

Grandparent Custody and Visitation

Statutes grandparents can use to request custody/visitation

G.S. 50-13.1	G.S. 50-13.2(b1)	G.S. 50-13.5(j)	G.S. 50-13.2A
<ul style="list-style-type: none"> • Any person seeking custody can request custody (including just visitation) pursuant to this statute • A general statute; anyone can use, including grandparents • Custody determined by best interest analysis <ul style="list-style-type: none"> • Parent v. Nonparent: no best interest unless parent has lost constitutional right to exclusive custody 	<ul style="list-style-type: none"> • Court can grant grandparent visitation as part of any custody order • Grandparent can request only when claim pending between parents • Court must presume that parent's decision re visitation is in best interest of child • If presumption is rebutted, visitation cannot interfere with parent/child relationship 	<ul style="list-style-type: none"> • Court can grant grandparent visitation when modifying custody order • Grandparent can request only when claim pending between parents • Court must presume that parent's decision re visitation is in best interest of child • If presumption is rebutted, visitation cannot interfere with parent/child relationship 	<ul style="list-style-type: none"> • Court can grant grandparent visitation when stepparent/relative adoption

From Trial Judges Bench Book, Volume 1, Chapter 4 (2021)

1. Grandparents: custody (including visitation)

- A. Grandparents may assert a claim for full or joint custody under **G.S. 50-13.1(a)**.
- 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).]

1. 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).]
 2. 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) (quoting *McDuffie v. Mitchell*, 155 N.C. App. 587, 589, 573 S.E.2d 606, 607-08 (2002) and *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".)]
 3. 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. The "intact family analysis" does not apply to custody and visitation claims brought under 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.
- E. Sufficiency of allegations in complaint by grandparent seeking custody.
1. 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).]
 2. 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).]

3. 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).]
4. 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.

1. 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).]
2. 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).]
3. 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).]

4. 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).]

II. 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).**
 1. 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.
 2. 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).]
 4. 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).]
 5. 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).]

B. The grandparent visitation statutes.

1. 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)).]
2. 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).]
3. 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 Due Process. [*Alexander v. Alexander*, 276 N.C. App. 148, 856 S.E.2d 136 (2021).]

C. **G.S. 50-13.2(b1)**

1. 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. The term 'grandparent' includes a biological grandparent of a child adopted by a stepparent or relative of the child where a substantial relationship exists between the grandparent and the child.
2. 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 (2021) (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).]

4. 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).]
5. 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 (2021) (application of G.S. 50-13.2(b1) in this case violated mother's Due Process 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).]

D. G.S. 50-13.2A

1. 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).]
2. 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).]
3. 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).]

4. 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).]

E. **G.S. 50-13.5(j)**

1. 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. The term 'grandparent' includes a biological grandparent of a child adopted by a stepparent or relative of the child where a substantial relationship exists between the grandparent and the child.
2. 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).]
3. 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).]
4. 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 (2021) (application of G.S. 50-13.2(b1) in this case violated mother's Due Process 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).]