App. 61, 660 S.E.2d 73 (2008) (harm to the third party is not relevant under *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997)).]

(f) Once a parent cedes to a third party his constitutionally protected parental rights, the parent cannot later assert those rights to unilaterally alter the relationship between

the child and the third party. [*Boseman v. Jarrell*, 364 N.C. 537, 704 S.E.2d 494 (2010); *Mason v. Dwinnell*, 190 N.C. App. 209, 660 S.E.2d 58 (2008).]

(g) Mother waived constitutionally protected status when:

(1) Mother and her partner jointly decided to create a family;

(2) Mother and her partner intentionally acted to identify partner as a parent, including by attempting to obtain sperm with physical characteristics similar to partner, using both parties' surnames to derive the child's name, allowing partner to participate in the pregnancy and birth, holding a baptismal ceremony at which partner was announced as a parent and her parents as grandparents, and designating partner as a parent of the child on forms and to teachers;

(3) Mother repeatedly identified partner publicly as child's parent;

(4) Mother stipulated that couple and child lived together as family unit;

(5) Mother shared her decision-making authority as to child with partner;

(6) Mother signed medical power of attorney allowing partner to participate in child's medical decisions; and

(7) Mother entered into parenting agreement providing that partner was a de facto parent and setting out provisions for continued custody by partner if couple's relationship ended. [*Mason v. Dwinnell*, 190 N.C. App. 209, 660 S.E.2d 58 (2008). *See also Boseman v. Jarrell*, 364 N.C. 537, 704 S.E.2d 494 (2010) (facts substantially similar to those in *Mason*).]

(h) Mother did not waive constitutionally protected status when she:

(1) Made the decision to have a child and selected the donor based on reasons important to her,

(2) Never represented that she and partner would be co-parents,

(3) Objected when others referred to her partner as "mom",

(4) Reminded her partner that she was not the mother of the children and that mother was and always would be their only mother, and

(5) Never entered into any written or verbal parenting agreement with her partner. [*Estroff v. Chatterjee*, 190 N.C. App. 61, 660 S.E.2d 73 (2008) (noting in dicta that the fact that a third party provides caretaking and financial support, engages in parent-like duties and responsibilities, and has a substantial bond with the children does not necessarily meet the requirements of *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997), and *Mason v. Dwinnell*, 190 N.C. App. 209, 660 S.E.2d 58 (2008)).]

(i) In *Heatzig v. MacLean*, 191 N.C. App. 451, 664 S.E.2d 347 (2008), the court made certain findings that would support a conclusion that a parent acted inconsistently with her constitutionally protected status:

(1) It was a joint decision for defendant natural parent to get pregnant by artificial insemination,

(2) The sperm donor was selected based upon physical characteristics similar to those of plaintiff nonparent,

(3) Plaintiff participated in birthing classes and was present at the birth of the children,

(4) Both parties signed the birth certificate application,

(5) Both parties were identified as parents at a baptismal ceremony,

(6) Plaintiff was given authority to obtain health care treatment for the children, and

(7) Names from plaintiff's family were used in the names of each of the children. [*Heatzig v. MacLean*, 191 N.C. App. 451, 664 S.E.2d 347, *appeal dismissed, review denied*, 362 N.C. 681, 670 S.E.2d 564 (2008).]

(j) In *Heatzig v. MacLean*, 191 N.C. App. 451, 664 S.E.2d 347 (2008), the court made certain findings that would support a conclusion that a parent acted consistently with his constitutionally protected rights:

(1) Defendant natural parent had been trying to get pregnant for many years before she and plaintiff nonparent began their relationship,

(2) Timing and methodology decisions regarding defendant's pregnancy were made primarily by defendant, and

(3) The parties were unable to work out a parenting agreement. [*Heatzig v. MacLean*, 191 N.C. App. 451, 664 S.E.2d 347, *appeal dismissed, review denied*, 362 N.C. 681, 670 S.E.2d 564 (2008).]

(k) In a case involving a heterosexual couple that the court of appeals found to be legally identical to *Mason v. Dwinnell*, 190 N.C. App. 209, 660 S.E.2d 58 (2008), and *Heatzig v. MacLean*, 191 N.C. App. 451, 664 S.E.2d 347 (2008), that court reversed a trial court's conclusion that the adoptive parent had not waived her protected status. In *Best v. Gallup*, 215 N.C. App. 483, 715 S.E.2d 597 (2011), *appeal dismissed, review denied*, 724 S.E.2d 505 (N.C. 2012), the appellate court held that the following facts established as a matter of law that mother had waived her protected status:

(1) The parties jointly cared for the child for approximately five years,

(2) The defendant adopted the child alone but identified plaintiff to the child and to others as the child's father, and

(3) The defendant adoptive mother did not state or otherwise indicate an intention that the relationship between the plaintiff and the child would be temporary.

iii. Lack of action/involvement by parent.

(a) Even though mother appointed her mother and another nonparent as guardians during a five-year period while mother dealt with untreated mental health and

substance abuse issues, evidence did not establish that mother had failed to shoulder the responsibilities attendant to raising a child that would result in waiver of her constitutionally protected status. [*Weideman v. Shelton*, 247 N.C. App. 875, 886, 787 S.E.2d 412, 420 (2016) (findings showed that mother had "made qualitative progress toward resolving . . . issues that previously hindered her from asserting her [parental] role," that mother had assumed certain parenting responsibilities, and that mother had intended guardianship to be a temporary arrangement and did not intend to abdicate complete parental responsibility; moreover, nonparent guardian who denied mother access to child could not argue that mother had failed to shoulder parenting responsibilities), *review denied*, 369 N.C. 481, 795 S.E.2d 367 (2017).]

(b) Finding that father was a fit parent would not preclude conclusion that father had waived his constitutionally protected status by his lack of involvement with the child for a period of years and by a lack of financial support. [*David N. v. Jason N.*, 359 N.C. 303, 608 S.E.2d 751 (2005) (case remanded for application of clear and convincing standard and for findings consistent with that standard).]

(c) Father's decision not to "do anything" after finding out about mother's pregnancy and birth of the child, and his failure to take responsibility for the child until the Department of Social Services contacted him about paying child support, was conduct inconsistent with his protected status. [*Adams v. Tessener*, 354 N.C. 57, 550 S.E.2d 499 (2001). *Cf. Jones v. Russell*, 213 N.C. App. 423, 714 S.E.2d 276 (2011) (**unpublished**) (father did not waive protected status, even though he had no involvement in child's life until child was approximately 4 years old, where father did not know he was child's father and began paying support as soon as he discovered that child was his).]

iv. Inability to care for children.

(a) Mother's failure to recognize and respond to child's medical needs; her inability to take on normal adult responsibilities, such as acquiring a driver's license, getting and maintaining a job, taking care of her living expenses, and providing care to her other child; as well as an earlier determination that mother was unfit all supported conclusion that mother's actions were inconsistent with her protected status. [*Davis v. McMillian*, 152 N.C. App. 53, 567 S.E.2d 159 (2002), *review denied*, 356 N.C. 669, 577 S.E.2d 114 (2003).]

(b) Fact that children had been taken into custody and adjudicated dependent based on mother's inability to care for them due to severe emotional issues relating to the untimely traumatic death of children's father and relating to the physical abuse inflicted upon her by father prior to his death was insufficient to support trial court's conclusion of waiver. [*Rodriguez v. Rodriguez*, 211 N.C. App. 267, 710 S.E.2d 235 (2011).]

10. Best interest standard.

a. After concluding that a parent has lost or waived his constitutional rights, a court is to apply the best interest analysis to determine custody. [*Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997); *Heatzig v. MacLean*, 191 N.C. App. 451, 664 S.E.2d 347 (error to apply best interests test without first concluding that parent had acted inconsistently with her constitutionally protected status), *appeal dismissed, review denied*, 362 N.C. 681, 670 S.E.2d 564 (2008); *McRoy v. Hodges*, 160 N.C. App. 381, 585 S.E.2d 441 (2003); *Davis v. McMillian*, 152 N.C. App. 53, 567 S.E.2d 159 (2002), *review denied*, 356 N.C. 669, 577 S.E.2d 114 (2003); *Owenby v. Young*, 357 N.C. 142, 579 S.E.2d 264 (2003); *Ellison v. Ramos*, 130 N.C. App. 389, 502 S.E.2d 891, *appeal dismissed*, *review denied*, 349 N.C. 356, 517 S.E.2d 891 (1998).] See Section III.B, above.

b. A best interest finding must be based on evidence that exists at the time of trial and cannot be speculative or premature. [*McRoy v. Hodges*, 160 N.C. App. 381, 585 S.E.2d 441 (2003) (when father and 7-year-old son had no relationship except for visitation in the months preceding the custody hearing, a best interest finding based on the relationship that was supposed to develop between the two over the next four months was premature and speculative and could not address the quality of the relationship).]

c. For examples of facts sufficient to support conclusion that an award of custody was in the child's best interest, see the following cases:

i. *Mason v. Dwinnell*, 190 N.C. App. 209, 214, 660 S.E.2d 58, 62 (2008) (joint custody between parent and nonparent was in child's best interests when findings showed that child considered nonparent to be a parent; that an emotional and psychological bond existed between child and nonparent; that child "has benefited from [nonparent's] love and affection, caretaking, emotional and financial support, guidance, and decision-making"; and that one therapist concluded from his discussions with child that child wished to maintain equal time with both parties).

ii. *Davis v. McMillian*, 152 N.C. App. 53, 567 S.E.2d 159 (2002) (findings that child had lived with nonparent most of her life and had a close relationship with her and that nonparent provided for child's daily care and well-being and allowed mother to visit were sufficient to support an award of custody to nonparent), *review denied*, 356 N.C. 669, 577 S.E.2d 114 (2003).

11. Grandparents: custody.

a. Grandparents may assert a claim for full or joint custody under G.S. 50-13.1(a). For discussion of grandparent visitation pursuant to the grandparent visitation statutes, see Section III.C.12, below.

b. Grandparents also may file a motion in the cause in an existing custody case seeking custody after showing a substantial change of circumstances since entry of the original order. [G.S. 50-13.5(j).]

c. Because the parental preference is applicable, grandparents must allege and prove that parents have lost their constitutional right to custody by being unfit or acting inconsistently with their parental status. [*Wellons v. White v. Wellons*, 229 N.C. App. 164, 748 S.E.2d 709 (2013) (citing

McDuffie v. Mitchell, 155 N.C. App. 587, 573 S.E.2d 606 (2002), *review denied*, 357 N.C. 165, 580 S.E.2d 368 (2003)) (standing to seek custody under G.S. 50-13.1(a) requires parental unfitness or acts that result in forfeiture of parent's protected status, not just estrangement from grandchild); *Perdue v. Fuqua*, 195 N.C. App. 583, 673 S.E.2d 145 (2009); *McDuffie*; *Eakett v. Eakett*, 157 N.C. App. 550, 579 S.E.2d 486 (2003) (to gain custody, grandparent must show that parent is unfit or has acted inconsistently with her parental status); *Sharp v. Sharp*, 124 N.C. App. 357, 477 S.E.2d 258 (1996).]

i. Parental preference is applicable even when one parent has died. [*See Montgomery v. Montgomery*, 136 N.C. App. 435, 524 S.E.2d 360 (2000); *Shaut v. Cannon*, 136 N.C. App. 834, 526 S.E.2d 214, *review denied*, 352 N.C. 150, 543 S.E.2d 892 (2000); *McRoy v. Hodges*, 160 N.C. App. 381, 585 S.E.2d 441 (2003); *Owenby v. Young*, 357 N.C. 142, 579 S.E.2d 264 (2003).]

ii. Parental preference is applicable to a surviving parent even if that parent was a noncustodial parent. [*See McDuffie v. Mitchell*, 155 N.C. App. 587, 573 S.E.2d 606 (2002) (noncustodial parent has the same constitutional right to the care, custody, and control of his children as a custodial parent; court rejected grandmother's argument that grandparents should have an expanded right to custody and visitation when a custodial parent dies), *review denied*, 357 N.C. 165, 580 S.E.2d 368 (2003); *Graham v. Jones*, 270 N.C. App. 674, 684, 842 S.E.2d 153, 161 (2020) (first quoting *McDuffie v. Mitchell*, 155 N.C. App. 587, 589, 573 S.E.2d 606, 607-08 (2002); then quoting *Rivera v. Matthews*, 263 N.C. App. 652, 659, 824 S.E.2d 164, 168–69 (2019)) (when one parent dies, the other parent has a "natural and legal right to custody and control of the minor children" and this is "no less true when the sole surviving parent was the non-custodial parent of the children.").]

iii. Parental preference is not implicated when the court does not grant custodial rights to a grandparent. [*See Everette v. Collins*, 176 N.C. App. 168, 625 S.E.2d 796 (2006) (court of appeals upheld an order under G.S. Chapter 50 that granted primary physical custody of child to father and that approved placement of child in the home of paternal grandmother, finding that physical placement with grandmother did not grant grandmother any custodial rights; thus, mother's constitutionally protected right to custody was not implicated).]

d. Unlike claims brought pursuant to the grandparent visitation statutes discussed below, an ongoing custody dispute is not required when a grandparent seeks custody or visitation pursuant to G.S. 50-13.1(a). [*Eakett v. Eakett*, 157 N.C. App. 550, 579 S.E.2d 486 (2003); *Wellons v. White v. Wellons*, 229 N.C. App. 164, 748 S.E.2d 709 (2013) (citing *Eakett*); *Grindstaff v. Byers*, 152 N.C. App. 288, 567 S.E.2d 429 (2002) (grandparents alleging unfitness can bring initial suit for custody pursuant to G.S. 50-13.1 even if there is no ongoing custody proceeding).] A grandparent can seek custody or visitation pursuant to G.S. 50-13.1(a) only if the grandparent can show that the parent has waived his constitutional right to custody. For visitation claims made pursuant to grandparent visitation statutes other than G.S. 50-13.1(a), see Sections III.C.12.d–f, below.

e. Sufficiency of allegations in complaint by grandparent seeking custody.

i. Allegations that father had not exercised visitation alone and could not provide a stable home environment were sufficient to give grandparent standing to seek custody under G.S. 50-13.1(a). [*Wellons v. White v. Wellons*, 229 N.C. App. 164, 748 S.E.2d 709 (2013).]

ii. Grandmother's complaint for custody pursuant to G.S. 50-13.1(a) survived G.S. 1A-1, Rule 12(b)(6) motion where complaint alleged that the parents had left the children in the grandmother's care and had visited them infrequently and inconsistently, were "preoccupied with their own lives," and had not shown they were capable of caring for and supervising the children. [*Grindstaff v. Byers*, 152 N.C. App. 288, 567 S.E.2d 429 (2002).]

iii. Grandmother's motion to intervene seeking custody under G.S. 50-13.5(j) was denied when it failed to allege conduct sufficient to indicate that father had acted inconsistently with his protected status when grandmother alleged only that father lost his job, obtained a new job that required him to work third shift, father had a young girlfriend babysitting the child, and that child had lived exclusively with grandmother for four months. [*Perdue v. Fuqua*, 195 N.C. App. 583, 673 S.E.2d 145 (2009).]

iv. After death of custodial parent (mother), maternal grandmother's complaint for custody under G.S. 50-13.1(a) was dismissed because it failed to allege facts sufficient to show that father had acted in a manner inconsistent with his constitutionally protected status. [*McDuffie v. Mitchell*, 155 N.C. App. 587, 573 S.E.2d 606 (2002) (court noted earlier findings that father had pursued modification of custody after being denied visitation and had sought custody immediately after mother went into a coma), *review denied*, 357 N.C.165, 580 S.E.2d 368 (2003).]

f. Sufficiency of evidence/findings of fact.

i. When a custody order granted custodial rights and decision-making authority to mother and father only, in a later action for custody between maternal grandmother and father, trial court erred in concluding that father had acted inconsistently with his protected status when father had complied with the custody order by exercising all holiday, summer, and other secondary physical custody allowed by the order, despite living 115 miles away, and had paid all child support obligations. [*Sides v. Ikner*, 222 N.C. App. 538, 730 S.E.2d 844 (2012) (rejecting grandmother's contention that father knowingly relinquished his parental rights and allowed grandmother to assume a parental role when he permitted child to remain in grandmother's home, where child and his mother had lived, after mother joined the military, unbeknownst to father; when father exercised his rights and complied with his duties under the custody order between mother and father, it was error to find that father chose to create a parental relationship between grandmother and child when in fact, grandmother assumed a parent-like status on her own).]

ii. Trial court's findings were not sufficient to support conclusion that father had lost his protected status when trial court did not find that father had abandoned or neglected his

children or was unfit. [*Grindstaff v. Byers*, 152 N.C. App. 288, 567 S.E.2d 429 (2002) (moreover, there was evidence that father had supported children financially and emotionally while in grandmother's custody, which placement father agreed to because of his temporary inability to care for children due to his work schedule).]

iii. After mother's death, grandmother failed to carry her burden of demonstrating that father had forfeited his protected status as parent. [*Owenby v. Young*, 357 N.C. 142, 579 S.E.2d 264 (2003) (allegations of father's alcohol abuse, financial instability, and driving without a license not sufficiently supported by evidence).]

iv. Where grandparents offered no evidence to rebut trial court's findings that father was fit to raise his child and no evidence that father had waived his constitutional right to custody, award of custody to father affirmed. [*Barger v. Barger*, 149 N.C. App. 224, 560 S.E.2d 194 (2002) (noting that trial court erred by impermissibly stating that child's best interest would be served by continued custody with grandparents after trial court found father fit).]

12. Grandparents: visitation.

a. One general custody and visitation statute and three grandparent visitation statutes are cited as the basis for a grandparent's complaint for visitation with a grandchild: G.S. 50-13.1(a); 50-13.2(b1); 50-13.2A; and 50-13.5(j).

b. The general custody and visitation statute, G.S. 50-13.1(a).

i. G.S. 50-13.1(a) is a general custody statute granting "[a]ny parent, relative, or other person . . . claiming the right to custody [or visitation]" the right to institute a custody action as provided in G.S. Chapter 50.

ii. Under G.S. 50-13.1(a), visitation is a lesser form of custody. [*Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994) (paramount right to custody includes right to control the child's associations).]

iii. Any person, including a grandparent, seeking custody or visitation pursuant to G.S. 50-13.1(a) must prove that the parent has waived his constitutional right to custody. [*See Wellons v. White v. Wellons*, 229 N.C. App. 164, 748 S.E.2d 709 (2013) (citing *Eakett v. Eakett*, 157 N.C. App. 550, 579 S.E.2d 486 (2003)) (to receive custody under G.S. 50-13.1(a), grandparents must prove parental unfitness); *Graham v. Jones*, 270 N.C. App. 674, 842 S.E.2d 153 (2020) (error for trial court to award grandparents visitation after concluding mother had not waived her constitutional right to custody).]

iv. G.S. 50-13.1(a) is not a grandparent visitation statute, meaning that it does not grant grandparents the right to seek visitation in situations where other third parties cannot. However, if grandparents can show that a parent has waived her constitutional right to the exclusive care, custody, and control of the child, they can seek custody or visitation pursuant to G.S. 50-13.1 as can any other third party. [*See Montgomery v. Montgomery*, 136 N.C. App. 435, 524 S.E.2d 360 (2000); *McIntyre v. McIntyre*, 341 N.C. 629, 461 S.E.2d 745 (1995) (General Assembly intended grandparents to have expanded rights to visitation

only in those situations addressed by three specific grandparent visitation statutes); *Eakett v. Eakett*, 157 N.C. App. 550, 579 S.E.2d 486 (2003) (G.S. 50-13.1(a) grants grandparents the privilege to institute an action for visitation as allowed in G.S. 50-13.2(b1), 50-13.2A, and 50-13.5(j)); *Grindstaff v. Byers*, 152 N.C. App. 288, 567 S.E.2d 429 (2002) (recognizing that grandparents alleging unfitness of their grandchildren's parents have a right to bring an initial suit for custody, even if there is no ongoing custody proceeding).]

v. For more on grandparent custody and visitation pursuant to G.S. 50-13.1, see Section III.C.11 above.

c. The grandparent visitation statutes.

i. The grandparent visitation statutes grant grandparents extended rights to visitation. [*See McIntyre v. McIntyre*, 341 N.C. 629, 461 S.E.2d 745 (1995), *Hill v. Newman*, 131 N.C. App. 793, 509 S.E.2d 226 (1998) (applying the grandparent statutes after decisions rendered in both *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994), *and Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997)).]

ii. Note that the statutes apply in very limited situations, where there has been a disruption of the family unit. [*McIntyre v. McIntyre*, 341 N.C. 629, 461 S.E.2d 745 (1995); *Eakett v. Eakett*, 157 N.C. App. 550, 579 S.E.2d 486 (2003).]

iii. Citing *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054 (2000), the court of appeals held that application of two of the grandparent visitation statutes, G.S. 50-13.2(b1) and G.S. 50-13.5(j), without a showing of deference to a parent's decision regarding grandparent visitation with the child and in such a way as to interfere with the parent/child relationship, violated mother's constitutional rights. [*Alexander v. Alexander*, 276 N.C. App. 148, 856 S.E.2d 136, *review denied*, 865 S.E.2d 876, *appeal dismissed*, *review denied*, 865 S.E.2d 876 (N.C. 2021).]

d. G.S. 50-13.2(b1).

i. G.S. 50-13.2(b1) provides for grandparent visitation as part of a child custody order as the court, in its discretion, deems appropriate.

ii. G.S. 50-13.2(b1) has been interpreted to apply only when custody of the minor child is an ongoing issue. [*See Wellons v. White v. Wellons*, 229 N.C. App. 164, 748 S.E.2d 709 (2013), *Hill v. Newman*, 131 N.C. App. 793, 509 S.E.2d 226 (1998), *and Moore v. Moore*, 89 N.C. App. 351, 365 S.E.2d 662 (1988) (all stating that this provision gives grandparents the right to seek visitation when there is an ongoing custody dispute between parents); *see also Smith v. Barbour*, 195 N.C. App. 244, 671 S.E.2d 578 (because issue of mother's visitation was still pending, custody of the child was still "in issue" and was "being litigated" by the parents, providing basis for grandmother's motion to intervene for visitation), *review denied*, 363 N.C. 375, 678 S.E.2d 670 (2009), *Quesinberry v. Quesinberry*, 196 N.C. App. 118, 674 S.E.2d 775 (2009) (where custody dispute between parents was ongoing when grandparents filed their visitation claim, subsequent consent judgment resolving controversy between parents did not divest court of jurisdiction to consider grandparents

request for visitation), *and Alexander v. Alexander*, 276 N.C. App. 148, 856 S.E.2d 136 (where trial court had granted grandparents' motion to intervene in action between the parents before father died, the trial court had authority to consider their request for visitation following father's death even though no claim remained between the parents), *review denied*, 865 S.E.2d 876, *appeal dismissed*, *review denied*, 865 S.E.2d 876 (N.C. 2021).]

iii. G.S. 50-13.2(b1) does not allow a grandparent to institute an independent action for visitation. [*Smith v. Barbour*, 195 N.C. App. 244, 671 S.E.2d 578 (statute applies only when custody is in issue or being litigated), *review denied*, 363 N.C. 375, 678 S.E.2d 670 (2009); *McIntyre v. McIntyre*, 341 N.C. 629, 461 S.E.2d 745 (1995) (statute allows a trial court to grant visitation to grandparents in a custody order); *Moore v. Moore*, 89 N.C. App. 351, 365 S.E.2d 662 (1988).]

iv. In addition to limiting application of G.S. 50-13.2(b1) to situations where there is an ongoing custody dispute between the parents, the court of appeals also has held that, when determining whether to award visitation to grandparents, the trial court must presume that the parent's determination regarding the appropriateness of visitation with the grandparent is correct. If the grandparent successfully rebuts this presumption, the trial court may not award visitation that interferes with the parent/child relationship. [*Alexander v. Alexander*, 276 N.C. App. 148, 856 S.E.2d 136 (application of G.S. 50-13.2(b1) in this case violated mother's constitutional rights where trial court failed to give deference to her decision regarding the child's contact with the grandparents and where trial court awarded substantial visitation time to grandparents, including every other weekend and every other Christmas and Thanksgiving), *review denied*, 865 S.E.2d 876, *appeal dismissed*, *review denied*, 865 S.E.2d 876 (N.C. 2021).]

e. G.S. 50-13.2A.

i. G.S. 50-13.2A states that a biological grandparent may seek visitation when the child has been adopted by a stepparent or relative where a substantial relationship exists between the grandparent and child. [*Hill v. Newman*, 131 N.C. App. 793, 509 S.E.2d 226 (1998) (explicit language of the statute requires a substantial relationship between grandparent and child).]

ii. While this statute gives a court authority to grant visitation, a trial court is not required to grant visitation unless it finds that visitation with the grandparent is in the best interest of the child. [G.S. 50-13.2A; *Hill v. Newman*, 131 N.C. App. 793, 509 S.E.2d 226 (1998).]

iii. A grandparent who had helped "raise the grandchildren from birth" had a "substantial relationship" so that court's exercise of jurisdiction pursuant to G.S. 50-13.2A was proper. [*Hill v. Newman*, 131 N.C. App. 793, 798, 509 S.E.2d 226, 229 (1998).]

iv. Trial court's decision to deny grandmother visitation was upheld as not in their best interest when grandmother was unable to accept that adoptive parents were now the

children's parents and was unable to get along with adoptive parents. [*Hill v. Newman*, 131 N.C. App. 793, 509 S.E.2d 226 (1998).]

f. G.S. 50-13.5(j).

i. G.S. 50-13.5(j) states that grandparents may file a motion in the cause in an existing custody case seeking visitation after showing a substantial change of circumstances since entry of the original order.

ii. However, the court of appeals has held that this statute does not allow grandparents to seek visitation unless there is a custody dispute actually ongoing between the parents of the child at the time the request for visitation is made by the grandparents. [*Eakett v. Eakett*, 157 N.C. App. 550, 579 S.E.2d 486 (2003) (where it had been more than one year since custody order was entered between parents, grandparents could not use G.S. 50-13.5(j) to assert a claim for visitation); *Wellons v. White v. Wellons*, 229 N.C. App. 164, 748 S.E.2d 709 (2013) (citing *Eakett*). *Cf. Smith v. Smith*, 179 N.C. App. 652, 634 S.E.2d 641 (2006) (**unpublished**) (where grandfather filed motion to intervene at same time mother filed motion to modify custody order between her and children's father, custody dispute was "ongoing" and grandfather's claim was appropriate), *appeal dismissed, review denied*, 362 N.C. 238, 660 S.E.2d 50 (2008).]

iii. A complaint for visitation pursuant to G.S. 50-13.5(j) must allege that there is an ongoing custody dispute between the parents. [*Eakett v. Eakett*, 157 N.C. App. 550, 579 S.E.2d 486 (2003).]

iv. In addition to limiting application of G.S. 50-13.5(j) to situations where there is an ongoing custody dispute between the parents, the court of appeals also has held that, when determining whether to award visitation to grandparents, the trial court must presume that the parent's determination regarding the appropriateness of visitation with the grandparent is correct. If the grandparent successfully rebuts this presumption, the trial court may not award visitation that interferes with the parent/child relationship. [*Alexander v. Alexander*, 276 N.C. App. 148, 856 S.E.2d 136 (application of G.S. 50-13.2(b1) in this case violated mother's constitutional rights where trial court failed to give deference to her decision regarding the child's contact with the grandparents and awarded substantial visitation time to grandparents, including every other weekend and every other Christmas and Thanksgiving) *review denied*, 865 S.E.2d 876, *appeal dismissed*, *review denied*, 865 S.E.2d 876 (N.C. 2021).]

g. For an award of attorney fees to grandparent intervenors, see Section VI.B.12, below.

13. Consent agreements between a parent and a nonparent.

a. It is unclear whether a consent order between a parent and a nonparent, that grants custody to the nonparent but does not contain a finding or conclusion that the parent has waived her constitutional right to the care, custody, and control of the child, is valid and not void.

b. Custody orders in the following cases granted custody or visitation to a nonparent without including a finding of fact or conclusion of law regarding the parent's waiver of his

constitutional protections but nevertheless were treated as valid orders by the court of appeals: *Sloan v. Sloan*, 164 N.C. App. 190, 595 S.E.2d 228 (2004) (father and/or paternal grandparents were awarded telephonic visitation without a conclusion that mother had waived constitutional right to custody; after father's death grandparents were allowed to intervene; mother was found in contempt of visitation provisions and trial court modified grandparents' visitation privileges based on substantial change of circumstance); *Bivens v. Cottle*, 120 N.C. App. 467, 462 S.E.2d 829 (1995) (in an initial custody proceeding, decided prior to *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994), the court awarded custody to maternal grandparents but found that mother was a fit and proper person; in a post-*Petersen* proceeding by mother for modification of custody, mother was required to show changed circumstances), *appeal dismissed*, 346 N.C. 270, 485 S.E.2d 296 (1997); *Speaks v. Fanek*, 122 N.C. App. 389, 470 S.E.2d 82 (1996) (initial custody orders, one of which was a consent order, granted custody to nonparents without findings regarding parents' constitutional rights; in modification action by parents, *Petersen* standard did not apply, as it is applicable only to initial custody determination), *overruled on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998).

c. However, in *Wellons v. White*, 229 N.C. App. 164, 748 S.E.2d 709 (2013), the court of appeals allowed an attack on a custody order granting a nonparent custody at a subsequent contempt hearing, repeatedly referring to allegations of a parent's waiver of rights as critical to "standing." Standing is required for subject matter jurisdiction, and a lack of standing results in a void order. [*See Wellons v. White*, 229 N.C. App. 164, 748 S.E.2d 709 (2013).] For more on this topic, see Cheryl Howell, *Nonparent vs. Parent Consent Custody Orders*, UNC SCH. OF GOV'T: ON THE CIVIL SIDE BLOG (May 22, 2015), http://civil.sog.unc.edu/nonparent-vs-parent-consent-custody-orders.

14. Statute allowing court to prohibit alcohol consumption by, or to require an alcohol monitoring system applicable to, third parties seeking custody or visitation.

a. 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 (CAM) 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 to each party to the action. Failure to comply with this condition shall be grounds for civil or criminal contempt. [G.S. 50-13.2(b2), *amended by* S.L. 2021-180, § 19C.9(t), effective July 1, 2021.]

b. If the court imposes CAM as a condition of custody or visitation, the custody or visitation order should address payment to the monitoring provider. [Memorandum from Troy Page and Jo McCants, N.C. Administrative Office of the Courts, "2012 Continuous Alcohol Monitoring Legislation—Child Custody and Visitation" (Nov. 16, 2012).]

NC Court of Appeals rules application of grandparent visitation statutes unconstitutional

In an opinion 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 mother's constitutional right to control with whom her children associate.

Alexander v. Alexander

Mother and father settled custody by a consent custody order when they divorced. When father became ill a few years later, he began living with his parents and he filed a motion to modify custody. His parents also filed a motion to intervene and filed a claim for visitation pursuant to the grandparent visitation statutes, GS 50-13.2(b1) and 50-13.5(j). The trial court granted the grandparents' motion to intervene, but father died before the court heard his motion to modify or grandparents' request for visitation. Following his death, the trial court entered a permanent order granting mother primary physical and legal custody and awarding grandparents extensive visitation rights. Mother appealed.

Statutory authority to order visitation

Mother first argued that the court had no statutory authority to grant visitation to the grandparents following the death of father. The court of appeals disagreed, holding that current case law interprets the grandparent visitation statutes to allow a court to award visitation when grandparents request visitation while there is an on-going action for custody between the parents. The appellate court held that because the grandparents had been allowed to intervene before father died, their claim remained pending when father passed away and the trial court had statutory authority to consider their request for visitation.

Constitutional authority to order visitation

Mother then argued that the grandparent visitation statutes are unconstitutional as applied in her case in that they allowed the trial court to impermissibly interfere with her fundamental Due Process right to exclusive care, custody and control of her child and the court of appeals agreed. The appellate court first noted that the grandparent visitation statutes are not facially unconstitutional in that both the US Supreme Court and the NC Supreme Court have recognized that there are situations where a trial court can award visitation rights to grandparents without violating Due Process, citing as an example the situation where a parent is found to be unfit or to have waived her constitutional right to custody. However, relying primarily on *Troxel v. Granville*, 530 U.S. 57 (2000), the court of appeals held that the trial court violated mother's constitutional right to control with whom her child associates by awarding visitation without giving sufficient deference to mother's decision regarding whether her child would visit with grandparents

and by awarding such extensive visitation as to interfere with the parent/child relationship.

Required deference to parent's decision regarding visitation

Citing *Troxel's* holdings that fit parents are presumed to act in the best interest of their children and that this presumption cannot be overturned "merely because a judge believes that a different decision would be better", the court of appeals stated that "the court must *presume* that the Mother's determination [about the appropriateness of visitation with the grandparent] is correct." (italics in original) Neither *Troxel* nor the court of appeals in this case gives specific guidance as to what specific circumstances will be sufficient to rebut the presumption, but the court of appeals suggests that one situation may be where the child has a significant bond with the grandparent and the mother denies all contact without justification. In this case, the court of appeals noted that the trial court order gave no indication that the court afforded any deference to mother's decision regarding visitation and contained no findings of fact indicating whether mother denied visitation altogether or about her reasons for her decision about visitation.

Interference with the parent/child relationship

Also based on *Troxel,* the court of appeals held that any award of visitation cannot "adversely interfere with the parent-child relationship". The trial court in *Alexander* granted grandparents every other Thanksgiving and Christmas with the child as well as every other weekend. The court of appeals stated:

"Mother, as the Child's sole custodial parent, has the right to determine with whom her Child spends these major holidays and should not be deprived of any right to spend these holidays with her Child. Also, the grant of visitation every other weekend is too extensive. Mother, as the Child's sole custodial parent, has the right to direct how her Child spends a large majority of the weekends."

The court of appeals remanded the visitation issue to the trial court with the instruction to consider grandparents' request for visitation by applying "the appropriate legal standard set forth in *Troxel* and other binding authority, recognizing the paramount right of Mother to decide with whom her Child may associate."

Where are we now?

Until there is further guidance from the appellate courts, this is what we know now about a court's authority to award grandparent visitation rights.

1. Pursuant to G.S. 50-13.1, the court can grant custody or visitation to a grandparent if the court concludes the parent has waived her constitutional right to custody by being unfit, neglecting the welfare of the child or otherwise acting inconsistent with her fundamental

Due Process right to exclusive care, custody and control of her child, and the trial court concludes visitation is in the best interest of the child; and

2. Pursuant to the grandparent visitation statutes, GS 50-13.2(b1) and G.S. 50-13.5(j), the court can grant visitation rights to a grandparent when there is an on-going custody dispute between the parents and:
    1. The grandparent overcomes the presumption that the parent's decision regarding visitation is in the best interest of the child,
    2. The court concludes visitation is in the best interest of the child, and
    3. The visitation awarded does not adversely interfere with the parent/child relationship.

Intervention in Custody and Child Support Cases

It is not uncommon for third parties to assert rights or claims against parents litigating child custody and child support. For example, grandparents frequently want the court to grant them visitation rights as part of a custody order resolving a dispute between the child's mother and father. Similarly, the IV-D child support enforcement agency or a non-parent who has been caring for a child often need to assert rights or claims in child support cases pending between the child's parents.

Before these people can assert claims or rights in an existing case, they must become parties to the case through the process of intervention.

What is intervention?

The NC Supreme Court explained intervention as follows:

"Only parties of record to a suit have a standing therein which will enable them to take part in or control the proceedings. If they desire to seek relief with respect to the matters involved they must either obtain the status of parties in the suit or, in proper instances, institute an independent action. Thus a person not originally a party may be permitted to become a party by his own intervention. 'In legal terminology, 'intervention' is the proceeding by which one not originally a party to an action is permitted, on his own application, to appear therein and join one of the original parties in maintaining the action or defense, or to assert a claim or defense against some or all of the parties to the proceeding as originally instituted. Stated in another way, 'intervention' is the admission by leave of court of a person not an original party to the pending legal proceeding, by which such person becomes a party thereto for the protection of some right or interest alleged by him to be affected by such proceeding." (citations omitted)

Strickland v. Hughes, 273 NC 481 (1968).

Once allowed to intervene, a person "has the same right to participate in the lawsuit as any other party." G. Gray Wilson, North Carolina Civil Procedure, p. 24-2. *See also Warner Inc. v. Nissan Motor Co*., 66 NC App 73 (1984)("[a]fter intervention, an intervener is as much a party to the action as the original parties are").

Procedure for intervention

Rule 24 of the Rules of Civil Procedure provides the process for intervention. As common as intervention is in family law matters, practitioners and litigants often fail to follow that process when asking to intervene. Rule 24 states:

"Intervention.

…….

(c) Procedure. - A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and *shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought*. The same procedure shall be followed when a statute gives a right to intervene, except when the statute prescribes a different procedure." (emphasis added).

Very frequently, litigants file motions to intervene without including the required pleading. The court of appeals has held that a motion to intervene filed without an appropriate pleading is defective. *State Employees' Credit Union v. Gentry*, 75 NC App 260 (1985). The type of pleading required is the type of pleading necessary to assert the claim or right that is the basis for the request to intervene. *Id.* The court should deny the motion to intervene if the pleading fails to state a claim giving the intervener the right for the relief requested. *See e.g., Eakett v. Eakett*, 157 NC App 550 (2003)(grandparent's motion to intervene denied where the accompanying motion in the cause requesting visitation did not allege child was not living in an in-tact family).

The party seeking to intervene must serve the motion to intervene and the pleading on the other parties to the action by Rule 5 service. The intervener is not required to have a summons issued or to effect service of the pleading by Rule 4, *Kahan v. Longiotti*, 45 NC App 367 (1980), unless required by Rule 5(a)(when new claim is asserted against a party in default for failure to appear, the new claim must be served by Rule 4 service).

Timeliness of request to intervene

The court of appeals has stated that the timeliness of the motion to intervene in relation to the existing litigation is "a threshold issue" for a court determining whether to grant a motion to intervene. *State Employees' Credit Union v. Gentry*, 75 NC App 260 (1985). In determining whether a motion to intervene is timely, the trial court should consider:

"…the status of the case; the unfairness or prejudice to the existing parties; the reason for the delay in moving for intervention; the resulting prejudice to the applicant if the motion is denied; and any unusual circumstances. *NAACP v. New York,* 413 U.S. 345, 93 S.Ct. 2591, 37 L.Ed.2d 648 (1973)."

Id.

The court of appeals also has stated that motions to intervene made before final judgment in a civil

case “are seldom denied” and that interventions after final judgment are appropriate only in extraordinary circumstances. *Id*. However, unlike other types of civil cases, requests for relief after a final adjudication are common and often appropriate in custody and child support cases. *See eg. Robbins v. Hunt*, 784 SE2d 219 (2016)(child support enforcement agency has statutory right to intervene in child support case at any time as long as the court retains jurisdiction to address child support).

The trial court cannot allow a party to intervene in an action after the court has lost jurisdiction over the case. *See Price v. Breedlove*, 138 NC App 149 (1995)(a party cannot intervene in a custody case between child’s parents following the death of one of the parents because the death of the parent terminated the jurisdiction of the trial court). *But cf. Sloan v. Sloan*, 164 NC App 190 (2004)(where grandparents had been awarded visitation rights in custody case between parents before the death of one of the parents, trial court retained jurisdiction to hear grandparents’ motion to modify).

Hearing on the motion to intervene

The only issue to be determined at an intervention hearing is whether the court should allow intervention and it generally is not appropriate to litigate factual issues relating to the substance of the intervener’s claim at that stage of the proceeding. *See e.g., Eakett, supra* (grandparent motion to intervene in custody case dismissed based on allegations in the pleadings); *Perdue v. Fuqua*, 195 NC App 583 (2009)(grandparent motion to intervene decided on allegations in he pleadings); and *Pender Country Child Support Enforcement Agency ex. rel. Crews v. Parker*, 319 NC 354 (1987)(grandmother’s motion to intervene in child support case decided on the basis of the allegations in her motion and pleading).

The NC Supreme Court has held that the trial court is not required to make specific findings of fact and conclusions of law to support an order allowing or denying intervention. *Virmani v. Presbyterian Health Services Corp.*, 350 NC 449 (1999)(reversing court of appeals decision that trial court erred by resolving a request for intervention summarily, without making written findings of fact and conclusions of law).

Who can intervene in a custody or child support case? The topic for my next post.

Nonparent custody claims: Court of Appeals confirms that an evidentiary hearing is not required to determine standing

Consider the situation where a grandparent or other nonparent files a custody action against a parent. The complaint includes allegations regarding the relationship between the nonparent and the child and includes allegations that the parent has waived their constitutional right to exclusive care, custody and control of the child. In response, the parent files an answer and a motion to dismiss the complaint pursuant to Rule 12(b), arguing that the nonparent does not have standing to seek custody of the child. To determine whether the complaint should be dismissed for plaintiff's lack of standing, does the court need to conduct an evidentiary hearing to determine whether the parent has waived their constitutional right to custody or is the standing determination made on a review of the complaint alone?

In a recent case, the Court of Appeals clarified that the standing determination is made on the court's review of the complaint alone.

Thomas v. Oxendine, N.C. Ct. App. (Dec. 7, 2021)

Plaintiffs are the paternal grandparents of the minor child whose custody is at issue in this case. The grandparent complaint alleged that plaintiffs are the child's paternal grandparents and that they have a close, substantial relationship with the child. In addition, the complaint alleged that the child's mother acted inconsistent with her protected status as a parent, thereby waiving her constitutional right to custody, by repeatedly and willfully failing to protect the child from danger and harm caused by the actions of mother's husband, the child's stepfather. The trial court entered an emergency ex parte order awarding custody of the child to plaintiffs and, following a hearing, entered a temporary custody order continuing custody with plaintiffs until the permanent custody trial.

Mother then filed a motion to dismiss, alleging grandparents had failed to state a claim in that the allegations regarding mother's conduct were insufficient to support a conclusion that she had acted inconsistent with her protected status as a parent and alleging that grandparents did not have standing to bring the custody action because they did not "allege an in loco parentis relationship with the child." The trial court denied the motion to dismiss and, following a trial on permanent custody, awarded primary custody of the child to plaintiffs.

Standing

On appeal, mother argued, among other things, that the trial court erred by determining that grandparents had standing without taking evidence. She argued that because a nonparent must prove by clear and convincing evidence that a parent has waived their constitutional right to custody before a trial court can award custody to the nonparent, the trial court must base a

determination of standing on actual evidence rather than on the sufficiency of the allegations in the complaint.

The Court of Appeals rejected mother's argument, stating:

"Standing is required to confer subject matter jurisdiction. *Wellons v. White*, 229 N.C. App. 164, 176, 748 S.E.2d 709, 718 (2013). "A [trial] court's subject matter jurisdiction over a particular matter is invoked by the pleading." *Boseman v. Jarrell*, 364 N.C. 537, 546, 704 S.E.2d 494, 501 (2010). At the motion to dismiss stage, all factual allegations in the pleadings are viewed in the light most favorable to the plaintiff, granting the plaintiff every reasonable inference. *Grindstaff v. Byers*, 152 N.C. App. 288, 293, 567 S.E.2d 429, 432 (2002)."

"To survive a motion to dismiss for lack of standing, grandparents must allege both that they are the grandparents of the minor child and facts sufficient to demonstrate that the minor child's parent is unfit or has engaged in conduct inconsistent with their parental status. *See, e.g., Rodriguez v. Rodriguez*, 211 N.C. App. 267, 276, 710 S.E.2d 235, 241-42 (2011) ("[The] plaintiffs had standing to proceed in an action for custody pursuant to N.C. Gen. Stat. § 50-13.1(a) as they alleged they are the grandparents of the children and that [the] defendant had acted inconsistently with her parental status and was unfit because she had neglected the children.") (citation omitted); *Grindstaff*, 152 N.C. App. at 292, 567 S.E.2d at 432 ("[G]randparents alleging unfitness of their grandchildren's parents have a right to bring an initial suit for custody[.]").

"[In arguing that evidence is required to determine standing], [m]other confuses two distinct but related stages in a custody dispute between a parent and non-parent, namely: (1) the standing and pleading requirements of the complaint at the motion to dismiss stage, and (2) the burden of producing evidence at the custody hearing sufficient to prove that a parent has waived the constitutional protections guaranteed to them. *Gray v. Holliday*, 2021-NCCOA-178, (unpublished). Where, as here, the pleading alleges sufficient facts to show that plaintiffs are the grandparents of the minor child and that the parent is unfit or has engaged in conduct inconsistent with their parental status, Grandparents had standing, and the trial court had subject matter jurisdiction to hear the case."

Conduct Inconsistent with Protected Status

In reviewing the permanent custody order entered by the trial court, the court of appeals explained that even when nonparent plaintiffs have standing, the plaintiffs still have the burden of proving by clear and convincing evidence during the permanent custody hearing that the parent has waived their constitutional right to exclusive custody of the child. The appellate court affirmed the permanent order in this case, concluding that plaintiffs' evidence was sufficient to show that mother failed to protect the child from the stepfather's abusive behavior and inappropriate discipline and that she also had "relinquished otherwise exclusive parental authority to" the grandparents when she left the child in grandparents care with no "definitive timeframe, oversight

or instruction" and otherwise regularly relied on "grandparents in a parental capacity for the minor child and intended for grandparents to shoulder parental responsibility."

Conclusory or vague statements in the complaint regarding conduct inconsistent with a parent's protected status are not sufficient to establish standing. To survive a motion to dismiss, the allegations in the complaint must be such that, if proven by clear and convincing evidence during the custody trial, will support a conclusion that the parent has waived their constitutional right to custody. *See Perdue v. Fuqua*, 195 N.C. App. 583 (2009) (allegations by grandmother that father had lost his job, began working third shift, left very young girlfriend alone to care for child, and left child in her custody for four months were insufficient to state a claim for custody against father); and *McDuffie v. Mitchell*, 155 N.C. App. 587 (2002) (trial court properly dismissed grandparent complaint for custody against father where complaint alleged only that the father "had been estranged from the children for some time and currently enjoys limited visitation with the children"; allegations were insufficient as a matter of law to support a finding that father had waived his right to custody). *Cf. Ellison v. Ramos*, 130 N.C. App. 389 (1998) (pleading sufficient to withstand dismissal where caretaker alleged she had cared for child since birth and that father had placed child in care of others who were unable to care for child's medical conditions resulting in child's hospitalization); *Grindstaff v. Byers,* 152 N.C. App. 288 (2002) (complaint was sufficient where grandmother alleged that parents had left children in her care and had visited the children infrequently and inconsistently and had not shown they were capable of caring for and supervising the children);

Intervention

I wrote about intervention procedure in custody and child support cases in this blog post: https://civil.sog.unc.edu/intervention-in-custody-and-child-support-cases/

The *Thomas* decision offers further support for the cases cited in that post indicating that an evidentiary hearing is not required to determine whether a nonparent has a right to intervene in a custody proceeding pending between other parties. The trial court makes the determination by reviewing the sufficiency of the allegations in the pleading filed by the intervenors. The full evidentiary hearing on the issue of the parent's constitutional right to custody will occur during the permanent custody trial.