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Chapter 4
Child Custody

In cooperation with the School of Government, The University of North Carolina at Chapel Hill
by Cheryl D. Howell and Jan S. Simmons

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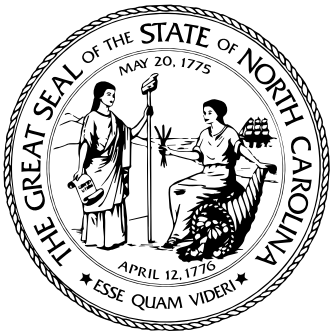

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Chapter 4: **Child Custody**

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I. Jurisdiction and Venue

A. Subject Matter Jurisdiction

1. District and superior courts have original and concurrent jurisdiction. [G.S. 7A-240, 7A-242.] District court is the proper court for custody proceedings. [G.S. 7A-244; 50-13.5(h) (custody action shall be heard by district court judge).]
    a. If a custody action involves an issue regarding paternity, the district court cannot address the paternity issue if a legitimation action is pending in superior court. [*Smith v. Barbour,* 154 N.C. App. 402, 571 S.E.2d 872 (2002) (where father filed a custody action in district court that included a request for a determination of paternity and on same day filed a legitimation action in superior court, the district court was divested of jurisdiction to proceed on paternity claim and, therefore, erred in ordering a paternity test as part of a temporary custody order), *cert. denied*, 599 S.E.2d 408 (2004).]
2. Subject matter jurisdiction is determined by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), G.S. Chapter 50A (until Oct. 1, 1999, applicable statute was the Uniform Child Custody Jurisdiction Act (UCCJA)). Subject matter jurisdiction is determined at the time of filing.
3. Trial court must have jurisdiction pursuant to the UCCJEA before entering any child custody order. [G.S. 50A-201(b) (this statute is "the exclusive jurisdictional basis for making a child-custody determination by a court of this State"); *Williams v. Walker,* 185 N.C. App. 393, 399, 648 S.E.2d 536, 541 (2007) (quoting *Foley v. Foley,* 156 N.C. App. 409, 411, 576 S.E.2d 383, 385 (2003)) (". . . jurisdictional requirements of the UCCJEA must be met for a court to have power to adjudicate child custody disputes").]
    a. For a determination of subject matter jurisdiction in a case with no previously entered custody order, see Section III.A, below (initial determinations).
    b. For a determination of subject matter jurisdiction to modify an existing custody order, see Section IV.A, below (modification of orders).
    c. For UCCJEA Subject Matter Jurisdiction Flowchart, see Appendix A.
    d. All courts have subject matter jurisdiction to enforce a custody order entered by a court with appropriate jurisdiction. [*See* G.S. 50A-303(a); see also Section VII.C, below (enforcement of orders of other states).]
4. Parties cannot confer jurisdiction by consent on a court that does not have jurisdiction pursuant to the UCCJEA. [Official Comment, G.S. 50A-201; *Foley v. Foley,* 156 N.C. App. 409, 576 S.E.2d 383 (2003) (subject matter jurisdiction cannot be conferred by consent,

waiver, or estoppel); *Sloop v. Friberg*, 70 N.C. App. 690, 320 S.E.2d 921 (1984) (subject matter jurisdiction in custody case cannot be conferred by waiver, estoppel, or consent).]

a. Regardless of whether subject matter jurisdiction is raised by the parties, a court must dismiss an action on the court's own motion when jurisdiction is lacking. [*In re N.R.M.,* 165 N.C. App. 294, 598 S.E.2d 147 (2004).]

5. Because jurisdiction under the UCCJEA is determined primarily by the past and present location of the child, G.S. 50A-209 requires that the following information be submitted in the initial pleading of every custody proceeding or by attached affidavit. [*In re Bhatti,* 98 N.C. App. 493, 391 S.E.2d 201 (1990).]

a. The child's present address or whereabouts;

b. The places where the child has lived the last five years;

c. The names and present addresses of the persons with whom the child has lived during the last five years;

d. Whether the party has been a party, witness, or other kind of participant in any proceeding concerning the custody of or visitation with the child and, if so, the identity of the court, the case number, and the date of any child custody determination;

e. Whether the party knows of any proceedings that could affect the current proceeding, including proceedings for enforcement and proceedings for domestic violence, termination of parental rights, and adoption and, if so, the identity of the court, the case number, and the nature of the proceeding; and

f. Whether the party knows the names and addresses of any person not a party to the proceeding who has physical custody of the child or claims rights of legal or physical custody of or visitation with the child and, if so, the names and addresses of such persons. [G.S. 50A-209(a).]

6. Failure to comply with G.S. 50A-209 does not defeat subject matter jurisdiction. [*In re Clark,* 159 N.C. App. 75, 582 S.E.2d 657 (2003) (citing *Pheasant v. McKibben*, 100 N.C. App. 379, 396 S.E.2d 333 (1990), *review denied,* 328 N.C. 92, 402 S.E.2d 417 (1991)) (failure to attach the G.S. 50A-209 affidavit does not, by itself, divest the trial court of jurisdiction); *Pheasant*.] However, if the required information is not furnished, the court may stay the proceeding until such information is presented. [G.S. 50A-209(b).]

7. Findings.

a. Evidence in the record must support the trial court's conclusion of law that it has subject matter jurisdiction under the UCCJEA. [*Foley v. Foley,* 156 N.C. App. 409, 576 S.E.2d 383 (2003) (order vacated when there was no evidence to support trial court's subject matter jurisdiction; record lacked evidence of minor's place of birth and length of time minor resided in North Carolina, and prior orders made no home state determination).]

b. Some appellate cases have indicated that findings of fact to establish jurisdiction are desirable but not legally required. [*See In re J.C.*, 235 N.C. App. 69, 760 S.E.2d 778 (2014), *rev'd on other grounds*, 368 N.C. 89, 772 S.E.2d 465 (2015); *Powers v. Wagner,* 213 N.C. App. 353, 716 S.E.2d 354 (2011); *In re E.X.J.*, 191 N.C. App. 34, 662 S.E.2d 24 (2008), *aff'd per curiam*, 363 N.C. 9 (2009); *In re T.J.D.W.*, 182 N.C. App. 394, 642

S.E.2d 471, *aff'd per curiam*, 362 N.C. 84 (2007); *Senner v. Senner,* 161 N.C. App. 78, 587 S.E.2d 675 (2003).]

c. Other cases hold that specific findings on subject matter jurisdiction under the UCCJEA are required. [*See In re E.J.*, 225 N.C. App. 333, 339, 738 S.E.2d 204, 208 (2013) (citing *Williams v. Williams,* 110 N.C. App. 406, 430 S.E.2d 277 (1993)) (stating that "[w]ithout . . . specific findings, the order was insufficient to invoke exclusive jurisdiction in North Carolina."); *see also Foley v. Foley*, 156 N.C. App 409 (2003) (vacating and remanding because order contained no findings as to jurisdiction, but also stating that there was no evidence in the record to support such findings).]

8. If a question of jurisdiction is raised in a custody proceeding, upon request of a party, the question must be given priority on the calendar and "handled expeditiously." [G.S. 50A-107.]

9. A child-custody determination as defined under the UCCJEA in G.S. 50A-102(3):

   a. Includes a judgment, decree, or other order of a court providing for the legal or physical custody of, or visitation with, a child, including permanent, temporary, initial, and modification orders.

   b. Does not include an order relating to child support or other monetary obligation of an individual.

10. Types of proceedings in which a custody determination can occur. A child custody proceeding as defined under the UCCJEA:

    a. Means any proceeding in which legal custody, physical custody, or visitation with a child is an issue and

    b. Includes proceedings for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence in which the issue may appear. [G.S. 50A-102(4); *Danna v. Danna*, 88 N.C. App. 680, 364 S.E.2d 694 (UCCJA, the statute in effect until adoption of the UCCJEA, applies to custody determinations made in actions brought pursuant to G.S. Chapter 50B), *review denied*, 322 N.C. 479, 370 S.E.2d 221 (1988); *In re M.M.*, 230 N.C. App. 225, 750 S.E.2d 50 (2013) (citing *In re Van Kooten*, 126 N.C. App. 764, 487 S.E.2d 160 (1997)) (child custody determination includes a determination made in abuse, dependency, or neglect proceedings involving the child).]

    c. Does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under Part 3, Article 2 of the UCCJEA. [G.S. 50A-102(4).]

B. Personal Jurisdiction

1. While a defendant in a custody case must be served with process, in personam jurisdiction ("minimum contacts") over a nonresident party is not required in a child custody proceeding. [G.S. 50A-201(c) (personal jurisdiction over a party or a child is not necessary to make a child-custody determination); *Shingledecker v. Shingledecker*, 103 N.C. App. 783, 407 S.E.2d 589 (1991) (citing *Hart v. Hart*, 74 N.C. App. 1, 327 S.E.2d 631 (1985)). *See also Coble v. Coble*, 229 N.C. 81, 47 S.E.2d 798 (1948) (child custody action is a proceeding in rem); *cf. In re Finnican*, 104 N.C. App. 157, 408 S.E.2d 742 (1991) (a nonresident defendant must have minimum contacts with North Carolina before a court here may

terminate the parent's rights), *cert. denied,* 330 N.C. 612, 413 S.E.2d 800 (1992), *overruled in part on other grounds by Bryson v. Sullivan*, 330 N.C. 644, 412 S.E.2d 327 (1992).]

2. Notice.

   a. Notice and an opportunity to be heard must be given to persons entitled to notice under the law of this state as in child custody proceedings between residents of this state, parents whose rights have not been terminated, and anyone having physical custody of the child. [G.S. 50A-205(a); 50A-108; *Henson v. Henson*, 95 N.C. App. 777, 384 S.E.2d 70 (1989) (custody determination made without appropriate notice is not enforceable under UCCJA, the statute in effect until adoption of the UCCJEA).]

   b. Wife had sufficient notice, under Vermont's UCCJA, that hearing in Vermont would address not only husband's motion to enforce Vermont temporary custody order but also the issue of Vermont's jurisdiction over the matter, even though the notice did not indicate that the Vermont court would consider jurisdiction. [*Chick v. Chick,* 164 N.C. App. 444, 596 S.E.2d 303 (2004) (notice informed wife that she could lose custodial rights by not appearing and her response raised issue of jurisdiction).]

   c. Service of process is as in other civil actions, and motions in an existing case may be made on ten days' notice. [G.S. 50-13.5(d)(1); 50A-205(a) (lists persons who must receive notice).]

      i. Service and notice must be in accordance with G.S. 1A-1, Rule 4 and Rule 5. [*See Osborne v. Osborne,* 129 N.C. App. 34, 497 S.E.2d 113 (1998) (placing notice of hearing in attorney mailbox located in office of the clerk of court and placing hearing on judge's trial calendar held not sufficient to give required notice of hearing).]

      ii. When determining the sufficiency of service pursuant to G.S. 1A-1, Rule 4(j)(1) d. and 1-75.10(a)(5), both of which require "delivery to the addressee," the crucial inquiry is whether the defendant in fact received the summons and complaint, not whether the delivery service employee personally served the individual addressee or his service agent. [*Washington v. Cline*, 233 N.C. App. 412, 761 S.E.2d 650 (citing *Granville Med. Ctr. v. Tipton,* 160 N.C. App. 484, 586 S.E.2d 791 (2003)) (service on city employees and current and former police officers was proper under G.S. 1A-1, Rule 4(j)(1)d., even though no employee or officer was personally served (one FedEx package was left at the side door of addressee's home, one FedEx package was left with a visiting 12-year-old grandson, one FedEx package was left with the defendant's receptionist, and six FedEx packages were delivered to the police department loading dock to person responsible for receiving deliveries; evidence of service by designated delivery service, which included delivery receipts and affidavits from defendants admitting that they all, in fact, received the packages, met requirements for proof of service in G.S. 1-75.10(a)(5)), *review denied, dismissed,* 367 N.C. 788, 766 S.E.2d 657 (2014); *Carpenter v. Agee,* 171 N.C. App. 98, 613 S.E.2d 735 (2005) (delivery receipt signed by person other than defendant in certified mail case raised presumption that person who signed was acting as agent of defendant; service was presumed valid). *But see Hamilton v. Johnson,* 228 N.C. App. 372, 747 S.E.2d 158 (2013) (service by delivery service under G.S. 1A-1, Rule 4(j)(1)

d. was insufficient when delivery receipt was not personally signed by defendant; appellate court rejected plaintiff's argument that signature of another person on the receipt raised a presumption of proper service and that person signing was acting as agent of defendant).] **NOTE**: The *Washington* decision distinguishes *Hamilton* by stating that in *Hamilton*, "the Court makes no mention of whether the defendant actually received the summons and complaint, or more specifically, whether the plaintiff attempted to prove service under section 1-75.10 with affidavits indicating that the defendant received the summons and complaint." *Washington*, 233 N.C. App. at 426, 761 S.E.2d at 659–60.

iii. A party may waive right to notice by attending and participating in a hearing. [*Brandon v. Brandon*, 10 N.C. App. 457, 179 S.E.2d 177 (1971) (under former statute, defendant's objection to custody order entered with less than five days' notice was waived by defendant's appearance and participation by her counsel); *Williams v. Williams*, 46 N.C. App. 787, 266 S.E.2d 25 (1980) (defendant made a general appearance when defendant's counsel's participated with opposing counsel in a conference with the judge in chambers on a custody issue, giving the district court personal jurisdiction over defendant in a later proceeding even though defendant had not been served with process).]

iv. Service of process was accomplished in Japan where service complied with the Hague Convention on International Service of Process. Fact that actual summons served in Japan was dormant at time of service did not make service invalid where all appropriate alias and pluries actually had been issued in North Carolina. [*Hammond v. Hammond,* 209 N.C. App. 616, 708 S.E.2d 74 (2011).] For more on international service of process, *see* W. Mark C. Weidemaier, *International Service of Process Under the Hague Convention*, Admin. of Just. Bull. No. 2004/07 (UNC School of Government, Dec. 2004), http://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/aoj200407.pdf.

C. Venue [G.S. 50-13.5(f).]

1. A civil action or proceeding for custody may be commenced in the county in which the child resides or is physically present or in a county in which either of the child's parents resides. [G.S. 50-13.5(f).]

   a. However, an objection to improper venue is waived if not raised by defendant. In a case brought by grandmother seeking custody of her grandchildren, the trial court erred when it transferred venue *sua sponte* to Lee County, where the grandmother and children lived, when defendant parents had not objected to or requested a transfer of venue and grandchildren were physically present in Durham County District Court when case was called for hearing. [*Zetino-Cruz v. Benitez-Zetino*, 791 S.E.2d 100 (N.C. Ct. App. 2016) (location of defendant parents was unknown and residence or presence of grandmother, since she was not a parent, was not relevant to proper venue under G.S. 50-13.5(f)).]

   b. Even if Durham County was not a proper venue under G.S. 50-13.5(f), the trial court could not change venue unless a defendant filed a written request for a change of venue pursuant to G.S. 1-83. [*Zetino-Cruz v. Benitez-Zetino*, 791 S.E.2d 100 (N.C. Ct. App. 2016).]

2. When other actions are pending between the parties.
    a. Prior pending action seeking different relief.
        i. A claim for custody must be joined with or be filed as a motion in the cause in a pending action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce involving the child's parents if a final judgment has not been entered in the pending action. [G.S. 50-13.5(f).]
        ii. If an action for custody and support is pending and an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce is subsequently instituted in the same or another county, the court having jurisdiction of the prior action may, in its discretion, direct that the actions be consolidated and, in the event consolidation is ordered, must determine in which court the consolidated action will be heard. [G.S. 50-13.5(f).]
        iii. A prior pending adoption proceeding did not preclude a district court from having jurisdiction over father's subsequent custody action. An adoption proceeding and a custody action do not request precisely the same relief and, in this case, the parties were not the same, as father was not a party to the adoption proceeding, his consent not being required. [*Johns v. Welker,* 228 N.C. App. 177, 744 S.E.2d 486 (2013) (holding, however, that to avoid unresolvable conflicts, custody action must be held in abeyance until resolution of adoption proceeding). *See also Jessee v. Jessee,* 212 N.C. App. 426, 713 S.E.2d 28 (2011) (pending equitable distribution (ED) action did not abate husband's subsequent tort action for conversion based on allegedly fraudulent acts of the wife after the date of separation; even though dismissal of the tort action was not required, because of the "clear interrelationship" between the two actions, the ED action was to proceed to resolution, with the result to be considered in the tort action).]
    b. Prior pending action seeking the same relief.
        i. The general rule is that where a prior action is pending between the same parties involving the same subject matter in a court within the state having like jurisdiction, the prior action serves to abate the subsequent action. The ordinary test for determining whether the parties and causes are the same for the purpose of abatement by reason of the prior pending action is whether the two actions present a substantial identity as to parties, subject matter, issues involved, and relief demanded. [*Jessee v. Jessee,* 212 N.C. App. 426, 713 S.E.2d 28 (2011).]
        ii. Upon timely motion, an action for, or to modify, child custody filed in one county or district in North Carolina is abated if a pending action for custody was filed previously in a court of competent jurisdiction within North Carolina. [*Brooks v. Brooks*, 107 N.C. App. 44, 47, 418 S.E.2d 534, 536 (1992) (quoting *Clark v. Craven Reg'l Med. Auth.*, 326 N.C. 15, 20, 387 N.C. App. 168, 171 (1990)) (until children are emancipated, the case in which custody and support are originally determined remains pending and, if the parties remain the same, this prior pending action "works an abatement of a subsequent action . . . in another court of the state having like jurisdiction"). *Cf. Cushing v. Cushing,* 263 N.C. 181, 139 S.E.2d 217 (1964) (pending action for alimony and child support

in South Carolina could not abate subsequent action filed in North Carolina for the same relief; former action must be pending within this state).]

iii. A plea of abatement based upon a prior pending action, although not specifically enumerated in G.S. 1A-1, Rule 12(b), is a preliminary motion of the type enumerated in Rule 12(b)(2)–(5) and also an affirmative defense. Accordingly, the plea in abatement based on a prior pending action must be raised either in a pre-answer motion or set forth affirmatively in the answer and is waived if not timely raised. [*Brooks v. Brooks*, 107 N.C. App. 44, 418 S.E.2d 534 (1992) (father's action to modify custody and support was improperly dismissed, even though venue was not proper where filed, because mother's objection to venue was not timely made; mother's oral motion at trial, after pleadings were complete, was not timely and therefore was ineffective to raise the issue of the prior pending action).]

3. Court of original venue is proper court for subsequent actions. [*Tate v. Tate*, 9 N.C. App. 681, 683, 177 S.E.2d 455, 457 (1970) (emphasis added) (the court first obtaining jurisdiction "is the only proper court . . . [for] an action for the modification of an order *establishing* custody and support"); *Broyhill v. Broyhill*, 81 N.C. App. 147, 343 S.E.2d 605 (1986) (interpreting *Tate not to preclude a court from transferring venue*); *Latham v. Latham*, 74 N.C. App. 722, 329 S.E.2d 721 (1985) (where parties divorced, remarried, and separated again, court where first divorce action was filed retained jurisdiction over the minor child after second separation).]

   a. The statute relating to venue of an action for custody and support, G.S. 50-13.5(f), applies only to the institution of an action for custody and support and does not apply to a proceeding for modification of an existing order. [*Tate v. Tate*, 9 N.C. App. 681, 177 S.E.2d 455 (1970) (Forsyth County court was the proper court to modify a child support obligation originally ordered by a court in that county; modification action filed in Mecklenburg County was properly dismissed).]

   b. However, an action to modify custody may proceed in a county other than the original county if no objection to venue is raised in a timely manner. [*Brooks v. Brooks*, 107 N.C. App. 44, 418 S.E.2d 534 (1992) (mother waived right to remove custody and support modification case to New Hanover County, where earlier child support order was entered, when she did not seek removal either in a pre-answer motion or answer; mother's oral motion at trial not timely).]

4. Transfer of venue.

   a. The most common reasons for a change of venue in custody and support cases are found in G.S. 1-83, which provides that a court may change the place of trial when:

      i. The county in which the action is brought is not the proper one [G.S. 1-83(1) (venue is improper).]

         (a) "May change" venue as used in G.S. 1-83(1) has been interpreted to mean "*must* change" venue. [*Zetino-Cruz v. Benitez-Zetino*, 791 S.E.2d 100, 105 (N.C. Ct. App. 2016) (quoting *Kiker v. Winfield*, 234 N.C. App. 363, 364, 759 S.E.2d 372, 373 (2014)).]

      ii. The convenience of witnesses and the ends of justice would be promoted by the change. [G.S. 1-83(2) (venue is proper but may be changed for reasons in

the statute); *Broyhill v. Broyhill*, 81 N.C. App. 147, 343 S.E.2d 605 (1986) (court of original venue may, in its discretion, transfer the venue of an ongoing action for custody or support to a more appropriate county based on convenience of witnesses and parties and the best interest of the child); *Zetino-Cruz v. Benitez-Zetino*, 791 S.E.2d 100 (N.C. Ct. App. 2016) (change of venue under G.S. 1-83(2) is discretionary with the court).]

(a) G.S. 1-83(2) does not authorize a change of venue for the "convenience of the court." [*Zetino-Cruz v. Benitez-Zetino*, 791 S.E.2d 100, 108 (N.C. Ct. App. 2016).]

b. A court may not change venue *sua sponte* under G.S. 1-83, whether under 1-83(1) or 1-83(2), when no defendant had answered or objected to venue. [*Zetino-Cruz v. Benitez-Zetino*, 791 S.E.2d 100 (N.C. Ct. App. 2016) (trial court's authority to change venue under G.S. 1-83(1) **or** (2) is triggered by a defendant's objection to venue).] For more on this case, see Cheryl Howell, *No Sua Sponte Change of Venue Allowed*, UNC Sch. of Gov't: On the Civil Side Blog (Aug. 26, 2016), http://civil.sog.unc.edu/no-sua-sponte-change-of-venue-allowed.

5. Time for filing request to transfer venue.

a. A defendant must request a change of venue based on improper venue before the time of answering expires [G.S. 1-83.] or before pleading if a further pleading is permitted. [G.S. 1A-1, Rule 12(b)(3). *Stokes v. Stokes*, 821 S.E.2d 161 (N.C. 2018).]

b. Objection to **improper venue** pursuant to G.S. 1-83(1) in a custody or support proceeding must be raised either in a pre-answer motion pursuant to G.S. 1A-1, Rule 12 or set forth affirmatively in the answer. [*Stokes v. Stokes,* 821 S.E.2d 161 (N.C. 2018); *Brooks v. Brooks*, 107 N.C. App. 44, 418 S.E.2d 534 (1992) (failure to raise the defense in this manner constitutes a waiver of the defense; mother's oral motion at trial, after the pleadings were complete, was not timely and therefore was ineffective to raise the issue of the prior pending support action).]

c. Motions for change of venue based on **convenience of witnesses** pursuant to G.S. 1-83(2) are addressed to the discretion of the judge. A party may file a motion to change venue for the convenience of the witnesses at any time before trial if the party can make the required showing. [*Stokes v. Stokes,* 821 S.E.2d 161 (N.C.), *aff'g as modified* 811 S.E.2d 693 (N.C. Ct. App. 2018).]

6. Waiver of objection to venue.

a. Venue may be waived by any party. [*Chillari v. Chillari,* 159 N.C. App. 670, 583 S.E.2d 367 (2003) (citing *Teer Co. v. Hitchcock Corp.,* 235 N.C. 741, 71 S.E.2d 54 (1952)); *Bass v. Bass*, 43 N.C. App. 212, 258 S.E.2d 391 (1979).]

b. An objection to venue is waived if not timely filed. [*Chillari v. Chillari,* 159 N.C. App. 670, 583 S.E.2d 367 (2003) (objection to venue based on improper county waived when included in an untimely answer); *Brooks v. Brooks*, 107 N.C. App. 44, 418 S.E.2d 534 (1992) (mother waived right to remove custody and support modification case to New Hanover County, where earlier child support order was entered, when she did not seek removal either in a pre-answer motion or answer; mother's oral motion at trial not timely).]

c. Whether a defendant has waived objection to venue is reviewed on appeal de novo. [*Zetino-Cruz v. Benitez-Zetino*, 791 S.E.2d 100 (N.C. Ct. App. 2016).]

7. Appeal of an order granting or denying a motion for change of venue pursuant to G.S. 1-83.

   a. An order granting or denying a motion to change venue based on improper venue pursuant to G.S. 1-83(1) affects a substantial right and is immediately appealable. [*Stokes v. Stokes*, 821 S.E.2d 161 (N.C.), *aff'g as modified* 811 S.E.2d 693 (N.C. Ct. App. 2018).]

   b. An order granting or denying a discretionary transfer of venue based on convenience of witnesses pursuant to G.S. 1-83(2) does not affect a substantial right and is not subject to immediate appeal. [*Stokes v. Stokes*, 821 S.E.2d 161 (N.C.), *aff'g as modified* 811 S.E.2d 693 (N.C. Ct. App. 2018).]

8. For statute allowing the court in a juvenile proceeding to order consolidation of a G.S. Chapter 50 civil action or claim for custody with the juvenile proceeding, including ordering a change of venue, see Section II.Q.2.a, below.

D. Application of Foreign Law

1. Application of foreign law is prohibited if it results in a violation of constitutional rights.

   a. The application of foreign law in cases under G.S. Chapters 50 (Divorce and Alimony) and 50A (Uniform Child Custody Jurisdiction and Enforcement Act) is prohibited when it would violate a fundamental right of a person under the federal or state constitution. A motion to transfer a proceeding to a foreign venue must be denied when doing so would have the same effect. [See G.S. 1-87.14, 1-87.17, and other provisions in Article 7A in G.S. Chapter 1, *added by* S.L. 2013-416, effective Sept. 1, 2013, and applicable to proceedings, agreements, and contracts entered into on or after that date.]

E. Policy to Promote and Encourage Parenting Time by Both Parents

1. It is the policy of the State of North Carolina to encourage parents to enter into parenting agreements to reduce needless custody litigation, to take significant and ongoing responsibility for their child, to share equitably in the rights and responsibilities of parenting, and to establish and maintain a healthy relationship with each other. It also is the policy of North Carolina to encourage programs and court practices that reflect the active and ongoing participation of both parents in the child's life when it is in the child's best interest to do so. [*See* G.S. 50-13.01, *added by* S.L. 2015-278, § 1, effective Oct. 20, 2015.]

   a. For more discussion of this statute, see Cheryl Howell, *Kids Need Both Parents When Possible*, UNC Sch. of Gov't: On the Civil Side Blog (Oct. 30, 2015), http://civil.sog.unc.edu/kids-need-both-parents-when-possible.

II. Procedure

A. Generally

1. The procedure in a custody action is the same as in other civil actions, unless a specific statute provides otherwise. [G.S. 50-13.5(a).]

B. Standing Generally

1. 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, as hereinafter provided." [G.S. 50-13.1(a).] For discussion of standing in cases between a parent and a nonparent, see Section III.C.2, below.
2. "[S]tanding is measured at the time the pleadings are filed," meaning that the court is to determine whether an actual controversy existed when the relevant pleading was filed. [*Chávez v. Wadlington*, 821 S.E.2d 289, 295 (N.C. Ct. App. 2018) (quoting *Quesinberry v. Quesinberry,* 196 N.C. App. 118, 123, 674 S.E.2d 775, 778 (2009)).]
3. The court does not have subject matter jurisdiction if a custody action or proceeding is initiated by a person or entity that does not have standing.
    a. A person who is not a parent of a child must have a relationship with the child sufficient to give the person standing to seek custody or visitation in a proceeding against the child's parent. [*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 89 (1998).] See Section III.C.2, below.
    b. A relative generally has standing to seek custody or visitation of a child. [*Rodriguez v. Rodriguez*, 211 N.C. App. 267, 710 S.E.2d 235 (2011); *Yurek v. Shaffer*, 198 N.C. App. 67, 678 S.E.2d 738 (2009).] See Section III.C.2, below.
    c. A person convicted of first-degree forcible rape pursuant to G.S. 14-27.21, of statutory rape of a child by an adult pursuant to G.S. 14-27.23, or second-degree forcible rape pursuant to G.S. 14-27.22 is prohibited from seeking custody of a child conceived as a result of that criminal act. [G.S. 50-13.1(a), *amended by* S.L. 2015-181, § 35, effective Dec. 1, 2015, and applicable to offenses committed on or after that date. *Cf. Bobbitt ex rel. Bobbitt v. Eizenga,* 215 N.C. App. 378, 715 S.E.2d 613 (2011) (nothing in North Carolina law prohibits a person who has been required to register as a sex offender from seeking visitation with his child); *Bobbitt v. Eizenga,* 223 N.C. App. 210 (2012) (**unpublished**) (appeal after remand of 2011 case cited immediately above) (fact that father was mother's attempted statutory rapist is a factor the court should consider when determining whether to grant visitation to father).]
    d. A parent who has consented to the adoption of her 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 his consent to adoption), *review denied,* 343 N.C. 123, 468 S.E.2d 782 (1996); G.S. 48-3-607(b) (parent's consent to adoption

vests legal and physical custody of child in the prospective adoptive parent and empowers that person to petition for adoption of the child; for other purposes as set out in G.S. 48-3-607(c), child remains the child of the parent).]

e. 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)).] **NOTE**: Each county has either a department of social services (DSS) or a consolidated human services agency that includes social services. "DSS" when used herein refers to both structures.

f. 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)).]

4. Unless a contrary intent is clear, the word "custody" shall be deemed to include custody or visitation or both. [G.S. 50-13.1(a); *Oxendine v. Catawba Cty. Dep't of Soc. Servs.*, 303 N.C. 699, 281 S.E.2d 370 (1981) (procedures set out in G.S. 50-13.1 with regard to custody are not restricted to disputes involving separation and divorce).]

5. Marital status is not a factor in determining the procedure to obtain custody of a child. [*Latham v. Latham,* 74 N.C. App. 722, 329 S.E.2d 721 (1985).]

6. The court of appeals has held that nothing in G.S. Chapter 50 prohibits a parent from seeking custody while continuing to live together with the other parent and the child, at least when one party expresses an intent to leave the marital residence as soon as custody is settled. [*Baumann-Chacon v. Baumann,* 212 N.C. App. 137, 710 S.E.2d 431 (2011). *Cf. Harper v. Harper,* 50 N.C. App. 394, 273 S.E.2d 731 (1981) (indicating there is no justiciable issue regarding custody when parties live together).]

C. Type of Action

1. A claim for custody may be:

a. Maintained as an independent civil action. [G.S. 50-13.5(b)(1).]

i. If an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce involving the child's parents is pending and final judgment has not been entered, the custody action **must** be joined as a claim in the pending action for divorce, etc. "or be by motion in the cause in such action." [G.S. 50-13.5(f).]

ii. An independent civil action for custody may be prosecuted during the pendency of a subsequently filed action for divorce, etc. filed in the same or in a different

county or may, at the discretion of the court having jurisdiction of the prior proceeding, be consolidated with the action for divorce, etc. [G.S. 50-13.5(f).]

b. Joined as a claim in an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce. [G.S. 50-13.5(b)(3).]

i. If an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce involving the child's parents is pending and final judgment has not been entered, the custody action **must** be joined as a claim in the pending action for divorce, etc. "or be by motion in the cause in such action." [G.S. 50-13.5(f).]

ii. *See Holbrook v. Holbrook,* 38 N.C. App. 303, 247 S.E.2d 923 (1978) (because husband's divorce action was pending in Forsyth County when wife filed custody action in Guilford County, Guilford County was without jurisdiction), *review denied,* 296 N.C. 411, 251 S.E.2d 469, 470 (1979).

c. Filed as a cross action in an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce. [G.S. 50-13.5(b)(4).]

d. Joined with or filed as a counterclaim in a civil action seeking child support. [G.S. 50-13.5(b).]

i. In IV-D cases brought pursuant to Article 9 of G.S. Chapter 110 to establish, enforce, or modify child support or to establish paternity, collateral disputes between a custodial parent and a noncustodial parent involving visitation, custody, and similar issues shall be considered only in separate proceedings. [G.S. 110-130.1(c).] Collateral issues regarding visitation and custody cannot be filed in IV-D cases.

ii. A "IV-D case" is a case in which services have been applied for or are being provided by a child support enforcement agency established pursuant to Title IV-D of the Social Security Act, as amended, and Article 9 of G.S. Chapter 110. [G.S. 110-129(7).]

e. Filed by motion in the cause (either before or after judgment) in an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce. [G.S. 50-13.5(b)(5); *Latham v. Latham*, 74 N.C. App. 722, 329 S.E.2d 721 (1985) (action for child custody and support can be brought as motion in the cause in divorce proceeding after entry of divorce; court retains jurisdiction until one party dies or the children reach the age of 18).]

f. Maintained on the court's own motion in an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce. [G.S. 50-13.5(b)(6).]

2. The court of appeals has held that a custody claim may be filed by motion in the cause in a divorce action even after the divorce judgment has been entered. [*Latham v. Latham*, 74 N.C. App. 722, 329 S.E.2d 721 (1985) (a divorce action is pending for the purpose of determining custody and support of children until the death of one party or until the youngest child reaches majority, whichever first occurs). *See also Winfield v. Winfield,* 228 N.C. 256, 45 S.E.2d 259 (1947) (G.S. 50-13 provides that after a complaint is filed in any divorce action, both before and after final judgment, it is lawful for the judge to make such orders respecting the care, custody, tuition, or maintenance of the minor children of the marriage as may be proper).] Note that G.S. 50-13, which included the "both before and after

final judgment" language cited in *Winfield*, was repealed by S.L. 1967-1153, § 1, effective Oct. 1, 1967.

3. The court of appeals has held that nothing in G.S. Chapter 50 prohibits a parent from seeking custody while continuing to live together with the other parent and the child, at least when one party expresses an intent to leave the marital residence as soon as custody is settled. [*Baumann-Chacon v. Baumann,* 212 N.C. App. 137, 710 S.E.2d 431 (2011). *Cf. Harper v. Harper,* 50 N.C. App. 394, 273 S.E.2d 731 (1981) (indicating there is no justiciable issue regarding custody when parties live together).]

D. Definition of Custody

1. Legal custody.
   a. "Legal custody" is not defined in the general statutes. [*Diehl v. Diehl,* 177 N.C. App. 642, 630 S.E.2d 25 (2006).]
   b. "Legal custody" refers "generally to the right and responsibility to make decisions with important and long-term implications for a child's best interest and welfare." [*Peters v. Pennington,* 210 N.C. App. 1, 17, 707 S.E.2d 724, 736 (2011) (quoting *Diehl v. Diehl,* 177 N.C. App. 642, 646, 630 S.E.2d 25, 27 (2006)); *Hall v. Hall,* 188 N.C. App. 527, 534, 655 S.E.2d 901, 906 (2008) (quoting *Diehl*); *Diehl*.]
   c. Examples of decisions a parent with legal custody can make include:
      i. The child's education, health care, and religious training [*Patterson v. Taylor*, 140 N.C. App. 91, 535 S.E.2d 374 (2002) (interpreting "joint legal custody" in a separation agreement).] and
      ii. Discipline and other matters of major significance concerning the child's life and welfare. [*Diehl v. Diehl,* 177 N.C. App. 642, 630 S.E.2d 25 (2006); 3 Lee's North Carolina Family Law § 13.2b (5th ed. 2002).]
   d. If awarded joint legal custody, the parties share the right to make major decisions affecting the child's life or certain decisions are allocated between the custodians by the court. [*Diehl v. Diehl,* 177 N.C. App. 642, 630 S.E.2d 25 (2006); *Patterson v. Taylor*, 140 N.C. App. 91, 96, 535 S.E.2d 374 (2002) (because the General Assembly chose not to define "joint custody", the court, or the parties to a custody agreement, are free to define the term to fit the needs of a particular situation).]
2. Physical custody.
   a. "Physical custody" means the physical care and supervision of a child. [G.S. 50A-102(14).]
   b. Visitation is a lesser form of physical custody. [*Davis v. Davis,* 229 N.C. App. 494, 748 S.E.2d 594 (2013), and *Benedict v. Coe,* 117 N.C. App. 369, 451 S.E.2d 320 (1994) (both citing *Clark v. Clark,* 294 N.C. 554, 243 S.E.2d 129 (1978), *overruled on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998)). *See also 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).]
   c. Examples of decisions a parent with physical custody can make include:
      i. The child's routine, but not matters with long-range consequences. [*Diehl v. Diehl,* 177 N.C. App. 642, 630 S.E.2d 25 (2006).]

3. A trial court should clearly define the parameters of legal and physical custody. [*See Carpenter v. Carpenter*, 225 N.C. App. 269, 280–81, 737 S.E.2d 783, 791 (2013) (when the order "appeared" to grant joint legal and physical custody but did not actually so state, instead speaking in terms of primary and secondary care and control, the trial court on remand was advised to clearly define its grant of legal and physical custody, given "the substantial communication difficulties and different parenting styles of the parties").]

E. Jury Trials

1. Custody actions are tried before a judge without a jury. [G.S. 50-13.5(h).]

F. Language Access Services in Custody Proceedings

1. As of Oct. 14, 2013, language services have been expanded to all child custody and child support proceedings for all spoken foreign languages. Court interpreters shall be provided at state expense for all limited English proficient parties in interest who require interpreting services during a child custody or child support proceeding. ["Expansion of Language Access Services to All Child Custody and Child Support Proceedings," Memorandum from Brooke A. Bogue, N.C. Administrative Office of the Courts, Office of Language Access Services, to various judges, clerks, administrators, and others (Sept. 25, 2013).]
2. Information about Language Access Services is available at www.nccourts.org/Language-Access/. The North Carolina Judicial Branch's Standards for Language Access Services in North Carolina State Courts (Jan. 1, 2017) are available at https://www.nccourts.gov/assets/documents/publications/NC_Standards_for_Language_Access.pdf?1qPBAlVPgJvskb.qELZOzfdc6pNxM7Hd; www.nccourts.org/LanguageAccess/Documents/NC_Standards_for_Language_Access.pdf.

G. Temporary Custody Orders

1. Jurisdiction.
   a. G.S. 50-13.5(c)(2) and (d)(2) give the district court jurisdiction to enter temporary custody and support orders for minor children. [*Story v. Story*, 57 N.C. App. 509, 291 S.E.2d 923 (1982) (trial court properly granted a temporary order after concluding that the order would serve the best interest of the child); G.S. 50-13.5(d)(2) (temporary orders may be entered "[i]f the circumstances of the case render it appropriate.").]
   b. G.S. Chapter 50B gives the district court jurisdiction to enter temporary custody and support orders as part of a domestic violence protection order. For the effect of a temporary custody order entered in a Chapter 50B proceeding on a later Chapter 50 custody action, see Section II.U.3, below. For more on custody in the context of a domestic violence proceeding, see Domestic Violence, Bench Book, Vol. 1, Chapter 7.
2. Generally.
   a. Under appropriate circumstances, upon gaining jurisdiction of the child the court may enter orders for temporary custody and support, pending the service of process or notice. [G.S. 50-13.5(d)(2).]

b. Temporary custody orders establish a party's right to custody pending the resolution of a claim for permanent custody. [*Regan v. Smith*, 131 N.C. App. 851, 509 S.E.2d 452 (1998).]

c. Temporary orders may be based on affidavits. [*Story v. Story*, 57 N.C. App. 509, 291 S.E.2d 923 (1982).]

d. G.S. 50-13.5(d)(2) authorizes a court to enter temporary orders ex parte under certain circumstances. [*Regan v. Smith*, 131 N.C. App. 851, 509 S.E.2d 452 (1998); *Brandon v. Brandon*, 10 N.C. App. 457, 179 S.E.2d 177 (1971) (ex parte order awarding father temporary custody was appropriate under G.S. 50-13.5(d)(2) where father's affidavit alleged facts tending to show that mother was not suitable to exercise custody).]

   i. Note, however, that a temporary order which changes custody or changes the living arrangements of a child cannot be entered ex parte and prior to service of process or notice, unless the court finds that the child is exposed to a substantial risk of bodily injury, sexual abuse, or abduction or removal from the state for purpose of evading the jurisdiction of the court. [G.S. 50-13.5(d)(3).]

   ii. A temporary custody order entered ex parte does not expire automatically after ten days. [*Campen* (*Featherstone*) *v. Featherstone,* 150 N.C. App. 692, 564 S.E.2d 616 (recognizing that G.S. Chapter 50 does not limit a temporary custody order to a specific length of time, nor does case law establish a definite period of viability for temporary custody orders), *appeal dismissed, review denied,* 356 N.C. 297, 570 S.E.2d 504 (2002).]

   iii. A person seeking custody ex parte who has been convicted of a sexually violent offense set out in G.S. 14-208.6(5) must disclose the conviction in the pleadings. [G.S. 50-13.1(a1).]

   iv. The court of appeals has upheld the imposition of G.S. 1A-1, Rule 11 sanctions against mother who sought and received an ex parte order based on allegations that children had been sexually abused while in the custody of father where trial court subsequently determined there was no basis for mother's allegations and found the allegations were "consistent with a pattern of continuing alienating behavior." [*Lamm v. Lamm,* 210 N.C. App. 181, 191, 707 S.E.2d 685, 692 (2011).]

   v. For an overview of temporary custody orders, see Cheryl Howell, *When Is a Temporary Child Custody Order Really a Temporary Child Custody Order?* UNC Sch. of Gov't: On the Civil Side Blog (June 5, 2015), http://civil.sog.unc.edu/when-is-a-temporary-child-custody-order-really-a-temporary-child-custody-order.

e. A temporary custody order that requires a law enforcement officer to take physical custody of a minor child shall be accompanied by a warrant to take physical custody of a minor child as set forth in G.S. 50A-311. [G.S. 50-13.5(d)(3), *added by* S.L. 2017-22, § 2, effective Oct. 1, 2017, and applicable to orders for temporary custody on or after that date.] Form AOC-CV-667, Warrant Directing Law Enforcement to Take Immediate Physical Custody of Child(ren) Subject to A Child Custody Order, may be used. See Section V.D.1.a, below.

3. Third-party actions against parents.
    a. There is nothing in case law or statutes indicating a different standard for temporary orders in cases initiated by nonparent third parties against parents when the constitutional rights of the parent are at issue. [*See Smith v. Barbour*, 154 N.C. App. 402, 571 S.E.2d 872 (2002) (where trial court made findings to show plaintiff third party had standing to bring action against parent, trial court had authority to enter a temporary custody order granting temporary visitation to third party), *cert. denied,* 599 S.E.2d 408 (2004).]
    b. In addition, numerous third-party cases reviewed by both the North Carolina Supreme Court and the Court of Appeals included temporary orders by the trial court, and the appellate courts have not indicated such orders are inappropriate. [*See Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997) (trial court awarded temporary custody to plaintiff after blood tests revealed plaintiff was not the father of the child); *Owenby v. Young,* 357 N.C. 142, 579 S.E.2d 264 (2003) (ex parte and temporary orders removed child from parent and granted temporary custody to third party); *Speagle v. Seitz,* 354 N.C. 525, 557 S.E.2d 83 (2001) (ex parte order granted custody to grandparents following arrest of mother for murder of father), *cert. denied,* 536 U.S. 923, 122 S. Ct. 2589 (2002); *Mason v. Dwinnell,* 190 N.C. App. 209, 660 S.E.2d 58 (2008) (temporary order gave nonparent significant temporary visitation following denial of parent's motion to dismiss complaint for failure to state a claim); *Brewer v. Brewer*, 139 N.C. App. 222, 533 S.E.2d 541 (2000) (ex parte order granted temporary custody to nonparents and temporary order granted custody to parent, all based on "best interest").]
4. When an order may be temporary.
    a. An order is temporary if:
        i. The order was entered without prejudice to either party,
        ii. It states a clear and specific reconvening time and the time interval between the two hearings is reasonably brief, or
        iii. It does not determine all issues pertinent to custody or visitation. [*Tankala v. Pithavadian*, 789 S.E.2d 31 (N.C. Ct. App. 2016) (citing *Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003)); *Gary v. Bright,* 231 N.C. App. 207, 750 S.E.2d 912 (2013) (citing *File v. File,* 195 N.C. App. 562, 673 S.E.2d 405 (2009)); *Smith v. Barbour,* 195 N.C. App. 244, 671 S.E.2d 578, *review denied,* 363 N.C. 375, 678 S.E.2d 670 (2009); *Senner*.] The rules used to determine whether a child custody order is temporary or permanent "logically apply to the child support context as well." [*Sarno* v. *Sarno*, 235 N.C. App. 597, 600, 762 S.E.2d 371, 373 (2014).]
    b. If a child custody order does not meet any of the three criteria set out immediately above, the order is permanent. [*Dancy v. Dancy*, 247 N.C. App. 25, 785 S.E.2d 126 (2016) (citing *Peters v. Pennington,* 210 N.C. App. 1, 707 S.E.2d 724 (2011)).]
    c. Yet the court of appeals has stated that there is no absolute test for determining whether a custody order is temporary or final. [*Gary v. Bright,* 231 N.C. App. 207, 750 S.E.2d 912 (2013) (citing *Miller v. Miller,* 201 N.C. App. 577, 686 S.E.2d 909 (2009)); *LaValley v. LaValley,* 151 N.C. App. 290, 564 S.E.2d 913 (2002). *But cf. Maxwell*

v. Maxwell, 212 N.C. App. 614, 713 S.E.2d 489 (2011) (an order that does not contain a specific reconvening date will be considered permanent); *Woodring v. Woodring,* 227 N.C. App. 638, 745 S.E.2d 13 (2013) (2011 order that was not entered without prejudice to either party, did not state a specific reconvening time, and determined all the issues by setting an ongoing visitation schedule and determining primary and legal custody was a permanent order; however, 2010 order that provided for visitation for that year only, did not address legal custody, and set a date for the custody hearing twelve months later was a temporary order).]

d. To determine whether a custody order is temporary or permanent, the order is considered as a whole, not by its parts, and is not to be considered as part temporary or part permanent. [*Gary v. Bright,* 231 N.C. App. 207, 750 S.E.2d 912 (2013) (citing *Smith v. Barbour,* 195 N.C. App. 244, 671 S.E.2d 578 (2009)) (rejecting trial court's view of a portion of a custody order restricting father's visitation as temporary, with the remainder of the order being permanent). *Cf. McRoy v. Hodges,* 160 N.C. App. 381, 585 S.E.2d 441 (2003) (order that granted temporary custody to grandparents while child and father established a relationship, and granted permanent custody to father after such a relationship was established, considered a permanent custody order).]

e. A trial court's designation of an order as temporary is not controlling. [*Dancy v. Dancy*, 247 N.C. App. 25, 785 S.E.2d 126 (2016) (citing *Woodring v. Woodring,* 227 N.C. App. 638, 643, 745 S.E.2d 13, 18 (2013)); *Woodring* (citing *Smith v. Barbour,* 195 N.C. App. 244, 671 S.E.2d 578 (2009)) (trial court's designation is neither dispositive nor binding on an appellate court); *Simmons v. Arriola,* 160 N.C. App. 671, 586 S.E.2d 809 (2003); *Lamond v. Mahoney,* 159 N.C. App. 400, 583 S.E.2d 656 (2003).]

f. Long-term temporary orders are not favored. [*See Simmons v. Arriola,* 160 N.C. App. 671, 675, 586 S.E.2d 809, 811 (2003) (stating that it is the public policy in North Carolina that, where practicable, custody orders should be permanent or final to avoid the "turmoil and insecurity" that children face from constant litigation of their custody status).]

g. An order has been found to be temporary when it:

   i. Did not determine all issues related to custody. [*Dancy v. Dancy*, 247 N.C. App. 25, 785 S.E.2d 126 (2016) (2011 order that provided for father's in-person visitation during military leave in 2011 and 2012, which was only through child's 8th birthday, did not resolve all issues in the case); *Sood v. Sood,* 222 N.C. App. 807, 732 S.E.2d 603 (even though the order was not entered without prejudice and did not include a specific reconvening time, the order was temporary when it stated that the trial court lacked information to make vital findings about the parties' mental conditions and ordered evaluations and when it set a custodial schedule for holidays over a four-month period but not for the indefinite future), *writ denied, review denied, appeal dismissed*, 366 N.C. 417, 735 S.E.2d 336 (2012); *Tricebock v. Krentz,* 234 N.C. App. 118, 761 S.E.2d 754 (2014) (**unpublished**) (consent order that made no express provision for legal custody was a temporary order); *Moore v. Moore,* 232 N.C. App. 522, 757 S.E.2d 526 (2014) (**unpublished**) (citing *Woodring v. Woodring,* 227 N.C. App. 638, 745 S.E.2d 13

(2013)) (custody order that was completely silent on issue of visitation did not determine all issues and was temporary).]

ii. Was entered without prejudice to either party. [*Marsh v. Marsh*, 816 S.E.2d 529 (N.C. Ct. App. 2018); *Senner v. Senner*, 161 N.C. App. 78, 587 S.E.2d 675 (2003); *LaValley v. LaValley*, 151 N.C. App. 290, 564 S.E.2d 913 (2002).]

iii. Expressly provided for further proceedings to consider appropriateness of unsupervised visitation for a three-month period and to consider permanent visitation after that period. [*Lamond v. Mahoney,* 159 N.C. App. 400, 583 S.E.2d 656 (2003).]

iv. Did not specify visitation periods and provided for regular review to assess mother's recovery from a traumatic brain injury. [*Simmons* v. *Arriola,* 160 N.C. App. 671, 586 S.E.2d 809 (2003).]

v. Did not determine mother's visitation, which would only be decided after court-ordered psychological evaluations had been completed, and specified a date by which issue of visitation was to be scheduled, which was reasonably brief (three months). [*Smith v. Barbour,* 195 N.C. App. 244, 671 S.E.2d 578 (rejecting argument that order should be viewed as being permanent as to custody but temporary as to visitation), *review denied,* 363 N.C. 375, 678 S.E.2d 670 (2009).]

vi. Set review hearings to be held in thirty, sixty, and ninety days so trial court could consider mother's mental health evaluation and its effect on her visitation. [*Lueallen v. Lueallen*, 790 S.E.2d 690 (N.C. Ct. App. 2016) (appeal proceeded on other grounds).]

vii. Set out a specific reconvening time and the order was modified at a rehearing held within twenty months. [*Anderson v. Lackey,* 163 N.C. App. 246, 593 S.E.2d 87 (2004).] For other cases considering whether time for rehearing was reasonably brief, see Section II.G.6.c, below.

viii. Remained in effect for two years while parties litigated custody. [*Miller v. Miller,* 201 N.C. App. 577, 686 S.E.2d 909 (2009) (during the two years, motions requesting mediation and requesting psychiatric exam were filed, showing parties were actively pursuing the litigation).]

5. When an order is permanent.

a. A permanent order is one that establishes a party's present right to custody and that party's right to retain custody indefinitely. [*Regan v. Smith*, 131 N.C. App. 851, 509 S.E.2d 452 (1998).]

b. An order was permanent when it was not entered without prejudice to either party, failed to state a clear and specific reconvening time, and determined all the issues pertaining to custody. [*Brown v. Swarn*, 810 S.E.2d 237 (N.C. Ct. App. 2018); *Summerville v. Summerville*, 814 S.E.2d 887 (N.C. Ct. App. 2018); *Hatcher v. Matthews*, 789 S.E.2d 499 (N.C. Ct. App. 2016); *Gary v. Bright,* 231 N.C. App. 207, 750 S.E.2d 912 (2013); *Tankala v. Pithavadian*, 789 S.E.2d 31 (N.C. Ct. App. 2016) (order entered with prejudice to both parties, with no specific reconvening time, and that determined all issues before the trial court, was a permanent order).]

6. Conversion of a temporary order into a permanent order.
    a. The court of appeals has held that a temporary order converts into a permanent order when neither party seeks a permanent order within a reasonable time after entry of the temporary order. [*LaValley v. LaValley*, 151 N.C. App. 290, 564 S.E.2d 913 (2002) (hearing on permanent custody not set within a reasonable time); *Woodring v. Woodring,* 227 N.C. App. 638, 745 S.E.2d 13 (2013) (citing *LaValley)* (acknowledging that a temporary order may become permanent but clarifying that a temporary order that does not set an ongoing visitation schedule cannot become permanent by operation of time).] The significant date is the date the hearing is set or requested to be set by one of the parties, rather than the date of the hearing itself. [*LaValley v. LaValley*, 151 N.C. App. 290, 292 n.5, 564 S.E.2d 913, 915 n.5 (2002) (crowded court calendars should not result in a party losing the benefit of a temporary order if the party is making "every effort" to get the case tried but cannot do so because of a backlog of cases); *Eddington v. Lamb*, 818 S.E.2d 350 (N.C. Ct. App. 2018) (court should consider the time when party requested a hearing on permanent custody, rather than the time of the hearing); *Tricebock v. Krentz,* 234 N.C. App. 118, 761 S.E.2d 754 (2014) (**unpublished**) (citing *LaValley*).]
    b. No case has determined the length of time that a temporary order remains in effect. [*See LaValley v. LaValley,* 151 N.C. App. 290, 292 n.5, 564 S.E.2d 913, 915 n.5 (2002) (noting in dicta that a temporary order "is not designed to remain in effect for extensive periods of time or indefinitely"); *see also Campen* (*Featherstone*) *v. Featherstone,* 150 N.C. App. 692, 564 S.E.2d 616 (citing *Cox v. Cox,* 133 N.C. App. 221, 515 S.E.2d 61 (1999)) (recognizing that G.S. Chapter 50 does not limit a temporary custody order to a specific length of time, nor does case law establish a definite period of viability for temporary custody orders), *appeal dismissed, review denied,* 356 N.C. 297, 570 S.E.2d 504 (2002).] "However, the passage of time alone will not convert a temporary order into a permanent order." [*Dancy v. Dancy*, 247 N.C. App. 25, 31,785 S.E.2d 126, 130 (2016) (citing *Senner v. Senner,* 161 N.C. App. 78, 587 S.E.2d 675 (2003)).]
    c. Whether time is reasonable must be determined on a case-by-case basis. [*Senner v. Senner,* 161 N.C. App. 78, 587 S.E.2d 675 (2003).]
        i. Twelve months between entry of temporary order and date set for permanent hearing was a reasonable time; temporary order did not convert to permanent order. [*Woodring v. Woodring,* 227 N.C. App. 638, 745 S.E.2d 13 (2013) (citing *LaValley v. LaValley*, 151 N.C. App. 290, 564 S.E.2d 913 (2002)) (the court noted that the parties had been in court at least three times in the intervening period on visitation matters); *Tricebock v. Krentz,* 234 N.C. App. 118, 761 S.E.2d 754 (2014) (**unpublished**) (citing *Woodring)* (order was a temporary order even though hearing was not set until some twenty or twenty-one months after its entry (actual date that request for a hearing was made was not known), case had been active in the interim, in that consent modification of custody and a motion/order to show cause had been filed, and two guardians ad litem and a custody advocate had been appointed; also significant to the appellate court's determination that the order was temporary was the trial court's treatment on two occasions of the order as temporary).]

ii. Five months was a "reasonably brief" time. [*File v. File,* 195 N.C. App. 562, 673 S.E.2d 405 (2009); *Cox v. Cox*, 133 N.C. App. 221, 515 S.E.2d 61 (1999) (citing five months as "reasonably brief" time).]

iii. Twenty months was reasonable where parties were negotiating a new custody arrangement, which eventually broke down. [*Senner v. Senner,* 161 N.C. App. 78, 587 S.E.2d 675 (2003). *See also Anderson v. Lackey*, 163 N.C. App. 246, 593 S.E.2d 87 (2004) (upholding modification within twenty months of earlier order).]

iv. One year was not "reasonably brief" where there were no unresolved custody issues. [*Brewer v. Brewer*, 139 N.C. App. 222, 533 S.E.2d 541 (2000).]

v. Twenty-three months between entry of temporary order and date set for hearing not reasonable; temporary order converted into permanent order. [*LaValley v. LaValley,* 151 N.C. App. 290, 293 n.6, 564 S.E.2d 913, 915 n.6 (2002).]

vi. A 2011 custody order that provided for father's in-person visitation only through 2012 did not convert to a permanent order, even though it continued in effect until 2015 when, during the period between 2012 and 2014, the parties arranged father's visitation on an ad hoc basis and "continued to agree" to visitation beyond the 2012 ending date. [*Dancy v. Dancy*, 247 N.C. App. 25, 31, 785 S.E.2d 126, 131 (2016) (citing *Senner v. Senner,* 161 N.C. App. 78, 587 S.E.2d 675 (2003) as support for finding that order did not convert despite length of time the 2011 order was in effect).]

vii. When determining whether a temporary order has converted to a permanent order, the court should consider the amount of time between the entry of the temporary order and the time a party requests a hearing on the issue of permanent custody, rather than the time of the hearing. [*Eddington v. Lamb*, 818 S.E.2d 350 (N.C. Ct. App. 2018) (temporary order in effect for more than two years by time of hearing but party requested hearing nine months after entry of temporary order).]

7. Classification of order as temporary or permanent determines the standard in modification proceedings and whether an appeal from the order is interlocutory. [*Woodring v. Woodring,* 227 N.C. App. 638, 745 S.E.2d 13 (2013).]

a. Modification of a temporary custody order.

i. A court may modify a temporary custody order without finding a substantial change of circumstances. Best interest is the proper standard. [*Gary v. Bright,* 231 N.C. App. 207, 750 S.E.2d 912 (2013) (quoting *Woodring v. Woodring,* 227 N.C. App. 638, 745 S.E.2d 13 (2013)) (to modify a temporary custody or visitation order, trial court proceeds directly to best interest); *Dixon v. Gordon*, 223 N.C. App. 365, 734 S.E.2d 299 (2012) (citing *Simmons v. Arriola,* 160 N.C. App. 671, 586 S.E.2d 809 (2003)) (for temporary custody or visitation order, applicable standard of review for proposed modification is best interest; no burden placed on either parent), *review denied,* 366 N.C. 604, 743 S.E.2d 191 (2013); *Smith v. Barbour,* 195 N.C. App. 244, 671 S.E.2d 578 (temporary custody order properly modified by application of the "best interests" standard), *review denied,* 363 N.C. 375, 678 S.E.2d 670 (2009); *Simmons* (upholding modification of

visitation schedule in a temporary custody order under best interest standard); *Senner v. Senner,* 161 N.C. App. 78, 587 S.E.2d 675 (2003) (recognizing that best interest standard applies when temporary custody order is set for rehearing); *Moore v. Moore,* 232 N.C. App. 522, 757 S.E.2d 526 (2014) (**unpublished**) (citing *Simmons)* (error to dismiss mother's motion to modify a temporary order to provide for visitation when she had alleged that it would be in children's best interest to have visitation with her; no need to allege a substantial change of circumstances).]

ii. A court may modify a final or permanent custody order only if it determines that there has been a substantial change in circumstances. [*Simmons v. Arriola,* 160 N.C. App. 671, 586 S.E.2d 809 (2003); *Senner v. Senner,* 161 N.C. App. 78, 587 S.E.2d 675 (2003) (this standard applicable to a temporary order that has converted to a final order); *Lamond v. Mahoney,* 159 N.C. App. 400, 583 S.E.2d 656 (2003); *LaValley v. LaValley,* 151 N.C. App. 290, 564 S.E.2d 913 (2002) (trial court erred in modifying a custody consent order that had converted into a permanent order without applying substantial change of circumstances standard).]

b. Appeal of a temporary custody order.

i. The general rule is that temporary custody orders are interlocutory "and the temporary custody granted by the order does not affect any substantial right of plaintiff which cannot be protected by timely appeal from the trial court's ultimate disposition of the entire controversy on the merits." [*File v. File,* 195 N.C. App. 562, 569, 673 S.E.2d 405, 410 (2009) (citing *Dunlap v. Dunlap*, 81 N.C. App. 675, 344 S.E.2d 806, *review denied,* 318 N.C. 505, 349 S.E.2d 859 (1986)) (temporary custody order did not affect a substantial right when trial court found there was no danger to child). *But see Smith v. Barbour*, 154 N.C. App. 402, 403 n.1, 571 S.E.2d 872, 874 n.1 (2002) (where court of appeals acknowledged that temporary orders are interlocutory but exercised discretion to grant certiorari to hear the appeal), *cert. denied,* 599 S.E.2d 408 (N.C. 2004); *Sood v. Sood,* 222 N.C. App. 807, 732 S.E.2d 603 (court of appeals declined to grant certiorari to review temporary custody order, noting that no G.S. 1A-1, Rule 54(b) certification was included in the order), *writ denied, review denied, appeal dismissed*, 366 N.C. 417, 735 S.E.2d 336 (2012).]

(a) G.S. 50-19.1, *added by* S.L. 2013-411, § 2, effective Aug. 23, 2013, providing for immediate appeal of certain actions when other claims are pending in the same action, does not apply to temporary orders. Thus, the nonappealability of a temporary custody order is not changed by G.S. 50-19.1.

ii. A permanent order may be appealed, even if the order also grants temporary custody. [*McRoy v. Hodges,* 160 N.C. App. 381, 585 S.E.2d 441 (2003) (order was not temporary and therefore not interlocutory where it granted temporary custody to grandparents and permanent custody to father, set no reconvening date, and established visitation rights and a schedule); see Section II.G.4, above, regarding when an order is temporary.]

iii. Objections to a temporary custody order are rendered moot by entry of a permanent custody order. [*Smithwick v. Frame,* 62 N.C. App. 387, 303 S.E.2d 217

(1983); *Cordell v. Doyle,* 185 N.C. App. 158 (2007) (**unpublished**) (citing *Smithwick*) (temporary visitation order); *Grandy v. Midgett*, 191 N.C. App. 250, 662 S.E.2d 404 (2008) (**unpublished**) (citing *Smithwick*) (objections to two temporary orders entered in 2006 rendered moot by 2007 custody order; mother's consent to modification of one of the temporary orders also rendered her objections to that order moot).]

iv. Whether an order is temporary or permanent in nature is a question of law, reviewed on appeal de novo. [*Smith v. Barbour,* 195 N.C. App. 244, 671 S.E.2d 578, *review denied,* 363 N.C. 375, 678 S.E.2d 670 (2009)*; Hatcher v. Matthews*, 789 S.E.2d 499 (N.C. Ct. App. 2016), and *Woodring v. Woodring,* 227 N.C. App. 638, 745 S.E.2d 13 (2013) (both citing *Barbour*).]

8. Effect of voluntary dismissal on a temporary order.

a. Voluntary dismissal of a custody claim probably vacates a temporary custody order, as long as no affirmative relief has been requested by the nondismissing party. [*See Doe v. Duke Univ.*, 118 N.C. App. 406, 408, 455 S.E.2d 470, 471 (1995) (quoting *Gibbs Light Co.,* 265 N.C. 459, 464, 144 S.E.2d 393, 398 (1965)*)* (protective order entered during medical malpractice case was nullified by voluntary dismissal; a voluntary dismissal "carries down with it previous rulings and orders in the case"); *Barham v. Hawk*, 165 N.C. App. 708, 600 S.E.2d 1 (2004) (voluntary dismissal nullified discovery order entered in case), *aff'd per curiam without precedential value,* 360 N.C. 358, 625 S.E.2d 778 (2006); *Collins v. Collins*, 18 N.C. App. 45, 196 S.E.2d 282 (1973) (party cannot be held in contempt of temporary order following termination of action by a G.S. 1A-1, Rule 41 voluntary dismissal).]

b. However, a "final" custody determination is not affected by the filing of a voluntary dismissal. [*Massey v. Massey,* 121 N.C. App. 263, 465 S.E.2d 313 (1996).] See Section II.X, below.

c. For more on this topic, see Cheryl Howell, *What Happens to Temporary Orders When a Case Is Dismissed?* UNC Sch. of Gov't: On the Civil Side Blog (Oct. 27, 2017), https://civil.sog.unc.edu/what-happens-to-temporary-orders-when-a-case-is-dismissed.

9. Effect of the Uniformed Deployed Parents Custody and Visitation Act (UDPCVA) on temporary custody orders.

a. The UDPCVA does not affect the validity of a temporary court order concerning custodial responsibility during deployment entered before its effective date. [S.L. 2013-27, § 4, effective Oct. 1, 2013.]

b. The UDPCVA repealed G.S. 50-13.7A, the former statute providing for temporary orders when a parent with primary physical custody or visitation rights was subject to military deployment. [S.L. 2013-27, § 2, effective Oct. 1, 2013.]

c. For more on the UDPCVA, see Section VIII.B, below.

H. Mediation, Arbitration, and Parent Education

1. Mediation.

a. Mandatory child custody and visitation mediation program is created by G.S. 50-13.1(b), 7A-494, and 7A-495. The Administrative Office of the Courts is

to establish mediation programs in districts as funding is allocated by the General Assembly. At the present time, all districts have custody and visitation mediation programs.

b. In a district with a mediation program, any case with a contested issue of custody or visitation must be referred to mediation unless excused by order of a judge. A case must be referred to mediation "[w]henever it appears to the court, from the pleadings or otherwise, that an action involves a contested issue as to custody or visitation." [G.S. 50-13.1(b) (includes issues that arise in motions for contempt and for modification).]

   i. Mediation is mandatory under G.S. 50-13.1 unless affirmatively waived by the court for good cause pursuant to a motion of either party or the court. [G.S. 50-13.1(c); *Chillari v. Chillari,* 159 N.C. App. 670, 583 S.E.2d 367 (2003) (trial court erred in entering a permanent custody order before the parties mediated issue as directed by court order; husband could not waive mediation merely by failing to raise mediation requirement). *Cf. Kiser v. Kiser,* 164 N.C. App. 410, 595 S.E.2d 816 (2004) (**unpublished**) (where wife requested waiver, which was never ruled on or withdrawn, trial court did not err by proceeding with custody trial even though parties had not attended mediation, where wife indicated at two custody hearings that she was ready to proceed and did not raise mediation failure until after entry of an adverse custody order).]

   ii. Trial court did not abuse its discretion when it waived a pretrial conference and mediation required by Durham County local rule when court found that there had been more than twenty scheduled hearings and continuances on custody issues since the case was filed in 2003 and the presiding judge, who had heard the case since its inception, would no longer be in the family court rotation. [*Mitchell v. Mitchell,* 199 N.C. App. 392, 681 S.E.2d 520 (2009).]

c. Alimony, child support, and other economic issues may not be referred to the child custody mediation program. [G.S. 50-13.1(b).]

d. Court may waive mediation upon a showing of good cause, either on motion of a party or on court's own motion. [G.S. 50-13.1(c).]

   i. Good cause may include, but is not limited to, the following:

      (a) A showing of undue hardship to a party;

      (b) An agreement between the parties for voluntary mediation, subject to court approval;

      (c) Allegations of abuse or neglect of the child;

      (d) Allegations of alcoholism, drug abuse, or domestic violence between the parents; or

      (e) Allegations of severe psychological, psychiatric, or emotional problems. [G.S. 50-13.1(c).]

   ii. A showing that either party resides more than fifty miles from the court may be considered good cause for waiver of mediation, but it does not require waiver. [G.S. 50-13.1(c), *amended by* S.L. 2011-411, § 4, effective Sept. 15, 2011.]

e. Any agreement reached by the parties as a result of mediation must be reduced to writing, signed by each party, and submitted to the court as soon as practicable. Unless the court finds good reason not to, the agreement must be incorporated into a court order. [G.S. 50-13.1(g).]

f. Agreements reached during mediation are called "parenting agreements." Once an agreement is incorporated into a court order, it is enforceable as a court order [G.S. 50-13.1(g).] and is deemed to be a custody order or determination for purposes of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). [G.S. 50-13.1(h).]

g. All verbal or written communications from either party to the mediator, or between the parties in the presence of the mediator, are privileged and not admissible in court. [G.S. 50-13.1(e), (f) (no privilege for communications in furtherance of a crime or fraud).]

2. Arbitration.

a. The Family Law Arbitration Act, G.S. 50-41 through 50-62, allows for the binding arbitration of all issues arising from separation or divorce, including child custody.

b. Agreements to arbitrate custody entered into during or after marriage are enforceable, as are custody orders entered by an arbitrator. [G.S. 50-42(a); 50-57(a).] However, the trial court may vacate any order for custody that is not in the best interest of the child, [G.S. 50-54(a)(6).] and the trial court may modify a custody order entered as the result of arbitration upon a showing of changed circumstances. [G.S. 50-56.]

3. Divorce education programs.

a. The Administrative Office of the Courts is to establish in all judicial districts with a family court pilot program a course to educate and sensitize separated or divorcing couples about the needs of their children during and after the separation and divorce process. [S.L. 1999-237, § 17.16(a).]

b. The educational course should:

i. Inform attendees of the impact of their separation, custody, or visitation on the children, on the parents' relationship with one another, on the family's relationship, and on the couple's financial responsibilities for the children. [S.L. 1999-237, § 17.16(a)(1).]

ii. Provide information to attendees on resources available in the community to help them address these issues. [S.L. 1999-237, § 17.16(a)(1).]

c. Parties to a custody or visitation action may attend the educational course voluntarily or may be ordered to attend by the court. [S.L. 1999-237, § 17.16(a)(1).]

d. The court shall order participation in the educational course if it finds that:

i. Significant parental conflict has adversely affected the children and

ii. The children's best interests would be served by the party's or the parties' participation in the course. [S.L. 1999-237, § 17.16(c).]

I. Parenting Coordinators

1. Appointment.
   a. The court may appoint a parenting coordinator at any time during the proceedings if all parties consent. [G.S. 50-91(a).]
   b. The court may appoint a parenting coordinator without the consent of the parties upon entry of a custody order (not ex parte) or upon entry of a parenting plan if the court finds that:
      i. The action is a high-conflict case, as defined in G.S. 50-90(1);
      ii. The appointment is in the best interests of any minor child in the case; and
      iii. The parties are able to pay the cost of the coordinator. [G.S. 50-91(b).]
   c. The findings in G.S. 50-91(b) must be made only if the trial court appoints a parenting coordinator. [*Thomas v. Thomas,* 233 N.C. App. 736, 757 S.E.2d 375 (2014) (when trial court did not appoint a parenting coordinator, trial court had no affirmative duty to require parties to produce evidence of their ability to pay for a coordinator).]
   d. The appointment order must specify the issues the coordinator is to assist the parties in resolving and may incorporate any agreement made by the parties as to the coordinator's role. [G.S. 50-91(c).]
2. Findings.
   a. If the trial court decides that the appointment of a parenting coordinator is appropriate, it must make the findings required by G.S. 50-91. [*Hall v. Hall,* 188 N.C. App. 527, 655 S.E.2d 901 (2008) (when there was evidence presented on the three matters required by G.S. 50-91(b), trial court failed to follow the statutory mandate when it made no findings as to any of the three).]
   b. Trial court satisfied the criteria for *sua sponte* appointment of a parenting coordinator as part of a contempt order when it made findings required by statute and additional findings about the parties' inability to communicate with each other and the effect on the child's activities and appointments, as well as findings as to the parents' employment status. [*Jackson v. Jackson,* 192 N.C. App. 455, 665 S.E.2d 545 (2008) (holding that findings were sufficient).]
3. Parenting coordinator's authority.
   a. The order appointing the parenting coordinator must specify the tasks and authority of the coordinator. The authority which may be conferred by court order is limited to six areas, as set out in G.S. 50-92(a).
   b. The court, however, may authorize the coordinator to decide issues regarding implementation of the parenting plan not governed by the appointment order that the parties are unable to resolve. [G.S. 50-92(b).] The parties must comply with the coordinator's decision but may ask for an expedited hearing to review the decision. [G.S. 50-92(b).]
      i. A trial court properly exercised its discretion under G.S. 50-92(b) when it authorized a parenting coordinator to make minor changes to the custody/visitation order if a dispute arose about transition time, pickup, delivery, or transportation

to and from visitation. [*Nguyen v. Heller-Nguyen*, 788 S.E.2d 601 (N.C. Ct. App. 2016).]

4. A parenting coordinator may request in writing a review hearing by the court pursuant to G.S. 50-97.
    a. An order entered pursuant to a G.S. 50-97 review hearing may implement provisions in an earlier order without being considered a modification of the earlier order. In *Tankala v. Pithavadian*, 789 S.E.2d 31 (N.C. Ct. App. 2016), an order sought and obtained by a parenting coordinator pursuant to G.S. 50-97 did not modify an earlier custody order when it did not change award of primary custody to mother, with visitation to father as approved by a reunification therapist who was given authority to decide the timing and methods of the child's therapy. The order entered at the review hearing implemented but did not modify the provisions in the earlier order when it (1) set out a visitation schedule with father in the presence of paternal family members, with father to have gradually increasing time during those visits, and (2) ordered mother, father, and child to attend an out-of-state therapeutic camp if progress toward reunification with father was not made during visitation. For more on *Tankala*, see Cheryl Howell, *Back to Parenting Coordinators in Custody Cases*, UNC Sch. of Gov't: On the Civil Side Blog (Aug. 19, 2016), https://civil.sog.unc.edu/back-to-parenting-coordinators-in-custody-cases.
5. Fees of the parenting coordinator.
    a. The parenting coordinator shall be entitled to reasonable compensation from the parties for services rendered. [G.S. 50-95(a).]
    b. A trial court erred when it ordered that amounts paid by father to cover mother's share of the parenting coordinator's fees "shall reduce [father's] child support arrearage by the amount so paid." [*Nguyen v. Heller-Nguyen*, 788 S.E.2d 601, 610 (N.C. Ct. App. 2016) (under G.S. 50-13.10(a), each past due child support payment vests when it accrues and may not later be vacated, reduced, or modified, precluding the trial court from allowing an offset against father's child support arrears).]
6. Termination of the parenting coordinator. The court may terminate or modify the parenting coordinator's appointment for good cause. [G.S. 50-99(a).]
7. For more on parenting coordinators, see Cheryl Howell, *Parenting Coordinators in Custody Cases*, UNC Sch. of Gov't: On the Civil Side Blog (July 8, 2016), http://civil.sog.unc.edu/parenting-coordinators-in-custody-cases.

J. Hearings

1. A final custody order that is not entered upon the consent of the parties cannot be entered without a hearing, even if the defendant has not filed an answer and fails to appear for the scheduled custody trial. [*Bohannan v. McManaway,* 208 N.C. App. 572, 705 S.E.2d 1 (2011) (trial court erred when it signed a custody order presented by plaintiff's counsel without first hearing evidence as to best interest of child).]
2. Persons and entities to whom custody may be awarded.
    a. An order for custody entered pursuant to G.S. 50-13.2 must award custody to such person, agency, organization, or institution as will best promote the interest and welfare of the child. [G.S. 50-13.2(a).]

b. Awarding custody to a party who has not sought custody.

i. A trial court is authorized to award custody to a party even though the party has filed no pleading for custody. [*In re Branch*, 16 N.C. App. 413, 192 S.E.2d 43 (1972) (father was made a respondent in the action but did not file an answer or otherwise request custody of his two children; he appeared at the hearing in person and through counsel, and as a respondent was subject to orders of the court, making the court "fully authorized" to award him custody of his children; custody to father affirmed).]

c. Awarding custody to a nonparty.

i. While a trial court may award custody to a nonparty, before it does so the person should be made a party. [*In re Branch*, 16 N.C. App. 413, 192 S.E.2d 43 (1972) (when awarding custody to a person who is not a party to the action or proceeding, it is proper and advisable for that person to be made a party to the action or proceeding so that the party would be subject to orders of the court); *Tucker v. Tucker,* 24 N.C. App. 649, 211 S.E.2d 825 (when custody was awarded to nonparty family members, matter was remanded for nonparties to be made parties so court would have effective jurisdiction over their persons; N.C. Supreme Court reversed for insufficient evidence to find substantial change in circumstances warranting change in custody, noting by way of background that trial court had awarded custody to nonparties), *rev'd and remanded on other grounds*, 288 N.C. 81, 216 S.E.2d 1 (1975); *In re Edwards*, 25 N.C. App. 608, 214 S.E.2d 215 (1975) (citing *Tucker)* (affirming trial court's award of primary custody to nonparty grandmother, remanding for grandmother to be made a party); *Isaac v. Wells,* 189 N.C. App. 210, 657 S.E.2d 445 (2008) (**unpublished**) (citing *Branch* and *Edwards)* (G.S. 50-13.1(a) and 50-13.2(a) do not give the trial court authority to award custody to a party who is not properly before the court; when Buncombe County Department of Social Services (DSS) was not a party to the action, matter was remanded for entry of orders joining DSS or any other necessary parties).]

ii. The court of appeals has held that a nonparty awarded custody may be made a party after judgment and by the appellate court when the case is appealed. [*Brandon v. Brandon,* 10 N.C. App. 457, 179 S.E.2d 177 (1972); *In re Branch*, 16 N.C. App. 413, 192 S.E.2d 43 (1972) (citing *Brandon*); *Sloan v. Sloan,* 164 N.C. App. 190, 595 S.E.2d 228 (2004) (citing *Branch*).] In *Brandon,* nonparties awarded custody were made parties by the appellate court upon motion and order entered pursuant to Rule 20(c) of the Rules of Practice in the Court of Appeals. Rule 20(c) specifically allowed the court of appeals to "make proper parties to any case, where the Court may deem it necessary and proper for the purposes of justice." There is no similar provision in the current Rules of Appellate Procedure.

iii. For a case where nonparties were made parties after judgment but before appeal, see *Sloan v. Sloan,* 164 N.C. App. 190, 194, 595 S.E.2d 228, 231 (2004) (trial court was "well within its discretion" to award visitation to grandparents pursuant to G.S. 50-13.2(b1) in temporary and permanent custody orders even though grandparents were not parties to the custody action when those orders

were entered; grandparents allowed to intervene to enforce visitation order, and so were parties when appeal was taken of contempt order).]

3. Necessary parties.
    a. When a putative father sought custody of a child born during mother's marriage to husband, husband was a necessary party to the proceeding, unless he had previously been determined not to be the child's father. [*Smith v. Barbour*, 154 N.C. App. 402, 571 S.E.2d 872 (2002) (trial court erred when it entered a temporary custody order without notice to mother's husband), *cert. denied,* 599 S.E.2d 408 (2004).]
4. Continuances.
    a. A continuance may be granted only for good cause shown and upon such terms and conditions as justice may require. [G.S. 1A-1, Rule 40(b).]
    b. Denial of a motion to continue a custody trial can violate a party's constitutional due process rights, which rights require a reasonable time for trial preparation. [*Ruth v. Ruth,* 158 N.C. App. 293, 580 S.E.2d 383 (2003) (trial court erred when it denied mother's motion for a new trial; mother's due process rights were violated by court's refusal to grant a continuance after her attorney withdrew thirty minutes before trial and mother believed that only issue before the court was visitation).]
    c. Trial court abused its discretion by denying mother's request for a continuance where mother was not provided reasonable notice of the withdrawal of her attorney. [*Skelly v. Skelly,* 215 N.C. App. 580, 715 S.E.2d 618 (2011).]
5. Appointment of a guardian ad litem and experts.
    a. Trial court has the authority to appoint a guardian ad litem (GAL) pursuant to G.S. 1A-1, Rule 17 to represent the interest of the child. [*Van Every v. McGuire*, 125 N.C. App. 578, 481 S.E.2d 377 (1997), *modified and aff'd*, 348 N.C. 58, 497 S.E.2d 689 (1998).]
    b. The GAL is to "insure that a child's interests are adequately investigated and presented to the court." [*West v. Marko,* 141 N.C. App. 688, 695, 541 S.E.2d 226, 231 (2001) (Fuller, J., concurring).]
    c. Because Rule 17 does not specify the role of a GAL in a child custody proceeding, the order appointing the GAL should list the specific tasks and services the court expects the GAL to perform. NOTE: 2012 Formal Ethics Opinion 9 holds that a lawyer asked to represent a child in a contested custody or visitation case should decline the appointment unless the order of appointment identifies the lawyer's role and specifies the responsibilities of the lawyer. [N.C. State Bar, 2012 Formal Ethics Op. 9, "Identifying the Roles and Responsibilities of a Lawyer Appointed to Represent a Child or the Child's Best Interests in a Contested Custody or Visitation Case" (Jan. 25, 2013), *searchable at* www.ncbar.com/ethics/index.asp.]
    d. The cost of a GAL is assessable pursuant to G.S. 7A-305(d)(7). [*See Van Every v. McGuire,* 125 N.C. App. 578, 481 S.E.2d 377 (1997) (trial court may assess cost of the GAL as part of court costs and tax those costs to either party or to both parties), *modified and aff'd,* 348 N.C. 58, 497 S.E.2d 689 (1998).]
        i. Because neither the child nor the parents are entitled to a GAL during a civil custody proceeding, the cost of a G.S. 1A-1, Rule 17 guardian ad litem must be

paid by one or all parties. The cost cannot be paid by the state. [Memorandum from Deana Fleming, N.C. Administrative Office of the Courts, to GAL Attorney Advocates (July 26, 2006) (hereinafter Fleming Memo).]

ii. A GAL volunteer under G.S. Chapter 7B cannot be appointed as a GAL in a civil custody proceeding. [Fleming Memo.]

iii. A GAL attorney advocate may be appointed to act as a GAL in a civil custody proceeding unless a conflict exists under the North Carolina Revised Rules of Professional Responsibility. [Fleming Memo.]

e. Trial court has authority to order physical and psychological assessment of the parties and the child, pursuant to G.S. 1A-1, Rule 35, before making a final custody determination. [*But see Jones v. Patience*, 121 N.C. App. 434, 466 S.E.2d 720 (court does not have authority to order treatment and periodic assessments as part of final custody order), *appeal dismissed, review denied*, 343 N.C. 307, 471 S.E.2d 72 (1996).] Neither Rule 35 nor G.S. 7A-305 authorize the court to assign or apportion the cost of the assessment to either party.

f. In addition, the court has authority pursuant to N.C. R. Evid. 706 to appoint experts in a custody case.

g. Costs of court-appointed experts are determined in accordance with N.C. R. Evid. 706(b) (unless otherwise provided by law, compensation of court-appointed experts and the apportionment of that cost between the parties is determined by the court).

6. Expert testimony.

a. Relevant Rules of Evidence.

i. N.C. R. Evid. 706 allows the court to appoint an expert agreed upon by the parties and to appoint witnesses of its own selection.

ii. N.C. R. Evid. 702(a) requires that (i) expert testimony be based on scientific, technical, or other specialized knowledge that would assist the trier of fact to understand the evidence or determine a fact in issue, referred to as the relevance inquiry; (ii) the witness be qualified as an expert by skill, knowledge, experience, training, or education; and (iii) the testimony be based upon sufficient facts or data, be the product of reliable principles and methods, and that the witness apply the principles and methods reliably to the facts of the case, referred to as the reliability test. Subsection (iii) was added in 2011 and incorporates the test set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993), for evaluating the admissibility of expert testimony.

b. The trial court did not err in admitting the expert testimony and report of a forensic custody evaluator, over objections as to relevance and reliability, when the custody evaluator testified that she spent approximately one year conducting a comprehensive evaluation, which included multiple components and described the general process of preparing a child custody evaluation, and testified and elaborated on the conclusions and analysis contained in the forty-three page report. [*Sneed v. Sneed*, 820 S.E.2d 536 (N.C. Ct. App. 2018).]

c. A judge is not bound by expert testimony and may apply his own experience and knowledge when considering that opinion. [*Correll v. Allen*, 94 N.C. App. 464, 380

S.E.2d 580 (1989) (citing *Sec.-First Nat'l Bank v. Lutz*, 322 F.2d 348 (9th. Cir. 1963)) (no abuse of discretion when judge agreed with psychologist that child's psychological problems warranted a change in custody but disagreed with expert as to which parent should have primary custody; change of custody to father with restricted visitation to mother upheld despite expert's recommendation that custody remain with mother). *See also Berry v. Berry*, 809 S.E.2d 908 (N.C. Ct. App. 2018) (trial court is not required to accept the recommendation of a court-appointed expert; trial court is free to give as much or as little weight to an expert's opinion as the court deems appropriate).]

d. Expert testimony as to the cause of mental or emotional harm to a child may be helpful to a trier of fact but is not required. [*Peters v. Pennington,* 210 N.C. App. 1, 707 S.E.2d 724 (2011) (rejecting mother's argument that a fact finder cannot determine the cause of mental or emotional harm absent expert testimony as to causation).]

e. When expert testimony is presented on the issue of sexual and psychological abuse, the court's findings must address that evidence. [*Lawing v. Lawing,* 226 N.C. App. 200, 739 S.E.2d 627 (2013) (**unpublished**) (not paginated on Westlaw) (while trial court found that it appeared that son "fantasized this story" (referring to abuse allegations) and that there was "no basis in fact" for the allegations, trial court erred by not addressing the testimony of three experts, who were of the opinion that the son's reports were genuine and not fabricated, and other documentary evidence showing emotional problems of son and father).]

f. Incorporation of expert reports into findings of fact was not an improper delegation of the court's fact-finding duties when the court also made its own findings regarding the central issue in the case, whether child was abused. [*Grandy v. Midgett*, 191 N.C. App. 250, 662 S.E.2d 404 (2008) (**unpublished**) (nine-page order was "comprehensive" and "thorough" and findings were sufficient without reference to the experts' reports).]

g. Reasonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings are assessable or recoverable. [G.S. 7A-305(d)(11).]

   i. If a category of costs is set forth in G.S. 7A-305(d), "the trial court *is required to assess the item as costs*." [*Simon v. Simon,* 231 N.C. App. 76, 87, 753 S.E.2d 475, 482 (2013) (emphasis in original) (quoting *Priest v. Safety-Kleen Sys., Inc.,* 191 N.C. App. 341, 343, 663 S.E.2d 351, 353 (2008)).]

   ii. The 2007 amendment to G.S. 7A-305(d)(11) overruled earlier case law holding that expert witness fees could be assessed only when the witness is under subpoena. [*Lassiter v. N.C. Baptist Hosps.*, 368 N.C. 367, 778 S.E.2d 68 (2015).]

h. Otherwise, costs relating to expert witnesses not appointed by the court pursuant to N.C. R. Evid. 706 are determined in accordance with G.S. 7A-314(d), which provides that an expert witness, other than a salaried state, county, or municipal law- enforcement officer, shall receive such compensation and allowances as the court, in its discretion, may authorize. [G.S. 7A-314(d). *Cf. McKinney v. McKinney,* 228 N.C. App. 300, 745 S.E.2d 356 (2013) (although G.S. 7A-314 gives trial court discretion as to expert witness compensation, when court of appeals gave specific

instructions to compensate an expert only for time spent testifying as provided in G.S. 7A-305(d)(11) and not for time expert spent in court, trial court on remand was bound by that mandate and erred in awarding compensation for court time pursuant to G.S. 7A-314), *review denied,* 367 N.C. 288, 753 S.E.2d 678, *review dismissed,* 367 N.C. 288, 753 S.E.2d 679 (2014).] G.S. 7A-314(d) was amended in 2015 to clarify that an award of expert witness costs is subject to G.S. 7A-305(d)(11). [G.S. 7A-314(d), *amended by* S.L. 2015-153, § 2, effective Oct. 1, 2015, and applicable to motions or applications for costs filed on or after that date, now provides that compensation and allowances awarded to an expert witness are "subject to the specific limitations set forth in G.S. 7A-305(d)(11)."]

7. Attorney-client privilege.
   a. "[W]hen the relationship of attorney and client exists, all confidential communications made by the client to his attorney on the faith of such relationship are privileged and may not be disclosed." [*In re Miller*, 357 N.C. 316, 328, 584 S.E.2d 772, 782 (2003) (quoting *State v. McIntosh*, 336 N.C. 517, 523, 444 S.E.2d 438, 441 (1994)).]
   b. The privilege generally applies to all communications between a client and attorney except communications made in the presence of a third person not acting as an agent of either party are not privileged. [*In re Miller*, 357 N.C. 316, 584 S.E.2d 772 (2003) (citing *State v. Brown*, 327 N.C. 1, 394 S.E.2d 434 (1990)).]
   c. The attorney-client privilege applied to communications between defendant and her attorneys in the presence of a third person/friend acting as defendant's agent pursuant to a written agreement during preparation for custody trial. [*Berens v. Berens*, 247 N.C. App. 12, 785 S.E.2d 733 (2016) (presence of a third person acting as an agent does not constitute a waiver of the attorney-client privilege; court of appeals noted the absence of case law or other authority prohibiting a friend from acting as a client's agent).]
8. Witnesses.
   a. A court has the authority to limit the number of witnesses called to testify in a custody case if during trial the evidence becomes cumulative. [*Woody v. Woody*, 127 N.C. App. 626, 492 S.E.2d 382 (1997), *review denied by* 347 N.C. 586, 502 S.E.2d 619 (1998).]
   b. However, it is error for the trial court to refuse to allow rebuttal evidence. [*Woody v. Woody*, 127 N.C. App. 626, 492 S.E.2d 382 (1997), *review denied,* 347 N.C. 586, 502 S.E.2d 619 (1998). *See also In re Shue*, 311 N.C. 586, 598, 319 S.E.2d 567, 574 (1984) (review hearing of trial placement of neglected child with her father), and *In re O'Neal*, 140 N.C. App. 254, 257, 535 S.E.2d 620, 622 (2000) (quoting *Shue*) (review hearing of custody arrangement for child removed from parents) (both cases holding that a trial court must hear and consider evidence offered by a party on the question of the best interest of the child if the offered evidence is "competent, relevant and non-cumulative").]
9. Time limits on presentation of evidence.
   a. N.C. R. Evid. 611(a) requires a court to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . ascertain[]

the truth, . . . avoid needless consumption of time, and . . . protect witnesses from harassment or undue embarrassment."

b. "[T]he manner of the presentation of evidence is a matter resting primarily within the discretion of the trial judge, [and] his control of the case will not be disturbed absent a manifest abuse of discretion." [*Wolgin v. Wolgin*, 217 N.C. App. 278, 282,719 S.E.2d 196, 199 (2011) (quoting *State v. Harris,* 315 N.C. 556, 562, 340 S.E.2d 383, 387 (1986)).]

c. Trial court did not arbitrarily impose two-day limitation on the presentation of evidence during a custody trial where:

i. The length of the trial was discussed at pretrial conferences and both parties agreed to a two-day trial;

ii. The court made inquiry concerning the ability of both parties to present evidence within the two-day time frame and neither party objected during the pretrial conferences;

iii. The court made several references to the time constrictions during the trial; and

iv. At the close of defendant's evidence, defendant made no objection to the time limits enforced by the trial court on the second day of trial. [*Wolgin v. Wolgin*, 217 N.C. App. 278, 719 S.E.2d 196 (2011).]

d. *See also* Michael Crowell, *Time Limits in Family Law Cases*, UNC Sch. of Gov't: On the Civil Side Blog (Mar. 11, 2016), http://civil.sog.unc.edu/time-limits-infamily-law-cases

10. Limits on review of evidence.

a. Trial court had authority under N.C. R. Evid. 403 to refuse to read all 562 email correspondences introduced into evidence by defendant. [*Wolgin v. Wolgin*, 217 N.C. App. 278, 284, 719 S.E.2d 196, 200 (2011) (trial court agreed to give the emails "due consideration" and to review a "representative portion of the e-mails" to ascertain their "tone and tenor").]

11. Standard of proof.

a. The general standard of proof in a child custody case between parents or between nonparents is by a preponderance, or greater weight, of the evidence. [*Respess v. Respess,* 232 N.C. App. 611, 754 S.E.2d 691 (2014), *Everette v. Collins,* 176 N.C. App. 168, 625 S.E.2d 796 (2006) (both citing *Speagle v. Seitz,* 354 N.C. 525, 557 S.E.2d 83 (2001)*).*] Because the burden of proof in a juvenile abuse, neglect or dependency proceeding is clear and convincing evidence, the doctrine of collateral estoppel does not apply to prevent relitigation in an abuse, neglect, or dependency case of matters previously determined in a custody proceeding, and vice versa. [*In re K.A.,* 233 N.C. App. 119, 127, 756 S.E.2d 837, 842 (2014) (noting that both respondent mother and the guardian ad litem had conceded that "case law is well[ ]settled that collateral estoppel cannot apply where the proceedings involve a different burden of proof").]

b. Neither party has the burden of proof on the issue of best interest of child. [*Lamond v. Mahoney,* 159 N.C. App. 400, 583 S.E.2d 656 (2003), *Regan v. Smith*, 131 N.C. App. 851, 509 S.E.2d 452 (1998) (both citing *Ramirez-Barker v. Barker*, 107 N.C. App. 71, 418 S.E.2d 675 (1992)).]

c. The standard of proof in a custody case between a parent and a nonparent is clear, cogent, and convincing evidence. [*Estroff v. Chatterjee*, 190 N.C. App. 61, 660 S.E.2d 73 (2008) (a determination that a parent has acted in a way inconsistent with his constitutionally protected status must be supported by clear, cogent, and convincing evidence); *Bennett v. Hawks,* 170 N.C. App. 426, 613 S.E.2d 40 (2005) (order is to indicate that the judge applied the clear and convincing standard in determining whether a parent's conduct was inconsistent with her constitutionally protected status).]

12. Relevant evidence.

a. A trial court must consider evidence that meets the test of relevancy. [*See Speagle v. Seitz,* 354 N.C. 525, 531, 557 S.E.2d 83, 87 (2001) (in a custody action between a parent and a nonparent, "any past circumstance or conduct which could impact either the present or the future of a child is relevant, notwithstanding the fact that such circumstance or conduct did not exist or was not being engaged in at the time of the custody proceeding"), *cert. denied,* 536 U.S. 923, 122 S. Ct. 2589 (2002).]

b. A trial court may consider, or take judicial notice of, findings from a prior proceeding. [*Davis v. McMillian,* 152 N.C. App. 53, 567 S.E.2d 159 (2002) (in a custody action between a parent and a nonparent, trial court did not err when it took judicial notice of a finding that mother was unfit in a prior custody action between mother and father or when it used that finding to support its conclusion that mother had lost her constitutionally protected status), *review denied,* 356 N.C. 669, 577 S.E.2d 114 (2003). *See also Raynor v. Odom*, 124 N.C. App. 724, 478 S.E.2d 655 (1996) (trial court did not err in considering temporary custody orders and prior contempt orders in determining child custody); *Dixon v. Gordon*, 223 N.C. App. 365, 734 S.E.2d 299 (2012) (citing *Raynor)* (in determining best interests of the child, it is not erroneous to consult a temporary parenting agreement), *review denied,* 366 N.C. 604, 743 S.E.2d 191 (2013).]

c. A parent's decision to invoke his Fifth Amendment right to remain silent when asked during custody trial about his alleged involvement in drug trafficking allowed judge to assume allegations were true when deciding issues of custody and visitation. [*Qurneh v. Colie,* 122 N.C. App. 553, 471 S.E.2d 433, *appeal withdrawn,* 343 N.C. 752, 477 S.E.2d 34 (1996) (parent's refusal to answer questions regarding illegal drug use, trafficking, and other drug involvement left the trial court unable to determine his fitness, which is an adequate basis for not awarding custody to that parent).]

13. Testimony by children.

a. Court may consider child's preference for custodial arrangement if child is of suitable age, but child's preference is not controlling. [*In re Peal,* 305 N.C. 640, 290 S.E.2d 664 (1982) (9-year-old child was of suitable age to express preference); *Hinkle v. Hinkle*, 266 N.C. 189, 146 S.E.2d 73 (1966) (child has reached age of discretion when he is of an age and capacity to form an intelligent and rational view on the matter); *Grissom v. Cohen*, 821 S.E.2d 454, 465 (N.C. Ct. App. 2018) (when court found 15-year-old child was "very intelligent, mature, and capable," trial court had "the duty to consider the weight to give to her preference" to remain with her father and not see her mother), *review denied*, 822 S.E.2d 631 (N.C. 2019).]

b. While appellate courts have stated that the preference of a child of sufficient age should be given "considerable weight . . . but is not controlling" [*Hinkle v. Hinkle*, 266 N.C. 189, 197, 146 S.E.2d 73, 79 (1966) (quoting *James v. Pretlow,* 242 N.C. 102, 105, 86 S.E.2d 759, 761 (1955)*).*], the court of appeals has held that trial judges have the discretion to refuse to allow children to testify. [*Daniels v. Hatcher*, 46 N.C. App. 481, 265 S.E.2d 429 (judge properly exercised discretion in refusing to allow children ages 7, 8, and 12 years old to testify in custody trial), *review denied,* 301 N.C. 87 (1980), *overruled on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998). *But compare Kearns v. Kearns*, 6 N.C. App. 319, 170 S.E.2d 132 (1969) (error for trial court to refuse defendant's request to hear the testimony of four children ages 7, 9, 11, and 12), *overruled on other grounds by Stephenson v. Stephenson,* 55 N.C. App. 250, 285 S.E.2d 281 (1981).]

14. In-chambers interviews of children.

a. "Without doubt the court may question a child in open court in a custody proceeding but it can do so privately only by consent of the parties." [*Rapier v. Berrier,* 246 N.C. 193, 195, 97 S.E.2d 782, 784 (1957); *Cox v. Cox*, 133 N.C. App. 221, 515 S.E.2d 61 (1999) (citing *Rapier*) (while it was error for court to interview child in chambers without consent of both parties, it was not prejudicial to party because attorneys for both parties were present during the interview); *Rowe v. Rowe*, 799 S.E.2d 280 (N.C. Ct. App. 2017) (**unpublished**) (trial court committed prejudicial error by interviewing in chambers, with only the judge and the clerk present, the step-sibling of the child whose custody was being determined, over the objection of both plaintiff father's counsel and intervenor grandmother's counsel and without counsel for the parents or the intervenor present; custody order reversed and remanded for a new hearing).]

b. A party's failure to object to an in-chambers interview of a child has been found to be an "informed acquiescence" to the interview. [*In re H.S.F.,* 177 N.C. App. 193, 628 S.E.2d 416 (2006) (father's silence in the face of an opportunity to object precluded appellate review of claim that judge's private interview with child and guardian ad litem was error).]

c. When a party fails to object to an in-chambers interview of a child, the party may not claim procedural errors on appeal. [*Dreyer v. Smith,* 163 N.C. App. 155, 592 S.E.2d 594 (2004) (consent to in-chambers interview and failure to request that interview be recorded precluded claim of error based on fact that interview was not recorded).]

d. Because an in-chambers interview of a child is done only by consent of the parties, it is not error for the trial court to make findings of fact based upon the statements of the child made during the interview. [*Dreyer v. Smith,* 163 N.C. App. 155, 592 S.E.2d 594 (2004) (citing *Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E.2d 178 (1977), and *Stevens v. Stevens*, 26 N.C. App. 509, 215 S.E.2d 881 (1975)).]

15. Statements of children to others.

a. Trial court erred in excluding testimony by witnesses relating statements of children regarding their father's intimidation and their desire to live with their mother; statements were admissible as a hearsay exception under N.C. R. Evid. 803 for children's then-existing state of mind. [*Griffin v. Griffin*, 81 N.C. App. 665, 344 S.E.2d 828

(1986) (error not prejudicial, as court interviewed children, who gave similar testimony, which court took into account in its custody decision).]

b. Father's report of child's statements to him was admissible as an exception to the hearsay rule under N.C. R. Evid. 803(3) as reflecting the child's then-existing state of mind or emotion. [*Johnson v. McNeil,* 193 N.C. App. 246, 666 S.E.2d 890 (2008) (**unpublished**) (father was allowed to testify that son asked him why maternal grandmother said that father did not love child; that child said maternal grandmother asked whether child wanted to live with his mother because father did not love him; and further that maternal grandmother did not like the child's younger brother; child's statements revealed his fears, anxiety, and sense of internal conflict with respect to his father, mother, and grandmother).]

c. Maternal grandmother's statements to the child, which child related to father, who offered the statements into evidence, were not hearsay because they were not received "for the truth of the matter asserted;" further if statements were hearsay, they were admissible as admissions by a party opponent under N.C. R. Evid. 801(d). [*Johnson v. McNeil,* 193 N.C. App. 246, 666 S.E.2d 890 (2008) (**unpublished**) (maternal grandmother was a party because she sought visitation).]

d. *See also* Jessica Smith, *Evidence Issues in Criminal Cases Involving Child Victims and Child Witnesses*, Admin. of Just. Bull. No. 2008/07 (Dec. 2008), http://sogpubs.unc.edu/electronicversions/pdfs/aojb0807.pdf.

e. Electronic media and still photography coverage of child custody proceedings is expressly prohibited. [Gen. R. Prac. for Super. & Dist. Cts. 15(b)(2).]

16. For expedited proceedings under the Uniform Deployed Parents Custody and Visitation Act when the parties are unable to reach a voluntary agreement, see Section VIII.B, below. **NOTE:** G.S. 50-13.7A, providing for temporary orders when a parent with primary physical custody or visitation rights was subject to military deployment, was repealed by S.L. 2013-27, § 2, effective Oct. 1, 2013.

K. Consent Agreements

1. A consent judgment regarding custody is not required to contain findings of fact and conclusions of law. [*Buckingham v. Buckingham*, 134 N.C. App. 82, 516 S.E.2d 869, *review denied,* 351 N.C. 100, 540 S.E.2d 353 (1999); *Balawejder v. Balawejder,* 216 N.C. App. 301, 721 S.E.2d 679 (2011) (citing *Buckingham*).] However, court should review consent judgment to "ensure that it does not contradict statutory, judicial, or public policy." [*Buckingham v. Buckingham,* 134 N.C. App. 82, 90, 516 S.E.2d 869, 875.]

2. A "consent judgment memo" that is signed by the judge and filed with the clerk of court is a final judgment even though the memo anticipates the preparation of a more formal judgment. [*Buckingham v. Buckingham*, 134 N.C. App. 82, 516 S.E.2d 869, *review denied,* 351 N.C. 100, 540 S.E.2d 353 (1999). *See also LaValley v. LaValley,* 151 N.C. App. 290, 291 n.1, 564 S.E.2d 913, 914 n.1 (2002) (consent order for custody signed by the parties and a district court judge is valid and enforceable).]

3. There is no requirement that parties appear before the court to acknowledge their consent to the order at the time of entry. [*Tevepaugh v. Tevepaugh*, 135 N.C. App. 489, 521 S.E.2d

117 (1999) (finding that trial court erred in not questioning the parties about their continued consent, but only because the form order signed by the judge contained language finding that the court had made inquiries of the parties).]

4. However, the power of the court to sign a consent order is dependent upon the "unqualified consent" of the parties at the time the judgment is signed. [*Tevepaugh v. Tevepaugh*, 135 N.C. App. 489, 521 S.E.2d 117 (1999) (court noted that the failure to question the parties at the time of signing may subject the judgment to being set aside on the ground that consent did not exist at time of judge's signing).]
5. 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)).] See Section III.C, below, on actions between a parent and nonparent.
6. A parent had no standing to challenge the validity of a consent custody judgment on the basis that the other parent, a minor, was not appointed a G.S. 1A-1, Rule 17 guardian ad litem before the consent order was executed. [*Yurek v. Shaffer,* 198 N.C. App. 67, 678 S.E.2d 738 (2009) (mother who co-signed consent judgment placing custody of child with relatives of father did not have standing to challenge minor father's capacity to consent to the judgment).]

L. Separation Agreements

1. Parents may contract concerning custody, but no contract will deprive the court of inherent authority to protect and provide for minor children. [*Hudson v. Hudson*, 299 N.C. 465, 263 S.E.2d 719 (1980); *Hennessey v. Duckworth,* 231 N.C. App. 17, 22 n.4, 752 S.E.2d 194, 198 n.4 (2013) (citing *Kiger v. Kiger,* 258 N.C. 126, 128 S.E.2d 235 (1962)) (it is well established that custody and support provisions in a separation agreement "are always subject to later modification by the court").]
2. A separation agreement will not prevent one party from subsequently filing an action seeking court-ordered custody. [*See Winborne v. Winborne*, 41 N.C. App. 756, 255 S.E.2d 640 (despite existence of agreement, the trial court has a duty to award custody in accordance with the best interest of the child), *review denied,* 298 N.C. 305, 259 S.E.2d 918 (1979).]
3. However, if the agreement was incorporated into a court order, modification requires a showing of changed circumstances since the date of incorporation in accordance with G.S. 50-13.7. [*Tyndall v. Tyndall*, 80 N.C. App. 722, 343 S.E.2d 284 (modification of child support), *review denied,* 318 N.C. 420, 349 S.E.2d 606 (1986); *Barnes v. Barnes*, 55 N.C. App. 670, 286 S.E.2d 586 (1982), *overruled on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998).]

M. Child Custody Orders

1. Custody orders are never "permanent," but rather are always subject to revision based upon changes in circumstances. [*Heatzig v. MacLean*, 191 N.C. App. 451, 454 n.1, 664 S.E.2d 347, 350 n.1, *appeal dismissed, review denied,* 362 N.C. 681, 670 S.E.2d 564 (2008).] See Section IV on modification, below.
2. However, an order for custody that resolves a claim for custody or a request for modification of custody is a final judgment. [*Massey v. Massey*, 121 N.C. App. 263, 465 S.E.2d 313 (1996).]
3. Findings.
   a. The custody order shall include sufficient findings of fact to support its conclusions of law concerning the best custody placement for the children. [*O'Connor v. Zelinske,* 193 N.C. App. 683, 668 S.E.2d 615 (2008).]
   b. Broad discretion is given to the trial court in its fact-finding duties and in making ultimate custody determinations. [*O'Connor v. Zelinske,* 193 N.C. App. 683, 668 S.E.2d 615 (2008).] However, the findings of fact and conclusions of law must be sufficient for an appellate court to determine whether the judgment is adequately supported by competent evidence. [*Cantrell v. Wishon,* 141 N.C. App. 340, 540 S.E.2d 804 (2000).]
   c. A trial court is not required to make findings of fact on every piece of evidence. [*Mason v. Dwinnell,* 190 N.C. App. 209, 231 n.6, 660 S.E.2d 58, 73 n.6 (2008) (citing *Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982)); *Witherow v. Witherow*, 99 N.C. App. 61, 392 S.E.2d 627 (1990) (trial court in custody dispute need not make a finding as to every fact which arises from the evidence; rather, the court need only find those facts which are material to the resolution of the dispute), *aff'd per curiam,* 328 N.C. 324, 401 S.E.2d 362 (1991); *Dixon v. Gordon*, 223 N.C. App. 365, 734 S.E.2d 299 (2012) (citing *Witherow*), review denied, 366 N.C. 604, 743 S.E.2d 191 (2013). *Cf. Lawing v. Lawing,* 226 N.C. App. 200, 739 S.E.2d 627 (2013) (**unpublished**) (trial court erred by not addressing in its findings the testimony of three experts and documentary evidence in support of allegations that father abused, threatened, humiliated, and was violent in front of, and toward, his children; trial court found that it appeared son "fantasized this story" (referring to abuse allegations) and that there was "no basis in fact" for the allegations); *Hunt v. Long*, 235 N.C. App. 217, 763 S.E.2d 338 (2014) (**unpublished**) (not paginated on Westlaw) (trial court erred when it did not address testimony of defendant grandmother and a "number of witnesses" as to father's heavy use of alcohol and DWI convictions, which were relevant to father's fitness; a trial court must resolve all issues raised by the evidence that directly concern a party's fitness to have custody).]
   d. When entering a written order a trial judge is not restricted to findings she rendered at a hearing. [*Hennessey v. Duckworth,* 231 N.C. App. 17, 752 S.E.2d 194 (2013) (citing G.S. 1A-1, Rule 58) (rejecting this argument in the context of an award of fees).] A custody order is not entered until it is reduced to writing, signed by the judge, and filed with the clerk of court pursuant to Rule 5. [G.S. 1A-1, Rule 58; *Scoggin v. Scoggin*, 791 S.E.2d 524 (N.C. Ct. App. 2016) (trial judge not bound by oral statement regarding custody made at conclusion of trial).] *See also* Cheryl Howell,

Rule 58 and Entry of Civil Judgments: Statements from the Bench Are Not Court Orders, UNC Sch. of Gov't: On the Civil Side Blog (May 3, 2017), https://civil.sog.unc.edu/rule-58-and-entry-of-civil-judgments-statements-from-the-bench-are-not-court-orders.

e. For findings required in an initial custody determination, see Sections III.B.4–6, below. For findings required to modify a custody determination, see Sections IV.C.9–10, below. See also the checklists included at the end of this chapter.

4. Continuous alcohol monitoring.

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 Adult Correction of the Department of Public Safety, 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), *added by* S.L. 2012-146, § 10, effective Dec. 1, 2012, and applicable to child custody and visitation orders issued on or after that date.]

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).]

5. Impact of the death of a party on a custody order.

a. After an initial custody determination, the court retains jurisdiction in the custody case until the death of one of the parties or the emancipation of the child. [*McIntyre v. McIntyre,* 341 N.C. 629, 461 S.E.2d 745 (1995).] When jurisdiction is terminated by the death of one of the parties, grandparents cannot file a motion to modify the original order by seeking visitation [*See Price v. Breedlove*, 138 N.C. App. 149, 530 S.E.2d 559, *review denied,* 353 N.C. 268, 546 S.E.2d 111 (2000).], and there is no case in which grandparents can intervene. [*See McDuffie v. Mitchell,* 155 N.C. App. 587, 590, 573 S.E.2d 606, 608 (2002) (citing *McIntyre*) (stating that "[u]pon the death of the mother in the instant case, the ongoing case between the mother and father ended"), *review denied,* 357 N.C. 165, 580 S.E.2d 368 (2003).]

b. If the grandparents were parties or de facto parties to the original and subsequent custody orders by being awarded visitation rights in those orders, the court does not lose jurisdiction upon the death of a parent and the grandparents can file a motion to modify. [*Sloan v. Sloan,* 164 N.C. App. 190, 595 S.E.2d 228 (2004).] See Section IV.C.2, below, dealing with parental preference in modification cases.

c. For more on this topic, see Cheryl Howell, *What Happens to a Custody Case When a Party Dies?* UNC Sch. of Gov't: On the Civil Side Blog (July 14, 2017), https://civil.sog.unc.edu/what-happens-to-a-custody-case-when-a-party-dies.

N. Relief from a Custody Judgment

1. G.S. 1A-1, Rule 60(a).
   a. A judge may correct clerical mistakes in judgments or orders "arising from oversight or omission . . . at any time on [the judge's] own initiative or on the motion of any party." [G.S. 1A-1, Rule 60(a).]
   b. Rule 60(a) provides a limited mechanism for trial courts to amend erroneous judgments. [*Spencer v. Spencer,* 156 N.C. App. 1, 575 S.E.2d 780 (2003); *Ice v. Ice,* 136 N.C. App. 787, 525 S.E.2d 843 (2000).]
   c. A trial court has no authority, under the guise of correction of a clerical error, to make modifications to an order or judgment which affect the substantive rights of any party. [*Black v. Black,* 174 N.C. App. 361, 620 S.E.2d 924 (2005) (citing *Spencer v. Spencer,* 156 N.C. App. 1, 575 S.E.2d 780 (2003)); *Davis v. Davis,* 229 N.C. App. 494, 505, 748 S.E.2d 594, 602 (2013) (a clarification of an order cannot amount to a modification without a finding of a substantial change of circumstances; "to allow parties to seek 'clarification' from a court any time a custody order could be clearer or any time the parties disagree over its interpretation. . . would undermine the very purpose of the 'changed circumstances' requirement").] No abuse of discretion when trial judge granted defendant's Rule 60(a) motion to correct ambiguity in initial order regarding child's custody after school and during the summer months; ambiguity constituted a clerical mistake. [*Garner v. Garner,* 195 N.C. App. 325, 672 S.E.2d 782 (2009) (**unpublished**).]
2. Standing of intervenors to bring a motion for relief under G.S. 1A-1, Rule 60(b).
   a. Paternal grandparents, who had intervened in a custody action between mother and father, were parties for all purposes and, as such, had standing as parties to pursue a Rule 60(b) motion. [*Williams v. Walker,* 185 N.C. App. 393, 648 S.E.2d 536 (2007).]
   b. 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.
3. G.S. 1A-1, Rule 60(b)(3).
   a. "[T]he court may relieve a party . . . from a final judgment, order, or proceeding for . . . [f]raud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." [G.S. 1A-1, Rule 60(b)(3).]
   b. Duress or undue influence used to secure execution of a consent order may amount to misconduct justifying relief from the order. [*Yurek v. Shaffer,* 198 N.C. App. 67, 678 S.E.2d 738 (2009) (citing *Coppley v. Coppley,* 128 N.C. App. 658, 496 S.E.2d 611 (1998)).]
   c. Where mother was 20 years old, enrolled in community college, and had had several previous interactions with the Department of Social Services concerning her child, trial court did not err when it determined that mother was not under duress or undue influence when she executed a consent judgment placing custody of her child with relatives of the child's father. [*Yurek v. Shaffer,* 198 N.C. App. 67, 678 S.E.2d 738 (2009).]

4. G.S. 1A-1, Rule 60(b)(6).
    a. A party may be granted relief from a judgment or order for any "reason justifying relief from the operation of the judgment." [G.S. 1A-1, Rule 60(b)(6).]
    b. The test for whether a judgment, order, or proceeding should be modified or set aside under Rule 60(b)(6) is two-pronged:
        i. Extraordinary circumstances must exist and
        ii. There must be a showing that justice demands that relief be granted. [*Harris v. Harris,* 162 N.C. App. 511, 591 S.E.2d 560 (2004); *Sloan v. Sloan,* 151 N.C. App. 399, 566 S.E.2d 97 (2002).]
    c. Relief not available under Rule 60(b)(6).
        i. Trial court erred when it amended the decretal part of a custody order pursuant to Rule 60(b)(6) rather than relieving the movant of its provisions. [*Black v. Black,* 174 N.C. App. 361, 620 S.E.2d 924 (2005) (Rule 60(b)(6) cannot be used to amend a custody order to add a provision announced in open court but not included in the final order, specifically, that an overnight visitation privilege terminated when child started kindergarten).]
        ii. Defendant's telephone calls three days before the scheduled hearing of a custody modification motion did not excuse his failure to attend the hearing or mandate setting aside the judgment pursuant to Rule 60(b)(6). [*Trivette v. Trivette,* 162 N.C. App. 55, 590 S.E.2d 298 (2004).]
    d. A trial court's order granting relief from a custody judgment under G.S. 1A-1, Rule 60 did not constitute a modification of the judgment in *Williamson v. Whitfield*, 244 N.C. App. 778, 781 S.E.2d 532 (2016) (**unpublished**) (not paginated on Westlaw) (North Carolina trial court that entered a custody order retained subject matter jurisdiction to consider and grant a G.S. 1A-1, Rule 60 motion for relief from that order even though it had lost modification jurisdiction under G.S. 50A-202(a)(2) because parties and child no longer resided in the state; trial court's decision to grant relief from its order awarding father sole custody was upheld when mother had not received notice of hearing; even though the order granting mother's Rule 60(b) motion "had an effect" on custody, it was not an order modifying custody as the court did not consider the merits of any arguments regarding custody).

O. New Trial

1. Rule 59 of the North Carolina Rules of Civil Procedure allows a trial judge to grant a new trial for any of the grounds listed in that Rule, as long as a party serves a motion requesting a new trial within ten days following entry of the custody order or the court on its own initiative orders a new trial within ten days of entry of the custody order. [G.S. 1A-1, Rule 59(a), (b), (d).]
2. A trial judge may grant a motion for a new trial if a party produces newly discovered material evidence which the party could not have, with reasonable diligence, discovered and produced at trial. [G.S. 1A-1, Rule 59(a)(4).]
3. "Newly discovered evidence" refers to evidence in existence at the time of trial of which the party was excusably ignorant. [*Faulkenberry v. Faulkenberry*, 169 N.C. App. 428, 610 S.E.2d 237 (2005) (new trial denied when motion based on post-trial conduct).]

4. A judge who did not preside over a custody modification proceeding did not have jurisdiction to rule upon a Rule 59 motion for a new trial. [*Quevedo-Woolf v. Overholser*, 820 S.E.2d 817 (N.C. Ct. App.) (Judge B did not have jurisdiction to rule on a motion for a new trial in a case tried by Judge A, even though Judge A had recused himself before entry of Judge B's order), *temporary stay allowed*, 819 S.E.2d 559 (N.C. 2018).]

P. Appeal

1. Right to take an immediate appeal.
   a. A final order may be appealed as a matter of right to the court of appeals. [G.S. 7A-27(b)(2), *added by* S.L. 2013-411, § 1, effective Aug. 23, 2013; 1-277(a).] A final judgment is one that disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. [*Hausle v. Hausle,* 226 N.C. App. 241, 739 S.E.2d 203 (2013); *Duncan v. Duncan,* 366 N.C. 544, 742 S.E.2d 799 (2013) (final judgment generally is one that ends the litigation on the merits).]
      i. An alimony order was final and immediately appealable as of right pursuant to G.S. l-277(a), even though it reserved the issue of attorney fees. Attorney fees and costs are collateral issues and not part of the parties' substantive claims. [*Duncan v. Duncan,* 366 N.C. 544, 742 S.E.2d 799 (2013) (citing *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202–03, 108 S. Ct. 1717, 1722 (1988)) (announcing a bright-line rule applicable to any civil case disposing of the parties' substantive claims but leaving open the issue of attorney fees and costs); *Lucas v. Lucas,* 209 N.C. App. 492, 706 S.E.2d 270 (2011) (citing *Bumpers v. Cmty. Bank of N. Va.,* 364 N.C. 195, 695 S.E.2d 442 (2010)) (alimony and equitable distribution judgment final for purposes of appeal, even if a claim for attorney fees under G.S. 50-16.4 remained pending; claim for attorney fees under G.S. 50-16.4 is not a substantive issue or part of the merits of an alimony claim under G.S. 50-16.3A). *See also Ray Haluch Gravel Co. v. Cent. Pension Fund,* 571 U.S. 177, 134 S. Ct. 773 (2014) (holding, for federal appellate jurisdictional purposes, that whether a claim for attorney fees is based on a statute, a contract, or both, a pending claim for fees and costs does not prevent, as a general rule, the merits judgment from becoming "final" for purposes of appeal).]
      ii. But when a custody order is appealed, the trial court loses jurisdiction to consider a request for attorney fees arising from the custody case. [*Balawejder v. Balawejder,* 216 N.C. App. 301, 721 S.E.2d 679 (2011) (appeal from an order for custody and child support); *In re Scearce,* 81 N.C. App. 662, 345 S.E.2d 411, *review denied,* 318 N.C. 415, 349 S.E.2d 590 (1986).] *But see Duncan v. Duncan,* 366 N.C. 544, 742 S.E.2d 799 (2013), discussed immediately above and in Section II.P.6.c.ii, below. Because *Duncan* identified attorney fees as a "collateral issue" separate from the parties' substantive claims, court of appeals opinions holding that trial courts lose jurisdiction to determine attorney fees while the custody order is on appeal because the fee issue is affected by child custody may be called into question.
   b. Generally there is no right of immediate appeal of an interlocutory order. An interlocutory order is one made during the pendency of an action that does not dispose of the case but leaves it for further action by the trial court in order to settle and

determine the entire controversy. [*Hausle v. Hausle,* 226 N.C. App. 241, 739 S.E.2d 203 (2013).]

c. Immediate appeal of an interlocutory order is allowed in three instances:

i. When the order affects a substantial right [G.S. 7A-27(b)(3)a., *added by* S.L. 2013-411, § 1, effective Aug. 23, 2013; 1-277(a). *See Beasley v. Beasley*, 816 S.E.2d 866 (N.C. Ct. App. 2018) (the traditional "substantial right" exception continues to apply to interlocutory orders entered in a family case, such as a claim for attorney fees, that are not covered by the recently enacted G.S. 50-19.1, discussed in Section P.1.c.iii, below).]

ii. In cases involving multiple parties or claims, when the order is final as to some but not all of the claims or parties and the trial judge certifies the order for immediate appeal by including in the order "that there is no just reason for delay." [G.S. 1A-1, Rule 54(b); *Duncan v. Duncan,* 366 N.C. 544, 742 S.E.2d 799 (2013) (certification under Rule 54(b) permits an interlocutory appeal from orders that are final as to a specific portion of the case but which do not dispose of all claims as to all parties).]

(a) (a) Appeal of an alimony order that was interlocutory when filed because of pending child support and equitable distribution (ED) claims was no longer interlocutory when those claims had been resolved by the time the appeal was heard. [*Crowley v. Crowley,* 203 N.C. App. 299, 691 S.E.2d 727 (granting defendant's motion to amend the record on appeal to reflect entry of a judgment resolving claims for ED, child support. and attorney fees), *review denied,* 364 N.C. 749, 700 S.E.2d 749 (2010).]

iii. For appeals taken on or after Aug. 23, 2013, G.S. 7A-27 allows for an immediate appeal of an order or judgment resolving a claim listed in G.S. 50-19.1, without requiring certification from the trial judge pursuant to G.S. 1A-1, Rule 54(b) that "there is no just reason for delay." [*See* G.S. 7A-27(b)(3)e., *added by* S.L. 2013-411, § 1, effective Aug. 23, 2013.] G.S. 50-19.1, *amended by* S.L. 2018-86, § 1, effective June 25, 2018, provides:

(a) Notwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment adjudicating a claim for absolute divorce, divorce from bed and board, the validity of a premarital agreement as defined by G.S. 52B-2(1), child custody, child support, alimony, or equitable distribution if the order or judgment would otherwise be a final order or judgment within the meaning of G.S. 1A-1, Rule 54(b), but for the other pending claims in the same action.

(1) An order was not a final judgment under G.S. 1A-1, Rule 54(b) as required by G.S. 50-19.1 when mother's visitation was not finally determined based on order for review hearings to be held in thirty, sixty, and ninety days, so trial court could consider mother's mental health evaluation and its effect on her visitation. [*Lueallen v. Lueallen*, 790 S.E.2d 690 (N.C. Ct. App. 2016) (appeal proceeded on other grounds).]

(b) A party does not forfeit the right to appeal under this section if the party fails to immediately appeal from an order or judgment described in G.S. 50-19.1.

(c) An appeal from an order or judgment under G.S. 50-19.1 shall not deprive the trial court of jurisdiction over any other claims pending in the same action. [G.S. 50-19.1, *amended by* S.L. 2018-86, § 1, effective June 25, 2018, and applicable to appeals filed on or after that date.]

d. Note also that the court of appeals has discretion to treat an appeal as a petition for certiorari to review an interlocutory appeal. [N.C. R. App. P. 21(a)(1).]

e. Before the effective date of G.S. 50-19.1, final judgments of equitable distribution (ED), alimony, child support, custody, absolute divorce, and divorce from bed and board could not be appealed if other claims remained pending in the case, unless the trial judge certified that there is no just reason for delay pursuant to G.S. 1A-1, Rule 54(b) or unless the judgment affected a substantial right.

i. An appeal of a custody order that reserves other issues for later determination is interlocutory. No case has held that an interlocutory custody order affects a substantial right, except when the child's physical well-being is at stake. [*Hausle v. Hausle,* 226 N.C. App. 241, 739 S.E.2d 203 (2013) (citing *McConnell v. McConnell,* 151 N.C. App. 622, 566 S.E.2d 801 (2002)).]

ii. An order modifying a permanent custody order and leaving other claims unresolved is interlocutory but affects a substantial right when the physical well-being of the child is at issue. [*McConnell v. McConnell,* 151 N.C. App. 622, 566 S.E.2d 801 (2002) (appeal proper even though order did not address claims for alimony or ED when child was at risk of sexual molestation if left in mother's home); *Lawing v. Lawing,* 226 N.C. App. 200, 739 S.E.2d 627 (2013) (**unpublished**) (citing *McConnell*) (appeal of interlocutory order modifying custody allowed, even though attorney fees issue pending when child had told his pediatrician of sexual abuse by father during visitation). *Cf. Hausle v. Hausle,* 226 N.C. App. 241, 245, 739 S.E.2d 203, 206 (2013) (distinguishing *McConnell*) (allegations that children's well-being was at stake because of lack of educational opportunities and dental issues are "well short of the level of physical well-being . . . contemplated in *McConnell*").]

f. The general rule is that temporary custody orders are interlocutory "and the temporary custody granted by the order does not affect any substantial right of plaintiff which cannot be protected by timely appeal from the trial court's ultimate disposition of the entire controversy on the merits." [*File v. File,* 195 N.C. App. 562, 569, 673 S.E.2d 405, 410 (2009) (quoting *Dunlap v. Dunlap*, 81 N.C. App. 675, 676, 344 S.E.2d 806, 807, *review denied,* 318 N.C. 505, 349 S.E.2d 859 (1986)) (temporary custody order did not affect a substantial right when trial court found there was no danger to child). *But see Smith v. Barbour*, 154 N.C. App. 402, 403 n.1, 571 S.E.2d 872, 874 n.1 (2002) (where court of appeals acknowledged that temporary orders are interlocutory but exercised discretion to grant certiorari to hear the appeal), *cert. denied,* 599 S.E.2d 408 (2004).]

2. Treatment of findings of fact and conclusions of law by an appellate court.
    a. The appellate court must evaluate whether a trial court's findings of fact are supported by substantial evidence and must determine if the trial court's factual findings support its conclusions of law. [*Shipman v. Shipman,* 357 N.C. 471, 586 S.E.2d 250 (2003); *Spoon v. Spoon,* 233 N.C. App. 38, 755 S.E.2d 66 (2014) (citing *Shipman*); *Martin v. Martin,* 167 N.C. App. 365, 605 S.E.2d 203 (2004).] "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. [*Shipman v. Shipman*, 357 N.C. 471, 586 S.E.2d 250 (2003); *Spoon v. Spoon,* 233 N.C. App. *38*, 755 S.E.2d 66 (2014) (citing *Shipman*).]
    b. Under our standard of review in custody proceedings, "the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." [*O'Connor v. Zelinske,* 193 N.C. App. 683, 687, 668 S.E.2d 615, 617 (2008) (quoting *Mason v. Dwinnell*, 190 N.C. App. 209, 221, 660 S.E.2d 58, 66 (2008)).]
    c. Findings must resolve the material, disputed issues raised by the evidence. [*Carpenter v. Carpenter,* 225 N.C. App. 269, 737 S.E.2d 783 (2013) (matter remanded when findings, although numerous, addressed the evidence and contentions of each party on the disputed issues regarding the child's welfare but resolved few of them; findings addressed other disputed issues but did not relate the findings to the child's needs or best interest).]
    d. "Unchallenged findings of fact are binding on appeal." [*Burger v. Smith*, 243 N.C. App. 233, 236, 776 S.E.2d 886, 889 (2015) (quoting *Peters v. Pennington,* 210 N.C. App. 1, 12–13, 707 S.E.2d 724, 733 (2011)); *Cox v. Cox,* 238 N.C. App. 22, 768 S.E.2d 308 (2014) (citing *Peters*).]
    e. If a trial court's uncontested findings support its conclusions of law, the court of appeals must affirm the trial court's order. [*Burger v. Smith*, 243 N.C. App. 233, 776 S.E.2d 886 (2015) (citing *Respess v. Respess,* 232 N.C. App. 611, 614, 754 S.E.2d 691, 695 (2014)).]
3. Standard of review.
    a. Generally.
        i. Absent an abuse of discretion, the trial court's decision in custody matters should not be upset on appeal. [*Everette v. Collins,* 176 N.C. App. 168, 625 S.E.2d 796 (2006); *Wolgin v. Wolgin*, 217 N.C. App. 278, 719 S.E.2d 196 (2011) (citing *Shipman v. Shipman,* 357 N.C. 471, 586 S.E.2d 250 (2003)) (trial courts are vested with broad discretion in child custody matters).]
        ii. An abuse of discretion occurs when the trial court's ruling was "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision." [*Tankala v. Pithavadian*, 789 S.E.2d 31, 37 (N.C. Ct. App. 2016) (quoting *White v. White,* 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).]
    b. Standard of review in appeal of the following matters is de novo:
        i. Whether a trial court has subject matter jurisdiction. [*Catawba Cty. ex rel. Rackley v. Loggins*, 370 N.C. 83, 804 S.E.2d 474 (2017) (decision to dismiss an action for lack of subject matter jurisdiction is reviewed de novo); *Wellons*

v. White v. Wellons, 229 N.C. App. 164, 748 S.E.2d 709 (2013) (citing *McKoy v. McKoy,* 202 N.C. App. 509, 689 S.E.2d 590 (2010)) (standing in custody action is reviewed de novo); *In re E.J.*, 225 N.C. App. 333, 738 S.E.2d 204 (2013).]

ii. Whether, in a custody case, a trial court's findings of fact support its conclusions of law. [*Respess v. Respess,* 232 N.C. App. 611, 754 S.E.2d 691 (2014), and *O'Connor v. Zelinske,* 193 N.C. App. 683, 668 S.E.2d 615 (2008) (both citing *Mason v. Dwinnell*, 190 N.C. App. 209, 660 S.E.2d 58 (2008)); *Carpenter v. Carpenter,* 225 N.C. App. 269, 737 S.E.2d 783 (2013) (noting that appellant incorrectly identified the standard of review applicable to the issue of whether findings of fact support the conclusions of law as "abuse of discretion" instead of de novo review); *Mason*, (reviewing de novo whether the trial court's findings supported its conclusion that a parent acted in a manner inconsistent with the parent's constitutionally protected status).]

iii. Review of a trial court's conclusions of law. [*Meadows v. Meadows*, 246 N.C. App. 245, 782 S.E.2d 561 (2016) (citing *McConnell v. McConnell,* 151 N.C. App. 622, 626, 566 S.E.2d 801, 804 (2002)); *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).]

iv. Whether an order is temporary or final in nature. [*Summerville v. Summerville*, 814 S.E.2d 887 (N.C. Ct. App. 2018).]

v. A finding of a natural parent's unfitness. [*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).]

vi. Whether conduct constitutes conduct inconsistent with the parent's protected status. [*Weideman v. Shelton*, 787 S.E.2d 412 (N.C. Ct. App. 2016) (citing *Rodriguez v. Rodriguez,* 211 N.C. App. 267, 276, 710 S.E.2d 235, 242 (2011)), *review denied*, 369 N.C. 481, 795 S.E.2d 367 (2017); *Sides v. Ikner*, 222 N.C. App. 538, 730 S.E.2d 844 (2012) (citing *Rodriguez*).]

vii. Whether a district court has applied the proper custody modification standard. [*Hatcher v. Matthews*, 789 S.E.2d 499 (N.C. Ct. App. 2016) (citing *Peters v. Pennington,* 210 N.C. App. 1, 707 S.E.2d 724 (2011)) (whether a court has utilized the correct legal standard in a custody modification proceeding is reviewed de novo); *Peters* (citing *Simmons v. Arriola,* 160 N.C. App. 671, 586 S.E.2d 809 (2003)).]

viii. Whether the statutory requirements in G.S. 50-13.6 for an award of attorney fees have been met. [*Hudson v. Hudson*, 299 N.C. 465, 263 S.E.2d 719 (1980) (question of law); *Bramblett v. Bramblett,* 218 N.C. App. 454, 721 S.E.2d 763 (2012) (**unpublished**) (citing *Hudson*).]

ix. "Whether a trial court has properly interpreted the statutory framework applicable to costs." [*Davignon v. Davignon*, 245 N.C. App. 358, 362, 782 S.E.2d 391, 394 (2016) (quoting *Peters v. Pennington,* 210 N.C. App. 1, 25, 707 S.E.2d 724, 741 (2011)); *Peters*.]

c. The appellate courts review for abuse of discretion a trial court's decision regarding:

i. Jurisdiction.

(a) The decision to relinquish jurisdiction to another state on the basis of a more convenient forum under G.S. 50A-207. [*In re M.M.*, 230 N.C. App. 225, 750 S.E.2d 50 (2013).]

ii. Best interest determination between parents.

(a) Determination of best interest is within the discretion of the trial judge and will not be disturbed on appeal absent clear abuse of discretion. [*See Pulliam v. Smith*, 348 N.C. 616, 625, 501 S.E.2d 898, 903 (1998) ("law . . . severely limits appellate court review of custody orders"); *Spoon v. Spoon,* 233 N.C. App. 38, 48, 755 S.E.2d 66, 74 (2014) (quoting *Metz v. Metz,* 138 N.C. App. 538, 540–41, 530 S.E.2d 79, 81 (2000)) ("[a]s long as there is competent evidence to support the trial court's findings, its determination as to the child's best interests cannot be upset absent a manifest abuse of discretion"); *Green v. Kelischek*, 234 N.C. App. 1, 13, 759 S.E.2d 106, 114 (2014) (quoting *Stephens v. Stephens,* 213 N.C. App. 495, 503, 715 S.E.2d 168, 174 (2011)) (modification upheld when mother failed to demonstrate that trial court's best interest determination was "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision"); *see also Hall v. Hall,* 188 N.C. App. 527, 655 S.E.2d 901 (2008) (trial judge is vested with broad discretion in custody cases and will not be overturned absent an abuse of discretion; when the trial court finds that both parties are fit and proper to have custody but determines that it is in the best interest of the child for one parent to have primary physical custody, that determination will be upheld if it is supported by competent evidence).]

iii. Best interest determination between a parent and a nonparent.

(a) The district court's determination regarding the best interest of the child in a case involving a parent and a third party will not be disturbed unless there is an abuse of discretion. [*Mason v. Dwinnell,* 190 N.C. App. 209, 660 S.E.2d 58 (2008).]

iv. Expert compensation.

(a) The trial court's award of reasonable compensation of an expert appointed under N.C. R. Evid. 706, in this case the child's psychological evaluator, and its apportionment among the parties, is reviewed for abuse of discretion. [*Smith v. Barbour,* 195 N.C. App. 244, 671 S.E.2d 578, *review denied,* 363 N.C. 375, 678 S.E.2d 670 (2009).]

v. Costs.

(a) The reasonableness and necessity of costs as well as the trial court's determination of costs when the applicable statute gives the trial court discretion to award costs. [*Davignon v. Davignon*, 245 N.C. App. 358, 782 S.E.2d 391 (2016).]

4. Effect on an appeal of child reaching majority.

a. Orders regarding the custody of a minor no longer apply when the minor reaches the age of majority, so an appeal therefrom is moot and must be dismissed. [*Swanson*

v. Herschel, 174 N.C. App. 803, 622 S.E.2d 159 (2005) (appeal of an order finding mother not in contempt of a custody order moot when son had turned 18 while the appeal was pending); *Robinson v. Robinson,* 210 N.C. App. 319, 707 S.E.2d 785 (2011) (appellate ruling on visitation schedule with child who reached majority during appeal would be "entirely academic").]

5. Post-remand procedure.
    a. When case remanded to trial court for additional findings:
        i. Absent direction from the court of appeals, the trial court has discretion to receive new evidence or to rely on evidence previously submitted. [*Hicks v. Alford,* 156 N.C. App. 384, 576 S.E.2d 410 (2003) (when court of appeals did not order trial court to hold a new hearing or receive new evidence, trial court was not required to take additional evidence on modification motion).] A trial court on remand may enter an order containing findings as to circumstances and events occurring after the case was appealed only if new evidence is received on remand. Otherwise, a trial court on remand can make findings and conclusions based only on the existing record. [*Crews v. Paysour*, 821 S.E.2d 469 (N.C. Ct. App. 2018).]
    b. When case remanded with specific instructions:
        i. It is error not to follow the mandate of the appellate court. [*McKinney v. McKinney,* 228 N.C. App. 300, 745 S.E.2d 356 (2013) (when the court of appeals gave specific instructions to compensate an expert only for time spent testifying, as provided in G.S. 7A-305(d)(11), and not for time expert spent waiting in court, trial court on remand was bound by that mandate and erred in awarding compensation for court time pursuant to G.S. 7A-314), *review denied,* 367 N.C. 288, 753 S.E.2d 678, *review dismissed,* 367 N.C. 288, 753 S.E.2d 679 (2014); *Lasecki v. Lasecki*, 809 S.E.2d 296, 308 (N.C. Ct. App. 2017) (quoting *D & W, Inc. v. City of Charlotte*, 286 N.C. 720, 722, 152 S.E.2d 199, 202 (1966)) (appellate mandate "is binding upon [the trial court] and must be strictly followed without variation or departure;" on remand, a trial court lacks authority to alter any part of a trial court order affirmed on appeal but is "free to address anew" portions of the order vacated on appeal).]
    c. When no additional evidence is presented on remand:
        i. In any case in which no additional evidence is presented on remand, the trial court is to make findings of fact and conclusions of law based only on the existing record. [*Crews v. Paysour*, 821 S.E.2d 469, 472 (N.C. Ct. App. 2018) (order on remand can address only the facts as of the date of the last evidentiary hearing, that being "the only evidence in the record."]
6. Effect of an appeal on jurisdiction.
    a. Pursuant to G.S. 1-294, when an appeal is perfected, the trial court is divested of jurisdiction "upon the judgment appealed from, or upon the matter embraced therein, unless otherwise provided by the Rules of Appellate Procedure." [G.S. 1-294, *amended by* S.L. 2015-25, § 2, effective May 21, 2015.]

b. The court below may proceed upon any other matter included in the action and not affected by the judgment appealed from. [G.S. 1-294, *amended by* S.L. 2015-25, § 2, effective May 21, 2015.]

i. Pursuant to G.S. 1-294, a trial court lacks jurisdiction to hear or decide any issues, or to enter an order, related to custody of a child while a custody order as to that child is on appeal. [*Quevedo-Woolf v. Overholser*, 820 S.E.2d 817 (N.C. Ct. App.) (trial court erred when it entered a custody order after appeals from two prior custody orders related to that child had been perfected and were pending; the last order entered before appeals were taken, a temporary consent visitation order, remained in effect), *temporary stay allowed*, 819 S.E.2d 559 (N.C. 2018).]

ii. Pursuant to G.S. 1-294, a trial court has jurisdiction to enter an order on matters other than child custody while a custody order is on appeal. [*McKyer v. McKyer,* 179 N.C. App. 132, 632 S.E.2d 828 (2006) (citing *Rosero v. Blake,* 150 N.C. App. 250, 563 S.E.2d 248, *rev'd on other grounds,* 357 N.C. 193, 581 S.E.2d 41 (2003), *cert. denied,* 540 U.S. 1177, 124 S. Ct. 1407 (2004)) (appeal of a custody order, which did not address child support, did not divest the trial court of jurisdiction to decide question of child support; court noted, however, that appeal of earlier custody order, expressly providing for child support by ordering mother to provide insurance, fell within scope of G.S. 1-294 so husband's complaint for past and future child support, filed while appeal pending, was properly dismissed). *See also Huang v. Huang*, 151 N.C. App. 752, 567 S.E.2d 469 (2002) (**unpublished**) (not paginated on Westlaw) (trial court could enter order for child support while custody order on appeal; while there was an "obvious relationship" between the two, under the facts presented, one did not directly affect the other).]

iii. For a later proceeding between the same parties addressing trial court jurisdiction after an appeal, see *McKyer v. McKyer,* 223 N.C. App. 210 (2012) (**unpublished**) (father's appeal of a 2008 order denying him sole custody stripped the trial court of jurisdiction to enter any orders affecting custody, including two orders entered in 2009 relating to visitation; entry of the 2009 orders nunc pro tunc to a date before appeal of the 2008 order taken did not avoid the jurisdictional bar of G.S. 1-294).

iv. Note also that an appeal from an order or judgment adjudicating a claim for absolute divorce, divorce from bed and board, the validity of a premarital agreement as defined by G.S. 52B-2(1), child custody, child support, alimony, or equitable distribution, where the order or judgment would otherwise be a final order or judgment within the meaning of G.S. 1A-1, Rule 54(b), does not deprive the trial court of jurisdiction over any other claims pending in the same action. [G.S. 50-19.1, *added by* S.L. 2013-411, § 2, effective Aug. 23, 2013; *amended by* S.L. 2018-86, § 1, effective June 25, 2018.]

v. G.S. 50-13.3(a) provides that a custody order is enforceable by civil contempt and its disobedience may be punished by criminal contempt. Thus, notwithstanding the provisions of G.S. 1-294, custody orders are enforceable by civil contempt pending appeal. [G.S. 50-13.3(a).]

c. When request for attorney fees is pending when custody order is appealed.

i. After a custody order is appealed, the trial court lacks jurisdiction to consider a request for attorney fees arising from the custody case. [*Balawejder v. Balawejder,* 216 N.C. App. 301, 721 S.E.2d 679 (2011) (citing *McClure v. Cty. of Jackson,* 185 N.C. App. 462, 648 S.E.2d 546 (2007)); *In re Scearce,* 81 N.C. App. 662, 345 S.E.2d 411, *review denied,* 318 N.C. 415, 349 S.E.2d 590 (1986).]

ii. However, the North Carolina Supreme Court has held that an alimony order was final and immediately appealable as of right pursuant to G.S. l-277(a), even though it reserved the issue of attorney fees, reasoning that attorney fees and costs are collateral issues and not part of the parties' substantive claims. [*Duncan v. Duncan,* 366 N.C. 544, 742 S.E.2d 799 (2013) (citing *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202–03, 108 S. Ct. 1717, 1722 (1988)) (announcing a bright-line rule applicable to any civil case disposing of the parties' substantive claims but leaving open the issue of attorney fees and costs); *Lucas v. Lucas*, 209 N.C. App. 492, 706 S.E.2d 270 (2011) (citing *Bumpers v. Cmty. Bank of N. Va.*, 364 N.C. 195, 695 S.E.2d 442 (2010)*)* (alimony and equitable distribution judgment final for purposes of appeal, even if a claim for attorney fees under G.S. 50-16.4 remained pending; claim for attorney fees under G.S. 50-16.4 is not a substantive issue or part of the merits of an alimony claim under G.S. 50-16.3A).] Because *Duncan* identified attorney fees as a "collateral issue," separate from the parties' substantive claims, court of appeals opinions holding that trial courts lose jurisdiction to determine attorney fees while the custody order is on appeal because the fee issue is affected by child custody may be called into question. *See* G.S. 1-294 (an appeal divests the court of jurisdiction with regard to "the judgment appealed from, or upon the matter embraced therein," but the court below may proceed upon any other matter "not affected by the judgment appealed from.").

iii. The attorney fee issue may be addressed by the trial court after the appeal is resolved. [*In re Scearce,* 81 N.C. App. 662, 345 S.E.2d 411 (holding that a request for attorney fees may be raised by a motion in the cause subsequent to the determination of the main custody action; if the matter is on appeal, the trial court can properly consider the motion for attorney fees upon resolution of the appeal), *review denied,* 318 N.C. 415, 349 S.E.2d 590 (1986).] Alternatively, the trial court could defer entry of the written judgment until after a ruling is made on the issue of attorney fees and incorporate all of its rulings into a single, written judgment, from which appeal could be taken. [*McClure v. Cty. of Jackson,* 185 N.C. App. 462, 648 S.E.2d 546 (2007) (suggesting procedure).]

Q. Relationship between G.S. Chapter 50 Custody and Chapter 7B Abuse, Neglect, or Dependency Proceedings

1. When a juvenile proceeding for abuse, neglect, or dependency and a civil custody action are pending at the same time for the same child, the civil custody action is automatically stayed, unless the juvenile court judge consolidates the juvenile proceeding with a civil action filed in the same district or dissolves the stay. [G.S. 7B-200(c)(1); 50-13.1(i).] The court in the juvenile proceeding may proceed in the juvenile proceeding

while the civil custody action remains stayed or may dissolve the stay of the civil custody action and stay the juvenile proceeding pending a resolution of the civil custody action. [G.S. 7B-200(d) (see statute and Section II.Q.2, below, for other options). *See Rodriguez v. Rodriguez,* 211 N.C. App. 267, 710 S.E.2d 235 (2011) (after the juvenile court terminated jurisdiction, the trial court had jurisdiction to proceed on the Chapter 50 custody claim filed while the juvenile case was pending; the juvenile order that relieved the Department of Social Services and the guardian ad litem from further responsibility, and ordered no further action of the parent, was an order terminating juvenile court jurisdiction).] For more on termination of juvenile court jurisdiction, see Section II.Q.3, below. For more on the automatic stay of custody claims in civil actions after a petition for abuse, neglect, or dependency is filed, see Sara DePasquale, *Abuse, Neglect, Dependency Actions Automatically Stay Custody Claims in Civil Actions*, UNC Sch. of Gov't: On the Civil Side Blog (Mar. 27, 2015), http://civil.sog.unc.edu/abuse-neglect-dependency-actions-automatically-stay-custody-claims-in-civil-actions.

2. If conflicting orders for the same child are entered in a juvenile proceeding for abuse, neglect, or dependency and a civil custody action, the order in the juvenile proceeding controls as long as the juvenile court continues to exercise jurisdiction in the juvenile proceeding. [G.S. 7B-200(c)(2).]
   a. Notwithstanding G.S. 50-13.5(f) (venue provision in G.S. Chapter 50 child custody or support proceeding), the court in a juvenile proceeding may order that any civil action or claim for custody filed in the district be consolidated with the juvenile proceeding. [G.S. 7B-200(d).]
   b. If a civil action or claim for custody of the juvenile is filed in another district, the court in the juvenile proceeding, for good cause and after consulting with the court in the other district, may:
      i. Order that the civil action or claim for custody be transferred to the county in which the juvenile proceeding is filed or
      ii. Order a change of venue in the juvenile proceeding and transfer the juvenile proceeding to the county in which the civil action or claim is filed. [G.S. 7B-200(d).]
3. Entry of a civil child custody order in the juvenile proceeding. [G.S. 7B-911.]
   a. Upon placing custody with a parent or other appropriate person, a court in a juvenile proceeding must determine whether or not jurisdiction in the juvenile proceeding should be terminated and custody of the juvenile awarded to a parent or other person pursuant to G.S. Chapter 50. [G.S. 7B-911(a).]
      i. The juvenile court must terminate juvenile jurisdiction before entering a civil custody order under G.S. 7B-911. [*Sherrick v. Sherrick,* 209 N.C. App. 166, 704 S.E.2d 314 (2011); *In re J.K.*, 799 S.E.2d 439 (N.C. Ct. App. 2017) (reversing and remanding an order entered in a juvenile proceeding that appeared to be intended to transfer the case but did not terminate the juvenile court's jurisdiction, did not include a provision transferring jurisdiction to a G.S. Chapter 50 matter, and did not have the findings and conclusions specified in G.S. 7B-911(c)).]

ii. The statute requires entry of the order in two files:

(a) In the existing Chapter 50 file (if one exists) or in a newly created Chapter 50 file and

(b) In the juvenile file. [G.S. 7B-911(b) and (c)(2).]

iii. The same order can be used for both the juvenile file and the civil file as long as the order is sufficient to justify termination of the juvenile court's jurisdiction and sufficiently supports the action taken in the custody case. [*In re A.S.*, 182 N.C. App. 139, 641 S.E.2d 400 (2007) (trial court is not required to enter two different orders); *Sherrick v. Sherrick,* 209 N.C. App. 166, 172 n.6, 704 S.E.2d 314, 319 n.6 (2011) (citing *A.S.*) (while one order may terminate juvenile court jurisdiction and serve as the "civil custody order" under Chapter 50, the order must include the proper findings and conclusions required by G.S. 7B-911(c) for each component of the order).]

iv. The custody order must set out findings and conclusions that support entry of an initial custody order or modification of an existing custody order and must otherwise meet the requirements for an order under Chapter 50. [G.S. 7B-911(c)(1); *Sherrick v. Sherrick,* 209 N.C. App. 166, 704 S.E.2d 314 (2011) (a civil custody order under G.S. 7B-911(c) must include appropriate findings of fact and conclusions of law under G.S. 50-13.1 *et seq.*).]

(a) An order modifying custody was sufficient when it incorporated a previous adjudication order setting out stepfather's inappropriate discipline of the children, and when it included additional findings as to the children's behavioral problems and counseling provided by the father. [*In re A.S.*, 182 N.C. App. 139, 641 S.E.2d 400 (2007).]

v. To terminate the jurisdiction of the juvenile court, the custody order must include the findings required by G.S. 7B-911(c)(2). [*Sherrick v. Sherrick,* 209 N.C. App. 166, 704 S.E.2d 314 (2011) (when order did not state that it was terminating juvenile court jurisdiction, did not find that there was no need for continued state intervention or find facts related thereto, and did not include a finding about a permanent plan for the juvenile, purported transfer was invalid).]

vi. Upon proper termination of the jurisdiction of the juvenile court, all future proceedings to modify or enforce the custody order will take place within the Chapter 50 file and will be treated as any other civil custody proceeding.

b. Failure to comply with the termination procedure in G.S. 7B-911 results in a lack of subject matter jurisdiction in the G.S. Chapter 50 proceeding.

i. G.S. 7B-911 sets forth a detailed procedure for transfer of cases, which will ensure that the juvenile is protected and that the juvenile's custodial situation is stable throughout the transition. [*Sherrick v. Sherrick,* 209 N.C. App. 166, 704 S.E.2d 314 (2011).]

ii. The procedure in G.S. 7B-911 is not a mere formality that can be dispensed with just because the parties agree to a consent order. [*Sherrick v. Sherrick,* 209 N.C. App. 166, 704 S.E.2d 314 (2011).]

iii. If the jurisdiction of the juvenile court is not terminated in compliance with G.S. 7B-911, the judge in the Chapter 50 case will not have subject matter jurisdiction. [*Sherrick v. Sherrick,* 209 N.C. App. 166, 704 S.E.2d 314 (2011) (a temporary custody order that purported to transfer a Chapter 7B abuse, neglect, and dependency matter to a civil action between private parties under Chapter 50 did not validly transfer the matter when the order did not comply with the procedure in G.S. 7B-911(c)(2) to terminate juvenile court jurisdiction; later Chapter 50 orders awarding parents sole custody and ordering payment of their attorney fees were vacated on appeal for lack of subject matter jurisdiction).]

4. Because the burden of proof in a juvenile abuse, neglect, or dependency proceeding is clear and convincing evidence and the standard in a custody case is preponderance of the evidence, the doctrine of collateral estoppel does not apply to prevent relitigation in an abuse, neglect, or dependency case of matters previously determined in a custody proceeding, and vice versa. [*In re K.A.,* 233 N.C. App. 119, 127, 756 S.E.2d 837, 842 (2014) (noting that both respondent mother and the guardian ad litem had conceded that "case law is well[ ]settled that collateral estoppel cannot apply where the proceedings involve a different burden of proof").]

5. In *Sharp v. Sharp*, 124 N.C. App. 357, 477 S.E.2d 258 (1996), the court of appeals held that grandparents had standing to file a Chapter 50 custody claim alleging unfitness of the child's mother where no juvenile proceeding had been initiated. The court rejected mother's contention that grandparents could raise issues of potential harm to the children only in a juvenile proceeding.

6. As in custody proceedings, a court in a juvenile proceeding may not consider granting permanent custody rights to a nonparent without first concluding that the parent is unfit or otherwise has waived her constitutional right to exclusive custody. [*See In re D.M.*, 211 N.C. App. 382, 712 S.E.2d 355 (2011) (citing *In re B.G.*, 197 N.C. App. 570, 677 S.E.2d 549 (2009)) (recognizing that this analysis is often applied in civil custody cases under Chapter 50 but that it also is applicable to custody awards arising out of juvenile petitions filed under Chapter 7B; reversing award of permanent custody to grandmother with visitation to father where child had been adjudicated only dependent, court had specifically found neither parent was unfit, and there were no findings or conclusions addressing whether father had acted inconsistently with his parental rights); *In re B.S.*, 225 N.C. App. 654, 738 S.E.2d 453 (2013) (**unpublished**) (citing *In re D.M.*, 211 N.C. App. 382, 712 S.E.2d 355 (2011)) (in neglect proceeding awarding temporary custody to Department of Social Services, it was both improper and unnecessary for trial court to make finding that father was unfit and had acted inconsistently with his protected parental rights; such a finding proper only when determining permanent custody).]

R. Relationship between G.S. Chapter 50 Custody and Termination of Parental Rights

1. The fact that a court in another district has continuing jurisdiction in a custody action under Chapter 50 does not affect the jurisdiction of the court in the district in which the child resides to proceed in an action to terminate parental rights. [*In re Humphrey*, 156 N.C. App. 533, 577 S.E.2d 421 (2003).] For a case in which a grandmother's civil action for custody and the Department of Social Service's action to terminate parental rights were consolidated, see *Smith v. Alleghany County Department of Social Services*, 114 N.C.

App. 727, 443 S.E.2d 101, *review denied*, 337 N.C. 696, 448 S.E.2d 533 (1994). See G.S. 7B-200(d), authorizing the court in a juvenile proceeding to order that a civil action or claim for custody filed in the district be consolidated with a juvenile proceeding.

2. The initiation of a termination of parental rights proceeding has no effect on a pending Chapter 50 custody action. [The stay provision in G.S. 7B-200 applies only when a petition alleges that the juvenile is abused, neglected, or dependent. The stay in G.S. 50-13.1(i) applies only when a child is the subject of a juvenile abuse, neglect, or dependency proceeding.]
3. A termination action cannot be initiated by one parent's filing of a counterclaim for termination in the other parent's civil action for visitation. [*In re S.D.W.*, 187 N.C. App. 416, 653 S.E.2d 429 (2007).]
4. The period of time that a child is in the custody of petitioners after a neglect proceeding converted to a civil custody case may be counted toward the required one year of court-ordered placement outside the home in a termination of rights proceeding under G.S. 7B-1111(a)(2). [*In re L.C.R.,* 226 N.C. App. 249, 739 S.E.2d 596 (2013) (rejecting respondent's argument that only the six months that the petitioners had custody under the juvenile court order should count).]
5. In a termination of rights proceeding under G.S. 7B-1111(a)(2), conversion of the case from a neglect proceeding to a Chapter 50 custody proceeding was not relevant to the court's determination of the parent's reasonable progress in correcting conditions that led to the child's removal. Making reasonable progress does not require that the parent be in a position to regain custody under the higher standard in a civil custody action. [*In re L.C.R.,* 226 N.C. App. 249, 739 S.E.2d 596 (2013).]

S. Relationship between G.S. Chapter 50 Custody and G.S. Chapter 35A Guardianship

1. Once the clerk of court makes a determination of incompetency under G.S. Chapter 35A and appoints a guardian for the incompetent, the clerk retains exclusive jurisdiction to determine disputes between guardians concerning the physical custody of the incompetent. [*McKoy v. McKoy,* 202 N.C. App. 509, 689 S.E.2d 590 (2010).]
2. District court had no jurisdiction to determine custody between parents of adult incompetent child pursuant to G.S. 50-13.8 because clerk of court retained exclusive jurisdiction in the guardianship proceeding. [*McKoy v. McKoy,* 202 N.C. App. 509, 689 S.E.2d 590 (2010).]
3. A guardianship order supersedes a Chapter 50 custody order, so the entry of a guardianship order renders all Chapter 50 custody matters "moot." [*Corbett v. Lynch*, 795 S.E.2d 564 (N.C. Ct. App. 2016) (trial court did not err in dismissing previously filed Chapter 50 custody action after petition for guardianship was filed with the clerk).] *See* Cheryl Howell, *Chapter 35A Guardianship Trumps Chapter 50 Custody*, UNC Sch. of Gov't: On the Civil Side Blog (Feb. 1, 2017), https://civil.sog.unc.edu/chapter-35a-guardianship-trumps-chapter-50-custody.
4. Note, however, that the court in *Corbett v. Lynch*, 795 S.E.2d 564, 567 (N.C. Ct. App. 2016) stated that the holding "does not affect any jurisdiction the district court may have to issue *ex parte* orders under Chapter 50 for temporary custody arrangements where the conditions of [G.S. 50-13.5(d)(2)–(3)] are met."

T. Relationship between G.S. Chapter 50 Custody Claims and Adoption Proceedings

1. The only way a district court obtains jurisdiction to hear matters relating to an adoption proceeding brought before the clerk is by transfer [G.S. 48-2-601(a1); 1-301.2(b).] or appeal. [G.S. 48-2-607(b); 1-301.2(e). *See Norris v. Norris*, 203 N.C. App. 566, 692 S.E.2d 190 (2010) (district court lacked jurisdiction to review an order of the clerk in an adoption proceeding because no appeal was taken pursuant to G.S. 48-2-607(b), nor was the order final for appeal purposes, and the case had not been transferred by the clerk; when the matter became contested after entry of the clerk's order at issue, the clerk should have transferred the proceeding to the district court for adjudication).]
2. Exercise of jurisdiction when there are concurrent proceedings for custody and adoption involving the same child.
    a. There is no statute specifying a procedure for concurrent adoption and custody proceedings, as there is for custody actions that coincide with abuse, neglect, or dependency proceedings under G.S. Chapter 7B. [*Johns v. Welker,* 228 N.C. App. 177, 744 S.E.2d 486 (2013).]
    b. In *Johns v. Welker,* 228 N.C. App. 177, 744 S.E.2d 486 (2013), father filed an action seeking custody of his child while an adoption proceeding for that child, to which father was not a party, was pending. The court of appeals, on de novo review, held that the trial court erred in dismissing the custody proceeding for lack of subject matter jurisdiction. However, even though the trial court had jurisdiction, the custody action must be held in abeyance pending completion of the adoption proceeding because of potentially "unresolvable conflicts."
        i. Statutes applicable in *Johns* did not provide a clear answer to the question of how to address the potential for conflicting orders when the same child is the subject of simultaneous custody and adoption proceedings; the adoption statutes had changed since the court of appeals in *Griffin v. Griffin*, 118 N.C. App. 400, 456 S.E.2d 329 (1995) considered the issue, so it was not controlling in *Johns*, and the doctrine of prior pending action was not applicable in *Johns* because the parties to the two proceedings were not the same and the proceedings did not provide the same relief.
        ii. Once the adoption petition is resolved by a final decree of adoption or denial or dismissal of the petition, the court may remove the stay and, if appropriate, consider custody of the minor child under G.S. Chapter 50.
    c. If a custody case and an adoption proceeding are pending in the same judicial district, consolidation pursuant to G.S. 1A-1, Rule 42(a) may be appropriate. [*See Oxendine v. Catawba Cty. Dep't of Soc. Servs.*, 303 N.C. 699, 281 S.E.2d 370 (1981) (consolidation of adoption proceeding and juvenile proceeding would have been appropriate but for procedural error, as both actions involved related issues of fact and law); *Johns v. Welker,* 228 N.C. App. 177, 744 S.E.2d 486 (2013) (noting that father had not filed a motion to consolidate adoption and custody actions); *cf. Norris v. Norris*, 203 N.C. App. 566, 692 S.E.2d 190 (2010) (where custody proceeding was pending in district court and adoption proceeding was pending before superior court clerk, motion of intervenor who contested the adoption, filed in the pending custody action, requesting both visitation and consolidation of the custody and adoption proceedings,

triggered the clerk's duty to transfer the adoption proceeding to district court under G.S. 48-2-601(a1) and 1-301.2(b)).]

3. A final order of adoption probably voids any existing custody order concerning the adopted child. [*See Griffin v. Griffin*, 118 N.C. App. 400, 456 S.E.2d 329 (1995); G.S. 48-1-106(a) (decree of adoption effects a complete substitution of families for all legal purposes); 48-1-106(c) (decree of adoption divests the former parents of all rights with respect to the adoptee).]
4. Custody during adoption proceeding. Since 1996, adoption statutes have provided that during the pendency of an adoption proceeding, custody of a child is with the potential adoptive parent in a direct placement adoption, [G.S. 48-3-501.] and with the agency in a placement by an agency, [G.S. 48-3-502.] "[u]nless the [district] court orders otherwise."
5. An adoptive parent is entitled to the parental preference in a custody proceeding against a nonparent. [*See Best v. Gallup,* 215 N.C. App. 483, 715 S.E.2d 597 (2011) (mother who adopted child alone waived her protected status when she and nonparent jointly agreed to care for the child before the adoption, jointly cared for the child before and after the adoption for approximately five years, adoptive mother identified nonparent to the child and to others as the child's father, and adoptive mother did not state or otherwise indicate an intention that the relationship between the nonparent and the child would be temporary), *appeal dismissed, review denied,* 724 S.E.2d 505 (N.C. 2012).]
6. Effect of stepparent adoption on grandparents' visitation rights.
   a. An adoption of a child by the child's stepparent does not terminate or otherwise affect visitation rights previously awarded to a biological grandparent of a minor pursuant to G.S. 50-13.2, nor does it affect the right of a biological grandparent to petition for visitation rights pursuant to G.S. 50-13.2A or 50-13.5(j). [G.S. 48-4-105.]

U. Relationship between Custody and Proceedings under G.S. Chapter 50B

1. An allegation of domestic violence between the parents of a child may be considered good cause for waiver of the mandatory setting of a contested custody or visitation matter for child custody mediation. [G.S. 50-13.1(c).]
2. When a party seeks a determination of custody or visitation rights in an action under G.S. Chapter 50B, subject matter jurisdiction over the action is determined by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), just as it is in any other custody dispute. Chapter 50B does not provide alternative grounds for jurisdiction over custody disputes. [*See Danna v. Danna,* 88 N.C. App. 680, 364 S.E.2d 694 (holding that a North Carolina trial judge, having properly declined to exercise jurisdiction under the UCCJA, the statute in effect until adoption of the UCCJEA, in favor of a Florida court that was exercising jurisdiction over the parties' custody dispute, did not err by failing to address mother's Chapter 50B claims filed in the same proceeding), *review denied,* 322 N.C. 479, 370 S.E.2d 221 (1988).]
3. Effect of a temporary custody order entered in a Chapter 50B proceeding.
   a. A temporary custody order pursuant to Chapter 50B is without prejudice and must be for a fixed period of time not to exceed one year. [G.S. 50B-3(a1)(4).] A subsequent Chapter 50 custody order supersedes a Chapter 50B temporary custody order. [G.S. 50B-3(a1)(4).]

b. When the trial court makes a temporary custody determination under Chapter 50B, the issue of custody may be heard de novo under Chapter 50. [G.S. 50B-3(a1)(4); *Doyle v. Doyle,* 176 N.C. App. 547, 626 S.E.2d 845 (2006).]

c. A trial court in a Chapter 50 proceeding is not bound by any finding regarding custody made in a temporary custody order under Chapter 50B. [*See* G.S. 50B-3(a1)(4).]

d. However, collateral estoppel prevented a trial court in the following cases from relitigating in a custody action the issue of domestic violence that had been litigated and resolved in an earlier Chapter 50B proceeding. [*Doyle v. Doyle,* 176 N.C. App. 547, 626 S.E.2d 845 (2006) (trial judge in custody matter erred by making findings with respect to an incident of domestic violence that contradicted findings made by another judge in an earlier Chapter 50B proceeding between the parties); *Simms v. Simms,* 195 N.C. App. 780, 673 S.E.2d 753 (2009) (citing *Doyle*) (where judge in Chapter 50B case found insufficient evidence to support a Chapter 50B order against defendant, trial judge in custody case erred by finding that defendant had committed an act of domestic violence).]

e. For more on temporary custody orders entered in a Chapter 50B proceeding, see Domestic Violence, Bench Book, Vol. 1, Chapter 7.

4. Domestic violence must be considered when trial court is determining best interests. See Section III.B.7, below.

V. Applicability of G.S. 1A-1, Rule 68 (Offer of Judgment) in Custody Actions

1. Offers of judgment pursuant to G.S. 1A-1, Rule 68 are not applicable to custody actions. [*Mohr v. Mohr*, 155 N.C. App. 421, 573 S.E.2d 729 (2002).]

W. Applicability of G.S. 1A-1, Rule 68.1 (Confession of Judgment) in Custody Actions

1. A judgment for confession may be entered without action for money due or for money that may become due and may be entered for alimony or support of minor children. [G.S. 1A-1, Rule 68.1(a).]

2. There is no statutory authorization for use of a confession of judgment in a custody proceeding. Moreover, the statute requires that a defendant desiring to confess judgment file a signed and verified statement authorizing "entry of judgment for the amount stated" and provides for entry of a judgment "for the amount confessed," so child custody is not a proper subject matter for confession. [G.S. 1A-1, Rule 68(b), (d).]

3. Notwithstanding the foregoing, an appellate case has enforced a judgment by confession that "purported to grant custody of the child to the plaintiff." [*Pierce v. Pierce,* 58 N.C. App. 815, 817, 295 S.E.2d 247, 249 (1982) (complaint seeking enforcement of separation agreement determining custody and specifying amount of support should have been dismissed where prior judgment by confession gave judgment on both issues).]

X. Applicability of G.S. 1A-1, Rule 41 (Dismissal of Action) in Custody Actions

1. Voluntary dismissal pursuant to G.S. 1A-1, Rule 41(a).

a. A plaintiff may dismiss an action or claim without order of court by filing:

i. A notice of dismissal at any time before the plaintiff rests his case or

ii. A stipulation of dismissal signed by all parties who have appeared in the action. [G.S. 1A-1, Rule 41(a)(1).]

b. Once plaintiff rests his case, plaintiff cannot terminate the case by taking a voluntary dismissal. At that point only a judge can dismiss the case. Unless otherwise specified, a dismissal under Rule 41(a)(2) is without prejudice. [G.S. 1A-1, Rule 41(a)(2).]

c. Plaintiff cannot take a voluntary dismissal any time after a "final" custody order has been entered. [*Massey v. Massey,* 121 N.C. App. 263, 465 S.E.2d 313 (1996) (stipulation of dismissal filed by the parties after reconciliation was void and of no effect as to the child custody and child support issues previously resolved by "final" judgment; parties were not free to dismiss voluntarily under Rule 41(a) a final determination of child custody; moreover, express language of Rule 41 provides for dismissal of an action or claim, not an order).] **NOTE**: A plaintiff may not voluntarily dismiss a custody action without the other party's consent if the other party has requested affirmative relief arising out of the plaintiff's claim. [*See Quesinberry v. Quesinberry,* 196 N.C. App. 118, 674 S.E.2d 775 (2009) (claim of intervenor grandparents for affirmative relief in the form of visitation remained pending and was not subject to dismissal after mother and father agreed to dismiss their custody claims by consent judgment).]

d. For the effect of a voluntary dismissal on a temporary order, see Section II.G.8, above.

2. Involuntary dismissal pursuant to G.S. 1A-1, Rule 41(b) for failure to prosecute.

a. Under G.S. 1A-1, Rule 41, a defendant may move for dismissal of an action or of any claim therein for failure of plaintiff to prosecute or to comply with the rules of civil procedure or any court order. [G.S. 1A-1, Rule 41(b).]

b. Unless the court in its order for dismissal otherwise specifies, a dismissal pursuant to Rule 41(b) and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication on the merits. [G.S. 1A-1, Rule 41(b).]

c. When a motion or complaint is involuntarily dismissed with prejudice, the party is precluded from filing another motion or complaint with identical allegations. The party is not precluded from filing another motion or complaint asserting different allegations and requesting different relief. [*Hebenstreit v. Hebenstreit,* 240 N.C. App. 27, 769 S.E.2d 649 (2015) (trial court *sua sponte* involuntarily dismissed for failure to prosecute father's motion for modification of custody and for contempt, the contempt motion being based on a single allegation that mother had left the state with the child, completely denying father access to the child in violation of an earlier order awarding father secondary physical custody and liberal visitation; trial court erred when it dismissed father's second motion for temporary emergency custody and for contempt based on its conclusion that all matters raised in the second motion for contempt had previously been adjudicated by the involuntary dismissal of the first contempt motion; father's second contempt motion contained additional allegations not included in the first contempt motion, alleged additional acts of contempt, and requested additional relief not requested in the first motion and thus was not barred).]

III. Initial Custody Determinations

A. Subject Matter Jurisdiction [G.S. Chapter 50A.]

1. Parties cannot confer jurisdiction by consent on a court that does not have jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). [Official Comment, G.S. 50A-201; *Foley v. Foley,* 156 N.C. App. 409, 576 S.E.2d 383 (2003) (subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel); *Sloop v. Friberg*, 70 N.C. App. 690, 320 S.E.2d 921 (1984) (subject matter jurisdiction in custody case cannot be conferred by waiver, estoppel, or consent).]
2. Unless authorized to exercise emergency jurisdiction, see Section III.A.4, below, a North Carolina court has jurisdiction to make an initial determination only if:
   a. North Carolina is the home state of the child (see Section III.A.3.b, below, for definition of "home state") on the date of the commencement of the proceeding, or it was the home state within six months of commencement, and the child is absent from the state but a parent continues to live in North Carolina; [G.S. 50A-201(a)(1).]
   b. There is no home state or the home state has declined to exercise jurisdiction on the ground that North Carolina is the more appropriate forum and:
      i. The child and at least one parent have a significant connection with North Carolina other than mere physical presence and
      ii. There is substantial evidence in North Carolina concerning the child's care, protection, training, and personal relationships; [G.S. 50A-201(a)(2). *See Potter v. Potter*, 131 N.C. App. 1, 505 S.E.2d 147 (1998) (jurisdiction cannot be invoked pursuant to the "significant connection/substantial evidence" ground unless there is no home state or the home state has declined jurisdiction; when case was decided, UCCJA did not limit jurisdiction on the basis of significant connection/substantial evidence to instances in which there was no home state or when home state had declined to exercise jurisdiction); *see also Holland v. Holland*, 56 N.C. App. 96, 100, 286 S.E.2d 895, 898 (1982) (to invoke significant connection/substantial evidence jurisdiction, the "substantial" evidence required is "more than a scintilla" and court must address each aspect of the child's "interest, care, protection, training, and personal relationships").]
      iii. There can be more than one state with significant connection/substantial evidence jurisdiction. [*Gerhauser v. VanBourgondien*, 238 N.C. App. 275, 767 S.E.2d 378 (2014).]
   c. All courts having jurisdiction under subsections a and b immediately above have declined to exercise jurisdiction on the ground that North Carolina is the more appropriate forum [G.S. 50A-201(a)(3). *See In re T.R.*¸792 S.E.2d 197 (N.C. Ct. App. 2016) ("docket entry" by judge in state with exclusive, continuing jurisdiction was sufficient to establish that state with jurisdiction had determined that North Carolina was the more convenient forum); *cf. In re T.E.N.*¸798 S.E.2d 792 (N.C. Ct. App. 2017) (where record contained nothing, other than parent's testimony, showing court in state with jurisdiction had determined that North Carolina was the more convenient forum, North Carolina trial court erred in exercising jurisdiction); see Section VII.A.5, below, for discussion of inconvenient forum determination).]; or

d. No other state has jurisdiction under subsections a, b, or c, immediately above. [G.S. 50A-201(a)(4). *See Gerhauser v. VanBourgondien*, 238 N.C. App. 275, 767 S.E.2d 378 (2014) (inappropriate for North Carolina to use "jurisdiction by necessity" pursuant to G.S. 50A-201(a)(4) when two other states had significant connection/substantial evidence jurisdiction).]

3. Definitions. [G.S. 50A-102.]

a. "Initial determination" is the first child custody determination concerning a particular child. [G.S. 50A-102(8).]

b. "Home state" is the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of the custody proceeding. [G.S. 50A-102(7); *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); *Brewington v. Serrato*, 77 N.C. App. 726, 336 S.E.2d 444 (1985).]

i. A temporary absence from a state is part of the six-month time period. [G.S. 50A-102(7).] UCCJA provision included counted as language but that language was not included in UCCJEA.

(a) The court of appeals has adopted a "totality of the circumstances" approach to determine whether an absence from a state is a temporary absence or whether it is a change of residence sufficient to lose home state status. [*Chick v. Chick,* 164 N.C. App. 444, 596 S.E.2d 303 (2004).]

(b) Ten months over a two-year period spent by children in Georgia pursuant to a temporary custody order was a "temporary absence" from North Carolina. [*Pheasant v. McKibben*, 100 N.C. App. 379, 396 S.E.2d 333 (1990), *review denied,* 328 N.C. 92, 402 S.E.2d 417 (1991).]

(c) Six-week period of time spent by children in North Carolina was a temporary absence from Vermont. [*Chick v. Chick,* 164 N.C. App. 444, 596 S.E.2d 303 (2004).]

(d) Six months in Japan was a temporary absence where parties traveled to Japan with the intent to visit family and return to North Carolina. [*Hammond v. Hammond,* 209 N.C. App. 616, 708 S.E.2d 74 (2011) (intent to return established by fact that parties had paid private school tuition in full for upcoming school year prior to leaving).]

(e) *See also Gerhauser v. VanBourgondien*, 238 N.C. App. 275, 767 S.E.2d 378 (2014) (military deployment is one of the circumstances considered in determining whether an absence from a state is temporary).]

ii. For a child less than six months of age, home state is the state in which the child lived from birth. [G.S. 50A-102(7).]

c. "State." [G.S. 50A-102(15).]

i. For purposes of determining jurisdiction, an Indian tribe is treated as a state, [G.S. 50A-104(b).] as are foreign countries. [G.S. 50A-105(a).]

ii. However, G.S. 50A-105(c) provides that a North Carolina court need not apply the UCCJEA if the child custody law of the foreign country violates fundamental principles of human rights. [*See Tataragasi v. Tataragasi,* 124 N.C. App. 255,

268, 477 S.E.2d 239, 246 (1996) (pending custody proceeding in Turkey did not prevent North Carolina from exercising subject matter jurisdiction over custody matter because Turkish custody law "is not in conformity with the UCCJA," the statute in effect until adoption of the UCCJEA), *review denied,* 345 N.C. 760, 485 S.E.2d 309 (1997).] See also Section I.D, above, on application of foreign law resulting in a violation of constitutional rights.

4. Temporary emergency jurisdiction. [G.S. 50A-204.]
   a. A court has temporary emergency jurisdiction if the child is present in North Carolina and the child has been abandoned or when it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse. [G.S. 50A-204(a). *See In re Van Kooten*, 126 N.C. App. 764, 487 S.E.2d 160 (1997), *appeal dismissed*, 347 N.C. 576, 502 S.E.2d 618 (1998).]
   b. See Section VII.A.3, below, regarding the exercise of emergency jurisdiction.
   c. The Uniform Deployed Parents Custody and Visitation Act, see Section VIII.B, below, does not prohibit the exercise of temporary emergency jurisdiction by a court under the UCCJEA. [G.S. 50A-353(d), *added by* S.L. 2013-27, § 3, effective Oct. 1, 2013.]
5. See Section VII, below, for more detailed information regarding interstate custody disputes.

B. Actions between Parents or between Nonparents: The "Best Interest" Test

1. Policy to Promote and Encourage Parenting Time by Both Parents.
   a. It is the policy of the State of North Carolina to encourage parents to enter into parenting agreements to reduce needless custody litigation, to take significant and ongoing responsibility for their child, to share equitably in the rights and responsibilities of parenting, and to establish and maintain a healthy relationship with each other. It also is the policy of North Carolina to encourage programs and court practices that reflect the active and ongoing participation of both parents in the child's life when it is in the child's best interest to do so. [*See* G.S. 50-13.01, *added by* S.L. 2015-278, § 1, effective Oct. 20, 2015.]
   b. For more discussion of G.S. 50-13.01, see Cheryl Howell, *Kids Need Both Parents When Possible*, UNC Sch. of Gov't: On the Civil Side Blog (Oct. 30, 2015), http://civil.sog.unc.edu/kids-need-both-parents-when-possible.
2. Application of the "best interest" test.
   a. In a custody dispute between two natural parents or between two or more nonparent custodians, the "best interest of the child" test must be applied. [*Everette v. Collins,* 176 N.C. App. 168, 173 n.3, 625 S.E.2d 796, 799 n.3 (2006).]
   b. For custody disputes between a parent and a nonparent, see Section III.C, below.
3. Determining "best interest."
   a. Custody is to be awarded to the person who will best promote the interest and welfare of the child. [G.S. 50-13.2(a).]

b. In a proceeding for custody of a child of a service member, a court may not consider a parent's past or possible future deployment as the only basis in determining the best interest of the child. The court may consider any significant impact on the best interest of the child regarding the parent's past or possible future deployment. [G.S. 50-13.2(f), *added by* S.L. 2013-27, § 1, effective Oct. 1, 2013.] See the Uniform Deployed Parents Custody and Visitation Act, Section VIII.B, below.

c. The paramount consideration and the "polar star" which guides the discretion of the trial judge is the welfare and needs of the child. [*Green v. Kelischek*, 234 N.C. App. 1, 759 S.E.2d 106 (2014) (citing *Evans v. Evans*, 138 N.C. App. 135, 530 S.E.2d 576 (2000)); *In re Peal*, 305 N.C. 640, 290 S.E.2d 664 (1982); *Tucker v. Tucker*, 288 N.C. 81, 216 S.E.2d 1 (1975).]

d. Judge must determine the environment that will "best encourage full development of the child's physical, mental, emotional, moral and spiritual faculties." [*In re Peal*, 305 N.C. 640, 645, 290 S.E.2d 664, 667 (1982).]

e. For an initial custody determination, neither party has the burden of proof on the issue of best interest. [*Lamond v. Mahoney,* 159 N.C. App. 400, 583 S.E.2d 656 (2003); *Regan v. Smith*, 131 N.C. App. 851, 509 S.E.2d 452 (1998).]

f. In determining best interest, it is not erroneous to consult or consider a temporary parenting agreement (TPA), a temporary order, or other orders in the case. [*Dixon v. Gordon.*, 223 N.C. App. 365, 734 S.E.2d 299 (2012) (citing *Raynor v. Odom*, 124 N.C. App. 724, 478 S.E.2d 655 (1996)) (consulting a TPA but assuring father that TPA would not be held against him), *review denied,* 366 N.C. 604, 743 S.E.2d 191 (2013); *Raynor* (considering temporary custody orders and prior contempt orders in determining child custody).]

g. The trial court is responsible for requiring production of any evidence that may be competent and relevant on the issue of "best interest." [*Lamond v. Mahoney,* 159 N.C. App. 400, 583 S.E.2d 656 (2003).]

h. The trial court must decide best interest based on all of the evidence presented. [*Regan v. Smith*, 131 N.C. App. 851, 509 S.E.2d 452 (1998) (citing *Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998)).]

i. In determining best interest, the court must consider "all relevant factors . . . and must include written findings of fact that reflect the consideration of each of these factors and that support the determination of what is in the best interest of the child." [G.S. 50-13.2(a), *amended by* S.L. 2015-278, § 2, effective Oct. 20, 2015. *See In re Shue*, 311 N.C. 586, 598, 319 S.E.2d 567, 574 (1984) (review hearing of trial placement of neglected child with her father), and *In re O'Neal*, 140 N.C. App. 254, 257, 535 S.E.2d 620, 622 (2000) (citing *Shue*) (review hearing of custody arrangement for child removed from parents) (both cases holding that a trial court must hear and consider evidence offered by a party on the question of the best interest of the child if the offered evidence is "competent, relevant and non-cumulative").]

j. As between parents, whether natural or adoptive, there is no presumption as to who will better promote the child's interest and welfare. [G.S. 50-13.2(a), *amended by* S.L. 2015-278, § 2, effective Oct. 20, 2015.]

i. Best interest of the child is to be determined from the actual facts without reference to any presumptions. [*Rosero v. Blake*, 357 N.C. 193, 581 S.E.2d 41 (2003), *cert. denied*, 540 U.S. 1177, 124 S. Ct. 1407 (2004).]

ii. Amendments to G.S. 50-13.2(a) abrogated two common-law presumptions as to custody:

(a) The "tender years" doctrine, which provided that a mother had the superior right to custody of her young children. [*Westneat v. Westneat*, 113 N.C. App. 247, 437 S.E.2d 899 (1994) (there is no longer a "tender years doctrine" requiring that young children be placed with mother). *See also Greer v. Greer,* 175 N.C. App. 464, 468, 471–72, 624 S.E.2d 423, 426, 428 (2006) (findings that "natural law of birthing and breast-feeding gives the mother a distinct advantage" to parent a newborn and that the "very nature of the age and gender of the minor child" placed father at a disadvantage amounted to an application of the abolished tender years presumption and was error).]

(b) The maternal preference presumption, which vested custody of an illegitimate child in the child's mother. [*Rosero v. Blake,* 357 N.C. 193, 581 S.E.2d 41 (2003) (holding that a father's right to custody of his illegitimate child is legally equal to that of the child's mother), *cert. denied,* 540 U.S. 1177, 124 S. Ct. 1407 (2004); *David v. Ferguson,* 160 N.C. App. 89, 584 S.E.2d 102 (2003) (citing *Rosero*) (upholding use of the best interest standard, instead of the common law presumption, to award custody of the parties' illegitimate children to father).]

iii. A court cannot resurrect a presumption that has been abolished by taking judicial notice of the assumptions underlying the doctrine. [*Greer v. Greer,* 175 N.C. App. 464, 468, 624 S.E.2d 423, 426 (2006) (court could not take judicial notice of the "natural law of birthing" or of the bond between a mother and child from breast-feeding; such matters are not appropriate for judicial notice because they are open to reasonable debate and could not be distinguished from the abrogated tender years presumption).]

k. G.S. 50-13.2(b) provides that if a party is absent or relocates with or without children due to an act of domestic violence, the absence or relocation shall not be a factor that weighs against the party in determining custody or visitation.

l. Trial court did not err by concluding best interest of children would be served by being in mother's physical custody, even though evidence showed that mother told father that she was taking the children to visit her parents in Georgia and made no mention of the fact that she was leaving defendant and taking the children with her. [*Hall v. Hall,* 188 N.C. App. 527, 655 S.E.2d 901 (2008).]

4. Findings of fact generally.

a. A custody order need not, and should not, include findings as to each piece of evidence presented at trial, but it must resolve the material, disputed issues raised by the evidence. If the trial court does not find sufficient evidence to resolve an issue, the order should so state. [*Carpenter v. Carpenter,* 225 N.C. App. 269, 737 S.E.2d 783 (2013).]

b. A trial court must make specific findings of the ultimate facts established by the evidence and may not simply recite testimony of the witnesses without resolving conflicting evidence on key issues. [*Carpenter v. Carpenter,* 225 N.C. App. 269, 737 S.E.2d 783 (2013) (finding regarding "hotly contested" practice of co-sleeping was, in part, a recitation of evidence and not a true finding, as it simply stated what the counselor suggested as to the practice).]

c. The findings of fact must relate to and support the judgment. [*Lamond v. Mahoney,* 159 N.C. App. 400, 583 S.E.2d 656 (2003) (sparse findings did not support a significant expansion of visitation, as findings did not set out the reasons for expanding visitation); *Jerkins v. Warren,* 219 N.C. App. 647, 722 S.E.2d 798 (2012) (**unpublished**) (not paginated on Westlaw) (citing *Lamond*) (findings insufficient when only findings relevant to custody provided that "[t]he parties are fit and proper persons for the roles assigned herein" and that "[t]his Order is in the best interest of the minor child").]

d. It is the quality, and not the quantity, of findings that is determinative. [*Carpenter v. Carpenter,* 225 N.C. App. 269, 737 S.E.2d 783 (2013) (custody order contained eighty findings, many of which were actually recitations of evidence that did not resolve disputed issues; findings also failed to resolve primary issues raised by the evidence bearing directly upon the child's welfare); *Odugba v. Odugba,* 227 N.C. App. 225, 741 S.E.2d 926 (2013) (**unpublished**) (not paginated on Westlaw) (". . . it is incumbent upon the trial judge not only to make quantitative findings, but also qualitative and competent findings" so that an appellate court can comprehend the basis for the judgment; order modifying custody reversed when it contained more than twenty instances of conflicting testimony on key issues, about which no findings were made).]

5. Findings as to best interest.

a. An order for custody must include written findings of fact that reflect the consideration of each of the factors set out in G.S. 50-13.2(a) and that support the determination of what is in the best interest of the child. [G.S. 50-13.2(a), *amended by* S.L. 2015-278, § 2, effective Oct. 20, 2015; *Green v. Green,* 54 N.C. App. 571, 284 S.E.2d 171 (1981) (judge must find enough material facts to support the judgment); *Carpenter v. Carpenter,* 225 N.C. App. 269, 737 S.E.2d 783 (2013) (findings should resolve disputed issues and relate those issues to the child's welfare).]

b. Findings as to best interest must resolve all questions raised by the evidence pertaining thereto. [*Dixon v. Dixon,* 67 N.C. App. 73, 312 S.E.2d 669 (1984) (a custody order that fails to treat an important question on which there was evidence is fatally defective); *Carpenter v. Carpenter,* 225 N.C. App. 269, 737 S.E.2d 783 (2013) (citing *Dixon*).]

c. Best interest is a legal conclusion that must be supported by sufficient findings of fact. [*Hunt v. Hunt,* 112 N.C. App. 722, 436 S.E.2d 856 (1993); *Hall v. Hall,* 188 N.C. App. 527, 655 S.E.2d 901 (2008) (before awarding primary physical custody of a child to a particular party, the trial court must conclude as a matter of law that the award of custody to a particular party will be in the best interest of the child, which conclusion must be supported by findings of fact).]

d. Findings sufficient.

i. Order contained sufficient findings to support conclusion that children's best interests would be served by awarding custody to mother when findings included that father was on medication for a neck injury, the side effects of which limited his ability to care for the children on a regular basis; was unable to work; sometimes drank to excess; was the subject of restraining orders obtained by mother and another woman; that father had used Social Security payments disbursed for the care of the children for his own personal expenses, including the hiring of at least three private investigators to follow mother; that father had attempted to impugn mother's reputation to the children; and that father had to enlist sheriff's department to determine which of the children needed medication while in his care. [*O'Connor v. Zelinske,* 193 N.C. App. 683, 668 S.E.2d 615 (2008).]

ii. Order modifying custody contained 226 unchallenged findings of fact. Primary finding supporting conclusion that it was in child's best interest for father to have primary custody and final decision-making authority was that father was most likely to encourage a relationship between the child and the other parent, thereby increasing chances of successful co-parenting. Other findings set out mother's interference with visitation, which had a detrimental impact on the child; stated that mother needed therapy; and determined that maintaining status quo was not in child's best interest, for if child remained with mother, dynamics between mother, father, and father's wife would probably not change and might result in loss of relationship with father. [*Thomas v. Thomas,* 233 N.C. App. 736, 757 S.E.2d 375 (2014).]

e. Findings not sufficient.

i. In *Carpenter v. Carpenter,* 225 N.C. App. 269, 737 S.E.2d 783 (2013), findings as to best interest or the child's welfare were insufficient for the following reasons:

(a) Findings addressed the evidence and the contentions of each party on the disputed issues regarding the child's welfare but resolved few of them. Examples include: numerous findings mentioned father's alcohol consumption but none resolved whether father abused alcohol to an extent that it might be adversely affecting the child; there were no findings that either party actually abused alcohol or that either party's drinking had adversely affected the child; while trial court may have had some "concern" about the matter, as it ordered both parents not to consume alcohol in child's presence, findings did not resolve the alcohol issue.

(b) Findings addressed other disputed issues but did not relate the findings to the child's needs or best interest. Examples include: a finding as to the ages and genders of father's friends did not indicate what those friends had to do with the child; a finding that child returned from visitation with father with muddy shoes and dirty clothes did not indicate whether this was positive (healthy outdoor play) or negative (poor hygiene while with father).

ii. In *Faircloth v. Faircloth,* 243 N.C. App. 505, 779 S.E.2d 528 (2015) (**unpublished**), issues at trial were (1) the needs of the children, both of whom had been

born prematurely, for medical, behavioral, and educational assistance and the ability of each parent to address those needs, (2) the children's ability to adapt to change if they were placed in father's custody, and (3) the suitability of the living conditions provided by each parent; an order giving father primary custody and mother periodic visitation was vacated when it failed to address issues (1) and (2) and addressed only issue (3).

iii. In *McGraw v. McGraw,* 233 N.C. App. 786, 759 S.E.2d 711 (2014) (**unpublished**) (citing *Carpenter v. Carpenter,* 225 N.C. App. 269, 737 S.E.2d 783 (2013)), custody order was remanded for additional findings and conclusions when only two findings resolved a dispute between the parties, leaving unresolved and merely recapping the evidence as to critical disputes, such as which party, if any, was at fault for lack of communication and cooperation, which party, if either, failed to follow agreed-upon rules and parenting procedures, and whether defendant's conduct disrupted plaintiff's parenting time; some findings addressed issues that neither party had raised as bearing on the child's welfare, such as which parent provided more stability for the child; and other provisions in the order, such as those restricting defendant's participation at child's school and allowing plaintiff to make all decisions regarding the child's physical appearance, had no findings to explain their inclusion.

6. Findings as to fitness.

   a. Court must conclude that parent awarded custody or visitation is fit, supported by findings about characteristics of the parties, such as physical, mental, or financial fitness. [*See Hunt v. Hunt*, 112 N.C. App. 722, 436 S.E.2d 856 (1993) (mere conclusions about parental fitness are insufficient).]

   b. Findings as to the fitness of a party must resolve all questions raised by the evidence pertaining thereto. [*Dixon v. Dixon,* 67 N.C. App. 73, 312 S.E.2d 669 (1984) *(*citing *In re Kowalzek,* 37 N.C. App. 364, 370, 246 S.E.2d 45, 48 (1978)); *Carpenter v. Carpenter,* 225 N.C. App. 269, 737 S.E.2d 783 (2013), and *Lawing v. Lawing,* 226 N.C. App. 200, 739 S.E.2d 627 (2013) (**unpublished**) (both citing *Dixon*).]

   c. Findings of fact should address characteristics of competing parties and may concern physical, mental, financial fitness, or any other factors raised by evidence and relevant to child's welfare. [*Hall v. Hall,* 188 N.C. App. 527, 655 S.E.2d 901 (2008) (citing *Steele v. Steele*, 36 N.C. App. 601, 244 S.E.2d 466 (1978)); *McRoy v. Hodges,* 160 N.C. App. 381, 585 S.E.2d 441 (2003). *See also Phelps v. Phelps*, 337 N.C. 344, 446 S.E.2d 17 (1994) (proper for court to consider fact that one parent is older than the other parent as part of court's consideration of continuity and stability in the life of the child; court also stated in dicta that it is appropriate to consider choices of parents with regard to education of the child and with regard to religious activities of the child). *But see Smith v. Alleghany Cty. Dep't of Soc. Servs.*, 114 N.C. App. 727, 443 S.E.2d 101 (trial court erred in considering problems experienced by petitioner's adult child in support of trial court's conclusion that petitioner possessed inadequate parenting skills), *review denied,* 337 N.C. 696, 448 S.E.2d 533 (1994).]

7. Findings as to alleged child abuse.

   a. Trial court must address evidence of abuse in its findings.

i. The nature of child abuse obligates a trial court to resolve any evidence of abuse in its findings of fact. "Any evidence of child abuse is of the utmost concern in determining whether granting custody to a particular party will best promote the interest and welfare of the child." [*Dixon v. Dixon,* 67 N.C. App. 73, 78, 312 S.E.2d 669, 673 (1984) (appellate court examines not only whether the factual findings are supported by competent evidence, but also whether the factual findings fail to treat any important issues raised by the evidence); *Lawing v. Lawing,* 226 N.C. App. 200, 739 S.E.2d 627 (2013) (**unpublished**) (citing *Dixon*) (a trial court must, at a minimum, indicate through its relevant findings and conclusions that it has considered the relevant evidence about abuse, and it must provide sufficient findings of fact for appellate review).]

ii. Order awarding custody to mother vacated when it failed to address mother's history of child abuse, the evidence of which included testimony that mother stabbed infant with diaper pins and two reports of abuse substantiated by the Department of Social Services. [*Dixon v. Dixon,* 67 N.C. App. 73, 312 S.E.2d 669 (1984) (evidence bore directly upon the question of custody; failure to treat important question raised by the evidence was fatal).]

iii. Where three experts were of the opinion that son's reports of sexual abuse by father were genuine and not fabricated, and where other documentary evidence, including medical records, showed emotional problems of both son and father, trial court erred when it failed to make findings addressing allegations that father abused, threatened, humiliated, and was violent in front of and toward his children. [*Lawing v. Lawing,* 226 N.C. App. 200, 739 S.E.2d 627 (2013) (**unpublished**) (citing *Dixon v. Dixon,* 67 N.C. App. 73, 312 S.E.2d 669 (1984)) (while trial court found that it appeared that son "fantasized this story" (referring to abuse allegations) and that there was "no basis in fact" for the allegations, trial court erred by not addressing the testimony of the three experts and other documentary evidence).]

b. Findings that sufficiently addressed evidence of abuse.

i. Evidence showed that mother spanked child, leaving temporary red marks but not requiring medical attention or causing serious injury; a finding that mother's discipline was appropriate, which also acknowledged that child frequently challenged mother's authority by physical and verbal intimidation, was sufficient. [*Scott v. Scott,* 157 N.C. App. 382, 579 S.E.2d 431 (2003).]

ii. Findings that child consistently failed to provide any information suggesting misconduct by father to numerous professionals, including two social workers, two counselors, and a forensic interviewer; that an examination by a medical doctor revealed no physical evidence of abuse; and that mother had made similar unsubstantiated allegations for approximately three years sufficiently addressed the issue of father's alleged sexual abuse. [*Grandy v. Midgett*, 191 N.C. App. 250, 662 S.E.2d 404 (2008) (**unpublished**).]

8. Findings as to alleged viewing and storing of child pornography.

a. The trial court sufficiently addressed allegations that defendant viewed and stored child pornography when it (1) found that it had insufficient evidence from which to

make a determination because defendant failed to answer questions on the subject in his deposition and failed to testify or present relevant evidence at trial and (2) continued to limit defendant's visitation to supervised visitation at a family abuse services center, with visitation to be revisited upon receipt of a full psychological report and parenting assessment of defendant. [*Meadows v. Meadows*, 246 N.C. App. 245, 782 S.E.2d 561 (2016).]

9. Consideration of domestic violence.
   a. G.S. 50-13.2(b) provides that the absence or relocation of a parent due to domestic violence shall not be a factor that weighs against that parent in determining custody or visitation.
   b. In determining whether North Carolina is an inconvenient forum so that the court may decline jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), the court must make findings on "all relevant factors," including whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child. [G.S. 50A-207(b)(1).]
   c. In making a custody determination, the court must consider and make findings about acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other. The findings must reflect the consideration of these matters. [G.S. 50-13.2(a), *amended by* S.L. 2015-278, § 2, effective Oct. 20, 2015.]
      i. Finding that father had "body slammed" the plaintiff mother twenty to fifty times during the marriage and threatened to punch his brother-in-law in the nose was relevant under G.S. 50-13.2(a) in making a custody determination. [*Hall v. Hall,* 188 N.C. App. 527, 655 S.E.2d 901 (2008).]
   d. If there are findings that domestic violence has occurred, the court must enter an order that will best protect the child and the party victim. [G.S. 50-13.2(b).] In custody actions filed on or after Oct. 1, 2004:
      i. Custody or visitation must be decided based upon the best interest of the child, with particular consideration given to the safety of the child; [G.S. 50B-3(a1)(1).]
      ii. The court must consider the factors set out in G.S. 50B-3(a1)(2) when awarding custody or visitation after finding that domestic violence has occurred; and
      iii. The court may consider placing conditions on visitation as set out in G.S. 50B-3(a1)(3) when awarding visitation after finding that domestic violence has occurred.
   e. Collateral estoppel prevented a trial court in the following cases from relitigating in a custody action the issue of domestic violence that had been litigated and resolved in an earlier Chapter 50B proceeding. [*Doyle v. Doyle,* 176 N.C. App. 547, 626 S.E.2d 845 (2006) (trial judge in custody matter erred by making findings with respect to an incident of domestic violence that contradicted findings made by another judge in an earlier Chapter 50B proceeding between the parties); *Simms v. Simms,* 195 N.C. App. 780, 673 S.E.2d 753 (2009) (where judge in a Chapter 50B case found insufficient

evidence to support a Chapter 50B order against defendant, trial judge in custody case erred by finding that defendant had committed an act of domestic violence).]

10. If requested by either parent, the court must consider "joint custody." [G.S. 50-13.2(a).]
    a. The General Statutes contain no definition of "joint custody," nor do they distinguish between "joint legal custody" and "joint physical custody." [*Patterson v. Taylor,* 140 N.C. App. 91, 535 S.E.2d 374 (2000) (holding that the term "joint custody" was an ambiguous term in the context of a separation agreement).] For definitions of "legal custody" and "physical custody," see Sections II.D.1 and 2, above.
    b. When the parties use the term "joint custody," "without further definition [it] implies a relationship where each parent has a degree of control over, and a measure of responsibility for, the child's best interest and welfare." [*Patterson v. Taylor*, 140 N.C. App. 91, 96, 535 S.E.2d 374, 378 (2000) (considering use of term in a separation agreement); *Carpenter v. Carpenter,* 225 N.C. App. 269, 280, 737 S.E.2d 783, 791 (2013) (quoting *Patterson*) (considering term in the context of an order that granted mother primary custody and father secondary custody and suggesting that the court on remand define its grant of legal and physical custody more clearly).]
    c. There is no presumption in favor of joint legal custody. [*Hall v. Hall,* 188 N.C. App. 527, 536 n.3, 655 S.E.2d 901, 907 n.3 (2008).]
    d. G.S. 50-13.2(a) allows the court substantial latitude in fashioning a "joint custody" arrangement. [*Diehl v. Diehl,* 177 N.C. App. 642, 630 S.E.2d 25 (2006); *Patterson v. Taylor,* 140 N.C. App. 91, 535 S.E.2d 374 (2000). *See also Witherow v. Witherow*, 99 N.C. App. 61, 392 S.E.2d 627 (1990) (upholding award of joint legal custody with primary physical custody in mother), *aff'd per curiam,* 328 N.C. 324, 401 S.E.2d 362 (1991).]
    e. When ordering joint legal custody, the trial court has discretion to distribute certain decision-making authority that would normally fall within the ambit of joint legal custody to one party rather than another, based upon the specifics of the case. [*Diehl v. Diehl,* 177 N.C. App. 642, 630 S.E.2d 25 (2006) (giving as an example the grant to one party of exclusive control over the child's religious upbringing).]
    f. A trial court should clearly define the parameters of legal and physical custody. [*See Carpenter v. Carpenter,* 225 N.C. App. 269, 280–81, 737 S.E.2d 783, 791 (2013) (when the order "appeared" to grant joint legal and physical custody but did not actually so state, instead speaking in terms of primary and secondary care and control, the trial court on remand was advised to clearly define its grant of legal and physical custody, given "the substantial communication difficulties and different parenting styles of the parties").]
    g. The trial court may deviate from "pure" legal custody only after making specific findings of fact as to why such deviation is necessary and is in the best interest of the children. [*Hall v. Hall,* 188 N.C. App. 527, 655 S.E.2d 901 (2008); *Diehl v. Diehl,* 177 N.C. App. 642, 630 S.E.2d 25 (2006) (order awarding parties joint legal custody but granting mother primary decision-making authority unless a particular decision would have a substantial financial effect on father was remanded because findings were insufficient).]

h. The extent of the deviation from "pure" legal custody is immaterial and not a relevant inquiry. The focus of the appellate court will be whether the court made specific findings to warrant a division of joint legal authority. [*Hall v. Hall,* 188 N.C. App. 527, 655 S.E.2d 901 (2008).]

i. Findings held not sufficient to justify a division of joint decision-making authority.

  i. The following findings were insufficient: the parents were "unable to effectively communicate regarding the needs of the minor children;" mother "occasionally found it difficult" to obtain father's consent when enrolling children in activities or obtaining services; and father had refused to consent to an evaluation of one child recommended by the child's school unless it was completely covered by insurance. [*Diehl v. Diehl,* 177 N.C. App. 642, 647, 630 S.E.2d 25, 28 (2006).]

  ii. In a case granting parents joint legal custody, findings regarding the parties' tumultuous relationship were not sufficient to support grant to mother of decision-making authority on all issues affecting the children except sports and extracurricular activities. [*Hall v. Hall,* 188 N.C. App. 527, 655 S.E.2d 901 (2008) (findings supported award of primary physical custody to one party over another but did not support a split in decision-making authority).]

  iii. Findings that parents disagreed on only one health-related issue and one issue regarding after-school care were insufficient to support giving mother sole decision-making authority on all health care and education decisions relating to the child. [*Eddington v. Lamb*, 818 S.E.2d 350 (N.C. Ct. App. 2018).]

j. Findings sufficient to justify a division of joint decision-making authority.

  i. Determination that joint decision-making was not in the children's best interest was upheld based on findings addressing the lack of trust between the parents, their differing values and parenting styles, and that both parents were extremely intelligent. Award of primary legal custody to mother was upheld based on the foregoing findings and upon a finding that mother had demonstrated a "willingness to rise above animosity and foster the children's relationship with [father] and to genuinely consider [father's] point of view in making decisions for the children." [*Oltmanns v. Oltmanns,* 241 N.C. App. 326, 334, 773 S.E.2d 347, 353 (2015).] For more on *Oltmanns*, see Cheryl Howell, *Should Little Johnny Play Football or Take Piano Lessons? Allocating Legal Custody*, UNC Sch. of Gov't: On the Civil Side Blog (Aug. 19, 2015), http://civil.sog.unc.edu/should-little-johnny-play-football-or-take-piano-lessons-allocating-legal-custody.

  ii. Decision to give mother, who was awarded primary physical and legal custody, final decision-making authority as to major decisions affecting the child was upheld based on trial court's specific determination that joint custody was not in the child's best interest because parents could not communicate effectively, except as to surface issues. [*Dixon v. Gordon*, 223 N.C. App. 365, 734 S.E.2d 299 (2012) (appellate court noted that father could actively participate in, and be informed about and involved in, all aspects of the child's life, as the order allowed each parent access to all school and medical records, teachers, doctors, and healthcare professionals, as well as any and all information related to the

child's health, education, welfare, and overall progress), *review denied,* 366 N.C. 604, 743 S.E.2d 191 (2013).]

iii. Decision to give parents joint legal custody with father exercising primary physical custody and "having final decision making authority if the parties are unable to timely agree as to a decision" was upheld, given the "parties' dysfunctional relationship history and the current level of conflict between the parties." [*Thomas v. Thomas,* 233 N.C. App. 736, 744, 746, 757 S.E.2d 375, 378, 382 (2014) (trial court found that "unless one parent is given final decision making authority on important issues, joint legal custody is not in [the minor child's] best interest in light of the risk of delay in making timely decisions").]

iv. When father was awarded exclusive control over child's religious upbringing, findings that parties had agreed to raise child in father's Jewish faith, that the child had been so raised since birth and derived considerable mental well-being therefrom, and that mother had recently begun pressuring the child to become Christian were found to merit a division of joint decision-making authority. [*MacLagan v. Klein*, 123 N.C. App. 557, 473 S.E.2d 778 (1996), *review denied,* 345 N.C. 343, 483 S.E.2d 170 (1997), *overruled on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998).]

v. In a case granting parents joint legal custody, specific findings setting out past disagreements between the parties regarding matters affecting the children, such as where they would attend school or church, were given in dicta as an example of findings that would justify dividing joint decision-making authority. [*Hall v. Hall,* 188 N.C. App. 527, 655 S.E.2d 901 (2008).]

11. Regardless of the custodial arrangement imposed by the court, absent an order to the contrary, both parents are entitled to equal access to records relating to the child's health, education, and welfare. [G.S. 50-13.2(b).]

12. Specific provisions in custody orders (other than visitation).

a. A trial court's authority in a custody case is limited to determining "the party or parties to whom custody of the child shall be awarded, whether and to what extent a noncustodial person shall be allowed visitation privileges, . . . and certain other related matters." [*Kanellos v. Kanellos*, 795 S.E.2d 225, 231 (N.C. Ct. App. 2016) (quoting *Appert v. Appert*, 80 N.C. App. 27, 34, 341 S.E.2d 342, 346 (1986)).]

b. A custody order requiring the custodial parent to reside in a specific county and house fell "outside the scope of authority granted to the district court in a child custody action." [*Kanellos v. Kanellos*, 795 S.E.2d 225, 227 (N.C. Ct. App. 2016).] *See* Cheryl Howell, *Child Custody Order Cannot Tell a Parent Where to Live*, UNC Sch. of Gov't: On the Civil Side Blog (Feb. 17, 2017), https://civil.sog.unc.edu/child-custody-order-cannot-tell-a-parent-where-to-live.

c. Because courts are required by G.S. 50-13.2(a) to enter orders that will "promote the interest and welfare of the child," a court has authority to order parents to cooperate with one another and to refrain from conduct detrimental to the child. [*Watkins v. Watkins,* 120 N.C. App. 475, 462 S.E.2d 687 (1995) (trial court properly included reciprocal provisions ordering each party to refrain from making any degrading or negative comments about the other or interfering with the other party's relationship

with the child), *appeal dismissed*, 343 N.C. 128, 468 S.E.2d 795 (1996). *See also MacLagan v. Klein*, 123 N.C. App. 557, 473 S.E.2d 778 (1996) (order of trial court that designated one parent responsible for religious upbringing of child upheld), *review denied,* 345 N.C. 343, 483 S.E.2d 170 (1997), *overruled on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998).] But the court must make findings in support of such provisions. [*See Martin v. Martin,* 167 N.C. App. 365, 605 S.E.2d 203 (2004) (appeals court vacated trial court's order that father not own or possess firearms until the children become emancipated because trial court did not find whether the safety of the children was affected by father's ownership of guns as specifically required by G.S. 50-13.2(a)).]

d. The trial court may preclude or otherwise limit certain educational options for a child when the circumstances render it appropriate. [*Metz v. Metz*, 138 N.C. App. 538, 530 S.E.2d 79 (2000) (no error for court to change custody based in part on consideration that custodial parent's decision to home school the child was not in best interest of child); *Elrod v. Elrod*, 125 N.C. App. 407, 481 S.E.2d 108 (1997) (trial court has authority in some circumstances to prohibit home schooling of a child as a condition of a grant of custody or upon a finding that the home schooling interferes with the visitation of the noncustodial parent).]

e. The court of appeals has held that a court does not have authority to appoint experts and to order psychological assessment or treatment for the parties and the child, pursuant to G.S. 1A-1, Rule 35 as part of a final custody determination. [*Jones v. Patience*, 121 N.C. App. 434, 466 S.E.2d 720 (court does have authority to order treatment and periodic assessments as part of a temporary custody order), *appeal dismissed, review denied,* 343 N.C. 307, 471 S.E.2d 72 (1996). *See also Rawls v. Rawls*, 94 N.C. App. 670, 381 S.E.2d 179 (1989) (trial court did not abuse its discretion in ordering defendant to consult with a psychologist or psychiatrist before court would consider defendant's request for visitation). *But cf. Maxwell v. Maxwell,* 212 N.C. App. 614, 621, 713 S.E.2d 489, 494 (2011) (trial court had authority to order father to submit to a mental health evaluation as part of a final order pursuant to the "broad discretion granted to courts in child custody proceedings"); *Davis v. Davis,* 229 N.C. App. 494, 748 S.E.2d 594 (2013) (to require father to attend anger management classes required a conclusion that father's conduct was a substantial change of circumstances affecting children's welfare; when order did not so provide, requirement was vacated; *Maxwell* was distinguished, as order in that case requiring evaluation was supported by a finding that father had committed acts of domestic violence, which constituted a substantial change of circumstances).]

f. Custody order may provide for child to be taken out of North Carolina. [*But see* the Interstate Compact on the Placement of Children, G.S. 7B-3800 through -3806.] If the order anticipates that the child will be returned to North Carolina, the court has authority to require a bond or other security for the child's return. [G.S. 50-13.2(c). *See Mussallam v. Mussallam*, 321 N.C. 504, 364 S.E.2d 364 (1988) (proceeds of forfeited appearance bond to be paid pursuant to G.S. 115C-452 to the local school administrative unit in the county, which in most counties is the county board of education).]

g. Court order may provide for relocation of child(ren) to another state or within the state. [*O'Connor v. Zelinske,* 193 N.C. App. 683, 668 S.E.2d 615 (2008) (no abuse of discretion in allowing mother the option to relocate with children to Minnesota when court made sufficient findings to support its conclusions that the advantages to the children outweighed the disadvantages and that relocation would be in the best interests of the children when mother would be employed there, would have a stable living environment, and a broad network of family and friends to assist her in caring for the children).]

i. For discussion of parental relocation as grounds for modification, see Section IV.C.8.c, below.

h. Court may require any party to abstain from consuming alcohol and require party to submit to a continuous alcohol monitoring system. [G.S. 50-13.2(b2).]

i. Court does not have the authority to prohibit a parent from owning or possessing firearms, at least not without specific findings indicating that the safety of the child is affected by the parent's possession of guns. [*Martin v. Martin*, 167 N.C. App. 365, 605 S.E.2d 203 (2004).]

13. Visitation provisions.

a. An order for custody shall include terms, including visitation, as will best promote the interest and welfare of the child. [G.S. 50-13.2(b).]

i. A visitation order should contain provisions for time, place, and conditions of visitation. [*In re Stancil*, 10 N.C. App. 545, 179 S.E.2d 844 (1971).] But an order that failed to specify such terms has been found valid. [*Furr v. Furr*, 22 N.C. App. 487, 206 S.E.2d 812 (order that did not set out specific day or hour for visitation, nor the mode of transfer of custody, upheld), *cert. denied,* 285 N.C. 757, 209 S.E.2d 281 (1974).]

b. 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 Adult Correction of the Department of Public Safety, 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), *added by* S.L. 2012-146, § 10, effective Dec. 1, 2012, and applicable to child custody and visitation orders issued on or after that date.]

i. 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).]

c. Noncustodial parent is entitled to reasonable visitation, and before denying a parent the right of reasonable visitation, the trial judge must make a written finding that the parent being denied visitation right is unfit to visit the child or that visitation is not in

the best interest of the child. [G.S. 50-13.5(i); *Respess v. Respess,* 232 N.C. App. 611, 616, 754 S.E.2d 691, 696 (2014) (emphasis in original) (language in G.S. 50-13.5(i) is "straightforward and unambiguous" and requires a trial court, before denying reasonable visitation to a parent, to find "*either* that the parent is 'an unfit person to visit the child' *or* that visitation with the parent is 'not in the best interest of the child' "); *Sneed v. Sneed*, 820 S.E.2d 536, 541 (N.C. Ct. App. 2018) (temporary suspension of mother's visitation pending completion by children and father of reunification therapy upheld based on findings that mother had engaged in conduct that alienated the children from father; finding that it was in the children's "best interests and welfare that [mother's] visitation . . . be suspended pending completion of [a family services] program" complied with requirements of G.S. 50-13.5(i)); *McNeely v. Hart*, 791 S.E.2d 676 (N.C. Ct. App. 2016) (**unpublished**) (not paginated on Westlaw) (trial court erred when it denied visitation to mother who engaged in prostitution based on a finding that prostitution was "illegal, immoral, and unhealthy for an individual's physical, mental, and spiritual well-being," which reflected the trial court's personal opinion; trial court failed to address the effect, if any, mother's prostitution had on the child, even though evidence was presented that child had never been exposed to "any aspect of the escort business").]

d. Significant restrictions on visitation, including limiting a parent to supervised visitation, requires the same findings of fact in G.S. 50-13.5(i), set out immediately above, for the denial of visitation. [*Maxwell v. Maxwell,* 212 N.C. App. 614, 713 S.E.2d 489 (2011) (order suspending father's visitation until completion of a mental health evaluation was reversed when it did not include a finding that suspension of visitation was in the children's best interest or otherwise address father's unfitness as a parent). *See also Hinkle v. Hartsell*, 131 N.C. App. 833, 509 S.E.2d 455 (1998) (trial court cannot restrict noncustodial parent to supervised visitation without finding conduct that warrants restricted visitation or that the exercise of visitation would be detrimental to the interests of the child), *and Cox v. Cox*, 133 N.C. App. 221, 515 S.E.2d 61 (1999) (supervised visitation was upheld where medical testimony supported conclusion that restricted visitation was necessary to protect child).] Note that a parent's refusal to provide information which the trial court needs to make a decision on custody or visitation can be the basis to deny or restrict custody or visitation for that parent. [*Meadows v. Meadows*, 246 N.C. App. 245, 782 S.E.2d 561 (2016) (trial court did not err when it ordered that father's visitation be supervised, take place at a family abuse services center, and be limited to two hours every other Sunday when father refused to testify or present relevant evidence in response to allegations that he viewed and stored child pornography on his computer; defendant's unwillingness to provide evidence left the trial court unable to determine his fitness as a parent).] For more on *Meadows*, see Cheryl Howell, *Child Custody: Denying or Significantly Limiting a Parent's Visitation*, UNC Sch. of Gov't: On the Civil Side Blog (Mar. 18, 2016), http://civil.sog.unc.edu/child-custody-denying-or-significantly-limiting-a-parents-visitation.

   i. In *Respess v. Respess,* 232 N.C. App. 611, 754 S.E.2d 691 (2014), the court of appeals clarified that the standard to be applied in any case between parents, including the instant case in which father was denied visitation, is the best interest of the child by:

(a) Noting that numerous cases applying G.S. 50-13.5(i) before 2003 consistently held that (1) the standard in a custody dispute between a child's parents is best interest of the child; (2) the applicable burden of proof is preponderance of the evidence; (3) principles that govern a custody dispute between a parent and a nonparent are irrelevant to a custody action between parents; and (4) a trial court complies with G.S. 50-13.5(i) if it makes the finding set out in the statute.

(b) Declining to apply the holding in *Moore v. Moore* (*Platte*), 160 N.C. App. 569, 573–74, 587 S.E.2d 74, 76 (2003), a case between parents that applied, according to the *Respess* court, a "new standard" for denying visitation rights and held "for the first time" that (1) denial of visitation is tantamount to termination of parental rights (TPR) and requires the "clear, cogent, and convincing" standard applicable in TPR cases and (2) to comply with G.S. 50-13.5(i), a trial court is to apply the standard applicable to a custody dispute between a parent and a nonparent as set out in *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994), and may not apply the best interest standard absent a finding that the noncustodial parent is unfit or has acted in a manner inconsistent with his constitutional rights as a parent before denying all visitation rights to a parent. [*Respess*, 232 N.C. App. at 624, 754 S.E.2d at 700.]

(c) Determining that the holding in *Moore v. Moore* (*Platte*), 160 N.C. App. 569, 587 S.E.2d 74 (2003), was not controlling in that (1) it contradicted North Carolina Supreme Court case law holding that *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994), is "irrelevant" to a dispute between parents and requiring application of best interest standard; (2) it provided no substantive or precedential basis for its holding that a denial of visitation was functionally equivalent to TPR; and (3) it "diverged sharply" from controlling precedent without acknowledging or providing a basis to distinguish those cases. [*Respess,* 232 N.C. App. at 625, 626, 754 S.E.2d at 701 (2014) (affirming trial court's denial of visitation to father based on a finding, applying a preponderance of the evidence standard, that father's visitation with two minor children was not in their best interest; father had pled guilty to multiple felony counts of indecent liberties with his oldest child and engaged in inappropriate conduct with his other daughters).]

ii. A trial court's decision to award a parent visitation but to delay entry of a visitation schedule pending a recommendation from a psychologist has been upheld. [*Pass v. Beck,* 156 N.C. App. 597, 577 S.E.2d 180 (minimal contact between father and child warranted expertise of a third-party professional with regard to visitation), *cert. denied,* 357 N.C. 252, 582 S.E.2d 277 (2003).]

iii. A temporary order for visitation may require a parent to undergo a mental health evaluation and may provide for future court review to consider the parent's progress in therapy and compliance with the court's order in determining whether to expand or restrict future visitation. In the order, the trial court

(a) With respect to a parent:

(1) May not require a parent to believe the facts found by the court and cannot evaluate a parent's progress in therapy by her beliefs;

(2) Is to make findings regarding past events and is to order the parties to take actions based upon those findings of fact;

(3) May consider a parent's continued insistence on her version of the facts and the impact of that choice on her progress in therapy when reviewing visitation; and

(4) May require a parent to fully conform her behavior and speech to the trial court's findings and conclusions when dealing with the child.

(b) With respect to a therapist:

(1) May not require a therapist to believe or accept that a parent's beliefs about the other parent are untrue;

(2) May order the therapist for either parent or for a child to read the court's orders for background on the matters for which therapy was ordered; and

(3) May require the therapist to fully conform his behavior and speech to the trial court's findings and conclusions when dealing with the child. [*Lueallen v. Lueallen*, 790 S.E.2d 690, 701 (N.C. Ct. App. 2016) (considering an order with similar provisions in *Peters v. Pennington,* 210 N.C. App. 1, 707 S.E.2d 724 (2011)) (trial court could not require in a temporary custody order "[m]other or a therapist to 'wholeheartedly accept' or believe anything", including that father was not physically abusive to child or that he did not use drugs).]

e. Cases considering visitation when parent is a sex offender.

i. Nothing in North Carolina law prohibits a parent who has been required to register as a sex offender from seeking visitation with her child. [*Bobbitt ex rel. Bobbitt v. Eizenga,* 215 N.C. App. 378, 715 S.E.2d 613 (2011) (father convicted of attempted statutory rape of mother was allowed a hearing on the merits on his complaint for custody and visitation).] Fact that father was mother's attempted statutory rapist is a factor the court should consider when determining whether to grant visitation to father. [*Bobbitt v. Eizenga*, 223 N.C. App. 210 (2012) (**unpublished**) (appeal after remand of 2011 case cited immediately above).]

ii. Denial of all visitation was upheld as not in the children's best interest when supported by numerous evidentiary findings, including that father engaged in a prolonged, deliberate, and willful course of sexually abusing his oldest daughter over a period of not less than five years, father refused to accept responsibility for the abuse, father had a continued obsession with his oldest daughter and engaged in grooming behaviors with his two youngest daughters, and father had disobeyed earlier visitation restrictions, threatening the youngest daughter with physical punishment if she revealed the violations. [*Respess v. Respess,* 232 N.C. App. 611, 624, 754 S.E.2d 691, 700 (2014) (trial court included in a mixed finding of fact and conclusion of law "that it would be actually adverse to any good

interest of the minor children" for father to have any contact whatsoever and noted that "the Court must be vigilant in preventing the same").]

f. Cases considering visitation when father is incarcerated.

i. Whether visitation with an incarcerated parent is appropriate must be based on factors including, but not limited to, the child's age, the relationship between the child's parents, developmental issues, and the nature of the visitation facilities. [*Bobbitt v. Eizenga,* 223 N.C. App. 210 (2012) (**unpublished**) (order vacated and remanded when it contained no findings to support conclusion that facility in which father was incarcerated was not suitable for visitation, especially when court found that the facility provided specific accommodations for inmate visitation with families and their children; court refused to hold as a matter of law that any visitation with an incarcerated parent is per se inappropriate).]

g. Cases considering visitation with parent in a foreign country.

i. An order allowing father, a Canadian citizen, to exercise visitation with his son in either Canada or in Malawi, Africa, where father had been living and working since 2006, was upheld based on findings that "reflect[ed] appropriate awareness of the possible dangers to the child" of travel to Malawi and demonstrated the trial court's "evaluation of a complex and unusual domestic situation." [*Burger v. Smith*, 243 N.C. App. 233, 244, 776 S.E.2d 886, 893 (2015) (mother's assertion that the trial court's ultimate decision was that it was in the best interest of the child to travel to Malawi was rejected; rather, the trial court's ultimate decision was that it was in the child's best interest for mother to have primary physical custody and for father to have secondary physical custody with visitation; the appellate court noted mother's failure to acknowledge that the parties' personal decisions, including marrying and conceiving a child in Malawi, would not permit a conventional visitation schedule in North Carolina, especially when father was not a U.S. citizen).]

h. Cases allowing court to anticipate future events.

i. An order providing for visitation of 18-month-old child with mother for two months, then with father for one month, until child started kindergarten, at which time father's visitation would take place over spring, summer, and Christmas breaks was within the trial court's discretion, was supported by a finding that both parents were excellent parents who had provided exceptional care and had strong support systems, and was an "appropriate response to the parties' unusual living situation," as set out immediately above. [*Burger v. Smith*, 243 N.C. App. 233, 248, 776 S.E.2d 886, 896 (2015).]

i. If the court finds that domestic violence has occurred, the court must enter orders designed to protect the child and any other party who was a victim of the domestic violence, in accordance with the provisions of G.S. 50B-3(a1)(1), (2), and (3). [G.S. 50-13.2(b).]

j. Visitation cannot be contingent upon payment of child support, or vice versa. [*Sowers v. Toliver,* 150 N.C. App. 114, 562 S.E.2d 593 (2002); *Appert v. Appert*, 80 N.C. App. 27, 341 S.E.2d 342 (1986).]

k. Court cannot delegate determination of visitation to discretion of custodial parent, nor award custodial parent exclusive control over visitation. [*Brewington v. Serrato*, 77 N.C. App. 726, 733, 336 S.E.2d 444, 449 (1985) (provision in order that permitted visitation "at such time as the parties may agree" not upheld); *Woodring v. Woodring,* 227 N.C. App. 638, 647, 745 S.E.2d 13, 20 (2013) (citing *Brewington*) (order providing that mother's visitation was at discretion of father, to be supervised by father or an appropriate adult as determined by father, "plainly awards father exclusive control over mother's visitation" and was error).]

l. A stipulation by the parties that father is to have visitation rights as agreed upon by the parties has been upheld. [*Diehl v. Diehl,* 177 N.C. App. 642, 630 S.E.2d 25 (2006) (noting that case law does not preclude parties from stipulating to such an arrangement).]

m. A court may provide for termination of visitation rights, pending court hearing, upon occurrence of a specified condition detrimental to the child's welfare. [*Woncik v. Woncik*, 82 N.C. App. 244, 346 S.E.2d 277 (1986) (order upheld that provided that should mother do or say anything intended to, or likely to, discredit father in the eyes of the child, or permit others to do so, mother's visitation privileges terminated pending a show cause hearing).]

n. A visitation schedule that provided for father's nonholiday visitation on alternating weekends from Thursday to Sunday evenings within a 100-mile radius of the children's home was reasonable. [*O'Connor v. Zelinske,* 193 N.C. App. 683, 668 S.E.2d 615 (2008) (recognizing that possible relocation of mother and children to Minnesota would create a hardship on father in making his visits but holding that the imposition did not constitute an abuse of the trial court's discretion; trial court was required to subordinate father's visitation privileges to the best interests of the children).]

o. Modification of visitation.

i. The same standards that apply to changes in custody determinations are applied to changes in visitation determinations. [*Simmons v. Arriola,* 160 N.C. App. 671, 586 S.E.2d 809 (2003).]

ii. A court may modify a final or permanent visitation order if it determines that there has been a substantial change in circumstances. [*Simmons v. Arriola,* 160 N.C. App. 671, 586 S.E.2d 809 (2003).]

iii. A court may modify a temporary visitation order if it is in the best interest of the child. [*Simmons v. Arriola,* 160 N.C. App. 671, 586 S.E.2d 809 (2003).]

p. For grandparent visitation, see Section III.C.12, below.

14. Visitation by electronic communication.

a. An order for custody may provide for visitation by electronic communication. [G.S. 50-13.2(e), *added by* S.L. 2009-314, § 1, effective July 17, 2009.]

i. G.S. 50-13.2(e) is a generic provision that applies to all custody actions, not just those brought under G.S. Chapter 50. [*In re T.R.T.*, 225 N.C. App 567, 574, 737 S.E.2d 823, 828 (2013) (G.S. 50-13.2(e) is by its terms applicable to "[a]n order for custody").]

ii. Skype-only visitation, allowed pursuant to G.S. 7B-905(c), ordered after trial court found child to be neglected, did not constitute visitation as contemplated by G.S. 7B-905(c). [*In re T.R.T.*, 225 N.C. App 567, 737 S.E.2d 823 (2013).]

iii. Any court ordering electronic visitation pursuant to G.S. 50-13.2(e) must comply with that statute, specifically, with the factors that the court must consider and, if electronic communication is ordered, with the guidelines for that communication. [*In re T.R.T.*, 225 N.C. App 567, 737 S.E.2d 823 (2013) (in a G.S. Chapter 7B neglect proceeding, when the trial court made findings that set up "some" guidelines for communication via Skype and "touched on" the court's rationale for ordering Skype visitation, matter was remanded for additional findings under G.S. 50-13.2(e); trial court also failed to make findings required by G.S. 7B-905(c)).]

b. "Electronic communication" means contact, other than face-to-face contact, facilitated by electronic means, such as by telephone, electronic mail, instant messaging, video teleconferencing, wired or wireless technologies by Internet, or other medium of communication. [G.S. 50-13.2(e), *added by* S.L. 2009-314, § 1, effective July 17, 2009.]

i. Skype is a form of video conferencing and, as such, falls within the definition of "electronic communication" set out above. [*In re T.R.T.*, 225 N.C. App 567, 737 S.E.2d 823 (2013).]

c. In granting visitation by electronic communication, the court must consider:

i. Whether electronic communication is in the best interest of the minor child.

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

iii. Any other factor the court deems appropriate in determining whether to grant visitation by electronic communication. [G.S. 50-13.2(e), *added by* S.L. 2009-314, § 1, effective July 17, 2009.]

d. Electronic communication with a minor child may be used to supplement visitation and may not be used as a replacement or substitution for custody or visitation. [G.S. 50-13.2(e), *added by* S.L. 2009-314, § 1, effective July 17, 2009.]

e. Electronic communication between the child and the parent may be subject to supervision as ordered by the court. [G.S. 50-13.2(e), *added by* S.L. 2009-314, § 1, effective July 17, 2009.]

f. The amount of time electronic communication is used shall not be a factor in calculating child support or be used to justify or support relocation by the custodial parent out of the immediate area or out of the state. [G.S. 50-13.2(e), *added by* S.L. 2009-314, § 1, effective July 17, 2009.]

C. 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 Chavez v. Wadlington*, 821 S.E.2d 289 (N.C. Ct. App. 2018).]

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 appears to grant grandparents expanded rights to request visitation. However, the constitutionality of these statutes has not yet been examined by the appellate courts. [See Section III.C.12, below, dealing with grandparent visitation.]

f. For discussion of third-party custody issues, see Cheryl Howell, *Third Party Custody and Visitation Actions: The Present State of the Law in North Carolina*, Fam. L. Bull. No. 21 (UNC School of Government, Nov. 2006), http://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/flb21.pdf. **NOTE**: This bulletin was published before 2008 cases addressing this issue in the context of a same-sex partnership. [See Section III.C.4.a, below, regarding *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), and *Heatzig v. MacLean*, 191 N.C. App. 451, 664 S.E.2d 347 (2008).]

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).]

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). *See 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*, 805 S.E.2d 378 (N.C. Ct. App. 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).]

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. [*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*, 787 S.E.2d 412 (N.C. Ct. App. 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*, 805 S.E.2d 378 (N.C. Ct. App. 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*, 787 S.E.2d 412 (N.C. Ct. App. 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. 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).]

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. [*Chavez v. Wadlington*, 821 S.E.2d 289 (N.C. Ct. App. 2018) (also dismissed for lack of standing); *Moriggia v. Castelo*, 805 S.E.2d 378 (N.C. Ct. App. 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. 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. [*Bennett v. Hawks,* 170 N.C. App. 426, 613 S.E.2d 40 (2005); *Moriggia v. Castelo*, 805 S.E.2d 378, 383 (N.C. Ct. App. 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").]

ix. 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*, 820 S.E.2d 817 (N.C. Ct. App.) (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), *temporary stay allowed*, 819 S.E.2d 559 (N.C. 2018).]

(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*, 787 S.E.2d 412 (N.C. Ct. App. 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*, 805 S.E.2d 378, 386 (N.C. Ct. App. 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. Chavez v. Wadlington*, 821 S.E.2d 289 (N.C. Ct. App. 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).]

(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*, 787 S.E.2d 412, 420 (N.C. Ct. App. 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, 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 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).]

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. The "intact family analysis" (discussed in Section III.C.12.g, below) 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. For visitation claims made pursuant to grandparent visitation statutes other than G.S. 50-13.1(a), see Sections III.C.12.d–g, 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 North Carolina appellate courts have not yet considered the constitutionality of any of these four statutes in the context of grandparent visitation in light of the *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), opinions. However, the appellate courts have narrowed the interpretation of these statutes in recognition of the rights of parents.
    c. 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).]
        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).]
    d. 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. To date, no appellate case has addressed directly the constitutionality of these statutes in light of the constitutional protection for parents identified in *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). [*But see Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054 (2000) (articulating minimum constitutional standards for grandparent visitation statutes).]

e. 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), *and 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).]

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. Remand for further findings was required when trial court (1) did not explain in its findings why it ordered the majority of grandparents' vacation visitation time to take place during mother's custodial time and (2) did not specifically address terms of the parents' consent judgment on custody when it decided grandparents' visitation schedule. [*Quesinberry v. Quesinberry,* 196 N.C. App. 118, 674 S.E.2d 775 (2009).]

f. 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).]

g. 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 when the child is living in an intact family, meaning that a grandparent cannot seek visitation of a child living with a parent 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 the child is not part of an intact family. [*Eakett v. Eakett,* 157 N.C. App. 550, 579 S.E.2d 486 (2003).]

iv. The appellate courts have held that the following situations involve "intact" families:

(a) Two married parents living with their children. [*McIntyre v. McIntyre,* 341 N.C. 629, 461 S.E.2d 745 (1995).]

(b) Two married parents who are separated and share custody. [*See Chavez v. Wadlington*, 821 S.E.2d 289 (N.C. Ct. App. 2018).]

(c) Single unwed mothers and their children. [*Fisher v. Gaydon,* 124 N.C. App. 442, 477 S.E.2d 251 (1996), *review denied,* 345 N.C. 640, 483 S.E.2d 706 (1997); *Wellons v. White v. Wellons,* 229 N.C. App. 164, 748 S.E.2d 709 (2013) (citing *Fisher*).]

(d) Single parents and their children following the death of the other parent. [*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); *Price v. Breedlove*, 138 N.C. App. 149, 530 S.E.2d 559, *review denied,* 353 N.C. 268, 546 S.E.2d 111 (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).] This is so even if the parents were separated at the time of the parent's death. [*Montgomery v. Montgomery,* 136 N.C. App. 435, 524 S.E.2d 360 (2000).]

(e) A married natural parent living with the child and a stepparent. [*Penland v. Harris*, 135 N.C. App. 359, 520 S.E.2d 105 (1999).]

(f) Single parents and their children following custody litigation between the parents. [*Eakett v. Eakett,* 157 N.C. App. 550, 579 S.E.2d 486 (2003).]

(g) An aunt and uncle who had adopted the child. [*Hill v. Newman,* 131 N.C. App. 793, 509 S.E.2d 226 (1998).]

v. Death of a party since entry of original custody order.

(a) After an initial custody determination, the court retains jurisdiction in the custody case until the death of one of the parties or the emancipation of the child. [*McIntyre v. McIntyre,* 341 N.C. 629, 461 S.E.2d 745 (1995).] When jurisdiction is terminated by the death of one of the parties, grandparents cannot file a motion to modify the original order by seeking visitation, [*See Price v. Breedlove*, 138 N.C. App. 149, 530 S.E.2d 559, *review denied,* 353 N.C. 268, 546 S.E.2d 111 (2000).] and there is no case in which grandparents can intervene. [*See McDuffie v. Mitchell,* 155 N.C. App. 587, 590, 573 S.E.2d 606, 608 (2002) (citing *McIntyre*) (stating that "[u]pon the death of the mother in the instant case, the ongoing case between the mother and father ended"), *review denied,* 357 N.C.165, 580 S.E.2d 368 (2003).]

(b) If the grandparents were parties or de facto parties to the original and subsequent custody orders by being awarded temporary and permanent visitation rights in those orders, the court does not lose jurisdiction upon the death of a parent and the grandparents can file a motion to modify. [*Sloan v. Sloan,* 164 N.C. App. 190, 595 S.E.2d 228 (2004).] See Section IV.C.2, below, dealing with parental preference in modification cases.

(c) For more on this topic, see Cheryl Howell, *What Happens to a Custody Case When a Party Dies?* UNC Sch. of Gov't: On the Civil Side Blog (July14,2017),https://civil.sog.unc.edu/what-happens-to-a-custody-case-when-a-party-dies.

h. 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 Adult Correction of the Department of Public Safety, 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), *added by* S.L. 2012-146, § 10, effective Dec. 1, 2012, and applicable to child custody and visitation orders issued on or after that date.]

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).]

D. Request for Findings Related to Special Immigrant Juvenile Status

1. Special Immigrant Juvenile (SIJ) status is a form of at least temporary protection from deportation provided by federal law for unmarried non-citizen children in the U.S. under the age of 21 who have been the victim of abuse, neglect, or abandonment by a parent. An application is submitted on behalf of the child to the United States Citizenship and Immigration Services (USCIS), and that agency decides whether SIJ status should be granted pursuant to the requirements set out in 8 C.F.R. § 204.11. If a child obtains SIJ status, that child then is eligible to apply for Lawful Permanent Resident Status.
2. A "special immigrant juvenile" eligible to apply for protected status is defined in 8 U.S.C. § 1101(a)(27)(J) as

   "an immigrant who is present in the United States–

   i. who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;

   ii. for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence; and

   iii. in whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status."
3. It has been stated that the purpose of the federal law is to "permit abused, neglected, or abandoned juveniles to remain in this country." [*In re Dany G.*, 117 A.3d 650, 655 (Md. Ct. Spec. App. 2015).]
4. State courts do not determine a child's eligibility for SIJ status. Only the federal government can determine a person's immigration status.
5. However, the federal government defers to the expertise of the state courts to determine issues relating to child welfare. While the North Carolina appellate courts have not considered the SIJ issue yet, there now are a significant number of opinions issued by other state appellate courts around the country. Those other courts consistently have held that when a state "juvenile court" is exercising jurisdiction over a child, and when it is requested to do so, that state court must determine whether a juvenile has been abused, neglected, or abandoned by one or both parents and whether it is in the child's best interest to be returned to the child's country of origin. Those courts reason that a state court cannot refuse to consider the request for the SIJ status findings because a child cannot petition for the protected status without a state court order containing the required findings and conclusions. [*See, e.g.*, *H.S.P. v. J.K.*, 121 A.3d 849 (N.J. 2015); *Recinos v. Escobar*, 46 N.E.3d 60 (Mass. 2016); *In re J.J.X.C.*, 734 S.E.2d 120 (Ga. Ct. App. 2012).] For a summary of cases decided throughout the country to date on this topic, see Eligibility for Special Immigrant Juvenile Status, 67 A.L.R. Fed. 2d 299 (2012) (updated weekly).

6. To petition for SIJ status, a child must present a state court order to the USCIS that:
   a. Commits the child to the custody of an agency or a person;
   b. Concludes that reunification with one or both parents is not viable due to abuse, neglect, or abandonment by one or both parents; and
   c. Concludes that it is not in the best interest of the child to be returned to the child's country of origin.
7. In the context of determining SIJ status, the term "juvenile court" is defined as "a court . . . having jurisdiction under State law to make judicial determinations about the custody and care of juveniles." [8 C.F.R. § 204.11.] Therefore, in North Carolina, a juvenile court would include, for example, a court with jurisdiction to hear:
   a. Abuse, neglect, and dependency proceedings;
   b. Delinquency proceedings;
   c. Chapter 50 custody proceedings; and
   d. Guardianship proceedings.
8. For discussion of the role of the district court when a litigant requests special findings, see Cheryl Howell, *Custody Orders Requesting Special Findings for Special Immigrant Juvenile Status*, UNC Sch. of Gov't: On the Civil Side Blog (Sept. 30, 2016), http://civil.sog.unc.edu/custody-orders-requesting-findings-for-special-immigrant-juvenile-status.

IV. Modification of Custody Orders

A. Jurisdictional Grounds [G.S. 50-13.7 and G.S. Chapter 50A.]

1. Parties cannot confer jurisdiction by consent on a court that does not have jurisdiction. [Official Comment, G.S. 50A-201; *Foley v. Foley,* 156 N.C. App. 409, 576 S.E.2d 383 (2003) (subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel); *Sloop v. Friberg*, 70 N.C. App. 690, 320 S.E.2d 921 (1984) (subject matter jurisdiction in custody case cannot be conferred by waiver, estoppel, or consent). *See also Booker v. Strege*, 807 S.E.2d 597 (N.C. Ct. App. 2017) (fact that father filed motion to modify did not preclude him from arguing on appeal that North Carolina did not have modification jurisdiction).]
2. Modification jurisdiction must exist at the time the modification proceeding is commenced. [*Booker v. Strege*, 807 S.E.2d 597 (N.C. Ct. App. 2017) (filing of motion to register a Michigan custody order was not the commencement of a child custody proceeding as defined in G.S. 50A-102(4) because the motion did not raise issues as to custody or visitation as required by G.S. 50A-102(4)).]
3. For a brief overview of modification jurisdiction, see Cheryl Howell, *Child Custody and Support: Jurisdiction to Modify*, UNC Sch. of Gov't: On the Civil Side Blog (Apr. 15, 2016), http://civil.sog.unc.edu/child-custody-and-support-jurisdiction-to-modify.
4. Modification of order entered by a North Carolina court. [G.S. 50A-202.]
   a. North Carolina has "exclusive, continuing jurisdiction" to modify custody orders entered in this state until:

i. Neither the child, the child's parents, nor any person acting as a parent has a significant connection with North Carolina and substantial evidence is no longer available in North Carolina concerning the child's care, protection, training, and personal relationships [G.S. 50A-202(a)(1).] or

ii. The child, the child's parents, and any person acting as the child's parent no longer reside in North Carolina. [G.S. 50A-202(a)(2).]

(a) Even though a North Carolina court does not have jurisdiction under G.S. 50A-202(a)(2) to modify a North Carolina custody order after the parties and child no longer reside in the state, a North Carolina court retains subject matter jurisdiction to consider and grant a G.S. 1A-1, Rule 60 motion for relief from that order. [*Williamson v. Whitfield*, 781 S.E.2d 532 (N.C. Ct. App. 2016) (**unpublished**) (not paginated on Westlaw) (trial court's decision to grant relief from an order awarding father sole custody was upheld when mother had not received notice of hearing; even though the order granting mother's Rule 60(b) motion "had an effect" on custody, it was not an order modifying custody as the court did not consider the merits of any arguments regarding custody).]

b. If North Carolina does not have continuing, exclusive jurisdiction as defined in Section IV.A.4.a, above, North Carolina has jurisdiction to modify an existing North Carolina order only if the court would have jurisdiction to make an initial determination under G.S. 50A-201. [G.S. 50A-202(b). See Section III.A, above.]

i. Where North Carolina no longer had continuing exclusive jurisdiction, was not the home state, and did not have grounds to exercise significant connection/substantial evidence jurisdiction, the trial court had no jurisdiction to modify custody, even though all previous custody orders regarding the children had been issued by the North Carolina court. [*Gerhauser v. VanBourgondien*, 238 N.C. App. 275, 767 S.E.2d 378 (2014).]

5. Modification of an order entered by a court of another state. [G.S. 50A-203.]

a. Unless exercising temporary emergency jurisdiction, see Section VII.A.3, below, a North Carolina court may not modify a custody order entered by another state unless North Carolina has grounds to exercise initial jurisdiction [See Section III.A, above.] and:

i. The court of the other state determines that it no longer has exclusive, continuing jurisdiction or the court in that state decides North Carolina is a more convenient forum pursuant to G.S. 50A-207 [G.S. 50A-203(1). See Section VII.A.5, below, for more on jurisdiction in interstate proceedings.] or

(a) The court in the issuing state is the sole determinant of whether jurisdiction continues under this subsection. [Official Comment, G.S. 50A-202; *In re N.B.*, 240 N.C. App. 353, 358, 771 S.E.2d 562, 566 (2015) (quoting *In re N.R.M.,* 165 N.C. App. 294, 300, 598 S.E.2d 147, 151 (2004)) ("the original decree State is the sole determinant of whether jurisdiction continues"); *N.R.M.*, 165 N.C. App at 300, 598 S.E.2d at 150 (citing Official Comment).]

(b) After entering initial custody orders placing neglected children with father, an order entered by a New York court "relinquishing jurisdiction to the

State of North Carolina" sufficiently relinquished jurisdiction, even though the order lacked findings indicating the statutory basis for relinquishment under New York law. Thus, North Carolina had jurisdiction under the UCCJEA to adjudicate the children neglected and dependent and to enter an order granting guardianship to third parties. [*In re N.B.,* 240 N.C. App. 353, 771 S.E.2d 562 (2015) (UCCJEA does not require a North Carolina district court to collaterally review a facially valid order from another state before exercising jurisdiction under G.S. 50A-203(1)).]

(c) North Carolina court had jurisdiction under the UCCJEA to modify an Illinois order when North Carolina could determine initial custody (North Carolina was child's home state) and when Illinois no longer had continuing jurisdiction (Illinois relinquished jurisdiction by removing father's motion for a visitation violation from its calendar and granting leave to transfer father's motion to North Carolina). [*Williams v. Walker,* 185 N.C. App. 393, 648 S.E.2d 536 (2007).]

(d) North Carolina court did not have jurisdiction under the UCCJEA to consider a termination of parental rights (TPR) petition which, if granted, would have modified an earlier custody order of an Arkansas court. Arkansas court had not decided issue of its continuing, exclusive jurisdiction and parent subject to termination petition continued to reside in Arkansas. [*In re N.R.M.,* 165 N.C. App. 294, 598 S.E.2d 147 (2004); *In re J.A.P.*, 218 N.C. App. 190, 721 S.E.2d 253 (2012) (trial court lacked subject matter jurisdiction to modify a New Jersey custody order as part of a TPR proceeding because New Jersey retained jurisdiction; record did not indicate that a New Jersey court had determined that New Jersey no longer had exclusive, continuing jurisdiction or that North Carolina would be a more convenient forum, nor had any court determined that father no longer lived in New Jersey).]

ii. Neither the child, the parents of the child, or a person acting as a parent to the child, continues to reside in the other state. [G.S. 50A-203(2).]

(a) If the child, the parents, and all persons acting as parents have all left the state that issued the custody determination before the commencement of the modification proceeding in North Carolina, either a court in the issuing state or a court in the state where modification is attempted can decide that the court in the issuing state has lost exclusive, continuing jurisdiction under this subsection. [Official Comment, G.S. 50A-202.]

(b) Upon the determination by a North Carolina court that it had jurisdiction to modify a Florida custody order because it was the home state when modification was sought and neither party nor the child continued to reside in Florida, Florida's exclusive, continuing jurisdiction over the child custody determination ceased. [*Quevedo-Woolf v. Overholser*, 820 S.E.2d 817 (N.C. Ct. App.), *temporary stay allowed*, 819 S.E.2d 559 (N.C. 2018).]

(c) Trial court had jurisdiction to modify a Michigan order where neither party remained in Michigan and North Carolina was the home state of the

children at the time the motion to modify was filed. [*Crenshaw v. Williams*, 211 N.C. App. 136, 710 S.E.2d 227 (2011); *In re T.J.D.W.*, 182 N.C. App. 394, 642 S.E.2d 471 (trial court had jurisdiction to enter order terminating mother's parental rights, even though South Carolina had entered a custody order, where evidence in the record showed that North Carolina was home state when petition was filed and child and both parents had left South Carolina before proceeding in North Carolina commenced), *aff'd per curiam*, 362 N.C. 84, 653 S.E.2d 143 (2007); *Smith v. Smith,* 230 N.C. App. 144, 752 S.E.2d 257 (2013) (**unpublished**) (trial court had jurisdiction to modify Virginia order when North Carolina was home state when father sought modification and neither parent nor children lived in Virginia when motion to modify was filed).]

(d) When neither the child, the parents, nor a person acting as a parent "actually resides" in the state that issued the original order, that state does not have continuing exclusive jurisdiction. [*In re B.L.H.*, 239 N.C. App. 52, 767 S.E.2d 905 (2015) (father whose rights were subject to termination had previously resided in Virginia and contended that he was still domiciled there despite being incarcerated out of state; because he did not actually reside in Virginia and mother and child both resided in North Carolina, North Carolina had jurisdiction to adjudicate the termination proceeding).]

iii. Findings.

(a) The order must contain findings to support the conclusion that North Carolina has jurisdiction to make an initial custody determination pursuant to G.S. 50A-201(a)(1) or (2) and one of the determinations required by G.S. 50A-203(1) or (2). [*See In re E.J.*, 225 N.C. App. 333, 738 S.E.2d 204 (2013) (trial court lacked jurisdiction to enter adjudication and disposition order when record contained no finding, order, or indication that New York had opted not to exercise its jurisdiction; even if trial court had supported a conclusion that New York no longer had exclusive, continuing jurisdiction because no party still lived there, order still lacked specific findings and conclusions to show that North Carolina had jurisdiction to enter an initial determination under G.S. 50A-201(a)(1) or (2)); *cf. In re T.J.D.W.*, 182 N.C. App. 394, 642 S.E.2d 471 (when evidence in the record supported the trial court's conclusion that it had subject matter jurisdiction under the UCCJEA, jurisdictional requirements were met; although the statute does not require the court to make findings of fact to support its conclusion that it has jurisdiction, making findings is the better practice), *aff'd per curiam*, 362 N.C. 84, 653 S.E.2d 143 (2007).]

(b) In determining whether North Carolina had jurisdiction to modify a Michigan custody order, which required the trial court to determine whether it had jurisdiction to make an initial custody determination, the proper time to consider was the time the motion to modify was filed, not the time an earlier motion to register the custody order was filed. [*Booker v. Strege*, 807 S.E.2d 597 (N.C. Ct. App. 2017) (child custody proceeding is defined in G.S. 50A-102(4) as a proceeding in which custody or visitation is an issue; a motion to register does not raise issues as to custody or visitation).]

b. Similarly, the Parental Kidnapping Protection Act (PKPA) allows a North Carolina court to modify a custody order of another state only if:

i. North Carolina has jurisdiction to make an initial child custody determination and

ii. The court in the other state no longer has jurisdiction or has declined to exercise its jurisdiction to modify the custody determination. [28 U.S.C. § 1738A(f). *See Williams v. Walker,* 185 N.C. App. 393, 648 S.E.2d 536 (2007).]

(a) North Carolina court had jurisdiction under the PKPA to modify an Illinois custody and guardianship order when North Carolina had jurisdiction to determine initial custody (North Carolina was the child's home state) and when Illinois had relinquished jurisdiction over the custody matter (Illinois court removed father's motion for a visitation violation from its calendar and granted leave to transfer father's motion to North Carolina, where mother's action to modify earlier Illinois order was pending). [*Williams v. Walker,* 185 N.C. App. 393, 648 S.E.2d 536 (2007).]

c. Once North Carolina has modification jurisdiction, a trial court is to apply the law of North Carolina regarding modification of custody. [*Quevedo-Woolf v. Overholser*, 820 S.E.2d 817 (N.C. Ct. App.), *temporary stay allowed*, 819 S.E.2d 559 (N.C. 2018).]

i. North Carolina is required to give full faith and credit to an order of another state "as to all matters existing when the decree was entered and which were or might have been adjudicated therein." [*Quevedo-Woolf v. Overholser*, 820 S.E.2d 817, 836 (N.C. Ct. App.) (quoting *In re Marlowe*, 268 N.C. 197, 199–200, 150 S.E.2d 204, 206–09 (1996)) (North Carolina was required to recognize and enforce a Florida custody determination as long as that determination was not modified or vacated), *temporary stay allowed*, 819 S.E.2d 559 (N.C. 2018).]

ii. Upon obtaining jurisdiction, a North Carolina trial court may only modify an order of another state by applying G.S. 50-13.7(b). [*Quevedo-Woolf v. Overholser*, 820 S.E.2d 817 (N.C. Ct. App.) (trial court properly applied G.S. 50-13.7 to deny modification when it found no substantial change of circumstances affecting the child's welfare since entry of a Florida order granting custody to grandmother), *temporary stay allowed*, 819 S.E.2d 559 (N.C. 2018).]

d. Neither the PKPA nor the UCCJEA applies to custody orders of another state and neither is implicated when a party alleges only an informal custody agreement between the parties that was never the subject of any action by a court in another state or incorporated into a court order. [*See David v. Ferguson,* 153 N.C. App. 482, 571 S.E2d 230 (2002) (provisions of the PKPA on modification not applicable to parties' informal custody arrangement), *remanded for reconsideration on other grounds*, 357 N.C. 452, 583 S.E.2d 594 (2003).]

6. Whether enforcement proceeding is pending.

a. In any modification proceeding, the court must determine whether a proceeding to enforce the order at issue in the modification proceeding has been commenced in any other state. [G.S. 50A-206(c).]

b. The parties should supply this information when the modification proceeding is initiated. [See Section I.A.5, above; see also Section VII.A.4.e, below, regarding options for court if enforcement proceeding is pending in another state.]

B. Procedure

1. Modification is initiated by motion in the cause.

   a. If the court has jurisdiction pursuant to G.S. Chapter 50A, [See Section IV.A, above.] G.S. 50-13.7(a) allows modification "at any time, upon motion in the cause and a showing of changed circumstances," except as otherwise provided in G.S. 50-13.7A. [However, G.S. 50-13.7(a) only applies to final custody orders. A showing of changed circumstances is not required to modify a temporary order. See Section II.G, above, for discussion of temporary custody orders.] **NOTE**: G.S. 50-13.7A was repealed by S.L. 2013-27, § 2, effective Oct. 1, 2013. Language in G.S. 50-13.7(a) referencing G.S. 50-13.7A was not changed.

   b. G.S. 50-13.7(a) requires a "motion in the cause" and a "showing of changed circumstances" before a trial court can modify an existing order for child support or child custody. The failure of a party to file a motion to modify does not divest the trial court of jurisdiction and, accordingly, does not render a modification order void. The failure to file a motion to modify, however, is a legal error that can be challenged on appeal if not waived. [*Catawba Cty. ex rel. Rackley v. Loggins*, 370 N.C. 83, 804 S.E.2d 474 (2017) (majority opinion found that the trial court maintained continuous jurisdiction to modify a consent voluntary support agreement and order, even though no motion to modify had been filed), *rev'g* 246 N.C. App. 387, 784 S.E.2d 620 (2016).] For more on the North Carolina Supreme Court decision in *Rackley*, see Cheryl Howell, *Child Support Modification: Yes, We're Still Supposed to File a Motion to Modify*, UNC Sch. of Gov't: On the Civil Side Blog (Oct. 6, 2017), https://civil.sog.unc.edu/child-support-modification-yes-a-motion-to-modify-still-is-required.

   c. A motion for modification must set forth the grounds for the motion and the relief or order sought. [*Dobos v. Dobos*, 111 N.C. App. 222, 226, 431 S.E.2d 861, 863 (1993) (citing G.S. 1A-1, Rule 7(b)(1) as support for holding that motion requesting "such relief as to the court may seem just and proper" was insufficient), *overruled on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998).]

   d. Upon determining that grounds for modification have been shown and that modification is needed, a trial court is not limited to the allegations and requests made by the moving party but may make any modifications that it determines are supported by evidence and are in the best interest of the child. [*Balawejder v. Balawejder,* 216 N.C. App. 301, 721 S.E.2d 679 (2011) (welfare of the child is the determining factor in custody proceedings).]

   e. The trial court errs if it modifies a custody order when no motion to modify has been filed. [*Kennedy v. Kennedy*, 107 N.C. App. 695, 421 S.E.2d 795 (1992) (when redetermining child support, trial court erred when it *sua sponte* changed custody from joint custody to sole custody to mother/visitation to father); *Jackson v. Jackson*, 192 N.C. App. 455, 665 S.E.2d 545 (2008) (citing *Paris v. Michael Kreitz, Jr. PA,* 75 N.C. App. 365, 331 S.E.2d 234 (1985)) (when neither plaintiff nor defendant had a

pending motion to modify custody, trial court erred by modifying custody provisions when it entered a contempt order against mother; G.S. 1A-1, Rule 15(b), allowing amendment of pleadings to conform to evidence, was not available to cure the defect because parties had no reason to know that evidence introduced at trial related to modification rather than contempt); *Lee v. Lee*, 37 N.C. App. 371, 246 S.E.2d 49 (1978) (the court is without authority to "transform" a show cause hearing, on its own motion and without notice to the parties, into a hearing to modify the original order).] Even though *Catawba County ex rel. Rackley v. Loggins*, 370 N.C. 83, 804 S.E.2d 474 (2017), set out above, held that failure to file the motion required by G.S. 50-13.7(a) to modify an order for child support did not in that case render an order modifying child support void, pursuant to *Loggins*, failure to file the required motion is a legal error that can be challenged on appeal if not waived. The court of appeals has interpreted *Loggins* as not expressly disapproving of cases of the court of appeals establishing a "longstanding prohibition of the *sua sponte* modification of child support obligations." [*See Summerville v. Summerville*, 814 S.E.2d 887, 897 (N.C. Ct. App. 2018) (reading *Loggins* "as continuing to require *some* action by the parties in order to satisfy the underlying purpose" of G.S. 50-13.7(a) and vacating an order modifying father's child support obligation when neither party had filed a motion in the cause for modification or an adequate substitute).]

f. The trial court errs if it grants a motion to modify a custody order before entry of the custody order. [*Carland v. Branch,* 164 N.C. App. 403, 595 S.E.2d 742 (2004) (trial court erred in granting a motion to modify a custody order, which had been announced in open court but had not been reduced to writing, signed, and filed, before the motion to modify was filed).]

2. Latest custody order is the order subject to modification.

   a. When considering a motion to modify custody, the court must look to the latest permanent custody order. [*Woodring v. Woodring,* 227 N.C. App. 638, 745 S.E.2d 13 (2013) (trial court committed an error of law when in 2012 it modified a 2010 temporary order instead of the permanent custody order entered in 2011).]

3. Notice.

   a. A motion for modification must be made on ten days' notice to other parties. [G.S. 50-13.5(d)(1); *Jones v. Jones*, 109 N.C. App. 293, 426 S.E.2d 468 (1993).]

      i. Attending and participating in a hearing without objection may waive improper notice. [*Dobos v. Dobos*, 111 N.C. App. 222, 431 S.E.2d 861 (1993), *overruled on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998).]

      ii. Defendant had sufficient notice of the new date for the hearing of a motion to modify, even though neither he nor his attorney was present at the regularly scheduled court date and neither received written notice of the new hearing date. [*Trivette v. Trivette,* 162 N.C. App. 55, 590 S.E.2d 298 (2004) (defendant had actual notice that motion had been continued and had a duty to either attend the first hearing or affirmatively inquire about the new hearing date).]

      iii. Plaintiff had sufficient notice that a hearing on defendant's motion for contempt would include possible changes to visitation based on language in the contempt

motion and the court's remarks at the start of the hearing. [*Anderson v. Lackey,* 163 N.C. App. 246, 593 S.E.2d 87 (2004).]

iv. Defendant received adequate notice of plaintiff's hearing on his motion to modify custody when, prior to the hearing, defendant had made a motion to continue the hearing, which was denied; defendant, her counsel, and numerous witnesses were present at the hearing; and defendant filed "extensive motions and documents" between receipt of the notice and the hearing itself. Further, the dialogue at the hearing established that defendant knew or should have known that the court planned to hear the motion to modify custody. [*Mitchell v. Mitchell,* 199 N.C. App. 392, 401, 681 S.E.2d 520, 527 (2009) (that court calendar received by defendant indicated that matter was on for pretrial conference only did not require continuance).]

4. For modification of a temporary order, see Section II.G.7.a, above.

5. Appeal.

   a. As long as there is competent evidence to support the trial court's findings with respect to a motion for modification of a permanent custody order, its determination as to the child's best interests cannot be upset absent a manifest abuse of discretion. [*West v. Marko*, 141 N.C. App. 688, 541 S.E.2d 226 (2001).]

   b. When reviewing a trial court's decision to grant or deny a motion to modify an existing child custody order, an appellate court must examine the trial court's findings of fact to determine whether they are supported by substantial evidence and must then determine if those findings support the trial court's conclusions of law. If the appellate court determines that the trial court has properly concluded that the facts show that a substantial change of circumstances has affected the welfare of the minor child and that modification was in the child's best interests, it will defer to the trial court's judgment and not disturb its decision to modify an existing custody agreement. [*Shipman v. Shipman,* 357 N.C. 471, 586 S.E.2d 250 (2003).]

C. Grounds for Modification

1. If the court has jurisdiction pursuant to G.S. Chapter 50A, [*See* Section IV.A, above.] G.S. 50-13.7(a) allows modification "at any time, upon a motion in the cause and a showing of changed circumstances." [*Pulliam v. Smith*, 348 N.C. 616, 629, 501 S.E.2d 898, 905 (1998) (Justice Orr, concurring) ("[b]oth 'substantial' and 'affecting the child's welfare' have been added by judicial decisions and represent a commonsense interpretation of the legislative intent").]

   a. G.S. 50-13.7(a), requiring changed circumstances, only applies to final/permanent custody orders. [*Shipman v. Shipman,* 357 N.C. 471, 586 S.E.2d 250 (2003) (citing *Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998)).] A showing of changed circumstances is not required to modify a temporary order. See Section II.G, above, for discussion of temporary custody orders.

   b. The best interest of the child is not considered until there has been a showing of substantial change affecting the child. [*Evans v. Evans*, 138 N.C. App. 135, 530 S.E.2d 576 (2000); *Shipman v. Shipman,* 357 N.C. 471, 586 S.E.2d 250 (2003) (if the trial court determines that a substantial change affects the welfare of the child, a court may

modify an existing custody order only if it further concludes that a change in custody is in the child's best interests).]

c. For more on the requirement that there be changed circumstances to support modification, see Cheryl Howell, *"Tweaking" of Custody Orders Not Allowed*, UNC Sch. of Gov't: On the Civil Side Blog (June 12, 2015), http://civil.sog.unc.edu/tweaking-of-custody-orders-not-allowed.

d. For modification of an agreement made pursuant to the Uniform Deployed Parents Custody and Visitation Act, see Section VIII.B, below.

2. The modification process.

a. When a parent seeks to modify a custody order between the parents, modification requires a two-step process:

i. A showing of a substantial change of circumstances affecting the welfare of the child and

ii. A determination that the best interest of the child requires that the order be modified. [G.S. 50-13.7(a) (requiring changed circumstances); *Shipman v. Shipman,* 357 N.C. 471, 586 S.E.2d 250 (2003).] The trial court is not bound by contentions or requests of party seeking modification when creating a new custody order. [*Balawejder v. Balawejder,* 216 N.C. App. 301, 721 S.E.2d 679 (2011) (trial court enters the new order based on the best interest of the child at the time of modification).]

b. When a parent seeks to modify an order granting custody to a nonparent.

i. When a parent seeks to modify an order granting custody to a nonparent, the parent seeking modification must make the same showing as above: that a substantial change of circumstances has occurred and that a change would now be in the child's best interests. [*See Warner v. Brickhouse,* 189 N.C. App. 445, 658 S.E.2d 313 (2008); *Brewer v. Brewer*, 139 N.C. App. 222, 533 S.E.2d 541 (2000) (discussing *Bivens v. Cottle,* 120 N.C. App. 467, 462 S.E.2d 829 (1995)).]

ii. When a previous order has granted custody to a third party in a case between a third party and parents, parents are not entitled to the parental preference presumption in a subsequent modification proceeding, even if the previous order did not conclude that the parent had waived her constitutional right to custody. [*Warner v. Brickhouse,* 189 N.C. App. 445, 658 S.E.2d 313 (2008) (presumption only applies to the initial custody determination between the parent and 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).]

c. When a nonparent seeks to modify a custody order between parents.

i. When a nonparent seeks to modify a custody order between parents, the nonparent must show that a substantial change of circumstances has occurred and that a change would now be in the child's best interests. The nonparent must also show that the parent is unfit, has neglected the welfare of the child, or has otherwise acted inconsistently with the protected status of a parent. [*See Brewer*

v. Brewer, 139 N.C. App. 222, 533 S.E.2d 541 (2000) (a natural parent maintains the presumption set out in *Petersen v. Rogers,* 337 N.C. 397, 445 S.E.2d 901 (1994) against a nonparent when only previous litigation was between the parents).]

d. When a parent seeks to modify a consent custody order between the parents.

i. A substantial change in circumstances affecting the welfare of the child is required for modification when the parties have entered into a consent order providing for custody and support of their children. [*Woncik v. Woncik*, 82 N.C. App. 244, 346 S.E.2d 277 (1986).]

ii. When an initial custody order was a consent order with no findings of fact, the trial court considering modification must take evidence and make findings about the circumstances existing at the time the initial order was entered for the court to have a "base line" to determine whether there has been a change. [*Balawejder v. Balawejder,* 216 N.C. App. 301, 721 S.E.2d 679 (2011).]

e. Modification of visitation provisions.

i. The same standards that apply to modification of a custody determination are applied to modification of a visitation determination. [*Frey v. Best,* 189 N.C. App. 622, 659 S.E.2d 60 (2008) (citing *Simmons v. Arriola,* 160 N.C. App. 671, 586 S.E.2d 809 (2003)).]

3. Burden of proof.

a. Party seeking modification has burden of showing changed circumstances affecting the welfare of the child. [*Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998); *Ford v. Wright*, 170 N.C. App. 89, 611 S.E.2d 456 (2005).]

b. However, after there has been a showing of a substantial change affecting the child, neither party has a burden of proof on the question of best interest. [*Evans v. Evans,* 138 N.C. App. 135, 530 S.E.2d 576 (2000).]

4. Change of circumstances that affects the welfare of the child.

a. A determination of whether changed circumstances has occurred is a conclusion of law. [*Thomas v. Thomas,* 233 N.C. App. 736, 757 S.E.2d 375 (2014) (citing *Head v. Mosier*, 197 N.C. App. 328, 677 S.E.2d 191 (2009)); *Gary v. Bright,* 231 N.C. App. 207, 750 S.E.2d 912 (2013).]

b. Because it is a legal conclusion, a stipulation by the parties that there has been a substantial change in circumstances is ineffective and invalid. [*Thomas v. Thomas,* 233 N.C. App. 736, 757 S.E.2d 375 (2014); *Gary v. Bright,* 231 N.C. App. 207, 750 S.E.2d 912 (2013). See discussion in Section IV.C.4.f, below.]

c. Change of circumstances must be substantial, [*See Savani v. Savani,* 102 N.C. App. 496, 403 S.E.2d 900 (2001).] and the change must affect or have the potential to affect the welfare of the child. [*Pulliam v. Smith*, 348 N.C. 616, 619, 501 S.E.2d 898, 899 (1998) ("courts must consider and weigh all evidence of changed circumstances which affect or will affect the best interests of the child").]

i. Changed circumstances that will have salutary effects upon the child and those that will have adverse effects upon the child must be considered. [*Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998) (court must consider both changed

circumstances that will have salutary effects upon the child and those that will have adverse effects upon the child; disapproving many court of appeals opinions requiring a showing of "adverse effect" on child); *Warner v. Brickhouse,* 189 N.C. App. 445, 658 S.E.2d 313 (2008) *(*citing *Metz v. Metz,* 138 N.C. App. 538, 530 S.E.2d 79 (2000)); *Simpson v. Simpson* (*Litka*), 149 N.C. App. 440, 562 S.E.2d 447 (2002) (citing *Pulliam*). *See also Dreyer v. Smith,* 163 N.C. App. 155, 592 S.E.2d 594 (2004) (citing *Evans v. Evans*, 138 N.C. App. 135, 530 S.E.2d 576 (2000)) (the court does not have to wait for an adverse effect on the child to manifest itself before the court can alter custody).]

ii. A showing of a change in circumstances that is, or is likely to be, beneficial to a child may warrant a change in custody. [*Shipman v. Shipman,* 357 N.C. 471, 586 S.E.2d 250 (2003) (citing *Pulliam v. Smith,* 348 N.C. 616, 501 S.E.2d 898 (1998)) (court properly considered changes that would positively affect the child, such as father's purchase of a house and his impending marriage to a woman who could help with the child's care); *McConnell v. McConnell,* 151 N.C. App. 622, 566 S.E.2d 801 (2002) (citing *Pulliam*).]

iii. Speculative or conjectural evidence that a substantial change, whether adverse or beneficial, may occur sometime in the future will not support a change in custody. [*Benedict v. Coe,* 117 N.C. App. 369, 451 S.E.2d 320 (1994) (modification in visitation based solely on mother's over-protectiveness, which caused court to "wonder" whether child could be an active, normal toddler, was improper), *overruled on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998); *McKee v. Smith*, 255 N.C. App. 841, 738 S.E.2d 830 (2013) (**unpublished**) (not paginated on Westlaw) (finding that "it is possible" that mother and her husband will relocate after their graduation was "mere speculation or conjecture").]

d. The substantial change must have occurred since entry of last custody order.

i. In determining substantial change of circumstances, a court may consider only events that occurred after entry of the most recent permanent order, unless the events were previously undisclosed to the court. [*Woodring v. Woodring,* 227 N.C. App. 638, 745 S.E.2d 13 (2013) (trial court erred when it considered, in modification proceeding, acts of mother that occurred before entry of the most recent permanent custody order).]

ii. However, a trial court may consider the effects of acts or changes, even if the acts or changes occurred prior to entry of the order being modified, when the effects arising from those acts or changes do not manifest themselves until after entry of the order being modified. [*Spoon v. Spoon,* 233 N.C. App. 38, 755 S.E.2d 66 (2014) (in an August 2012 order modifying an October 2011 custody order, the trial court properly considered mother's move with the children to Mebane in August 2011, as well as mother's move in May 2012 to Chapel Hill, both of which changed the school placements of the children; evidence and other findings showed that the effects of the relocation to Mebane on the children's emotional well-being, school performance, and time they were able to spend with their father did not become apparent until after entry of the October 2011 order).]

iii. A trial court probably can consider evidence of a change in circumstances occurring after the filing of a motion in the cause when determining whether there has been a substantial change in circumstances since the entry of the previous order. [*Cordell v. Doyle,* 185 N.C. App. 158 (2007) (**unpublished**) (court noted absence of authority to the contrary).]

iv. Short period of time since last order does not prohibit court from modifying the order as long as there has been a substantial change of circumstances. [*See Trivette v. Trivette,* 162 N.C. App. 55, 590 S.E.2d 298 (2004) (findings that father had visited for only brief periods rather than for the visitations provided for in the consent judgment, that father had interfered with the children's counseling, and that he became angry and enraged when communicating with mother, even when children were present, were sufficient to support a conclusion of substantial change of circumstances, even though only four months had elapsed since the initial custody order was entered).]

v. Even when circumstances existed at time of previous order, a significant change in the impact of those circumstances on the welfare of the child can support a modification. [*Laprade v. Barry*, 800 S.E.2d 112 (N.C. Ct. App. 2017) (even when parties had demonstrated an inability to communicate such that the ability to communicate alone did not constitute changed circumstances, the fact that the father's communication problems began causing the child to suffer a high level of anxiety, while mother's behavior had improved, was sufficient to support trial court's conclusion that there had been a substantial change), *Shell v. Shell*, 819 S.E.2d 566 (N.C. Ct. App. 2018) (even though mother had been sober for eight months at the time of the initial custody determination, and sober for four years at the time of the modification determination, the dramatic improvement in mother's ability to care for the children, together with findings (1) as to father's continued limited capabilities with reading and helping with homework and (2) that recognized while the parties had always had trouble communicating, father had become even less willing to share information and cooperate with mother, supported a conclusion of changed circumstances).] For more on this topic, see Cheryl Howell, *Custody Modification: The Effects of the Same Circumstances Can Be the Changed Circumstances*, UNC Sch. of Gov't: On the Civil Side Blog (Sept. 27, 2018), https://civil.sog.unc.edu/custody-modification-the-effects-of-the-same-circumstances-can-be-the-changed-circumstances.

e. If the trial court concludes that there has been no substantial change in circumstances, or if it fails to conclude that there has been a substantial change in circumstances, it cannot modify an existing custody order.

i. The trial court erred when it modified an existing consent order as to custody when it concluded, at the same time, that there had not been any substantial change in circumstances. [*Lewis v. Lewis,* 181 N.C. App. 114, 638 S.E.2d 628 (2007); *Davis v. Davis,* 229 N.C. App. 494, 748 S.E.2d 594 (2013) (citing *Hibshman v. Hibshman,* 212 N.C. App. 113, 710 S.E.2d 438 (2011)) (trial court commits reversible error if it modifies a custody order without finding substantial change affecting welfare of the child; rejecting argument that substantial change finding not required if change can be inferred from findings made); *Allen*

v. Allen, 201 N.C. App. 159, 688 S.E.2d 118 (2009) (**unpublished**) (even when record contains evidence sufficient to support a conclusion that a substantial change has occurred, an order modifying custody will be remanded if the order does not contain the conclusion that there has been a substantial change of circumstances).]

ii. The trial court erred when it modified a permanent custody order entered in Virginia by changing sole legal custody in mother to joint legal custody in mother and father without finding a substantial change in circumstances since entry of the Virginia order. [*Hatcher v. Matthews*, 789 S.E.2d 499 (N.C. Ct. App. 2016).]

iii. When the trial court did not find that father's inappropriate discipline or the parties scheduling conflicts constituted a substantial change of circumstances affecting the children's welfare, the trial court erred when it changed the existing custody order to require father to obtain an anger management assessment; when it ordered immediate resumption of father's visitation but with limitations not in original order, such as requiring that mother and children have phone access at all times during visitation; and when it prohibited father from physically disciplining the children. [*Davis v. Davis,* 229 N.C. App. 494, 748 S.E.2d 594 (2013) (rejecting mother's argument that majority of the changes were clarifications of prior order rather than modifications).]

f. The parties cannot by agreement or stipulation eliminate the requirement that a trial court find a substantial change of circumstances before modifying custody. A determination of whether changed circumstances exist is a conclusion of law that must be supported by findings of fact and that cannot be waived by the parties. [*Hibshman v. Hibshman,* 212 N.C. App. 113, 710 S.E.2d 438 (2011) (agreement by parties in initial custody order that the custody order was to be subject to modification without a showing of changed circumstances was ineffective); *Thomas v. Thomas,* 233 N.C. App. 736, 757 S.E.2d 375 (2014) (citing *In re A.K.D.,* 227 N.C. App. 58, 745 S.E.2d 7 (2013)) (stipulation by the parties at the beginning of the hearing, included in the trial court's modification order, that there had been a substantial change of circumstances since entry of prior custody orders was invalid and ineffective; changed circumstances determination is a conclusion of law; modification order affirmed, however, as trial court made sufficient findings in support of its conclusion of substantial change); *Spoon v. Spoon,* 233 N.C. App. 38, 755 S.E.2d 66 (2014) (citing *Hibshman*) (the trial court would have erred if it had relied on a stipulation by the parties, made before entry of a 2011 consent custody order, that a move by mother from Alamance to Orange County would constitute a substantial change in circumstances; appellate court would not assume error when there was no indication that the trial court relied on the stipulation when it modified the 2011 order).]

g. The trial court may not predetermine that a future event will amount to a substantial change in circumstances. To do so would "predetermine a legal conclusion absent any findings of fact." [*Cox v. Cox,* 238 N.C. App. 22, 32–33, 768 S.E.2d 308, 315 (2014) (error for order to include that a requirement that father reside with his mother for visitation purposes "shall be lifted" if father's therapist determined in the future that there were no concerns about father's mental health or his ability

to care for the children on his own, which showing was "deemed to be a substantial change in circumstances affecting the well-being of the minor children").] For more on *Cox*, see Cheryl Howell, *"Tweaking" of Custody Orders Not Allowed*, UNC Sch. of Gov't: On the Civil Side Blog (June 12, 2015), http://civil.sog.unc.edu/tweaking-of-custody-orders-not-allowed.

5. Connection between substantial change in circumstances and welfare of the child required.
   a. While the change in circumstances must be substantial, there is no requirement that the change in circumstances "*substantially* affect[ ] the children's welfare." [*Spoon v. Spoon,* 233 N.C. App. 38, 44, 755 S.E.2d 66, 71 (2014) (emphasis in original) (despite language in *Spence v. Durham*, 283 N.C. 671, 198 S.E.2d 537 (2000), to that effect, the appropriate standard is a "substantial change in circumstances that affects the welfare of" the child).]
   b. The evidence must demonstrate a connection between the substantial change in circumstances and the welfare of the child. [*Shipman v. Shipman,* 357 N.C. 471, 586 S.E.2d 250 (2003).] Evidence linking changed circumstances to the child's welfare might consist of assessments of the minor child's mental well-being by a qualified mental health professional, school records, or testimony from the child or the parent. [*Warner v. Brickhouse,* 189 N.C. App. 445, 658 S.E.2d 313 (2008).]
   c. The court is required to make findings of fact regarding that connection. [*Shipman v. Shipman,* 357 N.C. 471, 586 S.E.2d 250 (2003).]
      i. Trial court's findings about mother's improved lifestyle and ability to provide the children with a stable home life were insufficient where court failed to make findings about how these changes would impact the "children's physical and emotional well-being." [*Brewer v. Brewer*, 139 N.C. App. 222, 233, 533 S.E.2d 541, 549 (2000).]
      ii. Trial court failed to make sufficient findings to show impact on the child of custodial parent's cohabitation with person of the opposite sex, even though trial court made findings that the parent's conduct was in violation of North Carolina law and that the children were present in the home during the cohabitation. [*Browning v. Helff*, 136 N.C. App. 420, 524 S.E.2d 95 (2000).]
      iii. Trial court's finding that father frequently used alcohol was not sufficient to demonstrate a substantial change of circumstances when trial court made no findings as to impact of alcohol use on the child's welfare. [*Ford v. Wright*, 170 N.C. App. 89, 611 S.E.2d 456 (2005).]
      iv. Conclusion that change in father's work schedule and living arrangements and increase in the age of the children constituted a substantial change in circumstances warranting an increase in father's visitation time was not supported by findings when findings failed to address how those changes affected the welfare of the children; portion of the order increasing visitation time was vacated and matter was remanded for further findings. [*Frey v. Best*, 189 N.C. App. 622, 659 S.E.2d 60 (2008).]
   d. Where the effects of the changes on the welfare of the child are self-evident and supported by substantial underlying evidence, the findings may be upheld even if they do

not "present a level of desired specificity." [*Shipman v. Shipman,* 357 N.C. 471, 479, 586 S.E.2d 250, 256 (2003).]

i. Changes that have been found to have a "self-evident" effect on the child include:

(a) That the child needed Attention Deficit Hyperactivity Disorder (ADHD) medication and father was willing to provide it, that father was very attentive to the child's progress and behavior in school, and that father had been more consistent in treating the child's various recurring medical conditions. [*Lang v. Lang,* 197 N.C. App. 746, 678 S.E.2d 395 (2009) (noting that consideration by the trial court of the changes in circumstances on the child was "implicit" when viewing the order as a whole).]

(b) The deceitful denial of visitation over a considerable period of time with a father with whom the child had a good relationship and looked forward to seeing, coupled with an unequivocally unstable home life created by mother's often transient living arrangements. [*Shipman v. Shipman,* 357 N.C. 471, 586 S.E.2d 250 (2003).]

ii. Conduct that was found not to constitute a self-evident change of circumstances affecting the welfare of the child:

(a) A single incident of inappropriate discipline, especially when the trial court also found that defendant father did not pose an immediate threat to the child and ordered visitation to resume. [*Davis v. Davis,* 229 N.C. App. 494, 748 S.E.2d 594 (2013).]

(b) Conflicts between parents over custody and visitation schedules. [*Davis v. Davis,* 229 N.C. App. 494, 748 S.E.2d 594 (2013).]

e. Situations where the change in the child's welfare is not self-evident require "a showing of evidence *directly* linking the change to the welfare of the child." [*Shipman v. Shipman,* 357 N.C. 471, 478, 586 S.E.2d 250, 256 (2003) (emphasis in original).]

i. Examples of these situations include:

(a) A move on the part of a parent,

(b) A parent's cohabitation, or

(c) A change in the parent's sexual orientation. [*Shipman v. Shipman,* 357 N.C. 471, 586 S.E.2d 250 (2003). *See also Green v. Kelischek,* 234 N.C. App. 1, 759 S.E.2d 106 (2014) (citing *Shipman*) (where the substantial change involves a parent's relocation or remarriage, the effects of the change on the welfare of the child are not self-evident; evidence directly linking the change to the welfare of the child required); *Ford v. Wright*, 170 N.C. App. 89, 611 S.E.2d 456 (2005) (father's use of alcohol did not give rise to a self-evident conclusion as to the effect on the child; findings as to connection required).]

f. Where the effects of the changes on the welfare of the child are not "self-evident," movant has the burden to show evidence directly linking changes in circumstances to the welfare of the child. [*Warner v. Brickhouse,* 189 N.C. App. 445, 658 S.E.2d 313 (2008) (citing *Shipman v. Shipman,* 357 N.C. 471, 586 S.E.2d 250 (2003)).]

i. Where court found that mother had experienced "substantial circumstantial changes in her own personal life and environment" but mother did not present

evidence that showed how those changes affected the child, trial court properly denied mother's motion to modify custody. [*Warner v. Brickhouse,* 189 N.C. App. 445, 448, 658 S.E.2d 313, 316 (2008).]

6. Substantial change found: modification allowed.
   a. Substantial changes found by the court were father's completion of a fellowship in cardiology, which provided a more flexible schedule with more time to spend with the child, father's "healthy" remarriage, as well as his progression in therapy and increased self-awareness. [*Mitchell v. Mitchell,* 199 N.C. App. 392, 681 S.E.2d 520 (2009).]
   b. Changes since entry of the prior order included that mother had had two children ages 1 and 3 with her subsequent husband, from whom she was separated at the time of hearing, and that the child who was the subject of the modification motion had been diagnosed and recommended for treatment for ADHD. [*Lang v. Lang,* 197 N.C. App. 746, 678 S.E.2d 395 (2009).]
   c. Substantial changes included the following: father's relationship with a married woman, which resulted in a separation from his third wife, who provided at least 50 percent of the child's care, and in his resignation from his job; child's grades had suffered; mother's health had improved; and mother could now provide a stable environment. [*Karger v. Wood,* 174 N.C. App. 703, 622 S.E.2d 197 (2005).]
   d. Substantial change was remarriage of mother, which had negative effect on the children arising from new husband's alcohol abuse and violent behavior and exposure of the children to illegal drugs and risk of physical harm. [*Dreyer v. Smith,* 163 N.C. App. 155, 592 S.E.2d 594 (2004); *Patten v. Werner,* 207 N.C. App. 264, 699 S.E.2d 478 (2010) (**unpublished**) (modification was supported by violent conduct and alcohol abuse by mother's new husband).]
   e. The following substantial changes supported modification: mother's living arrangements had become unstable since entry of initial order; mother and child had lived with mother's boyfriend in violation of custody order; mother deceitfully hid her whereabouts from father to prevent visitation; and mother filed a "spiteful" criminal action against father's mother. [*Shipman v. Shipman,* 357 N.C. 471, 586 S.E.2d 250 (2003).]
   f. Substantial change that warranted change in custody from mother to father was mother's plan to marry a paroled sex offender whose victim was the same age and sex as the minor child, as well as mother's failure to disclose her plans and the sex offender's admission that he still struggled with inappropriate urges toward teenage girls. [*McConnell v. McConnell,* 151 N.C. App. 622, 566 S.E.2d 801 (2002).]
   g. Substantial changes warranting change in custody to father was fact that mother absconded with child for two months, causing child to miss thirty-eight days of school, and fact that father had moved to Hawaii, which an expert had found would have the beneficial effect of allowing child to reside with one parent and would provide needed stability. [*Carlton v. Carlton,* 354 N.C. 561, 557 S.E.2d 529 (2001), *rev'g per curiam for reasons stated in dissenting opinion in* 45 N.C. App. 252, 549 S.E.2d 916 (2001) (Tyson, J., dissenting), *cert. denied,* 536 U.S. 944, 122 S. Ct. 2630 (2002).]

h. Substantial change supported by findings that each parent enrolled the children in a different school and were unable to "work together for the benefit of the children." [*Booker v. Strege*, 807 S.E.2d 597, 603 (N.C. Ct. App. 2017).]

7. Substantial change not found: modification not allowed.

a. No abuse of discretion when trial court found that father's contention that child "did very well while he was with his father" was not sufficient to warrant a change in custody and further found that mother's alleged child abuse was appropriate discipline. [*Scott v. Scott,* 157 N.C. App. 382, 386, 579 S.E.2d 431, 434 (2003) (trial judge is sole judge of credibility and weight given to evidence).]

b. It being obvious that a growing child will "obtain more maturity," that finding alone does not constitute a sufficient change in circumstances to warrant modification. [*Hassell v. Means,* 42 N.C. App. 524, 531, 257 S.E.2d 123, 127, *review denied,* 298 N.C. 568, 261 S.E.2d 122 (1979); *McKee v. Smith*, 255 N.C. App. 841, 738 S.E.2d 830 (2013) (**unpublished**) (citing *Hassell*) (finding that child would start first grade in the fall, along with findings that both parents might relocate in the future, did not support conclusion of substantial change).]

8. Specific conduct as grounds for modification.

a. Remarriage of a parent.

i. Generally, remarriage of a parent, in and of itself, is not sufficient to justify modification of custody without a finding indicating the effect of the remarriage on the child. [*Green v. Kelischek,* 234 N.C. App. 1, 759 S.E.2d 106 (2014), and *Dreyer v. Smith,* 163 N.C. App. 155, 592 S.E.2d 594 (2004) (both citing *Evans v. Evans*, 138 N.C. App. 135, 530 S.E.2d 576 (2000)).]

ii. But remarriage that has a negative effect on the children can be a substantial change of circumstances justifying modification. [*Dreyer v. Smith,* 163 N.C. App. 155, 592 S.E.2d 594 (2004) (modification upheld based on findings that described negative effect mother's remarriage had on children, specifically, new husband's alcohol abuse and violent behavior and exposure of children to illegal drugs and risk of physical harm).]

b. Interference with visitation.

i. "[G]enerally, interference *alone* by the custodial parent with the noncustodial parent's visitation rights does not justify a modification of a child custody order." [*Shipman v. Shipman,* 357 N.C. 471, 479, 586 S.E.2d 250, 256 (2003) (emphasis in original) (citing *Woncik v. Woncik*, 82 N.C. App. 244, 346 S.E.2d 277 (1986)). *See also Jackson v. Jackson,* 192 N.C. App. 455, 665 S.E.2d 545 (2008) (citing 3 Lee's North Carolina Family Law § 13.52 (5th ed. 2002)) (noting in dicta that the trial court appeared to have confused the purposes of modification and contempt and that ordinarily the proper response when a custodial parent violates visitation provisions is a finding of contempt, not modification). *But cf. Hancock v. Hancock*, 122 N.C. App. 518, 471 S.E.2d 415 (1996) (proper response to a parent's failure to enforce visitation schedule is modification; this case is discussed in Section V.B.3.f.v, below).]

ii. Note that interference with the visitation of a noncustodial parent that has a negative impact on the welfare of the child can constitute a substantial change of circumstances sufficient to warrant a change of custody. [*Thomas v. Thomas,* 233 N.C. App. 736, 757 S.E.2d 375 (2014) (change in custody warranted by mother's pattern of disruptive behavior over a number of years, beginning with father's remarriage, which resulted in father being unable to exercise visitation, alienated the child from his father, significantly interfered with the parties' ability to co-parent, and detrimentally affected the welfare of the child); *Jordan v. Jordan,* 162 N.C. App. 112, 592 S.E.2d 1 (2004) (citing *Woncik v. Woncik*, 82 N.C. App. 244, 346 S.E.2d 277 (1986)) (deterioration in child's relationship with father was caused primarily by mother's actions that emotionally harmed child and warranted custody change); *Wolgin v. Wolgin*, 217 N.C. App. 278, 719 S.E.2d 196 (2011) (mother's unilateral decision to enroll children in extracurricular activities in Wake County after she relocated there with children, curtailing father's time with children and participation in those activities, was not in children's best interest); *Correll v. Allen*, 94 N.C. App. 464, 380 S.E.2d 580 (1989) (trial court's change of primary custody to father was upheld based in part on finding that mother's frustration of father's visitation privileges contributed to child's emotional problems); *Smith v. Smith,* 230 N.C. App. 144, 752 S.E.2d 257 (2013) (**unpublished**) (children's welfare was adversely impacted when mother obstructed father's reasonable visitation efforts by responding to father's requests in a confrontational and obstructive manner, by making it extremely difficult to arrange visitation and exchanges, by interfering with phone visitation, and by not being truthful about children's activities to avoid visitation); *Cordell v. Doyle,* 185 N.C. App. 158 (2007) (**unpublished**) (mother's interference with telephone communication between father and child and the lack of effective communication between father and mother about visitation matters rose to the level of a substantial change of circumstances warranting modification).]

iii. Interference with the visitation rights of a grandparent that placed the child "at a substantial risk of a negative impact both presently and in the future" constituted substantial change of circumstances justifying additional visitation privileges. [*Sloan v. Sloan,* 164 N.C. App. 190, 195, 595 S.E.2d 228, 232 (2004) (rejecting mother's claim that court had to find that mother had acted inconsistently with the best interest of the child before allowing modification).]

iv. Mother's pervasive and harmful interference with father's visitation rights, as well as violent actions by mother and her family directed at father in minor child's presence, adversely affected child by preventing father from developing a relationship with her and warranted a change of custody. [*Hicks v. Alford,* 156 N.C. App. 384, 576 S.E.2d 410 (2003).]

v. Long-standing disagreements over visitation issues did not constitute a change in circumstances when findings showed that the parents' disagreements had gone on for many years and "unfortunately" was a circumstance that was "far from changed." [*Davis v. Davis,* 229 N.C. App. 494, 503, 748 S.E.2d 594, 601 (2013).]

c. Parental relocation.

i. A number of cases prior to *Pulliam v. Smith,* 348 N.C. 616, 501 S.E.2d 898 (1998), held that a parent's change of residence is not sufficient to support a finding of substantial change of circumstances absent a further showing that the move had or would have an adverse effect on the child. [*See, e.g., Ramirez-Barker v. Barker*, 107 N.C. App. 71, 418 S.E.2d 675 (1992).] However, *Pulliam* specifically disavowed *Ramirez-Barker* and other relocation cases and held that the effect of a move may be adverse or beneficial to the child.

ii. However, a trial court still must find that the relocation will have an impact on the welfare of the child in order to support a conclusion that there has been a substantial change of circumstances. [*Evans v. Evans*, 138 N.C. App. 135, 530 S.E.2d 576 (2000) (trial court made insufficient findings to support conclusion that mother's remarriage and relocation to Maryland would affect the welfare of the child). *See also Carlton v. Carlton,* 354 N.C. 561, 557 S.E.2d 529 (2001), *rev'g per curiam for reasons stated in dissenting opinion in* 145 N.C. App. 252, 549 S.E.2d 916 (2001) (Tyson, J., dissenting), *cert. denied,* 536 U.S. 944, 122 S. Ct. 2630 (2002) (state supreme court adopted dissent in court of appeals, which found that the trial court had made sufficient findings to support conclusion that father's relocation to Hawaii amounted to a substantial change affecting the welfare of the child where the trial court incorporated into the judgment a report by a psychiatrist stating that the move would have a positive effect on the child).]

iii. After finding that parental relocation has or will have an effect on the child, the court should consider several factors in evaluating the best interest of the child in a proposed relocation, including: "the advantages of the relocation in terms of its capacity to improve the life of the child; the motives of the custodial parent in seeking the move; the likelihood that the custodial parent will comply with visitation orders when he or she is no longer subject to the jurisdiction of the courts of North Carolina; the integrity of the noncustodial parent in resisting the relocation; and the likelihood that a realistic visitation scheme can be arranged which will preserve and foster the parental relationship with the noncustodial parent." [*Evans v. Evans,* 138 N.C. App. 135, 142, 530 S.E.2d 576, 580 (2000); *Green v. Kelischek*, 234 N.C. App. 1, 759 S.E.2d 106 (2014) (citing *Evans*).]

iv. Findings must address the effect of the proposed relocation on the child's welfare and best interest.

(a) Where the trial court found that mother's proposed relocation with the child would adversely affect the relationship between father and the child but made no findings about the effect of the proposed relocation on the child himself, and where the trial court did not explicitly address the question of the best interest of the child, order that provided for change in custody to father upon mother's relocation with the child was vacated and matter was remanded for detailed findings. [*Evans v. Evans*, 138 N.C. App. 135, 530 S.E.2d 576 (2000).]

(b) Trial court's findings regarding the improving relationship between the children and their father and the close relationships the children shared

with numerous extended relatives in the area supported a conclusion that the proposed relocation would have an adverse effect on the children and was not in their best interest; trial court's denial of mother's motion to relocate was upheld. [*Frey v. Best,* 189 N.C. App. 622, 659 S.E.2d 60 (2008).]

(c) Findings supporting trial court's determination that it was in child's best interest for father to have school-year custody if mother moved to Oregon included the following, as well as some of findings set out below supporting substantial change conclusion: that neither mother nor her new husband had family in Oregon; that child has a loving and close relationship with father and father's extended family, to whom father is dedicated, as well as extensive maternal family connections in North Carolina; and that father lives and works in a unique and enriching artistic environment with his family members, providing child with "a rich life in the Kelischek community." [*Green v. Kelischek,* 234 N.C. App. 1, 14, 759 S.E.2d 106, 115 (2014) (findings as to substantial change showed that mother's remarriage and proposed relocation to Oregon had escalated conflict between the parents, causing child some separation anxiety; that mother's decision to remarry and relocate were made for her benefit and not child's and gave the court concern over the stability of mother's plans; that there was no evidence that the proposed relocation to Oregon offered a superior environment for child; that child's long distance travel several times a year for father's custodial time would not be reasonable and would prevent a normal school and social experience; and that child's relocation would cause the loss of ongoing, consistent, stable contact between child and father and extended family).]

(d) Findings were sufficient to show mother's move with children to another town had a detrimental effect on children where the move resulted in children having an hour-long commute to and from school and extracurricular activities. [*Stephens v. Stephens,* 213 N.C. App. 495, 502, 715 S.E.2d 168, 174 (2011) (evidence that children were "well-adjusted" and a finding that they were "performing well in school" did not preclude conclusion that relocation, affected children); *Nordstrom v. Shaw,* 225 N.C. App. 265, 736 S.E.2d 649 (2013) (**unpublished**) (mother's relocation that resulted in one-and-one-half-hour to two-hour commute to children's school was detrimental to children's welfare when evidence showed that mother used length of the commute as a reason to keep children home from school; children also unable to participate in same activities).]

(e) A finding that a change of school due to parent's relocation had a detrimental effect on child's social adjustment, as teachers at prior school were successfully addressing and improving child's social interactions with her peers, supported conclusion of a substantial change in circumstances that affected child's welfare. [*Wolgin v. Wolgin*, 217 N.C. App. 278, 719 S.E.2d 196 (2011). *See also Spoon v. Spoon,* 233 N.C. App. 38, 755 S.E.2d 66 (2014) (multiple findings showed how two relocations by mother in ten-month period, with corresponding changes to children's school placement, affected

children; relocations caused children added stress, resulted in negative changes in their demeanors, with children becoming more clingy, tearful and upset, and children's academic performance declined; withdrawal of children from extracurricular activities as a way to limit father's time with children, and mother's unstable lifestyle, further supported modification as being in children's best interest).]

(f) The following findings were sufficient to establish that father's move to Georgia with the child impacted the welfare of the child:

(1) Father's residence in Georgia was an inappropriate place for the child;

(2) Following the move, father increased child's visits with paternal grandfather, whom the trial court had earlier ordered to stay away from the child;

(3) The child expressed strong attachment to mother and her friends in North Carolina; and

(4) The child had resided in the same town in North Carolina since birth and the move to Georgia "put a substantial distance between the minor child and her family and friends." [*Pass v. Beck,* 210 N.C. App. 192, 201, 708 S.E.2d 87, 93 (2011).]

v. In deciding whether to grant primary custody to a parent who plans to relocate, the trial court must weigh the advantages to the children against the disadvantages of the move and decide best interest in light of all the circumstances of the case. [*O'Connor v. Zelinske,* 193 N.C. App. 683, 668 S.E.2d 615 (2008). *See Crenshaw v. Williams,* 211 N.C. App. 136, 710 S.E.2d 227 (2011) (finding that father's move to Tennessee for a new job would result in a salary increase that would allow him to support the children financially was sufficient to show the court had considered the impact of the move on the children).]

vi. Difficulty of visitation for the nonmoving parent is a consideration for the court in determining best interest, but visitation rights are subordinate to the overall best interest of the child. [*O'Connor v. Zelinske,* 193 N.C. App. 683, 668 S.E.2d 615 (2008) (citing *Evans v. Evans*, 138 N.C. App. 135, 530 S.E.2d 576 (2000)) (mother and children's relocation to Minnesota was in children's best interest, even though it created a hardship for father to exercise visitation). *Cf. Wolgin v. Wolgin*, 217 N.C. App. 278, 719 S.E.2d 196 (2011) (mother's unilateral decision to enroll children in extracurricular activities in Wake County after relocating there with children, at locations and times that curtailed father's time with the children and participation in those activities, was not in children's best interest).]

vii. [G.S. 50-13.2(b) provides that the relocation of a parent due to domestic violence cannot be held against that parent for purposes of determining custody.

d. Reformed lifestyle of a parent.

i. The reformed lifestyle of a parent not originally awarded custody can be the basis for modifying custody. [*Simpson v. Simpson* (*Litka*), 149 N.C. App. 440, 562 S.E.2d 447 (2002) (mother who overcame drug dependency, remarried, had stable employment, and had become active in church and community showed

substantial change that benefited child and warranted a change in custody). *See also Metz v. Metz*, 138 N.C. App. 538, 530 S.E.2d 79 (2000) (father who abused alcohol and battered wife "completely reformed" his life by becoming minister; trial court's conclusion that a substantial change affecting the child's welfare had occurred, based on beneficial changes made by father, was upheld).]

ii. Trial court must make findings as to the effect the improved lifestyle had on the children's welfare. [*Brewer v. Brewer*, 139 N.C. App. 222, 233, 533 S.E.2d 541, 549 (2000) (findings about mother's improved lifestyle and ability to provide the children with a stable home life were insufficient where court failed to make findings about how these changes would impact the "children's physical and emotional well-being"); *Warner v. Brickhouse,* 189 N.C. App. 445, 658 S.E.2d 313 (2008) (since mother did not present evidence that the substantial changes in her personal life and environment affected the child, trial court properly denied mother's motion to modify, even though court recognized that mother was not able to demonstrate the effect on the child "largely" because mother had been ordered to have no contact with the child).]

e. Inability to communicate and make joint decisions.

i. The parties' inability to effectively communicate and their continual disagreements, coupled with specific findings setting out how those issues affected the welfare of the children, warranted a change in custody. [*Wolgin v. Wolgin*, 217 N.C. App. 278, 719 S.E.2d 196 (2011) (findings included the following: lack of communication, which hindered children's religious growth; mother's refusal to continue child's therapy, which had a profound effect on child's mental health; change of school, which had a detrimental effect on child's social adjustment; and mother's unilateral decision to enroll children in extracurricular activities in Wake County after relocating there with children, which curtailed father's time with children and participation in those activities). *See also Booker v. Strege*, 807 S.E.2d 597, 603 (N.C. Ct. App. 2017) (modification supported by findings that each parent enrolled the children in a different school and were unable to "work together for the benefit of the children").]

ii. For a case affirming the trial court's *sua sponte* appointment of a parenting coordinator as part of a contempt order based on the parties' inability to communicate about the child's activities, doctors' visits, and other issues, which conflict had increased since entry of the last order and which was negatively impacting the child, *see Jackson v. Jackson,* 192 N.C. App. 455, 665 S.E.2d 545 (2008).

iii. For a case affirming the trial court's decision to give mother, who was awarded primary physical and legal custody, final decision-making authority as to major decisions affecting the child based on trial court's specific determination that joint custody was not in the child's best interest because parents could not communicate effectively except as to surface issues, see *Dixon v. Gordon*, 223 N.C. App. 365, 734 S.E.2d 299 (2012), *review denied,* 366 N.C. 604, 743 S.E.2d 191 (2013). *See also Thomas v. Thomas,* 233 N.C. App. 736, 744, 746, 757 S.E.2d 375, 378, 382 (2014) (parents were given joint legal custody, with father exercising primary physical custody and "having final decision making authority if the parties are unable to timely agree as to a decision;" the "parties' dysfunctional

relationship history and the current level of conflict between the parties" required that one parent be given final decision making authority on important issues, otherwise joint legal custody would not be in the child's best interest "in light of the risk of delay in making timely decisions").]

9. The trial court must make findings of fact to support the conclusion that there has been a substantial change affecting the welfare of the child. [*Lewis v. Lewis,* 181 N.C. App. 114, 638 S.E.2d 628 (2007).]

   a. The North Carolina Supreme Court has encouraged trial courts, when memorializing their findings of fact, to "pay particular attention in explaining whether any change in circumstances can be deemed substantial, whether that change affected the welfare of the minor child, and, finally, why modification is in the child's best interests." [*Shipman v. Shipman,* 357 N.C. 471, 481, 586 S.E.2d 250, 257 (2003); *Gary v. Bright,* 231 N.C. App. 207, 750 S.E.2d 912 (2013), and *Davis v. Davis*, 229 N.C. App. 494 , 748 S.E.2d 594 (2013) (both citing *Shipman*). *See also Johnson v. Adolf,* 149 N.C. App. 876, 878 n.1, 561 S.E.2d 588, 589 n.1 (2002) (statement that "there have been changes in circumstances since August 1997" was not adequate to modify a custody order, as the change must be substantial; moreover, trial court never determined whether changes impacted child, positively or negatively, and failed to connect the changes to the welfare of the child).]

   b. Findings should make it clear to an appellate court that a party's motion to modify custody was addressed in full. Even when a trial court does not consider the motion to be supported by the facts or the law, "still the trial court needs to make findings." [*D'Alessandro v. D'Alessandro*, 235 N.C. App. 458, 467, 762 S.E.2d 329, 335 (2014) (defendant sought modification order granting him primary custody of three children; trial court's order addressed modification as to one child but failed to address defendant's request for modification, and his evidence in support of modification, as to the two younger children; matter was remanded).]

   c. Findings in an order for modification must be supported by substantial, competent evidence. [*Karger v. Wood,* 174 N.C. App. 703, 622 S.E.2d 197 (2005) (*citing Shipman v. Shipman,* 357 N.C. 471, 586 S.E.2d 250 (2003)).] Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." [*Shipman v. Shipman,* 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003); *McConnell v. McConnell,* 151 N.C. App. 622, 566 S.E.2d 801 (2002).]

      i. Evidence did not support trial court's finding that parties were not able to communicate effectively about the child. [*Ford v. Wright*, 170 N.C. App. 89, 611 S.E.2d 456 (2005) (evidence showed that despite disagreements and disputes, parties were able to communicate about the needs of the child).]

      ii. Evidence did not support trial court's finding that the parties' unresolved issues and disagreements resulted in emotional trauma to the child. [*Ford v. Wright*, 170 N.C. App. 89, 611 S.E.2d 456 (2005) (testimony that child cried after a disagreement not sufficient to support conclusion of emotional trauma).]

   d. When determining whether findings are adequate, the appellate court examines the entire order. [*Karger v. Wood,* 174 N.C. App. 703, 622 S.E.2d 197 (2005); *Lang v. Lang,* 197 N.C. App. 746, 678 S.E.2d 395 (2009) (citing *Karger*).]

e. The court is not required to use "certain and specific 'buzz' words or phrases." [*Karger v. Wood,* 174 N.C. App. 703, 709, 622 S.E.2d 197, 202 (2005) (fact that the trial court did not use the exact phrase "affecting the welfare of the child" was not determinative; findings and conclusions supported trial court's modification); *Carlton v. Carlton,* 354 N.C. 561, 557 S.E.2d 529 (2001) (even though there was no conclusion as to effect on child's welfare, findings made clear that mother's actions affected the child and did not require the court to make inferences on that point), *rev'g per curiam for reasons stated in dissenting opinion in* 145 N.C. App. 252, 549 S.E.2d 916 (2001) (Tyson, J., dissenting), *cert. denied,* 536 U.S. 944, 122 S. Ct. 2630 (2002). *See also McConnell v. McConnell,* 151 N.C. App. 622, 566 S.E.2d 801 (2002) (order must demonstrate that the court considered the effect on the child's welfare); *Lang v. Lang,* 197 N.C. App. 746, 678 S.E.2d 395 (2009) (citing *Karger*); *cf. Davis v. Davis,* 229 N.C. App. 494, 503, 504, 748 S.E.2d 594, 601 (2013) (distinguishing *Karger* and *Carlton*) (a finding of a substantial change in circumstances is not just a "buzz word" but a legal requirement for custody modification; when trial court "did not conclude that there was a substantial change in circumstances, let alone that those changes affected the welfare of the children," and when it was not self-evident that conduct complained of constituted a substantial change in circumstances, modifications to father's visitation and requirement that he attend anger management classes vacated).]

f. Specific findings of fact generally are not required if the court denies a motion based on its conclusion that there has not been a substantial change of circumstances. [*See Searl v. Searl,* 34 N.C. App. 583, 587, 239 S.E.2d 305, 308 (1977) (citing *In re Custody of Mason*, 13 N.C. App. 334, 185 S.E.2d 433 (1971)) (in custody context, when there is no change in circumstances warranting modification, the district court is not required to make negative findings of fact justifying a holding that a party has not met the burden of proof on an issue; trial court's conclusion that there were "no material changes of circumstances with respect to the custody and welfare of the minor children" since entry of the prior order was sufficient), *disapproved of on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998).]

10. Cases with sufficient findings.

a. The following findings stemming from the parties' lack of communication and frequent disagreements supported conclusion of a substantial change in circumstances: mother's lack of cooperation resulted in children's failure to participate in religious and holiday observances after attaining ages where they could more fully participate therein; mother's refusal to continue one child's therapy had a profound effect on child's mental health; mother's unilateral decision to change schools had a detrimental effect on one child's social adjustment, as teachers at prior school were successfully addressing and improving child's social interactions with her peers; and mother's unilateral decision to enroll children in extracurricular activities in Wake County after relocating there curtailed father's time with the children and participation in those activities. [*Wolgin v. Wolgin*, 217 N.C. App. 278, 719 S.E.2d 196 (2011).]

b. Evidence supported findings that children had benefitted from father's flexible work schedule since completing a fellowship in cardiology, from father's progression in therapy, and from his "healthy" remarriage. Evidence also supported findings of adverse impact on the children from mother's continued "animosity and perception"

and from father's limited access to children's medical and psychological information. [*Mitchell v. Mitchell,* 199 N.C. App. 392, 681 S.E.2d 520 (2009).]

c. Findings that mother's living arrangements had become unstable since entry of initial order, that mother and child had lived with mother's boyfriend in violation of custody order, and that mother deceitfully hid her whereabouts from father to prevent visitation were sufficient, even though court did not make explicit findings about the effect of the changes on the welfare of the child; court held effect on child was "self-evident." [*Shipman v. Shipman,* 357 N.C. 471, 586 S.E.2d 250 (2003). But see Section IV.C.5.d, above, listing the changes where court said effect was not self-evident).]

d. Finding that the child's grades had suffered was sufficient to establish the nexus between the changes that had occurred since the previous order and the effect on the child. [*Karger v. Wood*, 174 N.C. App. 703, 622 S.E.2d 197 (2005).]

e. Findings contained in a prior order and a psychiatrist's report assessing the impact on the child of a move to Hawaii, both of which were incorporated into the order modifying custody, were sufficient to support the conclusion of a substantial change of circumstances affecting the welfare of the child. [*Carlton v. Carlton,* 354 N.C. 561, 557 S.E.2d 529 (2001), *rev'g per curiam for reasons stated in dissenting opinion in* 145 N.C. App. 252, 549 S.E.2d 916 (2001) (Tyson, J., dissenting), *cert. denied,* 536 U.S. 944, 122 S. Ct. 2630 (2002).]

f. Findings based on evidence as to child's care and educational opportunities, babysitters, amount of time each parent spent with child, each parent's household situation and living conditions, and that mother had obtained employment with flexible hours, increasing her ability to care for subject child and her other children, established conditions "naturally affecting" the child's welfare. [*West v. Marko,* 141 N.C. App. 688, 541 S.E.2d 226 (2001).]

g. The following findings established an appropriate nexus between change and the children: mother had "engaged in a course of conduct that demonstrates hostility towards [father] that has occurred in front of the minor children," making it difficult for the children "to remain emotionally secure and bonded to both parties" and mother's conduct threatened "to undermine and alienate the [father] as well as the [father's] wife from the minor children." [*Stephens v. Stephens*, 213 N.C. App. 495, 499–500, 500, 502, 715 S.E.2d 168, 172, 174 (2011) (evidence that children were "well-adjusted" and a finding that they were "performing well in school" did not preclude conclusion that circumstances affected children).]

V. Enforcement of Custody Orders

A. Subject Matter Jurisdiction

1. A state always has subject matter jurisdiction and the duty to enforce a child custody order entered by a court with appropriate jurisdiction. [G.S. 50A-303.]

2. No statute or appellate case requires that a custody order be registered before it can be enforced. This is different from child support orders. [*See* G.S. 52C-6-603(c), *amended by*

S.L. 2015-117, § 1, effective June 24, 2015 (except as otherwise provided in G.S. Chapter 52C, a court of this state shall recognize and enforce a registered child support order if the issuing court had jurisdiction).]

B. Contempt

1. For more on civil or criminal contempt generally and for a checklist to use when finding a party in either civil or criminal contempt, see *Contempt of Court,* Bench Book, Vol. 2, Chapter 4.
2. For an online module on contempt, see Michael Crowell, *Contempt of Court* (UNC School of Government, Nov. 2010), https://sog.adobeconnect.com/p30019876/.
3. Civil contempt.
    a. An order for custody or visitation is enforceable by civil contempt and its disobedience may be punished by criminal contempt. [G.S. 50-13.3(a).]
        i. An order for custody or visitation is enforceable by civil contempt pending appeal. [G.S. 50-13.3(a). See Section V.B.3.h, below, and Section II.P.6.b.v, above, on enforcement during appeal.]
        ii. Trial court must follow the procedures of G.S. Chapter 5A. [See *Contempt of Court*, Bench Book, Vol. 2, Chapter 4.]
    b. A person may be held in civil contempt for failure to comply with a custody order if:
        i. The order remains in force;
        ii. The purpose of the order may still be served by the person's compliance with the order;
        iii. The person's failure to comply with the order is willful; and
        iv. The person has the present ability to comply with the order (in whole or in part) or take reasonable measures that would enable him to comply with the order (in whole or in part). [G.S. 5A-21(a); *Oakley v. Oakley,* 165 N.C. App. 859, 599 S.E.2d 925 (2004).] For a discussion on the required findings on willfulness precluding a default judgment in contempt matters, see Cheryl Howell, *No Default Judgment in Contempt*, UNC Sch. of Gov't: On the Civil Side Blog (May 1, 2015), http://civil.sog.unc.edu/no-default-judgment-in-contempt.
    c. Civil contempt is not available when:
        i. *The minor reaches majority*. Orders regarding the custody of a minor no longer apply when the minor reaches majority; issue of whether a parent's actions constituted willful contempt of a custody order was moot when son turned 18 during appeal. [*Swanson v. Herschel*, 174 N.C. App. 803, 622 S.E.2d 159 (2005) (appellate court dismissed as moot appeal of contempt portion of the order; no indication whether motion was for civil or criminal contempt).]
        ii. *The required action has been performed*. In other words, the alleged contemnor is in compliance on the date of the hearing.
            (a) A court has not found a party in civil contempt when the required action has been performed by the time of the contempt hearing. [*Ruth v. Ruth*, 158 N.C. App. 123, 579 S.E.2d 909 (2003) (error for trial court to find

mother in contempt for failing to return children after visitation when she had returned children to father before the contempt hearing); *McKinney v. McKinney*, 799 S.E.2d 280 (N.C. Ct. App. 2017) (father complied with purge condition on Sept. 13, 2014, by delivering child to mother before contempt order was entered pursuant to G.S. 1A-1, Rule 58 on Sept. 25, 2014; oral order on Sept. 10, 2014, finding father in contempt not effective); *Vaughn v. Vaughn*, 176 N.C. App. 409, 626 S.E.2d 876 (2006) (**unpublished**) (husband's marriage before the contempt hearing meant that he was in compliance with custody order that prohibited opposite sex overnight guests).] But criminal contempt may be available. See Section V.B.4, below.

(b) The "compliance by date of hearing" argument was not successful when the alleged contemnor was ordered to refrain from certain behavior, in this case, unsupervised visitation, as opposed to an order requiring an affirmative act, for example, bringing support up to date. [*See Helms v. Landry*, 198 N.C. App. 405, 681 S.E.2d 566 (**unpublished**) (rejecting mother's argument that since she had not attempted to visit the minor child after the motion in the cause was filed, she was in compliance at the time of the hearing with the court's prior orders requiring supervised visitation), *review denied*, 363 N.C. 744, 688 S.E.2d 454 (2009).]

iii. *Conduct alleged to be contemptuous is not specifically prohibited by the custody order or provision in order is impermissibly vague.*

(a) Provision that allowed defendant to purge his contempt by "fully complying" with prior orders did not clearly specify what defendant could or could not do to purge himself of contempt and did not establish a date after which contempt purged. Order for civil contempt reversed. [*Wellons v. White,* 229 N.C. App. 164, 748 S.E.2d 709 (2013) (citing *Scott v. Scott,* 157 N.C. App. 382, 579 S.E.2d 431 (2003)).]

(b) Father was not in contempt when the conduct mother complained of was not specifically prohibited by the existing custody order. In addition, language in purge condition of contempt order that father not "interfere" with mother's custody was impermissibly vague, for it did not specify what father could or could not do to purge himself of contempt. [*Scott v. Scott,* 157 N.C. App. 382, 579 S.E.2d 431 (2003). *See also Williams v. Chaney*, 792 S.E.2d 207, 209 (N.C. Ct. App. 2016) (trial court erred in holding mother in contempt for posting comments on Facebook regarding father's compliance with visitation schedule where custody order stated only that mother "shall not intimidate the child or make any derogatory statements about the child or any of the child's family members."); *cf. Middleton v. Middleton,* 159 N.C. App. 224, 583 S.E.2d 48 (2003) (upholding contempt, even though the conduct complained of was not specifically addressed in the agreement or order, when it was clear that the party violated the intent and spirit of the agreement or order).]

(c) A contempt order must include a definite date by which a defendant may purge the contempt. [*Spears v. Spears*, 245 N.C. App. 260, 784 S.E.2d 485 (2016) (contempt order was vacated as impermissibly vague when it did

not set an ending date for defendant's alimony purge payments); *Lueallen v. Lueallen*, 790 S.E.2d 690 (N.C. Ct. App. 2016) (contempt order requiring purge payments to be applied to child support arrearages was impermissibly vague when ending date for the payments was uncertain); *Wellons v. White*, 229 N.C. App. 164, 183, 748 S.E.2d 709, 722 (2013) ("We will not allow the district court to hold [defendant] indefinitely in contempt.").]

iv. *A party acts in accordance with a valid court order.* Mother's denial of visitation not contemptuous when she relied upon a temporary custody order entered ex parte, which on its face purported to be a valid order denying visitation and which had not been modified, vacated, or appealed. [*Campen* (*Featherstone*) *v. Featherstone,* 150 N.C. App. 692, 564 S.E.2d 616 (civil contempt), *appeal dismissed, review denied,* 356 N.C. 297, 570 S.E.2d 504 (2002).]

v. *The violations were failures to act in the past and party can no longer perform the required acts.* Where mother failed to inform father of certain events as required by the custody order, failed to give father right of first refusal when she needed child care in the past as required by the order, and allowed her husband to have contact with children in violation of the custody order, the court of appeals stated that it was "not apparent how an appropriate civil contempt purge condition could 'coerce the defendant to comply with a court order' as opposed to punishing for a past violation" and noted that these violations were more appropriately addressed through criminal contempt. [*Kolczak v. Johnson,* 817 S.E.2d 861, 868 (N.C. Ct. App. 2018) (quoting *Wellons v. White*, 229 N.C. App. 164, 181, 748 S.E.2d 709, 722 (2013)).] *See* Cheryl Howell, *Enforcing Custody Orders: Civil Contempt Is Not Always the Appropriate Remedy*, UNC Sch. of Gov't: On the Civil Side Blog (Nov. 1, 2018), https://civil.sog.unc.edu/enforcing-custody-orders-civil-contempt-is-not-always-the-appropriate-remedy.

d. Sanctions for civil contempt.

i. Imprisonment until the respondent has complied with the purge is the only authorized sanction for civil contempt. [G.S. 5A-21(b).] "[A] fixed term of imprisonment is an appropriate sanction for criminal contempt, but not civil contempt." [*Cty. of Durham ex rel. Alston v. Hodges*, 809 S.E.2d 317, 321 n.2 (N.C. Ct. App. 2018).]

ii. A person who is found in civil contempt is not subject to the imposition of a fine. [G.S. 5A-21(d), added by S.L. 2015-210, § 1, effective Oct. 1, 2015, and applicable to civil contempt orders entered on or after that date.] The 2015 amendment to G.S. 5A-21 changed the result in *Tyll v. Berry, 234* N.C. App. 96, 758 S.E.2d 411 (a fine is a "statutorily permitted" sanction for civil contempt proceedings), *review denied, appeal dismissed,* 367 N.C. 532, 762 S.E.2d 207 (2014).]

iii. A person who is incarcerated for civil contempt may be imprisoned as long as the civil contempt continues, subject to the limitations in G.S. 5A-21(b1) and (b2). [G.S. 5A-21(b).]

iv. There is no limitation on the term of imprisonment when a person is held in civil contempt for failing to pay court-ordered child support or for failing

to comply with a court order that does not involve the payment of money. [G.S. 5A-21(b).]

e. Fundamentals of an order finding a person in civil contempt. The order should:

i. Indicate that a party is being held in civil contempt. [*See Watkins v. Watkins,* 136 N.C. App. 844, 526 S.E.2d 485 (2000) (urging trial courts to identify whether contempt proceedings are in the nature of criminal or civil contempt).]

ii. State how a party may purge the contempt. [G.S. 5A-23(e) and -22(a); *Bethea v. McDonald,* 70 N.C. App. 566, 320 S.E.2d 690 (1984) (purge provision is essential to the order); *Kolczak v. Johnson,* 817 S.E.2d 861 (N.C. Ct. App. 2018) (civil contempt order vacated for lack of a purge condition).]

iii. Make findings as follows:

(a) On each of the elements in G.S. 5A-21(a), [G.S. 5A-23(e).]

(b) As to the facts constituting contempt, [G.S. 5A-23(e).]

(c) That the party had the ability to comply during the period when the party was in default, [*Mauney v. Mauney*, 268 N.C. 254, 150 S.E.2d 391 (1966).] and

(d) That the party has the present means to comply with the purge conditions set out in the order. [*Shippen v. Shippen,* 204 N.C. App. 188, 693 S.E.2d 240 (2010).]

f. Enforcement of visitation by civil contempt.

i. A custodial parent who prevents visitation may be held in civil contempt. [*Walleshauser v. Walleshauser*, 100 N.C. App. 594, 397 S.E.2d 371 (1990) (husband in civil contempt of temporary visitation order when he willfully refused to allow wife to visit children during holidays and required that he be present during her visitation).]

ii. A parent must deliberately interfere with or frustrate the other parent's custody or visitation before the parent's actions can be found willful and sufficient to support civil contempt. [*Hancock v. Hancock*, 122 N.C. App. 518, 471 S.E.2d 415 (1996). *See also McKinney v. McKinney*, 799 S.E.2d 280 (N.C. Ct. App. 2017) (civil contempt order was not supported by the record where evidence showed father did not willfully refuse to abide by the custody order; while the child refused to stay in his mother's custody, father did not refuse to allow the child to visit and did not discourage the child from complying with the custody order).]

iii. When there was competent evidence to support a finding that mother's failure to allow visitation with father was "justified under the circumstances" based on concerns for the children's safety, mother did not willfully violate custody order. [*Davis v. Davis,* 229 N.C. App. 494, 510, 748 S.E.2d 594, 605 (2013) (noting, however, that mother's unilateral denial of visitation, termed "self-help", is not one of the options available to address visitation-related safety concerns; options available to a parent include seeking a domestic violence protective order with temporary visitation rights under G.S. 50B-3(a)(4) or seeking a temporary or ex parte order under G.S. 50-13.5(d)(2)–(3)). *Cf. Baines v. Baines,* 225 N.C. App. 840, 738 S.E.2d 829 (2013) (**unpublished**) (mother in contempt for actions

that caused father to lose eighty hours of visitation; mother's argument that her refusal to allow visitation was not willful but was based on safety concerns arising from a drug-addicted family member living with father was rejected).]

iv. A trial court that finds a parent in contempt for failing to abide by a visitation order may not terminate the other parent's child support obligation. [*Sowers v. Toliver,* 150 N.C. App. 114, 562 S.E.2d 593 (2002) (court erred when, after finding mother in contempt of visitation order, it terminated father's child support payments; no finding to support termination other than as "punishment" for mother's conduct; issue of contempt remanded to the trial court for specific findings).]

v. Where custodial parent does not prevent visitation but takes no action to force a child to comply with ordered visitation, the proper procedure is to modify the visitation order to require the custodial parent to force visitation. [*Hancock v. Hancock*, 122 N.C. App. 518, 471 S.E.2d 415 (1996) (error for trial court to hold custodial parent in civil contempt where she had done nothing to prevent or discourage compliance with the ordered visitation schedule; custodial parent must have deliberately interfered with or frustrated the noncustodial parent's visitation before the custodial parent's actions can be found willful). *Cf. Jackson v. Jackson,* 192 N.C. App. 455, 665 S.E.2d 545 (2008) (citing 3 Lee's North Carolina Family Law § 13.52 (5th ed. 2002)) (noting in dicta that ordinarily the proper response when a custodial parent violates visitation provisions is a finding of contempt, not modification).] See Section IV.C.8.b, above, for interference with visitation as a ground for modification.

vi. The court of appeals has indicated that a trial court can enter orders other than contempt orders to encourage compliance with custody orders and visitation schedules. [*Grissom v. Cohen*, 821 S.E.2d 454 (N.C. Ct. App. 2018), *review denied*, 822 S.E.2d 631 (N.C. 2019).] *See* Cheryl Howell, *Enforcing Custody Orders: Civil Contempt Is Not Always the Appropriate Remedy*, UNC Sch. of Gov't: On the Civil Side Blog (Nov. 1, 2018), https://civil.sog.unc.edu/enforcing-custody-orders-civil-contempt-is-not-always-the-appropriate-remedy.

vii. A trial judge may enter an order of forced visitation only under compelling circumstances and after the court has "afforded to the parties a hearing in accordance with due process; created a proper court order based on findings of fact and conclusions of law determined by the judge to justify and support the order; and made findings that include at a minimum that the drastic action of incarceration of a parent is reasonably necessary for the promotion and protection of the best interest and welfare of the child." [*Hancock v. Hancock*, 122 N.C. App. 518, 526, 471 S.E.2d 415, 420 (1996) (quoting *Mintz v. Mintz*, 64 N.C. App. 338, 341, 307 S.E.2d 391, 394 (1983)); *Grissom v. Cohen*, 821 S.E. 2d 454, 468, 462, 463 (N.C. Ct. App. 2018) (the appellate court found that the requirements in *Hancock* apply when a court considers whether to enter an order to force visitation, noting however that the use of physical force to make a child visit or stay with a parent "would probably never be in a child's best interest;" the court also rejected mother's argument that language stating "[t]his order is enforceable by

the contempt powers of the Court" made the order a "forced visitation" order), *review denied*, 822 S.E.2d 631 (N.C. 2019).]

viii. Where there were no findings that incarcerating mother was reasonably necessary to promote and protect the best interests of the child and no record evidence that her actions were willful, mother was improperly sentenced to thirty days for violating a consent judgment by preventing visitation. [*Hancock v. Hancock*, 122 N.C. App. 518, 471 S.E.2d 415 (1996) (civil contempt). *See also Grissom v. Cohen*, 821 S.E.2d 454 (N.C. Ct. App. 2018) (father was not in civil contempt of a custody order when 15-year-old daughter refused to comply with provisions for mother's custody; trial court properly considered the best interests of daughter, as well as the current circumstances, which included that daughter was depressed and self-harming by cutting herself, when it determined that father had done all he could reasonably do to comply with the order without making daughter's situation worse; father had encouraged daughter to return to mother's house, driven daughter by mother's house almost daily and encouraged daughter to get out, and invited mother to his home to talk to daughter), *review denied*, 822 S.E.2d 631 (N.C. 2019), *and McKinney v. McKinney*, 799 S.E.2d 280 (N.C. Ct. App. 2017) (father was not in civil contempt where teenaged son refused to return to mother's home; while father did not make it "uncomfortable" for the child to be in his home or punish the child for refusing to return to mother, he did nothing to prohibit the child from returning to mother or otherwise violate the terms of the custody order).]

g. Right to and appointment of counsel.

i. The North Carolina Supreme Court has held that an alleged contemnor has the right to be represented by court-appointed counsel in civil contempt proceedings for the nonpayment of child support if (1) he is indigent **and** (2) there is a significant likelihood that he will actually be incarcerated as a result of the hearing. [*See McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993); *King v. King,* 144 N.C. App. 391, 547 S.E.2d 846 (2001) (for appointment of counsel, a defendant must show that she is indigent and that her liberty interest is at stake); *Young v. Young,* 224 N.C. App. 388, 736 S.E.2d 538 (2012) (citing *Turner v. Rogers,* 564 U.S. 431, 131 S. Ct. 2507 (2011), and *King*) (father who failed to meet his burden of proving indigence not entitled to counsel at civil contempt hearing for failure to pay child support).]

(a) In *D'Alessandro v. D'Alessandro*, 235 N.C. App. 458, 762 S.E.2d 329 (2014), the court of appeals specifically held that *McBride* applies in civil contempt proceedings for violation of a custody order.

ii. However, in *Wilson v. Guinyard*, 801 S.E.2d 700, 704 (N.C. Ct. App. 2017), the court of appeals indicated that the broad right to counsel granted in *McBride* may be limited to child support enforcement cases. The court in *Guinyard* cited earlier cases stating that whether appointment of counsel is necessary for an indigent person in a custody enforcement matter must be determined on a "case-by-case basis," with appointed counsel being required only "where assistance of counsel is necessary for an adequate presentation of the merits, or to otherwise insure fundamental fairness."

iii. For further discussion, see Cheryl Howell, *Right to Counsel in Civil Contempt Proceeding for Violation of Custody Order*, UNC Sch. of Gov't: On the Civil Side Blog (Aug. 25, 2017), https://civil.sog.unc.edu/right-to-counsel-in-civil-contempt-proceeding-for-violation-of-custody-order.

h. Contempt after appeal of custody order.

i. Pursuant to G.S. 1-294, when an appeal is perfected, the trial court is divested of jurisdiction "upon the judgment appealed from, or upon the matter embraced therein, unless otherwise provided by the Rules of Appellate Procedure." [G.S. 1-294, *amended by* S.L. 2015-25, § 2, effective May 21, 2015.]

ii. Notwithstanding G.S. 1-294, orders for custody and visitation may be enforced in the trial court by civil contempt pending appeal of those orders. [G.S. 50-13.3(a).]

iii. The court of appeals may, upon motion of an aggrieved party, stay an order for civil contempt entered for child custody until the appeal is decided, if justice requires. [G.S. 50-13.3(a); N.C. R. App. P. 23.]

i. For more on the effect of an appeal on a trial court's jurisdiction, see Section II.P.6, above. For more on civil contempt, including procedure, fundamentals of an order and findings, right to and appointment of attorney in civil contempt proceedings, award of attorney fees, and a checklist, see *Contempt of Court,* Bench Book, Vol. 2, Chapter 4.

4. Criminal contempt.

a. G.S. 5A-11(a) sets out eleven exclusive grounds for criminal contempt. The ground most relevant in the custody context is G.S. 5A-11(a)(3), which provides that the willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution is a criminal contempt.

b. Punishment for criminal contempt.

i. A person found in criminal contempt is subject to censure; a fine not to exceed $500; or imprisonment for a definite and fixed term not to exceed 30 days, or any combination of the three, subject to certain exceptions set out in the statute. [G.S. 5A-12(a).]

c. Criminal contempt for visitation matters.

i. Mother in criminal contempt pursuant to G.S. 5A-11(a)(3) of a court order allowing father visitation with their child, which mother repeatedly refused. [*File v. File,* 195 N.C. App. 562, 673 S.E.2d 405 (2009); *Sloan v. Sloan,* 164 N.C. App. 190, 595 S.E.2d 228 (2004) (trial court did not err in finding mother in criminal contempt for refusing to comply with orders providing for telephonic visitation with child's grandparents); *Lafell v. Lafell,* 177 N.C. App. 811, 630 S.E.2d 257 (2006) (**unpublished**) (mother in criminal contempt of order allowing father visitation and twice weekly telephone contact when she admitted intentionally withholding visitation, failed to inform father of relocation and that one child had switched schools, limited father's contact to five minutes in the presence of a security guard when both children were hospitalized, and allowed only brief telephone contact with children).]

ii. A trial court was within its discretion to award defendant mother attorney fees as a sanction under G.S. 1A-1, Rule 11 for having to defend allegations by child's father that were not legally sufficient to constitute criminal contempt of a custody order. [*Jackson v. Jackson*, 192 N.C. App. 455, 665 S.E.2d 545 (2008) (mother not guilty of criminal contempt with respect to most of the custody violations alleged by father but was found in criminal contempt for failing to allow father reasonable telephone access with the child).]

5. Appeal of an order for contempt.

   a. An aggrieved party may appeal the district court's order in a civil contempt proceeding to the court of appeals by filing a notice of appeal within thirty days after the order is entered. [*See* N.C. R. App. P. 3(c); G.S. 5A-24 and 7A-27(b)(2) (if order is a final order) or (b)(3)a. (if order affects a substantial right).] A motion to stay an obligor's incarceration under a civil contempt order must be directed initially to the district court. [N.C. R. App. P. 8(a).]

   b. District court orders adjudicating criminal contempt are appealable to the superior court for hearing de novo. [G.S. 5A-17(a).] Upon appeal in a case imposing confinement for criminal contempt, a bail hearing must be held within a reasonable time after imposition of the confinement, with the contemnor being retained in custody no more than twenty-four hours from the time of imposition of confinement without a bail determination being made by a superior court judge. If a superior court judge has not acted within twenty-four hours of the imposition of confinement, any judicial official shall hold a bail hearing. [G.S. 5A-17(b), (c), *added by* S.L. 2013-303, § 1, effective Dec. 1, 2013, and applicable to confinement imposed on or after that date.]

   c. Standard of review.

      i. In reviewing contempt proceedings, a court is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. [*Wellons v. White,* 229 N.C. App. 164, 748 S.E.2d 709 (2013) (citing *Shumaker v. Shumaker,* 137 N.C. App. 72, 527 S.E.2d 55 (2000)) (civil contempt); *Campen* (*Featherstone*) *v. Featherstone,* 150 N.C. App. 692, 564 S.E.2d 616 (civil contempt), *appeal dismissed, review denied,* 356 N.C. 297, 570 S.E.2d 504 (2002).]

      ii. In reviewing a nonjury proceeding such as contempt, findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary. [*Wellons v. White,* 229 N.C. App. 164, 748 S.E.2d 709 (2013) (citing *Tucker v. Tucker,* 197 N.C. App. 592, 679 S.E.2d 141 (2009)) (on appeal from order of civil contempt, conclusions subject to de novo review); *File v. File,* 195 N.C. App. 562, 673 S.E.2d 405 (2009) (citing *State v. Simon,* 185 N.C. App. 247, 648 S.E.2d 853 (2007)) (criminal contempt).]

6. Award of attorney fees in a contempt proceeding involving custody.

   a. Attorney fees were awarded in the following cases: *Wiggins v. Bright,* 198 N.C. App. 692, 679 S.E.2d 874 (2009) (plaintiff properly ordered to pay attorney fees incurred by defendant in defending frivolous proceeding for contempt; award based on authorization in G.S. 50-13.6 of fees upon a finding that the supporting party has initiated a frivolous action or proceeding; court noted that fees were also authorized under

G.S. 50-13.6 based on findings that defendant responded in good faith to the motion for contempt and did not have sufficient means to defray the costs and expenses of the matter); *Jackson v. Jackson,* 192 N.C. App. 455, 665 S.E.2d 545 (2008) (affirming trial court's award to defendant of attorney fees as a sanction under G.S. 1A-1, Rule 11 for having to defend allegations that she had violated a custody order when the allegations were not legally sufficient to constitute criminal contempt); *Ruth v. Ruth,* 158 N.C. App. 123, 579 S.E.2d 909 (2003) (when mother had returned children to father at time of the contempt hearing, mother was not in civil contempt of custody order but was properly ordered to pay father's attorney fees under G.S. 50-13.6); *Lafell v. Lafell,* 177 N.C. App. 811, 630 S.E.2d 257 (2006) (**unpublished**) (attorney fees allowed to father in part for mother's criminal contempt for failure to comply with order allowing visitation and telephone contact).]

b. Fees awarded pursuant to G.S. 50-13.6 may be awarded to either party to a contempt proceeding, provided the court makes the two required findings regarding good faith and insufficient means. [*Wiggins v. Bright,* 198 N.C. App. 692, 679 S.E.2d 874 (2009); *Best v. Gallup,* 234 N.C. App. 115, 761 S.E.2d 755 (2014) (**unpublished**) (citing *Wiggins*) (defendant ordered to pay attorney fees as a purge condition in custody contempt order; award of fees reversed when contempt order awarding fees contained only one of the two findings required by G.S. 50-13.6).] Note, however, that in an unpublished opinion the court of appeals has held that when a court orders payment of attorney fees to opposing counsel as a condition of being purged of contempt, rather than as a discretionary award pursuant to G.S. 50-13.6, findings as to the plaintiff's good faith and insufficient means are unnecessary. [*Walker v. Hamer,* 175 N.C. App. 796, 625 S.E.2d 202 (2006) (**unpublished**) (mother in contempt of an order allowing father visitation).]

c. Note also that, pursuant to *Shippen v. Shippen,* 204 N.C. App. 188, 693 S.E.2d 240 (2010), for any award of attorney fees, including contempt, the trial court must make the two findings required by G.S. 50-13.6, as well as findings about the lawyer's skill, hourly rate, and the nature and scope of the legal services rendered.

C. Injunction

1. A court may use the power of injunction pursuant to G.S. Chapter 1, Article 37, and G.S. 1A-1, Rule 65 to enforce a custody order. [G.S. 50-13.3(b).]

D. Law Enforcement Officers

1. Statutes authorizing use of law enforcement officers in North Carolina and in interstate cases.

   a. G.S. 50A-311 allows a court to order law enforcement to pick up children in limited circumstances to aid in the enforcement of a custody order issued by a court in North Carolina or in another state.

      i. Court must consider testimony of the petitioner or other witness, in addition to pleadings, to determine whether law enforcement should be ordered to pick up a child. [G.S. 50A-311(b).]

ii. A warrant authorizing law enforcement to pick up a child is authorized only when the court finds that the child is imminently likely to suffer serious physical harm or be removed from this state. [G.S. 50A-311(b).] The order should include findings that the child is likely to suffer serious physical harm or to be removed from North Carolina.

iii. A warrant to take physical custody of a child issued pursuant to G.S. 50A-311 is enforceable throughout the state. [G.S. 50-13.3(c).]

iv. An officer executing a warrant to take physical custody of a child, that is complete and regular on its face, is not required to inquire into the regularity or continued validity of the order. [G.S. 50A-311(e), *amended by* S.L. 2017-22, § 3, effective Oct. 1, 2017, and applicable to orders for temporary custody on or after that date.] *See* Cheryl Howell, *More on Law Enforcement Involvement in Custody Cases*, UNC Sch. of Gov't: On the Civil Side Blog (June 16, 2017), https://civil.sog.unc.edu/more-on-law-enforcement-involvement-in-custody-cases.

v. An officer executing a warrant pursuant to G.S. 50A-311 shall not incur criminal or civil liability for its due service. [G.S. 50A-311(e), *amended by* S.L. 2017-22, § 3, effective Oct. 1, 2017, and applicable to orders for temporary custody on or after that date.]

b. G.S. 50-13.5(d)(3) provides that a temporary custody order that requires a law enforcement officer to take physical custody of a child must be accompanied by a warrant issued pursuant to G.S. 50A-311.

c. G.S. 50A-311 allows the court to issue a warrant directing law enforcement officers to pick up a child when a party is seeking the expedited enforcement of a custody order pursuant to G.S. 50A-308 when the requirements of G.S. 50A-311 are met.

d. G.S. 50A-315 allows prosecutors and other public officials to utilize in interstate cases any civil proceeding to locate a child, obtain the return of the child, or enforce a custody determination under the circumstances set out in G.S. 50A-315(a). The prosecutor or public official may request the assistance of law enforcement pursuant to G.S. 50A-316.

i. G.S. 50A-315 and -316 should not be interpreted as including a trial court. [*Chick v. Chick,* 164 N.C. App. 444, 458 n.7, 596 S.E.2d 303, 313, n.7 (2004).]

e. If none of the statutory circumstances allowing for the use of law enforcement is present, the court should not invoke the assistance of law enforcement. [*See Chick v. Chick,* 164 N.C. App. 444, 596 S.E.2d 303 (2004) (trial court erred in ordering law enforcement to assist with enforcement of Vermont custody order when there was no statutory basis for their participation); *In re Bhatti*, 98 N.C. App. 493, 391 S.E.2d 201 (1990) (without statutory authority, a trial court erred in ordering law enforcement to pick up children in an effort to assist in the enforcement of a Georgia custody order).] For more on *Chick* and *Bhatti*, see Cheryl Howell, *Ordering Law Enforcement Officers to Enforce a Child Custody Order*, UNC Sch. of Gov't: On the Civil Side Blog (Jan. 15, 2016), http://civil.sog.unc.edu/ordering-law-enforcement-officers-to-enforce-a-child-custody-order.

E. Foreign Orders

1. A foreign judgment for custody may not be enforced in North Carolina pursuant to the Uniform Enforcement of Foreign Judgments Act. [G.S. 1C-1702(1) (excluding from the definition of "foreign judgment" a custody decree as defined in G.S. 50A-102; "custody decree" is not defined in G.S. 50A-102; for the definition of "child-custody determination", see G.S. 50A-102(3)).]
2. For procedures to enforce custody and visitation orders from other states, see Section VII.C, below.

VI. Costs and Attorney Fees

A. Costs

1. Statutory provisions on costs or fees.
    a. G.S. 6-21 specifically authorizes costs in actions brought pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), G.S. Chapter 50A. Costs in custody proceedings under Chapter 50A shall be taxed against either party, or apportioned among the parties, in the discretion of the court. [G.S. 6-21(11).]
    b. In actions where allowance of costs is not otherwise provided by the General Statutes, costs may be allowed in the discretion of the court. Costs awarded by the court are subject to the limitations on assessable or recoverable costs set forth in G.S. 7A-305(d), unless specifically provided for otherwise in the General Statutes. [G.S. 6-20.]
        i. G.S. 7A-305(d) provides, in part, that the following expenses, when incurred, are assessable or recoverable, as the case may be:
            (a) Witness fees, as provided by law. [G.S. 7A-305(d)(1).]
            (b) Counsel fees, as provided by law. [G.S. 7A-305(d)(3).]
            (c) Fees of mediators appointed by the court or agreed upon by the parties, guardians ad litem, and other similar court appointees, as provided by law. [G.S. 7A-305(d)(7). See Section II.J.5, above, for more on guardian ad litem fees.]
            (d) Reasonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings. [G.S. 7A-305(d)(11). See Section II.J.6, above, for more on expert witness fees.]
    c. The trial court had no statutory authority under G.S. 6-20 or G.S. 7A-305(d) to award plaintiff as allowable costs her expenses, and the expenses of witnesses, for travel to North Carolina for a custody trial that was continued on the day of trial because of defendant's incarceration two days earlier. [*Davignon v. Davignon*, 245 N.C. App. 358, 782 S.E.2d 391 (2016).]
    d. The court must award the prevailing party necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses,

attorney fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be "clearly inappropriate". [G.S. 50A-312(a); *Creighton v. Lazell-Frankel,* 178 N.C. App. 227, 630 S.E.2d 738 (2006) (the costs set out in G.S. 50A-312 are available only in proceedings brought pursuant to Part 3 of G.S. Chapter 50A, labeled "Enforcement," and are not available in contempt proceedings). See Section VII.C.4.g, below.]

2. A court cannot award a party lost wages for time missed from work to prosecute a contempt claim. [*Ruth v. Ruth,* 158 N.C. App. 123, 579 S.E.2d 909 (2003).]

3. Based on findings that father delayed evaluation of the child by failing to attend appointments, coming unprepared to appointments, and refusing to provide documents in a timely manner, court's apportionment of the costs of the evaluation were affirmed, making father responsible for 40 percent rather than 33-1/3 percent, as would be the case if the bill were equally divided among the parties. [*Smith v. Barbour,* 195 N.C. App. 244, 671 S.E.2d 578, *review denied,* 363 N.C. 375, 678 S.E.2d 670 (2009).]

B. Attorney Fees

1. Authorization.

   a. G.S. 50-13.6 allows a court in its discretion to award reasonable attorney fees in an original action for custody or for custody and support, or in a motion to modify or vacate, to an interested party acting in good faith who has insufficient means to defray the expense of the suit.

   b. Fees also are authorized to an interested party as deemed appropriate under the circumstances upon a finding that the supporting party has initiated a frivolous action or proceeding. [G.S. 50-13.6.]

   c. G.S. 6-21(11) provides that costs in custody cases under Chapter 50A, which includes reasonable attorney fees in such amounts as the court in its discretion determines and allows, shall be taxed against either party, or apportioned among the parties, in the court's discretion. [Two provisions in Chapter 50A authorize fees: G.S. 50A-208(c) (attorney fees authorized when court declines to exercise jurisdiction because of a person's unjustifiable conduct) and G.S. 50A-312 (attorney fees limited to registration and enforcement of custody determinations pursuant to Part 3 of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)).]

   d. Attorney fees may be awarded under a separation agreement entered into pursuant to G.S. 52-10.1 that provides for attorney fees, unless the provision is otherwise contrary to public policy. [*Hennessey v. Duckworth,* 231 N.C. App. 17, 752 S.E.2d 194 (2013) (citing *Bromhal v. Stott,* 341 N.C. 702, 462 S.E.2d 219 (1995)).]

2. Discretion as to award and amount.

   a. The trial court has the discretion to award attorney fees once the statutory requirements of G.S 50-13.6 have been met. [G.S 50-13.6 (court has discretion to award fees); *Hennessey v. Duckworth,* 231 N.C. App. 17, 752 S.E.2d 194 (2013) (citing *Atwell v. Atwell,* 74 N.C. App. 231, 328 S.E.2d 47 (1985)).]

b. The amount of attorney fees to be awarded rests within the sound discretion of the trial judge. [*Burr v. Burr*, 153 N.C. App. 504, 570 S.E.2d 222 (2002).]

c. The trial court has discretion to award less than the total amount claimed by an attorney. [*See Kuttner v. Kuttner,* 193 N.C. App. 158, 666 S.E.2d 883 (2008) (order awarding only a portion of mother's attorney fees upheld).]

3. Types of proceedings in which fees awarded. An award of attorney fees is proper in:

a. An action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support. [G.S. 50-13.6.]

b. A contempt proceeding involving custody or visitation. [See Section V.B.6, above.]

c. A remand proceeding following an appeal. [*See Lasecki v. Lasecki*, 809 S.E.2d 296 (N.C. Ct. App. 2017) (fact that attorney fee award for original trial proceedings was affirmed on appeal did not preclude trial court from ordering additional attorney fees for remand proceedings).]

4. When request for fees is properly made.

a. A request for attorney fees may be properly raised by a motion in the cause subsequent to the determination of the main action. [*In re Scearce,* 81 N.C. App. 662, 345 S.E.2d 411, *review denied,* 318 N.C. 415, 349 S.E.2d 590 (1986).]

b. There is no requirement that a party first pay attorney fees before seeking an award pursuant to the statute. [*Belcher v. Averette,* 152 N.C. App. 452, 568 S.E.2d 630 (2002) (denying as irrelevant father's motion to compel mother to answer a discovery request that sought proof that she had paid her attorney fees).]

c. The court of appeals has noted that no case has imposed a time limitation for the filing of a motion for attorney fees in a child custody and child support action pursuant to G.S. 50-13.6, "other than that a proper notice of appeal divests the trial court of jurisdiction to hear a motion filed after notice of appeal has been given in the case." [*Bramblett v. Bramblett,* 218 N.C. App. 454, 721 S.E.2d 763 (2012) (**upublished**) (not paginated on Westlaw) (order awarding fees upheld against claim that request was not timely when it was not included in complaint and was asserted more than a year after complaint was filed; motion for fees was filed after conclusion of hearing on child custody and support, and trial court heard and ruled on motion before entry of an order in the custody and support action and prior to any appeal); *Balawejder v. Balawejder,* 216 N.C. App. 301, 721 S.E.2d 679 (2011) (when a custody order is appealed, the trial court loses jurisdiction to consider a request for attorney fees arising out of the custody case).] For a discussion of a trial court's jurisdiction to consider a request for attorney fees after appeal of the underlying custody order, see Section II.P.6.c, above.

5. Ability of party to pay award of fees.

a. The plain language of G.S. 50-13.6 contains no requirement that a trial court make a finding of ability to pay on the part of the person being ordered to pay before attorney fees may be awarded in a custody and support action. [*Loosvelt v. Brown*, 235 N.C. App. 88, 760 S.E.2d 351 (2014) (although some cases have "mentioned" an obligor's ability to pay an award of fees under G.S. 50-13.6, the statute requires no

such finding); *Respess v. Respess,* 232 N.C. App. 611, 754 S.E.2d 691 (2014) (citing *Van Every v. McGuire,* 348 N.C. 58, 497 S.E.2d 689 (1998)*)* (before awarding fees to mother in custody and support action, trial court was not required to find that father had resources available to pay the fees); *Webster v. Webster*, 182 N.C. App. 767, 643 S.E.2d 84 (2007) (**unpublished**) (appellate court unwilling to create such a requirement). *But see Smith v. Barbour,* 195 N.C. App. 244, 671 S.E.2d 578 (trial court findings were sufficient to establish father's ability to pay a portion of attorney fees awarded to child's grandparents), *review denied,* 363 N.C. 375, 678 S.E.2d 670 (2009); *Roberts v. McAllister,* 174 N.C. App. 369, 621 S.E.2d 191 (2005) (affirming trial court's order, in support-only proceeding, requiring mother to pay half of father's attorney fees based, in part, on conclusion that mother had the means to pay half), *appeal dismissed,* 360 N.C. 364, 629 S.E.2d 608 (2006).]

6. Findings.
   a. G.S. 50-13.6 requires a trial court to find that the party awarded fees (1) is an interested party acting in good faith (2) who has insufficient means to defray the expense of the suit.
   b. In addition to the two required statutory findings set out immediately above, the trial court must make findings to support and show "the basis of the award, including . . . the nature and scope of the legal services, the skill and time required, and the relationship between the fees customary in such a case and those requested." [*Davignon v. Davignon*, 245 N.C. App. 358, 365, 782 S.E.2d 391, 397 (2016) (quoting *Robinson v. Robinson,* 210 N.C. App. 319, 337, 707 S.E.2d 785, 798 (2011)).]
7. Interested party acting in good faith.
   a. "Good faith" has been defined as "honesty of intention, and freedom from knowledge of circumstances which ought to put [one] upon inquiry" that a claim is frivolous. [*Bryson v. Sullivan*, 330 N.C. 644, 662, 412 S.E.2d 327, 336 (1992) (quoting Black's Law Dictionary 693 (6th ed. 1990)) (considering good faith in the context of a request for sanctions under G.S. 1A-1, Rule 11); *Setzler v. Setzler*, 244 N.C. App. 465, 467, 781 S.E.2d 64, 66 (2015) (citing *Bryson*).]
   b. To satisfy the requirement of good faith, a party must demonstrate "that he or she seeks custody in a genuine dispute with the other party." [*Setzler v. Setzler*, 244 N.C. App. 465, 467, 781 S.E.2d 64, 66 (2015) (quoting 3 Lee's North Carolina Family Law § 13.92 (2014)).]
   c. A party will not be found to have acted in bad faith for seeking attorney fees in a custody case on the basis that "she should know that she is a poor parent." [*Setzler v. Setzler*, 244 N.C. App. 465, 468, 781 S.E.2d 64, 66 (2015) (mother awarded secondary custody of children was awarded attorney fees; father's appeal of the fee award was based on mother's struggle with drug addiction, which the appellate court rejected because to deny fees on this ground would negate efforts made by parents, such as the mother here, "to correct previous mistakes and become better parents" and could cause parents to refrain from seeking custody).]
8. Insufficient means to defray litigation expenses.

a. "Insufficient means" has been interpreted to mean that the party is unable to employ adequate counsel to proceed as a litigant to meet the other spouse as a litigant. [*Hudson v. Hudson,* 299 N.C. 465, 263 S.E.2d 719 (1980).]

b. A party requesting fees is not expected to deplete her estate. [*Taylor v. Taylor,* 343 N.C. 50, 468 S.E.2d 33 (1996) (wife had the means to defray her litigation expenses from her estate without unreasonably depleting it); *Cobb v. Cobb,* 79 N.C. App. 592, 339 S.E.2d 825 (1986) (to force wife to sell her only remaining asset, the former marital residence, to pay her attorney fees would constitute an unreasonable depletion of her separate estate).]

c. When considering whether a party has insufficient means to defray expense of the suit, the court should generally focus on the disposable income and estate of the party requesting fees, although a comparison of both parties' estates may sometimes be appropriate. [*Van Every v. McGuire,* 348 N.C. 58, 497 S.E.2d 689 (1998) (explaining that the trial court should not be placed in a straitjacket by prohibiting any comparison with the other party's estate, for example, in determining whether any necessary depletion of wife's estate by paying her own expenses would be reasonable or unreasonable); *Hennessey v. Duckworth,* 231 N.C. App. 17, 752 S.E.2d 194 (2013) (noting that plaintiff was unemployed and that her attorney fees alone "far exceeded" the value of her few assets combined, while defendant had monthly income close to $11,000). *See also Schneider v. Schneider*, 807 S.E.2d 165, 168 (N.C. Ct. App. 2017) (attorney fee issue remanded where trial court "misapprehended its discretion to consider [mother's] financial situation" based on its belief that the law did not allow the court to compare the estates of the parties).] For more on comparison of the parties' estates and the effect when the party seeking fees has a substantial separate estate, see *Child Support Liability and Amount*, Bench Book, Vol. 1, Chapter 3, Part 1.

d. Findings regarding insufficient means to defray expenses.

   i. Even though a custody-only case rarely requires detailed financial findings, in custody cases where attorney fees are awarded, specific findings as to insufficient means have been required. [*Dixon v. Gordon,* 223 N.C. App. 365, 373 n.1, 373, 734 S.E.2d 299, 305 n.1, 305 (2012) (citing *Atwell v. Atwell,* 74 N.C. App. 231, 328 S.E.2d 47 (1985)) (order awarding fees was remanded when findings contained "little more than the bare statutory language" as to father's means to employ counsel; appellate record contained information as to father's gross income and employment, but no findings were made on those points, the only finding being "father . . . does not have sufficient funds with which to employ and pay legal counsel [sic] . . . to meet Mother on an equal basis"), *review denied,* 366 N.C. 604, 743 S.E.2d 191 (2013); *Respess v. Respess,* 232 N.C. App. 611, 754 S.E.2d 691 (2014) (custody and child support case) (determination that a party has insufficient means to defray expenses must be supported by findings; findings were sufficient as to plaintiff's income, but remand was required when trial court made no findings as to her expenses or her assets and estate). *Cf. Smith v. Barbour,* 195 N.C. App. 244, 671 S.E.2d 578 (without setting out the findings in the opinion, court held that sufficient findings were made, even though father alleged that findings simply repeated the statutory requirements and were

conclusory; court noted that almost identical findings were found sufficient in *Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675 (2005)), *review denied,* 363 N.C. 375, 678 S.E.2d 670 (2009).] In *Cunningham,* the trial court found in relevant part that the "plaintiff is an interested party acting in good faith who has insufficient means to defray the expenses of this action" and that the plaintiff's attorney had been licensed to practice law since 1969, limited his practice to and was board certified in family law, and charged $300 per hour, which, the court found, was reasonable based upon his experience. [*Cunningham v. Cunningham*, 171 N.C. App. 550, 566, 615 S.E.2d 675, 686–87.]

ii. Finding that "[p]laintiff did not have sufficient funds to defray the costs and expenses of this lawsuit, including attorneys' . . . fees" was not sufficient when there was no evidence in the record as to plaintiff's financial circumstances. [*Davignon v. Davignon*, 245 N.C. App. 358, 366, 782 S.E.2d 391, 397 (2016).]

iii. Evidence as to a party's income and expenses must be sufficient to support a determination that a party has insufficient means to defray expenses of the suit. [*Baines v. Baines,* 225 N.C. App. 840, 738 S.E.2d 829 (2013) (**unpublished**) (award of fees was reversed for insufficient evidence as to father's means when affidavit as to father's income and expenses was not submitted as an exhibit and discussion by father's counsel of father's income and expenses was not evidence).]

9. Reasonableness of fees awarded.

a. A trial court, considering a motion for fees under G.S. 50-13.6, is permitted but is not required to take judicial notice of the customary hourly rates for local attorneys performing the same services and having the same experience as the attorney whose fees are the subject of the request, if the judge has the necessary knowledge of the customary rate and believes there is no debate within the local community as to the customary rate. This would satisfy the moving party's obligation to provide evidence as to the reasonableness of the attorney's hourly rate. [*Simpson v. Simpson,* 209 N.C. App. 320, 328 n.2, 703 S.E.2d 890, 895 n.2 (2011) (proceeding to modify child custody) (in this matter of first impression, the court noted in a footnote that the better practice is for parties to provide evidence of the customary local rates rather than depending upon judicial notice). *But cf. WFC Lynnwood I LLC v. Lee of Raleigh, Inc.*, 817 S.E.2d 437, 444 (N.C. Ct. App. 2018) (award vacated where trial court's order simply stated "the court is aware of the range of hourly rates charged by law firms [in the local area and in North Carolina]" and there was no additional evidence in the case on that point).] *See* Ann Anderson, *Attorney Fee Motions and Judicial Notice of "Customary Fee for Like Work,"* UNC Sch. of Gov't: On the Civil Side Blog (July 20, 2018), https://civil.sog.unc.edu/attorney-fee-motions-and-judicial-notice-of-customary-fee-for-like-work.

b. That the trial court had ample opportunity to observe an attorney at a custody trial was sufficient to determine the reasonableness of her fee in comparison to attorneys of comparable experience and skill. [*Peters v. Pennington,* 210 N.C. App. 1, 707 S.E.2d 724 (2011) (citing *Dyer v. State,* 331 N.C. 374, 416 S.E.2d 1 (1992)).]

c. The reasonableness of attorney fees is not gauged by the fees charged by the other side. [*Kuttner v. Kuttner,* 193 N.C. App. 158, 666 S.E.2d 883 (2008) (rejecting argument that since the fees for plaintiff's counsel were much lower than the fees charged by defendant's counsel, defendant's fees must be unreasonable).]

d. Findings.

i. To support an award of attorney fees, "the trial court should make findings as to the lawyer's skill, his hourly rate, its reasonableness in comparison with that of other lawyers, what he did, and the hours he spent." [*Kuttner v. Kuttner,* 193 N.C. App. 158, 160, 666 S.E.2d 883, 885 (2008) (quoting *Falls v. Falls,* 52 N.C. App. 203, 221, 278 S.E.2d 546, 558 (1981)).]

ii. When a finding as to the amount of time spent matched exactly the hours shown on the two attorney fee affidavits and plaintiff stipulated that the hourly rate was reasonable, trial court's findings more than adequately supported the reasonableness of the fees awarded. [*Kuttner v. Kuttner,* 193 N.C. App. 158, 666 S.E.2d 883 (2008).]

iii. Finding based on an attorney's affidavit was insufficient when the affidavit stated the dates on which work was performed and the hours the attorney worked on that date but did not delineate the nature of the work performed on each date. [*Davignon v. Davignon*, 245 N.C. App. 358, 782 S.E.2d 391, 397 (2016). *Cf. Beasley v. Beasley*, 816 S.E.2d 866 (N.C. Ct. App. 2018) (trial court had discretion to determine attorney fee award based on the court record and the attorney fee affidavit submitted in the case).]

iv. A finding that addressed an award of attorney fees inappropriately expressed the personal opinion of the court and should not have been included in the order, but it was not essential to support any of the trial court's conclusions of law and did not warrant reversal. [*Kuttner v. Kuttner,* 193 N.C. App. 158, 165, 666 S.E.2d 883, 888 (2008) (finding stated that "[i]f this had been the Court's custody and child support case, she would want that level of effort spent on her behalf").]

10. Whether party must be successful in underlying action.

a. There is no requirement in G.S. 50-13.6 that a party seeking fees in a custody case be the prevailing party. In many cases awarding fees pursuant to G.S. 50-13.6, whether the recipient of fees is the prevailing party is not raised or discussed.

b. Several appellate opinions have rejected the argument that the recipient of fees in a custody action must be a prevailing party. [*See Wiggins v. Bright,* 198 N.C. App. 692, 679 S.E.2d 874 (2009) (when attorney fees awarded for mother's defense of a contempt proceeding for alleged failure to comply with a custody order were authorized by G.S. 50-13.6 and the trial court made the required findings as to good faith and insufficient means, it was immaterial whether the recipient of the fees was either the movant or the prevailing party; plaintiff's argument that the party awarded fees must have prevailed is contrary to *Burr v. Burr,* 153 N.C. App. 504, 570 S.E.2d 222 (2002)); *Burr* (rejecting husband's argument that because wife did not prevail at trial, award of attorney fees to her was improper; no abuse of discretion in the award of attorney fees for the custody and support portions of the lawsuit); *see also Ruth v. Ruth*, 158 N.C. App. 123, 579 S.E.2d 909 (2003) (recognizing general rule that attorney fees in

a civil contempt action are not available unless moving party prevails but allowing nonprevailing party to recover attorney fees when other party had returned children prior to hearing; exception to prevailing party requirement for cases in which contempt fails because party has complied with order before contempt heard); *cf. Baumann-Chacon v. Baumann,* 212 N.C. App. 137, 138 n.1, 710 S.E.2d 431, 432 n.1 (2011) (stating in a footnote that "Plaintiff's claim for attorney's fees rests on N.C. Gen. Stat. §§ 50-13.6 and 50-16.4, which authorize such relief in the event that a litigant successfully prosecutes child support, child custody, or spousal support claims and meets any other applicable conditions for such an award" and thus "rises or falls" with those claims).]

c. Other custody cases have awarded fees based only on the requirements set out in G.S. 50-13.6 for awarding fees, with no discussion of prevailing party requirement. [*See Setzler v. Setzler*, 244 N.C. App. 465, 781 S.E.2d 64 (2015) (an award of fees to mother who received secondary custody was upheld with no discussion of whether she had prevailed in the action against father, who was awarded primary custody); *Smith v. Barbour,* 195 N.C. App. 244, 671 S.E.2d 578 (order requiring father to pay portion of intervening grandparents' attorney fees affirmed based only on statutory findings of good faith/insufficient means and reasonableness of fees), *review denied,* 363 N.C. 375, 678 S.E.2d 670 (2009).] Note, however, that some child support cases have reversed, or indicated a willingness to reverse, an award of fees when the underlying order for support is reversed or remanded on appeal. [*See Walker v. Tucker*, 69 N.C. App. 607, 317 S.E.2d 923 (1984) (citing *Daniels v. Hatcher,* 46 N.C. App. 481, 265 S.E.2d 429 (1980)) (a court would abuse its discretion if, after determining that an increase in the award of child support was not warranted, it nevertheless proceeded to award attorney fees to plaintiff); *Mullen v. Mullen*, 79 N.C. App. 627, 339 S.E.2d 838 (1986) (citing *Tucker*) (in child support modification action, court reversed award of attorney fees because portion of order increasing child support award was reversed on appeal), *superseded by statute on other grounds as stated in Brooker v. Brooker,* 133 N.C. App. 285, 515 S.E.2d 234 (1999).] For more on these and other cases, see *Child Support Liability and Amount,* Bench Book, Vol. 1, Chapter 3, Part 1.

d. One case has upheld an award of fees under G.S. 50-13.6 when "[n]either party was a clear winner or loser." [*Hennessey v. Duckworth,* 231 N.C. App. 17, 20, 752 S.E.2d 194, 198 (2013) (consent order resolved custody and child support claims; mother's claim for attorney fees under G.S. 50-13.6 was allowed, while father's claim for attorney fees was denied; in considering whether the award of fees was precluded by an unincorporated separation agreement providing that the losing party in any enforcement action was solely responsible for all legal fees and costs, the court found it difficult to say who was the "losing party" and who was the "prevailing party" when each party had prevailed on some issues; after court determined that the agreement was not applicable, the award of fees to mother under G.S. 50-13.6. was upheld when the trial court's conclusions as to good faith and insufficient means were supported by adequate findings, which were supported by affidavits and record evidence).]

e. For attorney fees to a prevailing party under the UCCJEA in a proceeding for expedited enforcement of a foreign custody order, see G.S. 50A-312 and Section VII.C.4.g.ii, below.

11. Other findings.
    a. Findings are required when the court awards attorney fees and also when fees are denied.
        i. An award of fees must be supported by findings. [*Smith v. Barbour,* 195 N.C. App. 244, 671 S.E.2d 578, *review denied,* 363 N.C. 375, 678 S.E.2d 670 (2009).]
        ii. Denial of fees must be supported by findings. [*Diehl v. Diehl,* 177 N.C. App. 642, 630 S.E.2d 25 (2006) (remand was required when trial court made no findings relating to its denial of fees); *Tricebock v. Krentz,* 234 N.C. App. 118, 761 S.E.2d 754 (2014) (**unpublished**) (citing *Gowing v. Gowing,* 111 N.C. App. 613, 432 S.E.2d 911 (1993)) (reversing order in custody case denying defendant attorney fees when only finding stated that the claim for attorney fees "should be" denied; further findings required).]
    b. Findings in combined actions.
        i. Since attorney fees are recoverable only if authorized by statute, in a combined action, the trial court's findings of fact must reflect that the attorney fees awarded are attributable only to the causes of actions authorized by statute. [*Burr v. Burr,* 153 N.C. App. 504, 570 S.E.2d 222 (2002) (matter was remanded for court to determine fees attributed to custody and support actions only; any award of fees for termination of parental rights cause of action was error).]
        ii. Order was upheld that excluded attorney fees for the equitable distribution portion of a case and directed husband to pay a portion of the approximately 75 percent of wife's attorney fees that were attributable to the custody, child support, and alimony portions of the case, even though the fee affidavits did not label every charge as being attributable to a particular issue. [*Cunningham v. Cunningham,* 171 N.C. App. 550, 615 S.E.2d 675 (2005) (since services were adequately described, the trial court could compare the time spent on each issue at trial and the evidence presented with the line-item services on the fee affidavits to rationally determine proper apportionment of fees); *Clark v. Clark*, 231 N.C. App. 514, 753 S.E.2d 743 (2013) (**unpublished**) (when plaintiff was entitled to attorney fees related to her motions to increase alimony and for payment of child support arrearages, both of which are authorized by statute, the trial court was not required to set out amount of fees incurred as to each issue).]
12. Award of fees to third party.
    a. Order requiring father to pay a portion of grandparents' attorney fees was upheld based on father's failure to cooperate with grandparents regarding visitation and father's failure to cooperate with child's psychological evaluation. [*Smith v. Barbour,* 195 N.C. App. 244, 671 S.E.2d 578 (maternal grandparents had intervened in action), *review denied,* 363 N.C. 375, 678 S.E.2d 670 (2009).]
13. Standard of review on appeal on an award of fees.
    a. Whether the statutory requirements necessary to support an award of attorney fees in a child custody and support suit have been met is a question of law, reviewable on appeal, and only when these requirements have been met does the standard of review change to abuse of discretion for an examination of the amount of attorney fees awarded. [*Hudson v. Hudson*, 299 N.C. 465, 263 S.E.2d 719 (1980); *Carson v. Carson,*

199 N.C. App. 101, 680 S.E.2d 885 (2009) (citing *Hudson*); *Cunningham v. Cunningham,* 171 N.C. App. 550, 615 S.E.2d 675 (2005); *Doan v. Doan,* 156 N.C. App. 570, 577 S.E.2d 146 (2003).]

14. Award of fees for services performed on appeal.
    a. A trial court's discretionary authority to award attorney fees in child custody and support matters pursuant to G.S. 50-13.6 extends to any appeal of those matters, whether interlocutory or final. [*McKinney v. McKinney,* 228 N.C. App. 300, 745 S.E.2d 356 (2013) (citing *Fungaroli v. Fungaroli,* 53 N.C. App. 270, 280 S.E.2d 787 (1981)) (award of $26,000 for fees incurred on appeal upheld), *review denied,* 367 N.C. 288, 753 S.E.2d 678, *review dismissed,* 367 N.C. 288, 753 S.E.2d 679 (2014).]
15. For trial court jurisdiction to consider a request for attorney fees after appeal taken, see Section II.P.6.c, above.
16. Contingency fee agreements are void on public policy grounds in custody actions. *Maxwell Schuman & Co. v. Edwards,* 191 N.C. App. 356, 663 S.E.2d 329 (2008) (finding that an agreement between father and father's law firm in which certain legal fees were contingent upon a successful appeal of an order in a custody case was void against public policy; however, fees and expenses not based on prohibited contingency fee arrangement could be collected by plaintiff Canadian law firm), *review denied,* 363 N.C. 128, 673 S.E.2d 358 (2009).]
17. When attorney fees are authorized, trial court also can award fees for court proceedings following a remand of the case from the court of appeals. [*Lasecki v. Lasecki*, 809 S.E.2d 296 (N.C. Ct. App. 2017).]
18. For more on awarding attorney fees, see *Child Support Liability and Amount,* Bench Book, Vol. 1, Chapter 3, Part 1.

VII. Interstate Proceedings: The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) [G.S. Chapter 50A.]

A. Jurisdiction to Enter Custody Orders

1. When there has been no other custody order entered by any state with regard to the child, see Section III.A, above, regarding the exercise of initial jurisdiction.
2. When there has been an order with regard to the child entered by any state, see Section IV.A, above, regarding the exercise of modification jurisdiction.
3. Temporary emergency jurisdiction. [G.S. 50A-204.]
    a. A court has temporary emergency jurisdiction if (1) the child is present in this state and the child has been abandoned or (2) it is necessary in an emergency to protect the child because the child or a sibling or parent of the child is subjected to or threatened with mistreatment or abuse. [G.S. 50A-204(a). *See In re N.T.U.*, 234 N.C. App. 722, 760 S.E.2d 49 (exercise of temporary emergency jurisdiction over child abandoned in North Carolina was proper; child, a South Carolina resident, was abandoned when mother was arrested in motel where mother was staying with child after fleeing South Carolina; order was upheld without findings as to jurisdiction, as they

are not required, and without findings as to the circumstances warranting exercise of temporary emergency jurisdiction, as, while particular circumstances must exist, findings to that effect are not required), *review denied,* 763 S.E.2d 517 (N.C. 2014); *In re E.J.*, 225 N.C. App. 333, 738 S.E.2d 204 (2013) (trial court properly exercised temporary emergency jurisdiction and entered order continuing nonsecure custody of child abandoned in North Carolina); *In re Van Kooten*, 126 N.C. App. 764, 487 S.E.2d 160 (1997) (jurisdiction pursuant to the emergency provision of the UCCJA—the statute in effect until adoption of the UCCJEA—is temporary jurisdiction only), *appeal dismised*, 347 N.C. 576, 502 S.E.2d 618 (1998).]

b. If there is no previous custody order entitled to enforcement and there is no proceeding pending in another state with appropriate jurisdiction, the temporary order entered with emergency jurisdiction remains in effect until an order is obtained from a court with appropriate jurisdiction. [G.S. 50A-204(b).] However, if a proceeding is not commenced in the appropriate state by the time North Carolina becomes the home state of the child, [See Section III.A.2.b, above.] then the order entered pursuant to the emergency jurisdiction statute becomes a final determination if it so provides. [G.S. 50A-204(b); *In re M.B.,* 179 N.C. App. 572, 635 S.E.2d 8 (2006) (the court's temporary emergency custody determination became a final order when no custody order had been entered or was pending in any other state at the time North Carolina became the home state of the child); *In re K.M.*, 228 N.C. App. 281, 748 S.E.2d 773 (2013) (**unpublished**) (citing *In re M.B.*, 179 N.C. App. 572, 635 S.E.2d 8 (2006)) (North Carolina became the home state, with jurisdiction to enter an adjudication order, based on North Carolina's exercise of emergency jurisdiction, the juveniles' residence in North Carolina for more than six months at the time of adjudication, and the lack of custody orders or proceedings in any other state).]

c. If there is a custody order entitled to enforcement, or if a custody proceeding is pending in a state with jurisdiction, an order entered pursuant to the emergency jurisdiction statute must specify a period in which the party seeking the order must return to the state with appropriate jurisdiction for relief. The temporary order remains in effect until the specified period of time expires or until the court with jurisdiction enters an order within the specified time. [G.S. 50A-204(c).]

d. Any time the court becomes aware that an action is pending in another state or that another state has entered a custody order, the North Carolina judge must immediately communicate with the judge in the other state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order. [G.S. 50A-204(d); *In re Malone,* 129 N.C. App. 338, 498 S.E.2d 836 (1998) (trial court should have contacted judge in home state of Florida before exercising temporary emergency jurisdiction over custody and visitation issues); *In re J.W.S.*, 194 N.C. App. 439, 669 S.E.2d 850 (2008) (adjudication order void where trial judge failed to contact New York court where temporary custody order had been entered several years before North Carolina court exercised emergency jurisdiction).] Similarly, if a North Carolina judge learns that another court is exercising emergency jurisdiction, the North Carolina judge must immediately contact the other judge and attempt to, among other things, "resolve the emergency." [G.S. 50A-204(d). See Section VII.B.2, below, on communication between judges.]

i. "Court" means a trial judge and not the Department of Social Services (DSS) or a DSS attorney. [*In re J.W.S.*, 194 N.C. App. 439, 669 S.E.2d 850 (2008) (citing *In re Malone* 129 N.C. App. 338, 498 S.E.2d 836 (1998)) (contact by Carteret County DSS attorney not sufficient); *In re Malone* (efforts by Durham County DSS to contact various Florida agencies not sufficient).]

ii. G.S. 50A-204(d) requires a trial court to contact another state only upon being informed that a child custody proceeding has been commenced in, or that a child custody determination has been made by, a court of another state exercising jurisdiction pursuant to G.S. 50A-201 to -203. [*In re K.M.*, 228 N.C. App. 281, 748 S.E.2d 773 (2013) (**unpublished**) (citing *In re M.B.,* 179 N.C. App. 572, 635 S.E.2d 8 (2006)) (trial court was not required to contact any other state to determine whether there was an unknown custody order in existence or to request that the alleged home state assume jurisdiction without an action pending in the unknown court).]

iii. The Uniform Deployed Parents Custody and Visitation Act, see Section VIII.B, below, does not prohibit the exercise of temporary emergency jurisdiction by a court under the UCCJEA. [G.S. 50A-353(d), *added by* S.L. 2013-27, § 3, effective Oct. 1, 2013.]

4. Simultaneous proceedings. [G.S. 50A-206.]

a. Unless exercising emergency jurisdiction pursuant to G.S. 50A-204, before hearing a child custody proceeding, a judge must examine all pleadings and information supplied by the parties to determine whether a child custody proceeding has been commenced in another state. [G.S. 50A-206(b).]

b. If a North Carolina court determines that a child custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with the UCCJEA, the North Carolina court must stay its proceeding and communicate with the other court. If the court of the other state having jurisdiction substantially in accordance with the UCCJEA does not determine that the North Carolina court is a more appropriate forum, the North Carolina court must dismiss the North Carolina action. [G.S. 50A-206(b). See Section VII.B.2, below, on communication between judges.]

i. Under G.S. 50A-206(b), when an action has already been commenced in another state, a North Carolina trial court must determine whether the court in the other state has subject matter jurisdiction pursuant to the UCCJEA (for example, home state jurisdiction). If the other state has jurisdiction, the North Carolina court does not need to determine whether all statutory procedures were followed properly in the other state. [*Jones v. Whimper*, 366 N.C. 367, 368, 736 S.E.2d 170, 171 (2013), *aff'g in part and vacating in part per curiam* 218 N.C. App. 533, 727 S.E.2d 700 (2012).]

ii. A North Carolina trial court properly declined to exercise jurisdiction under G.S. 50A-206(b) when a New Jersey court had communicated its determination that North Carolina was not the more appropriate forum for the parties' custody dispute. [*Jones v. Whimper*, 366 N.C. 367, 736 S.E.2d 170 (2013), *aff'g in part and vacating in part per curiam* 218 N.C. App. 533, 727 S.E.2d 700 (2012).]

iii. G.S. 50A-110, and the safeguards set out therein, apply to "*all* communications between courts attempting to determine" which court has jurisdiction, including communications required by G.S. 50A-206. [*Jones v. Whimper*, 366 N.C. 367, 368, 736 S.E.2d 170, 171 (2013) (emphasis in original), *aff'g in part and vacating in part per curiam* 218 N.C. App. 533, 727 S.E.2d 700 (2012). See Section VII.B.2, below, discussing G.S. 50A-110 on communication between judges.]

c. Unless exercising emergency jurisdiction pursuant to G.S. 50A-204, see Section VII.A.3, above, a North Carolina court may not exercise jurisdiction if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction "substantially in conformity with" the UCCJEA. [G.S. 50A-206(a).] For the North Carolina Supreme Court's interpretation of the same language in G.S. 50A-206(b), see Section VII.A.4.b.i, above.

d. The court in the other state having jurisdiction substantially in conformity with the UCCJEA may terminate or stay the proceeding in the other state upon a finding that North Carolina would be a more appropriate forum pursuant to G.S. 50A-207. [G.S. 50A-206(a). See Section VII.A.5, immediately below.] There is no transfer of the case to North Carolina.

e. In an action to modify a custody order, the court must determine whether a proceeding to enforce the order at issue in the modification proceeding has been commenced in another state. [G.S. 50A-206(c).] If an enforcement proceeding is pending in another state, after communicating with the court of the other state, the North Carolina court may:

i. Stay the modification proceeding until the conclusion of the enforcement action,

ii. Enjoin the parties from continuing to pursue the enforcement proceeding, or

iii. Proceed with the modification under conditions the court deems appropriate. [G.S. 50A-206(c).]

f. If there is a proceeding in North Carolina to enforce an order from another state and the North Carolina court determines that there is a motion to modify the order pending in the court of a state with appropriate modification jurisdiction, the North Carolina court must "immediately communicate with the modifying court." [G.S. 50A-307.] Enforcement continues in North Carolina unless the North Carolina court, after consultation with the modification court, stays or dismisses the enforcement action. [G.S. 50A-307.]

5. Inconvenient forum. [G.S. 50A-207.] For more on the authority granted in G.S. 50A-207, see Cheryl Howell, *Child Custody: We Can't "Change Venue" to Another State*, UNC Sch. of Gov't: On the Civil Side Blog (Oct. 28, 2016), http://civil.sog.unc.edu/child-custody-we-cant-change-venue-to-another-state.

a. A court of this state may decline to exercise its jurisdiction at any time upon determining that North Carolina is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised by motion of a party, by the court's own motion, or by request of a court of another state. [G.S. 50A-207(a). *See In re M.M.*, 230 N.C. App. 225, 750 S.E.2d 50 (2013) (court does not dismiss North Carolina action; North Carolina

action is stayed for period of time to determine whether other state will exercise jurisdiction; see discussion at Section VII.A.5.d, below).]

b. Before determining whether North Carolina is an inconvenient forum, the court must consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court must allow the parties to submit information and must consider "all relevant factors," including those listed in G.S. 50A-207(b):

   i. Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;

   ii. The length of time the child has resided outside this state;

   iii. The distance between the court in this state and the court in the state that would assume jurisdiction;

   iv. The relative financial circumstances of the parties;

   v. Any agreement of the parties as to which state should assume jurisdiction;

   vi. The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

   vii. The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

   viii. The familiarity of the court of each state with the facts and issues in the pending litigation. [G.S. 50A-207(b).]

c. Findings on the factors listed in G.S. 50A-207(b) are necessary when the court determines that the current forum is inconvenient, but they are not necessary when the court determines that the forum is convenient. [*Velasquez v. Ralls,* 192 N.C. App. 505, 665 S.E.2d 825 (2008) (rejecting argument that the trial court must make findings of fact on all factors in G.S. 50A-207(b) about which evidence was submitted before it decides convenience of the forum; no abuse of discretion when trial court denied mother's motion to transfer custody proceeding from North Carolina to California); *Westlake v. Westlake,* 231 N.C. App. 704, 753 S.E.2d 197 (2014) (trial court erred when it determined that North Carolina was an inconvenient forum without first considering the factors in G.S. 50A-207(b)); *In re M.M.*, 230 N.C. App. 225, 750 S.E.2d 50 (2013) (order relinquishing jurisdiction to Michigan was reversed when findings failed to demonstrate that the trial court properly considered relevant factors under G.S. 50A-207(b)).]

d. If the court determines that North Carolina is an inconvenient forum and that a court of another state is a more appropriate forum, the court must stay the North Carolina action upon the condition that a child custody proceeding be promptly filed in another designated state. The court may impose any other conditions it considers "just and proper." [G.S. 50A-207(c); Official Comment, G.S. 50A-207 ("other conditions" include issuance of temporary custody orders during the time necessary to commence a proceeding in the appropriate state); *Westlake v. Westlake,* 231 N.C. App. 704, 753 S.E.2d 197 (2014) (citing *In re M.M.*, 230 N.C. App. 225, 750 S.E.2d 50 (2013)) (trial court erred when instead of staying the proceedings upon prompt filing in another state as required by G.S. 50A-207(c), it "effectively dismissed" the case in North Carolina); *M.M.* (the requirement in G.S. 50A-207(c) that the trial court stay

the proceeding upon the condition that a custody proceeding be promptly commenced in another designated state is mandatory; failure to include those provisions in the jurisdiction order leaves the child and the legal proceeding in "legal limbo").]

i. There is no transfer of the case to the other state. G.S. 50A-207(c) provides that upon a determination that North Carolina is an inconvenient forum and that another state is a more appropriate forum, the trial court stays the North Carolina proceedings so that it may be pursued in the state that is a more appropriate forum.

ii. The order should include a date by which the custody proceeding is to be filed in the state with jurisdiction.

iii. The North Carolina proceeding is stayed until that date. The matter will appear on a calendar at the appropriate time.

6. Declining jurisdiction due to misconduct. [G.S. 50A-208.]

a. Unless exercising temporary emergency jurisdiction pursuant to G.S. 50A-204, [See Section VII.A.3, above.] the court must decline to exercise jurisdiction if the court determines that North Carolina has jurisdiction because the person seeking to invoke the jurisdiction has engaged in "unjustifiable conduct." [G.S. 50A-208(a).]

b. However, the court cannot decline to exercise jurisdiction if:

i. The parents and all persons acting as parents acquiesce in the exercise of jurisdiction,

ii. A court in another state that has jurisdiction determines that North Carolina is a more appropriate forum under G.S. 50A-207, or

iii. No court of any other state would have initial jurisdiction pursuant to G.S. 50A-201 [See Section III.A, above.] or modification jurisdiction pursuant to G.S. 50A-202 or -203. [G.S. 50A-208(a)(1)–(3). See Section IV.A, above.]

c. If the court declines jurisdiction based upon unjustifiable conduct, the court has the authority to fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the unjustifiable conduct, such as staying the proceeding until a proceeding is commenced in an appropriate state. [G.S. 50A-208(b).]

d. If the court dismisses or stays a proceeding pursuant to G.S. 50A-208(a), the court must assess against the party requesting the court to exercise jurisdiction necessary and reasonable expenses including "costs, communication expenses, attorneys' fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings," unless the party from whom fees are sought establishes that the assessment would be "clearly inappropriate." [G.S. 50A-208(c).]

B. Procedure

1. Notice. [G.S. 50A-205, 50A-108.]

a. Notice and an opportunity to be heard must be given to all persons entitled to notice under the law of North Carolina, to any parent whose parental rights have not been terminated, and to any person having physical custody of the child. [G.S. 50A-205(a).]

b. Notice to a person outside of North Carolina may be given in a manner allowed by North Carolina law or by the law of the state in which service is made. Notice must be given in a manner reasonably calculated to give actual notice but may be by publication if other means are not effective. [G.S. 50A-108(a). *See Hammond v. Hammond,* 209 N.C. App. 616, 708 S.E.2d 74 (2011) (service of complaint and summons in Japan was proper where service complied with the Hague Convention on International Service of Process).] For more on international service of process, see W. Mark C. Weidemaier, *International Service of Process Under the Hague Convention*, Admin. of Just. Bull. No. 2004/07 (UNC School of Government, Dec. 2004), http://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/aoj200407.pdf.

c. Notice to a person outside of North Carolina is not required for persons who submit to the exercise of jurisdiction by this state. [G.S. 50A-108(c).]

2. Communication between courts. [G.S. 50A-110.]

a. G.S. 50A-110 authorizes communications between a North Carolina judge and a judge of another state concerning any proceeding arising under the UCCJEA. [G.S. 50A-110(a) and Official Comment thereto; *Jones v. Whimper*, 366 N.C. 367, 368, 736 S.E.2d 170, 171 (2013) (emphasis in original) (G.S. 50A-110, and the safeguards set out therein, apply to "*all* communications between courts attempting to determine" which court has jurisdiction, including communications required by G.S. 50A-206), *aff'g in part and vacating in part per curiam* 218 N.C. App. 533, 727 S.E.2d 700 (2012).]

b. The court may allow the parties to participate in the communication, but their participation is not required. If the parties are not able to participate, they must be given the opportunity to present facts and legal arguments before a jurisdictional determination is made. [G.S. 50A-110(b); *Harris v. Harris,* 202 N.C. App. 584, 691 S.E.2d 133 (2010) (**unpublished**) (trial judge erred by failing to make a record of a communication with a judge in Indiana and by not allowing parties to be heard before making a decision on jurisdiction).]

c. A record must be made of the communication. The parties must be informed promptly of the communication and be granted access to the record of the communication. [G.S. 50A-110(d).] "Record" is defined to mean "information that is transcribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." [G.S. 50A-110(e).]

i. Requirement met if either court makes a record that is available to the parties. [*Chick v. Chick,* 164 N.C. App. 444, 596 S.E.2d 303 (2004) (no error when Vermont court made record even though North Carolina court did not).]

ii. A court order has been found to be a sufficient record of the communication. [*Chick v. Chick,* 164 N.C. App. 444, 596 S.E.2d 303 (2004) (noting, however, that the better practice is to include in the record greater detail than the minimum required by statute and that "generous disclosure" is preferred).]

d. The North Carolina court may communicate with another court concerning schedules, calendars, court records, and similar matters without informing the parties and without keeping a record. [G.S. 50A-110(c).]

3. Cooperation between courts. [G.S. 50A-112.]
    a. A North Carolina court may ask the court of another state to:
        i. Hold an evidentiary hearing;
        ii. Order a person to produce or give evidence pursuant to procedures of the other state;
        iii. Order that a custody evaluation be made in the other state;
        iv. Forward to North Carolina a certified copy of the transcript of a hearing held about a custody determination, as well as any evidence presented or any evaluation prepared; and
        v. Order a party or any person having physical custody of the child to appear in the custody proceeding with or without the child. [G.S. 50A-112(a).]
    b. A North Carolina court is authorized to perform any of the above listed acts if requested to do so by the court of another state. [G.S. 50A-112(b).]
4. Ordering the appearance of a party or the child. [G.S. 50A-210.]
    a. A North Carolina court may order any party in this state to appear in court with or without the child. The court may order any person in this state who has physical custody or control of the child to appear in court with the child. [G.S. 50A-210(a).]
    b. If the party is not in North Carolina, the court can require that notice of the order to appear with or without the child inform the party that failure to comply could result in an adverse determination. [G.S. 50A-210(b). *See also* G.S. 50A-112(a)(5) (court may ask the court in another state to order a party or person having physical custody of the child to appear with or without the child in the North Carolina proceeding).]
    c. If the court orders an out-of-state party to appear, or if an out-of-state party desires to appear personally with or without the child, the court may require another party to pay the reasonable and necessary travel and other expenses of the out-of-state party and of the child. [G.S. 50-210(d).]

C. Enforcement of Orders from Another State

1. Duty to enforce. [G.S. 50A-303.]
    a. A North Carolina court must recognize and enforce a custody determination made by a court of another state if the other state exercised jurisdiction in substantial conformity with the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) or if the order was entered under factual circumstances meeting the jurisdictional standards of the UCCJEA, and the order has not been modified in accordance with the UCCJEA. [G.S. 50A-303(a).]
    b. For cases determining the enforceability of foreign orders, see *Tataragasi v. Tataragasi*, 124 N.C. App. 255, 268, 477 S.E.2d 239, 246 (1996) (pending custody proceeding in Turkey did not prevent North Carolina from exercising subject matter jurisdiction over custody matter because Turkish custody law "is not in conformity with the UCCJA," the statute in effect until adoption of the UCCJEA), *review denied,* 345 N.C. 760, 485 S.E.2d 309 (1997), and *Schrock v. Schrock*, 89 N.C. App. 308, 365 S.E.2d 657 (1988) (Michigan order was not enforceable in North Carolina because Michigan

court did not exercise jurisdiction in accordance with the UCCJA and the Parental Kidnapping Prevention Act).

2. Temporary visitation. [G.S. 50A-304.]
   a. Even if North Carolina does not have jurisdiction to modify an order, a court in this state can enter a temporary order enforcing (1) a visitation schedule made by a court in another state or (2) the visitation provisions of an order of another state that does not set out a specific visitation schedule. [G.S. 50A-304(a).]
   b. A temporary order entered by a North Carolina court under G.S. 50A-304(a) must specify a period that the court deems adequate to allow the petitioner to return to the appropriate state to obtain an order for a new visitation schedule. The temporary order remains in effect until an order is obtained from the other court or the period expires. [G.S. 50A-304(b).]
3. Registration and confirmation of orders from other states. [G.S. 50A-305.]
   a. A custody order from another state may be registered and confirmed with or without a petition for enforcement. [G.S. 50A-305(a). *See* Official Comment, G.S. 50A-305 (registration and confirmation allows parties to "predetermine" the enforceability of a custody order before allowing the child to come to the state).]
      i. There is no requirement that a custody order be registered. See Cheryl Howell, *Does a Foreign Custody Order Have to Be Registered Before Our Court Can Enforce or Modify It?* UNC Sch. of Gov't: On The Civil Side Blog (Mar. 6, 2015), http://civil.sog.unc.edu/does-a-foreign-custody-order-have-to-be-registered-before-our-court-can-enforce-it-or-modify-it.
      ii. A North Carolina court can enforce a custody order from another state that has not been registered and can modify that order if the North Carolina court has modification jurisdiction.
      iii. This is different from child support orders, where an order from another state must be registered before a North Carolina court can modify or enforce the order. [G.S. 52C-6-609 (requiring a party to register a child support order issued in another state before modification) and 52C-601 and Official Comment thereto (registering child support order of another state is first step to enforcement by a North Carolina court).]
   b. A person may register an order by sending a letter or other document requesting registration to the appropriate court. [G.S. 50A-305(a).] The letter or document must contain the information and documents set out in G.S. 50A-305(a). [Form AOC-CV-660, Petition for Registration of Foreign Child Custody Order, may be used.]
   c. Upon receipt of the request, the court must register the order and send instructions to the petitioner informing her of the notice requirements for confirmation. [G.S. 50A-305(b). *See* Official Comment, G.S. 50A-305 (procedures intended to aid *pro se* litigants); Form AOC-CV-660I, Instructions for Registration of Foreign Child Custody Order, and AOC-CV-661, Notice of Registration of Foreign Child Custody Order, may be used.]

d. A party seeking to object to registration must request a hearing within twenty days of service of the required notice. [G.S. 50A-305(d); Form AOC-CV-663, Motion to Contest Validity of a Registered Foreign Child Custody Order and Notice of Hearing, may be used.] If no request for hearing is made, the order is confirmed as a matter of law and the court must notify all persons served of the confirmation. [G.S. 50A-305(e).]

e. If a hearing is requested and held, the court must confirm the order unless the party objecting to registration establishes that:

   i. The court that issued the order did not have appropriate jurisdiction;

   ii. The order has been vacated, stayed, or modified by a court having appropriate jurisdiction; or

   iii. The person contesting registration was entitled to notice in the proceeding in the other state but was not given notice in accordance with the statute. [G.S. 50A-305(d); Form AOC-CV-664, Order Confirming Registration or Denying Confirmation of Registration of Foreign Child Custody Order, may be used.]

f. Confirmation, either as a matter of law or as the result of a hearing, precludes further attack on the validity of the order for any of the reasons that could have been raised in an objection to registration. [G.S. 50A-305(f).]

g. A North Carolina court can enforce a registered order but may not modify that order unless North Carolina has modification jurisdiction. [G.S. 50A-306(b). See Section IV.A, above; but see Section VII.C.2, above (court may enter temporary orders to enforce or set out visitation schedules if necessary).]

4. Expedited enforcement procedure. [G.S. 50A-308 through 50A-317.]

a. A petition seeking enforcement of an order from another state must be verified. Certified copies of the order to be enforced, and certified copies of any order confirming registration of the order, must be attached. A copy of a certified copy may be attached instead of the original. [G.S. 50A-308(a); Form AOC-CV-665, Petition for Expedited Enforcement of Foreign Child Custody Order, may be used.] The petition must contain all information set out in G.S. 50A-308(b).

b. Upon the filing of the petition, the court must issue an order to the respondent to appear in person, with or without the child, at a hearing that must be held on the next judicial day after service of process, unless that date is impossible. [G.S. 50A-308(c); Form AOC-CV-666, Order for Hearing on Petition for Expedited Enforcement of Foreign Child Custody Order, may be used.] If not held on the next judicial day because of impossibility, the hearing must be held on the first judicial day possible. The hearing date can be continued only upon the request of the petitioner. [G.S. 50A-308(c).]

c. G.S. 50A-308(d) sets out the content of the notice that must be sent by the court to the respondent upon the filing of a petition for enforcement.

d. At a hearing for enforcement, the court must enforce the order by allowing petitioner immediate possession of the child unless the respondent can show that the order has not been confirmed (or that the order has been appropriately stayed, modified, or vacated since confirmation) and that:

i. The issuing court did not have appropriate jurisdiction at the time the order was entered;

ii. The order has been stayed, vacated, or modified by a court with appropriate jurisdiction; or

iii. The respondent was entitled to notice in the proceeding in the other state but notice was not given in accordance with the UCCJEA. [G.S. 50A-310(a); Form AOC-CV-668, Order Allowing or Denying Expedited Enforcement of Foreign Child Custody Order, may be used.]

e. If the order has been confirmed, respondent cannot contest enforcement based on any of the reasons that could have been raised in an objection to registration. [G.S. 50A-305(f).]

f. A court that has been requested to enforce a custody order from another state can order law enforcement to take physical custody of the child only if grounds exist to issue a warrant for physical custody pursuant to G.S. 50A-311 (order appropriate only upon verified application by a petitioner seeking enforcement pursuant to G.S. 50A-308 and upon a finding based upon testimony before the court that the child is immediately likely to suffer serious physical harm or be removed from the state). Any order directing law enforcement to take custody of the child must provide for the child's placement pending final relief. [G.S. 50A-311(c)(3); Form AOC-CV-667, Warrant Directing Law Enforcement to Take Immediate Physical Custody of Child(ren) Subject to A Child Custody Order, may be used.] For more on the use on law enforcement to enforce a custody order, see Cheryl Howell, *Ordering Law Enforcement Officers to Enforce a Child Custody Order*, UNC Sch. of Gov't: On the Civil Side Blog (Jan. 15, 2016), http://civil.sog.unc.edu/ordering-law-enforcement-officers-to-enforce-a-child-custody-order.

g. The court must award the prevailing party necessary and reasonable expenses incurred by or on behalf of the party, unless the party from whom fees or expenses are sought establishes that the award would be "clearly inappropriate." [G.S. 50A-312(a); Form AOC-CV-668, Order Allowing or Denying Expedited Enforcement of Foreign Child Custody Order, may be used to award expenses.] Expenses include costs, communication expenses, attorney fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings. [G.S. 50A-312(a).]

i. The attorney fees authorized in G.S. 50A-312 are available only in proceedings brought pursuant to Part 3 of G.S. Chapter 50A, labeled "Enforcement," and are not available in contempt proceedings. [*Creighton v. Lazell-Frankel,* 178 N.C. App. 227, 630 S.E.2d 738 (2006).]

ii. Father's motion for attorney fees as a prevailing party under G.S. 50A-312 was denied when mother had filed motion in the cause for contempt and had not sought relief under Part 3 of the UCCJEA; she had not sought expedited enforcement of a child custody determination or to register an out-of-state order, nor had she otherwise utilized the remedies set forth in Part 3 of the UCCJEA. [*Creighton v. Lazell-Frankel,* 178 N.C. App. 227, 630 S.E.2d 738 (2006).]

VIII. Military Service

A. Servicemembers Civil Relief Act [50 U.S.C. §§ 3901 *et seq*.]

1. Generally.

a. The Servicemembers Civil Relief Act (SCRA) was enacted by Congress, effective Dec. 19, 2003. It is a complete revision of the Soldiers' and Sailors' Civil Relief Act (SSCRA).

b. The SCRA and SSCRA were previously codified in the Appendix to Title 50 of the United States Code and cited as "50 U.S.C. app. § ___." In December 2015, the SCRA was recodified at 50 U.S.C. §§ 3901 *et seq*. This section cites sections of the SCRA as recodified. For a chart setting out the former and current statutory cites, see *"The Old and the New" – SCRA Concordance,* Silent Partner (A.B.A. Sec. Fam. L.), Dec. 15, 2015.

c. For an overview of the SCRA, see Cheryl Howell, *Servicemembers' Civil Relief Act Applies to Family Cases Too*, UNC Sch. of Gov't: On the Civil Side Blog (Feb. 13, 2015), http://civil.sog.unc.edu/servicemembers-civil-relief-act-applies-to-family-cases-too.

d. Purpose.

i. The purpose of the SCRA is to:

(a) Strengthen and expedite the national defense by enabling persons in the military service to devote their entire energy to the defense of the Nation and

(b) Temporarily suspend judicial and administrative proceedings that may adversely affect the civil rights of servicemembers during their military service. [50 U.S.C. § 3902.]

e. Covered servicemembers. The SCRA applies to servicemembers in military service, including:

i. Members of the Army, Navy, Air Force, Marine Corps, and Coast Guard on active duty under 10 U.S.C. § 101(d)(1) (Title 10 status). [50 U.S.C. § 3911(2)(A).] Pursuant to the definition of "active duty" in Title 10 of the U.S. Code, this includes members of the Army, Navy, Air Force, Marine Corps, and Coast Guard Reserves when on active duty. [*See* 10 U.S.C. § 101(d)(1).]

ii. Members of the National Guard serving under a call to active duty under 32 U.S.C. § 502(f) for more than thirty consecutive days for purposes of responding to a national emergency (Title 32 status under federal call to active duty). [50 U.S.C. § 3911(2)(A).]

iii. Individuals on active service as commissioned officers of the Public Health Service Service or the National Oceanic and Atmospheric Administration. [50 U.S.C. § 3911(2)(B).]

iv. Servicemembers who are absent from duty on account of sickness, wounds, leave, or other lawful cause, during any period of such sickness, etc. [50 U.S.C. § 3911(2)(C).]

f. Covered proceedings.

i. The SCRA applies to any judicial or administrative proceeding commenced in any court or agency in the United States, in each of the states, including the political subdivisions thereof, and all territory subject to the jurisdiction the United States. [50 U.S.C. §§ 3912(a) and (b).]

ii. The SCRA does not apply to criminal proceedings. [50 U.S.C. § 3912(b).]

iii. The stay provisions of the SCRA state specifically that they apply to child custody proceedings. [50 U.S.C. § 3931(a) (protection against entry of a default judgment applies to any civil action or proceeding, including any child custody proceeding, in which the defendant does not make an appearance); 50 U.S.C. § 3932(a) (provision on stay of proceedings when servicemember has notice applies to any civil action or proceeding, including any child custody proceeding, as provided therein).] However, most courts have interpreted the SCRA to allow a court to enter temporary custody orders. [*Lenser v. McGowan,* 358 Ark. 423, 191 S.W.3d 506 (2004) (stating that the SCRA provides a stay of a domestic relations case but does not prevent a court from entering a temporary order of custody; noting that the purpose of the SCRA is to relieve servicemembers from disadvantages arising from military service, not to provide advantages by reason of military service).] The Uniform Deployed Parents Custody and Visitation Act (UDPCVA), discussed at Section VIII.B, below, does not affect the validity of a temporary court order concerning custodial responsibility during deployment entered before its effective date. [S.L. 2013-27, § 4, effective Oct. 1, 2013.] The UDPCVA provides for temporary custody orders by agreement or by judicial procedure. [G.S. 50A-350 to 50A-376.]

g. For a guide for judges to use in a case involving the SCRA, which includes a checklist for judges as attachment 3, see Mark E. Sullivan, *A Judge's Guide to the Servicemembers Civil Relief Act* (N.C. State Bar, Standing Comm. on Legal Assistance for Military Pers., rev. Sept. 25, 2015), www.nclamp.gov/media/425665/jdg-guide.pdf.

2. Appointment of counsel and stay provisions for servicemember who has not made an appearance. [50 U.S.C. § 3931.]

a. The SCRA prohibits entry of a "default" judgment against a servicemember who has not made an appearance until after the court appoints an attorney for the defendant servicemember. [50 U.S.C. § 3931(b)(2).]

b. The term "default judgment" has broad meaning under the SCRA and includes any order or judgment adverse to the interests of the servicemember entered when the servicemember has not made an appearance.

c. If a defendant servicemember has not made an appearance, the court must require plaintiff to file an affidavit stating (1) whether defendant is in the military and showing necessary facts to support the affidavit or (2) that plaintiff is unable to determine whether defendant is in military service. [50 U.S.C. § 3931(b)(1).]

i. Default judgments obtained in the absence of the required affidavit are voidable, not void. [*Klaeser v. Milton*, 47 So. 3d 817 (Ala. Civ. App. 2010); *Taylor v. Ferguson*, 437 S.W.3d 799, 804 (Mo. Ct. App. 2014) (citing *Klaeser*) ("[a]

default judgment entered without fulfilling the affidavit requirement—indeed all requirements of the SCRA—is voidable").]

ii. Form AOC-G-250, Servicemembers Civil Relief Act Affidavit, may be used as the required affidavit.

d. If the court determines that a defendant is in the military, the court must appoint an attorney to represent the defendant servicemember. [50 U.S.C. § 3931(b)(2).]

i. Order is voidable if court fails to appoint an attorney. [50 U.S.C. § 3931(b)(2). *See United States v. Hampshire,* 892 F. Supp. 1327 (D. Kan. 1995) (federal district court holding that a judgment rendered in violation of the SSCRA (predecessor of the SCRA) is voidable), *aff'd on other grounds,* 95 F.3d 999 (10th Cir. 1996), *cert. denied,* 519 U.S. 1084, 117 S. Ct. 753 (1997).]

ii. The role of the attorney is to protect the interest of the absent servicemember. [*See* Mark E. Sullivan, *A Judge's Guide to the Servicemembers Civil Relief Act*, (N.C. State Bar, Standing Comm. on Legal Assistance for Military Pers., rev. Sept. 25, 2015), http://www.nclamp.gov/media/425665/jdg-guide.pdf. For a guide for appointed counsel, see Mark E. Sullivan, *Clerks' and Workers' Guide, Military Support Enforcement and the Servicemembers Civil Relief Act* (N.C. State Bar, Standing Comm. on Legal Assistance for Military Pers., Aug. 2012), App. F, http://www.nclamp.gov/clerks_workers_guide.pdf.]

iii. Note that the SCRA contains no provisions regarding how appointed attorneys are to be paid.

e. If the court determines that a defendant is in the military, on motion of the appointed attorney or on court's own motion, the proceeding must be stayed for at least ninety days if the court determines that:

i. There may be a defense to the action and the defense cannot be presented without the presence of defendant or

ii. After due diligence, counsel has been unable to contact defendant or otherwise determine if a meritorious defense exists. [50 U.S.C. § 3931(d).]

f. A defendant who has not made an appearance but who has actual notice of the proceedings also may apply for a stay pursuant to 50 U.S.C. § 3932, described below. [50 U.S.C. § 3931(f).]

3. Stay of proceedings where the servicemember has notice of the proceeding. [50 U.S.C. § 3932.]

a. The stay provisions of 50 U.S.C. § 3932 apply to any civil action, including child custody proceedings, in which plaintiff or defendant at the time of filing:

i. Is in military service or is within ninety days after termination of or release from military service and

ii. Has received notice of the action or proceeding. [50 U.S.C. § 3932(a).]

b. A party can request a stay at any point before final judgment. [50 U.S.C. § 3932(b)(1).]

i. An application for a stay does not constitute an appearance. [50 U.S.C. § 3932(c).]

c. The court may grant a stay of up to ninety days on its own motion, and it must grant a stay of up to ninety days on application of the servicemember, if the application includes the following:

i. A letter or other communication setting forth facts stating the manner in which current military duty materially affects the servicemember's ability to appear and stating a date when the servicemember will be able to appear and

ii. A letter or other communication from the servicemember's commanding officer stating that the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter. [50 U.S.C. § 3932(b).]

d. The denial of a stay under the SCRA has been found appealable as an order affecting a substantial right. [*Carmichael v. Rollins*, 280 Neb. 59, 783 N.W.2d 763 (2010).]

e. A servicemember who receives an initial stay may request an additional stay based on continuing material affect of military duty on the servicemember's ability to appear. [50 U.S.C. § 3932(d)(1).] The request must include the same letters or other communications as required for the initial stay. [50 U.S.C. § 3932(d)(1).]

f. If a servicemember's request for additional time is denied, the court shall appoint a lawyer to represent the servicemember in the action. [50 U.S.C. § 3932(d)(2).]

4. If application of the SCRA was not at issue, cases decided before adoption of the Uniform Deployed Parents Custody and Visitation Act, see Section VIII.B, below, involving servicemembers determined custody as in other cases.

a. Trial court properly applied parental presumption to father in custody dispute with maternal grandmother arising after mother's enlistment in the military and move to Germany and maternal grandmother's assumption of a parent-like role. [*Sides v. Ikner*, 222 N.C. App. 538, 730 S.E.2d 844 (2012) (custody between mother and father had been determined in earlier consent order). *See also Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997) (recognizing military service as a circumstance that could require a parent acting in the best interest of his child to temporarily relinquish custody).]

b. Trial court's finding that husband "is on active duty with the United States Marine Corps and is stationed at Camp Lejeune, North Carolina" was sufficient to satisfy the home state requirement for jurisdiction under the Uniform Child Custody Jurisdiction Act (UCCJA), the statute in effect until adoption of the UCCJEA. [*Hart v. Hart,* 74 N.C. App. 1, 9, 327 S.E.2d 631, 636 (1985).]

c. Custody order affirmed that granted servicemember father primary physical custody with physical placement with paternal grandmother when mother had serious health problems and uncertain future health. [*Everette v. Collins,* 176 N.C. App. 168, 625 S.E.2d 796 (2006) (both parents in the military).]

d. Substantial change in circumstances justified change of custody to father, who was stationed in London with the Air Force, when mother had had two illegitimate children since divorce from father and currently had insufficient income to provide for herself and three children. [*White v. White,* 90 N.C. App. 553, 369 S.E.2d 92 (1988).]

e. No substantial and material change in circumstances justified modification of custody, even though custodial parent, the mother, had joined the army and placed the child with maternal grandparents on and off since entry of the original custody order. [*Charett v. Charett*, 42 N.C. App. 189, 256 S.E.2d 238 (father also in military), *review denied*, 298 N.C. 294, 259 S.E.2d 299 (1979).]

f. Award of custody to servicemember father upheld over his objection to provision in order that "[i]n the event that the father is assigned to duty overseas, . . . the minor child shall at all times remain in the United [S]tates." [*Curtis v. Klimowicz,* 279 Ga. App. 425, 426, 631 S.E.2d 464, 466 (2006) (order did not impose an improper self-executing modification in legal or physical custody triggered by an overseas assignment; child would remain with father's new wife upon overseas assignment and mother would not be granted any additional custody rights).]

5. Additional references.

a. Memorandum from Pamela Weaver Best, N.C. Administrative Office of the Courts, "UPDATE: Servicemembers Civil Relief Act" (June 17, 2005).

b. Christopher Missick, *Child Custody Protections in the Servicemembers Civil Relief Act: Congress Acts to Protect Parents Serving in the Armed Forces*, 29 Whittier L. Rev. 857 (2008).

c. Mark E. Sullivan, *Clerks' and Workers' Guide, Military Support Enforcement and the Servicemembers Civil Relief Act* (N.C. State Bar, Standing Comm. on Legal Assistance for Military Pers., Aug. 2012), www.nclamp.gov/clerks_workers_guide.pdf.

d. Mark E. Sullivan, *A Judge's Guide to the Servicemembers Civil Relief*, (N.C. State Bar, Standing Comm. on Legal Assistance for Military Pers., rev. Sept. 25, 2015), www.nclamp.gov/media/425665/jdg-guide.pdf.

e. W. Mark C. Weidemaier, *Service of Process and the Military*, Admin. of Just. Bull. No. 2004/08 (UNC School of Government, Dec. 2004), www.sog.unc.edu/sites/www.sog.unc.edu/files/aoj200408.pdf.

f. Mark E. Sullivan, Q&A on Military Divorce, Custody and Child Support, North Carolina Academy of Trial Lawyers Trial Briefs (Apr. 2007).

g. Jay M. Zitter, Annotation, *Effect of Parent's Military Service Upon Child Custody*, 21 A.L.R. 6th 577 (2007).

B. The Uniform Deployed Parents Custody and Visitation Act (UDPCVA)

1. Overview.

a. The UDPCVA repealed G.S. 50-13.7A, the former statute addressing custody when a parent with primary physical custody or visitation rights was subject to military deployment. [S.L. 2013-27, § 2, effective Oct. 1, 2013.]

b. The UDPCVA does not affect the validity of a temporary court order concerning custodial responsibility during deployment entered before its effective date. [S.L. 2013-27, § 4, effective Oct. 1, 2013.]

c. Part 1 of the UDPCVA contains general provisions. Part 2 provides a procedure whereby parents may enter into a temporary agreement for custodial responsibility

of their child during deployment. Part 3 sets out a judicial procedure for entry of a temporary custody order when no agreement pursuant to Part 2 is reached. Part 4 addresses procedures for termination of either a temporary agreement or a temporary order after a parent returns from deployment.

d. All parts and provisions of the UDPCVA were added by S.L. 2013-27, § 3, effective Oct. 1, 2013. [Session law not cited hereinafter.]

e. For more on the UDPCVA, see Cheryl Howell, *Custody When a Military Parent Deploys*, UNC Sch. of Gov't: On the Civil Side Blog (Feb. 27, 2015), http://civil.sog.unc.edu/custody-when-a-military-parent-deploys.

2. General provisions.

a. Definitions. [G.S. 50A-351.]

i. Custodial responsibility:

(a) A comprehensive term that includes any and all powers and duties relating to caretaking authority and decision-making authority for a child.

(b) Includes custody, physical custody, legal custody, parenting time, right to access, visitation, and the authority to designate limited contact with a child. [G.S. 50A-351(6).]

ii. Caretaking authority is the right to live with and care for a child on a day-to-day basis, including physical custody, parenting time, right to access, and visitation. [G.S. 50A-351(2).]

iii. Decision-making authority:

(a) The power to make important decisions regarding a child, including decisions regarding the child's education, religious training, health care, extracurricular activities, and travel.

(b) Does not include day-to-day decisions that necessarily accompany a grant of caretaking authority. [G.S. 50A-351(7).]

iv. Deployment is the movement or mobilization of a servicemember to a location for more than ninety days, but less than eighteen months, pursuant to an official order that is designated as unaccompanied, does not authorize dependent travel, or otherwise does not permit the movement of family members to that location. [G.S. 50A-351(9).]

b. Jurisdiction. [G.S. 50A-353.]

i. A court must have jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to issue an order regarding custodial responsibility pursuant to Part 3 of the UDPCVA. [G.S. 50A-353(a).]

ii. For purposes of the UCCJEA, the residence of the deploying parent is not changed by reason of the deployment. [G.S. 50A-353(a)–(c).]

iii. The UDPCVA does not prohibit the exercise of temporary emergency jurisdiction under the UCCJEA. [G.S. 50A-353(d).]

c. Notice requirement. [G.S. 50A-354.]

i. Except as provided in G.S. 50A-354(c) and (d), a deploying parent must notify the other parent of a pending deployment within seven days of receiving notice of deployment, unless circumstances of her service prevent notification. [G.S. 50A-354(a).]

ii. Except as provided in G.S. 50A-354(c) and (d), as soon as reasonably possible after receipt of a notice of deployment, each parent must provide the other parent with a plan for fulfilling that parent's share of custodial responsibility during deployment. [G.S. 50A-354(b).]

3. Temporary agreement addressing custodial responsibility during deployment. [G.S. 50A-360.]

a. Parents may enter into a written temporary agreement granting custodial responsibility during deployment, signed by both parents and any nonparent to whom custodial responsibility is granted. The agreement may include provisions as set out in G.S. 50A-360(c). [G.S. 50A-360(a), (b).]

b. Parents may enter into such temporary agreements even if there is an existing custody order between them. The agreement must be filed with the court if there is a previous court order for custody or child support. [G.S. 50A-364.]

c. An agreement pursuant to the UDPCVA derives from the parents' custodial responsibility and does not create an independent, continuing right to caretaking authority, decision-making authority, or limited contact in an individual to whom custodial responsibility is given. [G.S. 50A-361(a).]

d. A nonparent given caretaking authority, decision-making authority, or limited contact by agreement has standing to enforce the agreement until it has been modified pursuant to agreement of the parents under G.S. 50A-362 or terminated under Part 4 of the UDPCVA or by court order. [G.S. 50A-361(b).]

e. If no other parent possesses custodial responsibility, or if a court order prohibits contact between the child and the other parent, a deploying parent, by power of attorney (POA), may delegate all or part of his custodial responsibility to an adult nonparent for the period of deployment. The deploying parent may revoke the POA by a signed revocation. [G.S. 50A-363.] The POA must be filed within a reasonable time with any court that has entered an existing order for custody or child support. [G.S. 50A-364.]

f. If an agreement granting caretaking authority is executed, the court may enter a temporary order for child support consistent with the laws of North Carolina if the court has jurisdiction under the Uniform Interstate Family Support Act (UIFSA), G.S. Chapter 52C. [G.S. 50A-378.] The parties may not modify existing support obligations in an agreement executed pursuant to G.S. 50A-360.

g. A temporary agreement terminates pursuant to Part 4 of the UDPCVA following the deployed parent's return from deployment, unless the agreement has been terminated before the deployed parent's return by court order or by modification pursuant to G.S. 50A-362. [G.S. 50A-361(a).]

h. Part 4 of the UDPCVA provides for termination of a temporary agreement:

i. By an agreement to terminate. [G.S. 50A-385(a), (b).]

(a) If the agreement to terminate specifies a date, the temporary agreement terminates on that date.

(b) If no date is specified, the temporary agreement terminates on the date the agreement to terminate is signed by both parents. [G.S. 50A-385(b).]

ii. In the absence of an agreement to terminate, termination occurs sixty days from the date the deploying parent gives notice to the other parent that the deploying parent has returned from deployment, unless earlier terminated upon the date stated in an order terminating the temporary grant of custodial responsibility or the death of the deploying parent. [G.S. 50A-385(c), *amended by* S.L. 2014-115, § 38(c), effective Aug. 11, 2014.]

i. After a deploying parent returns from deployment and until the temporary agreement is terminated, the court is to enter a temporary order granting visitation to the deploying parent, unless it is contrary to the best interest of the child, even if the time exceeds the time the deploying parent spent with the child before deployment. [G.S. 50A-387.]

4. Judicial procedure for custodial responsibility during deployment. [G.S. 50A-370 to 50A-377.]

a. Procedure is initiated by either parent filing a motion to grant custodial responsibility during deployment. [G.S. 50A-370(b).] The motion must be filed in an existing proceeding for custodial responsibility of the child. If there is no existing proceeding, the motion is filed in a new action for custodial responsibility during deployment. [G.S. 50A-370(b).]

b. The court must conduct an expedited hearing if a motion to grant custodial responsibility is filed before deployment. [G.S. 50A-371.] For the effect of a prior judicial decree designating custodial responsibility in the event of deployment, see G.S. 50A-373(1). For the court's responsibility to enforce a prior written agreement between the parents designating custodial responsibility in the event of deployment, see G.S. 50A-373(2). For testimony by electronic means by a witness or party not reasonably available to appear, see G.S. 50A-372.

c. A court may issue a temporary order granting custodial responsibility, unless prohibited by the SCRA, after a deploying parent receives notice of deployment and during deployment. [G.S. 50A-370(a).] See Section VIII.A, above, for more on the SCRA.

d. A court may not issue a permanent order granting custodial responsibility in the absence of the deploying parent without her consent. [G.S. 50A-370(a).]

e. If a court has issued an order granting caretaking authority, the court may enter a temporary order for child support consistent with the laws of North Carolina if the court has jurisdiction under UIFSA, G.S. Chapter 52C. [G.S. 50A-378.]

f. A court is specifically authorized to grant temporary caretaking authority, decision-making authority, and limited contact to a nonparent who is an adult family member of the child or to an adult with whom the child has a close and substantial relationship. [G.S. 50A-374(a) (caretaking authority); 50A-374(c) (decision-making authority); 50A-375(a) (limited contact; no requirement that the nonparent be an adult).] A nonparent granted caretaking authority, decision-making authority,

or limited contact shall be made a party to the action until the grant is terminated. [G.S. 50A-374(d) (caretaking and decision-making authority); 50A-375(b) (limited contact).]

i. Caretaking authority to a nonparent.

(a) On motion of a deploying parent, a court may grant caretaking authority to a nonparent as set out above if it is in the best interest of the child. [G.S. 50A-374(a).]

(b) Unless the other parent agrees to the grant of caretaking authority set out above, the grant is limited to the amount of time granted to the deploying parent in an existing permanent custody order (plus unusual travel time) or, if there is no permanent custody order, the amount of time the deploying parent habitually cared for the child before notice of deployment (plus unusual travel time). [G.S. 50A-374(b).]

ii. Decision-making authority to a nonparent.

(a) A court may grant part of the deploying parent's decision-making authority to a nonparent as set out above if the deploying parent is unable to exercise that authority. [G.S. 50A-374(c).]

(b) The court must specify the decision-making powers that will and will not be granted, including those applicable to health, educational, and religious decisions. [G.S. 50A-374(c).]

iii. Limited contact to a nonparent.

(a) In accordance with North Carolina law and on motion of a deploying parent, a court shall grant limited contact with a child to a nonparent unless the court finds that the contact would be contrary to the best interest of the child. [G.S. 50A-375(a) (no requirement that the nonparent be an adult).]

g. For content of the temporary custody order, see G.S. 50A-377.

h. Modification of an order granting custodial responsibility to a nonparent. [G.S. 50A-379.]

i. Except in the case of a prior order or as otherwise provided in G.S. 50A-379(b), and consistent with the SCRA, on motion of a deploying parent, other parent, or any nonparent to whom caretaking authority, decision-making authority, or limited contact has been granted, the court may modify a grant of caretaking, decision-making authority, or limited contact if the modification is consistent with Part 3 of the UDPCVA and the court finds modification is in the child's best interest. [G.S. 50A-379(a).]

ii. Any modification is temporary and terminates following the conclusion of deployment as set out in Part 4 of the UDPCVA, unless the grant has been terminated by court order before that time. [G.S. 50A-379(a).]

i. Termination of an order granting custodial responsibility. [G.S. 50A-379, 50A-386, 50A-388.]

i. Termination of grant of custodial responsibility to a nonparent. [G.S. 50A-379.]

(a) Except in the case of a prior order or as otherwise provided in G.S. 50A-379(b), and consistent with the SCRA, on motion of a deploying parent, other parent, or any nonparent to whom caretaking authority, decision-making authority, or limited contact has been granted, the court may terminate a grant of caretaking, decision-making authority, or limited contact if the termination is consistent with Part 3 of the UDPCVA and the court finds termination is in the child's best interest. [G.S. 50A-379(a).]

(b) On motion of a deploying parent, the court must terminate a grant of limited contact. [G.S. 50A-379(b).]

ii. By consent agreement. [G.S. 50A-386.]

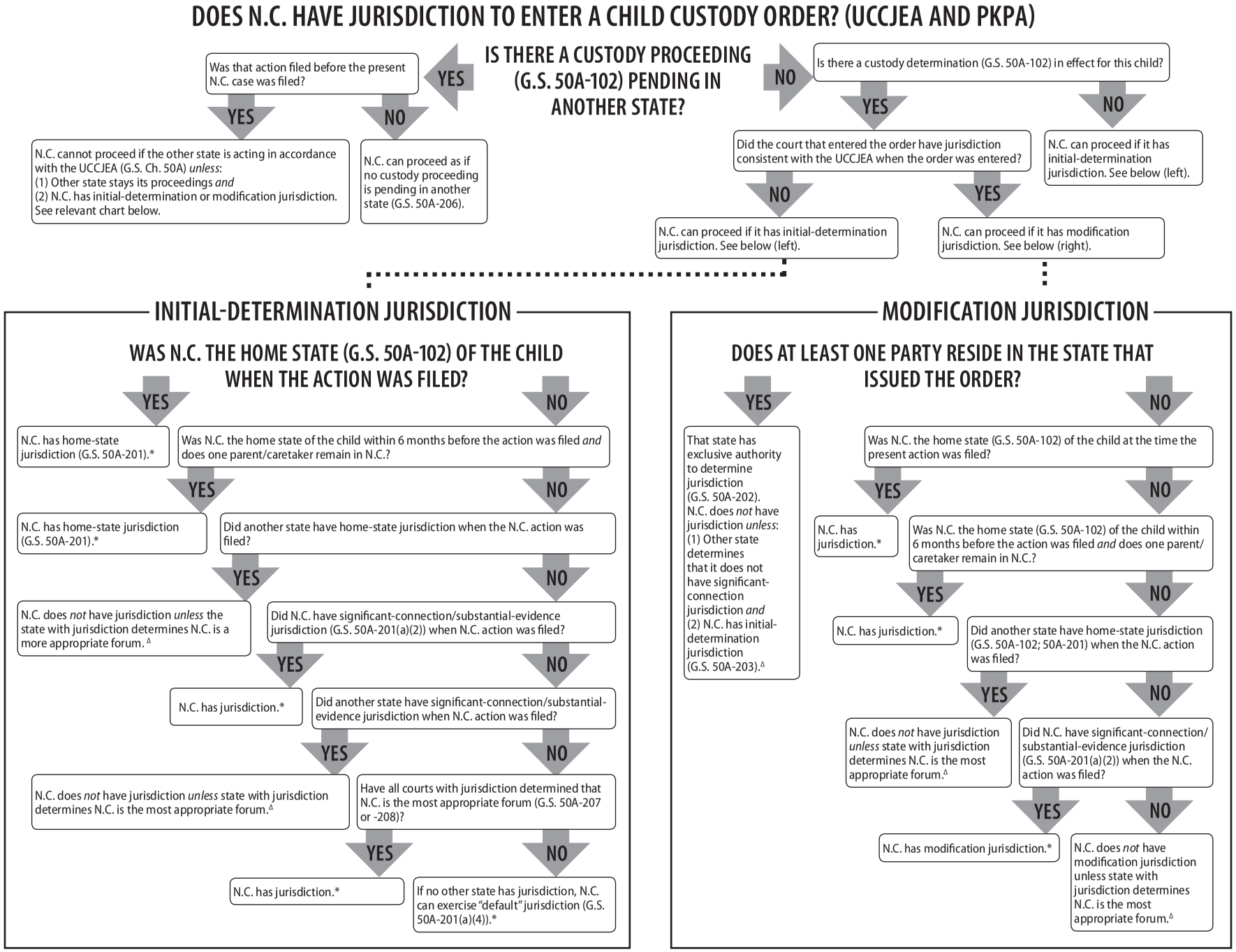
(a) At any time following return from deployment, the deploying parent and the other parent may file an agreement to terminate a temporary order for custodial responsibility. After the consent agreement to terminate has been filed, the court must issue an order terminating the temporary order on the date specified in the agreement. If no date is specified, the court shall issue the order immediately. [G.S. 50A-386.]

iii. By operation of law. [G.S. 50A-388.] In the absence of a consent agreement to terminate, a temporary order for custodial responsibility terminates sixty days from the date the deploying parent gives notice of having returned from deployment to the other parent or to any nonparent granted custodial responsibility, when applicable, or upon the death of the deploying parent, whichever occurs first. [G.S. 50A-388(a), *amended by* S.L. 2014-115, § 38(d), effective Aug. 11, 2014.]

j. Any proceedings to terminate or prevent termination of a temporary order for custodial responsibility are governed by the laws of North Carolina. [G.S. 50A-388(b).]

k. After a deploying parent returns from deployment and until the order granting custodial responsibility is terminated, the court is to enter a temporary order granting visitation to the deploying parent unless it is contrary to the best interest of the child, even if the time exceeds the time the deploying parent spent with the child before deployment. [G.S. 50A-387.]

Appendix A. UCCJEA Subject Matter Jurisdiction Flowchart



* A court with jurisdiction can decline jurisdiction if N.C. is an inconvenient forum (G.S. 50A-207) or because of petitioner's conduct (G.S. 50A-208).

Δ If emergency exists and child is present in this state, N.C. may exercise temporary emergency jurisdiction in accordance with provisions and procedures of G.S. 50A-204.

Cheryl Howell — March 2019

Findings for Initial Child Custody
Parent vs. Parent; Nonparent vs. Nonparent

- ☐ 1. Personal and subject matter jurisdiction
  - ☐ Service of process
  - ☐ Uniform Child Custody Jurisdiction and Enforcement (UCCJEA) (G.S. Chapter 50A) grounds for subject matter jurisdiction
    - ☐ Parties **cannot** confer subject matter jurisdiction by consent
- ☐ 2. Relationship of parties and relationship of each party to the child
- ☐ 3. Fitness of each party to exercise custody, including physical, mental, and financial fitness
- ☐ 4. Description of the physical and legal custody arrangement being ordered and findings by a preponderance of the evidence to show why the arrangement is in the best interest of the child
  - ☐ If joint custody is requested, findings to show consideration of that request
  - ☐ If legal custody, i.e., decision-making authority, is split, findings to show reason split custody is required
  - ☐ If visitation of a parent is denied, supervised, or severely limited, findings to show why restriction is necessary for the welfare of the child
  - ☐ If domestic violence has occurred, need all findings required by G.S. 50B-3(a1)(1), (2), and (3). *See* G.S. 50-13.2(b).
- ☐ 5. If appointing parenting coordinator, order must describe duties of coordinator. *See* G.S. 50-91. In addition, if coordinator is appointed without consent of parties, need the following additional findings:
  - ☐ Case is a high-conflict case as defined by G.S. 50-90,
  - ☐ Appointment of parenting coordinator is in best interest of child, and
  - ☐ Parties are able to pay the cost of parenting coordinator.

Findings for Initial Child Custody
Nonparent vs. Parent

- ☐ 1. Personal and subject matter jurisdiction
  - ☐ Service of process
  - ☐ UCCJEA (G.S. Chapter 50A) grounds for subject matter jurisdiction
    - ☐ Parties **cannot** confer subject matter jurisdiction by consent
- ☐ 2. Relationship of parties and relationship of each party to the child
- ☐ 3. Nonparent relationship to child sufficient to give nonparent standing to bring custody action
- ☐ 4. Findings by clear, cogent, and convincing evidence that parent has waived his constitutional right to exclusive care, custody, and control of the child by unfitness, neglect of child's welfare, or other conduct inconsistent with his protected status
- ☐ 5. Fitness of each party to exercise custody, including physical, mental, and financial fitness
- ☐ 6. Description of the physical and legal custody arrangement being ordered and findings by a preponderance of the evidence to show why the arrangement is in the best interest of the child
  - ☐ If joint custody is requested, findings to show consideration of that request
  - ☐ If legal custody, i.e., decision-making authority, is split, findings to show reason split custody is required
  - ☐ If visitation of a parent is denied, supervised, or severely limited, findings to show why restriction is necessary for the welfare of the child
  - ☐ If domestic violence has occurred, need all findings required by G.S. 50B-3(a1)(1), (2), and (3). *See* G.S. 50-13.2(b).
- ☐ 7. If appointing parenting coordinator, order must describe duties of coordinator. *See* G.S. 50-91. In addition, if coordinator is appointed without consent of parties, need the following additional findings:
  - ☐ Case is a high-conflict case as defined by G.S. 50-90,
  - ☐ Appointment of parenting coordinator is in best interest of child, and
  - ☐ Parties are able to pay the cost of parenting coordinator.

Findings for Modification of Child Custody Parent vs. Parent; Nonparent vs. Nonparent

- ☐ 1. Personal and subject matter jurisdiction
  - ☐ Service of process
  - ☐ UCCJEA (G.S. Chapter 50A) grounds for modification jurisdiction (subject matter jurisdiction)
    - ☐ Parties **cannot** confer subject matter jurisdiction by consent
- ☐ 2. Relationship of parties and relationship of each party to the child
- ☐ 3. Substantial change in circumstances **affecting welfare of the child** occurring since the entry of the last custody order
- ☐ 4. Fitness of each party to exercise custody, including physical, mental, and financial fitness
- ☐ 5. Description of the physical and legal custody arrangement being ordered and findings by a preponderance of the evidence to show why the arrangement is in the best interest of the child
  - ☐ If joint custody is requested, findings to show consideration of that request
  - ☐ If legal custody, i.e., decision-making authority, is split, findings to show reason split custody is required
  - ☐ If visitation of a parent is denied, supervised, or severely limited, findings to show why restriction is necessary for the welfare of the child
  - ☐ If domestic violence has occurred, need all findings required by G.S. 50B-3(a1)(1), (2), and (3). *See* G.S. 50-13.2(b).
- ☐ 6. If appointing parenting coordinator, order must describe duties of coordinator. *See* G.S. 50-91. In addition, if coordinator is appointed without consent of parties, need the following additional findings:
  - ☐ Case is a high-conflict case as defined by G.S. 50-90,
  - ☐ Appointment of parenting coordinator is in best interest of child, and
  - ☐ Parties are able to pay the cost of parenting coordinator.

Findings for Modification of Child Custody Nonparent vs. Parent

- ☐ 1. Personal and subject matter jurisdiction
  - ☐ Service of process
  - ☐ UCCJEA (G.S Chapter 50A) grounds for modification jurisdiction (subject matter jurisdiction)
    - ☐ Parties **cannot** confer subject matter jurisdiction by consent
- ☐ 2. Relationship of parties and relationship of each party to the child
- ☐ 3. If order to be modified granted custody rights to a nonparent, skip findings in paragraph 4 and go directly to paragraph 5, below.
- ☐ 4. If order to be modified did not grant custody rights to the nonparent:
  - ☐ Findings to show nonparent relationship to child sufficient to give nonparent standing to bring custody action and
  - ☐ If awarding custody to the nonparent, findings by clear, cogent, and convincing evidence that parent has waived her constitutional right to exclusive care, custody, and control of the child by unfitness, neglect of child's welfare, or other conduct inconsistent with her protected status.
- ☐ 5. Substantial change in circumstances **affecting welfare of the child** occurring since the entry of the last custody order
- ☐ 6. Fitness of each party to exercise custody, including physical, mental, and financial fitness
- ☐ 7. Description of the physical and legal custody arrangement being ordered and findings by a preponderance of the evidence to show why the arrangement is in the best interest of the child
  - ☐ If joint custody is requested, findings to show consideration of that request
  - ☐ If legal custody, i.e., decision-making authority, is split, findings to show reason split custody is required
  - ☐ If visitation of a parent is denied, supervised, or severely limited, findings to show why restriction is necessary for the welfare of the child
  - ☐ If domestic violence has occurred, need all findings required by G.S. 50B-3(a1)(1), (2), and (3). *See* G.S. 50-13.2(b).

- ☐ 8. If appointing parenting coordinator, order must describe duties of coordinator. *See* G.S. 50-91. In addition, if coordinator is appointed without consent of parties, need the following additional findings:
  - ☐ Case is a high-conflict case as defined by G.S. 50-90,
  - ☐ Appointment of parenting coordinator is in best interest of child, and
  - ☐ Parties are able to pay the cost of parenting coordinator.

Findings for Attorney Fees

- ☐ 1. Fees awarded
  - ☐ Party seeking fees is an interested party acting in good faith
  - ☐ Party has insufficient means to defray expenses of suit
  - ☐ Reasonableness of fees, including
    - ☐ Nature and scope of services rendered
    - ☐ Attorney's skill and time required
    - ☐ Attorney's hourly rate
    - ☐ Reasonableness of that rate compared to other lawyers in community
  - ☐ If custody claim combined with other claims for which fees not statutorily authorized (equitable distribution, termination of parental rights), fees awarded attributed only to claims for which fees authorized by statute
- ☐ 2. Fees denied
  - ☐ Findings as to reason(s) for denial

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