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Third Party Custody and Visitation Actions: 2010 Update to the State of the Law in North Carolina

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When parents turn to the court to resolve a dispute involving custody of their child, North Carolina law clearly provides that the dispute is resolved by applying the best interest of the child standard. That is, the court imposes a custody and visitation plan on the parties that the court determines will best promote the child's interest and welfare. This same standard is used to resolve custody and visitation disputes that do not involve parents, such as disputes between two potential caretakers when parents are absent from a child's life. In both types of cases, the best interest of the child standard provides that the welfare of the child is the "polar star" which guides the judge in the decision-making process.[1]

However, the legal analysis becomes more complicated when the custody or visitation dispute is between a parent and a nonparent third party. The law has long recognized that, ordinarily, parents have the privilege and responsibility of looking out for the welfare of their children. In our society, it is parents who generally determine how to promote the best interest of their children. A significant amount of litigation over the past two decades, both within North Carolina and throughout the country, concerns when, if ever, a court can award custody or visitation rights to a third party, such as a grandparent or a stepparent, over the objection of a parent.

This bulletin discusses the present state of the law in North Carolina concerning the common law and constitutional right of parents to the exclusive care, custody, and control of their children. The article examines how that parental right impacts the authority of North Carolina courts to apply the best interest standard to resolve custody and visitation claims brought by third parties against parents. In addition, it reviews statutory and case law dealing specifically with grandparents to determine whether custody and visitation claims by grandparents are treated differently from claims by other third parties.[2]

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1. *See In re* Peal, 305 N.C. 640, 290 S.E.2d 664 (1982).

2. The constitutional rights of parents also raise important issues in cases involving abused, neglected, and dependent children. However, juvenile cases are beyond the scope of this bulletin.

Parental Preference: *Petersen v. Rogers* and *Price v. Howard*

Read literally, North Carolina statutes appear to allow the award of custody or visitation to any person able to prove to the satisfaction of the court that the requested custody or visitation is in the best interest of the child, regardless of the party's biological or other relationship to the child. Section 50-13.1(a) of the North Carolina General Statutes (hereinafter G.S.) 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." Since 1989, that statute also has provided that "[u]nless a contrary intent is clear, the word 'custody' shall be deemed to include custody or visitation or both." Further, G.S. 50-13.2(a) provides that any "order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child." And subsection (b) of that statute provides in part that "[a]ny order for custody shall include terms, including visitation, as will best promote the interest and welfare of the child."

Before 1994, several decisions by the North Carolina Court of Appeals interpreted these statutes broadly, holding that literally any person, whether a relative of the child or a legal stranger, may assert a claim for custody or visitation by alleging that such custody or visitation is in the best interest of the child.[3] Further, regardless of the legal or biological status of the parties, the court of appeals has held that the trial court should resolve all custody and visitation disputes by application of the best interest of the child analysis.[4]

Petersen v. Rogers

During the 1990s, however, the North Carolina Supreme Court issued two opinions rejecting the expansive statutory interpretation adopted by the court of appeals. First, in *Petersen v. Rogers*,[5] the court held that despite the seemingly broad language of the statutes, the right of a nonparent third party to seek court-ordered custody and visitation when a parent opposes the custody or visitation is extremely limited. The court explained that a parent has a paramount constitutional and common law right to the care, custody, and control of a minor child. According to *Petersen*, this constitutional right of parents prohibits a trial court from considering a child's best interest in a contest between a parent and a nonparent unless it is shown that the parent is unfit or has neglected the welfare of the child.

Petersen involved a custody dispute between natural parents Pamela Rogers and William Rowe and potential adoptive parents, the Petersens. Upon the birth of the child, the mother placed the child with the state Department of Social Services (DSS) for adoption. The Petersens took physical custody of the child within days of birth and petitioned for adoption. An adoption order was entered but was subsequently set aside by the N.C. Supreme Court. When the adoption was set aside, custody of the child reverted to the DSS pursuant to G.S. 48-20(c) (1991). DSS placed the child in the custody of the Petersens, and the Petersens immediately filed an action against the natural parents seeking custody of the child pursuant to G.S. 50-13.1. The

3. *See, e.g., In re* Rooker, 43 N.C. App. 397, 258 S.E.2d 828 (1979) (natural father allowed to seek custody after children adopted by grandparents); Ray v. Ray, 103 N.C. App. 790, 407 S.E.2d 592 (1991) (stepgrandmother allowed to seek visitation over parent's objection).

4. *See* Black v. Glawson, 114 N.C. App. 442, 442 S.E.2d 79 (1994) (third parties do not have to prove a parent unfit in order to gain custody or visitation).

5. 337 N.C. 397, 445 S.E.2d 901 (1994).

trial court applied a best interest analysis and awarded custody to the natural parents, even though the child had resided with the Petersens since birth. The trial court also denied the Petersens' request for visitation with the child. The court of appeals reversed the trial court, but the supreme court held that the trial court could not award custody to anyone other than the defendants (the natural parents) because the trial court had found them to be "fit and proper" and able to care for the child, whose welfare they had not neglected.

In reaching this decision, the court in *Petersen* pointed out that the United States Supreme Court has held that the "rights to conceive and to raise one's children have been deemed 'essential' . . . 'basic civil rights of man' . . . and 'rights far more precious . . . than property rights.'"[6] In addition, the *Petersen* court noted that the U.S. Supreme Court has held that the "integrity of the family unit" is protected by "the Due Process Clause of the Fourteenth Amendment, . . . the Equal Protection Clause of the Fourteenth Amendment, . . . and the Ninth Amendment."[7] Given these protections, the U.S. Supreme Court also has stated that as long as a parent is "shown to be fit," the state's interest in caring for children is de minimis.[8]

The *Petersen* court also noted that the U.S. Supreme Court had recently discussed specifically the use of the best interest of the child standard. In *Reno v. Flores*, the Court explained:

> "The best interests of the child," a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody. But it is not traditionally the sole criterion—much less the sole *constitutional* criterion—for other, less narrowly channeled judgments involving children, where their interests conflict in varying degrees with the interests of others. Even if it were shown, for example, that a particular couple desirous of adopting a child would *best* provide for the child's welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child *adequately*. . . . Similarly, "the best interests of the child" is not the legal standard that governs parents' or guardians' exercise of their custody: So long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves.[9]

In addition, the *Petersen* court stated that North Carolina common law has long recognized the paramount right of parents to the care, custody, and control of their children. The court cited *Jolly v. Queen*,[10] where the state supreme court stated that a court

> might find it to be in the best interest of a legitimate child of poor but honest, industrious parents . . . that his custody be given to a more affluent [person]. . . . Such a finding, however, could not confer a right as against such parents who had not abandoned their child, even though they had permitted him to spend much time [with the more affluent person]. In other words, the parents'

6. *Id*. at 400, 445 S.E.2d at 903 (citations omitted).
7. *Id*. at 401, 445 S.E.2d at 903 (citations omitted).
8. Stanley v. Illinois, 405 U.S. 645, 657–58 (1972).
9. Reno v. Flores, 507 U.S. 292, 303–04 (1993).
10. 264 N.C. 711, 715–16, 142 S.E.2d 592, 596 (1965).

> paramount right to custody would yield only to a finding that they were unfit custodians because of bad character or other, special circumstances.

And, even before *Jolly*, the N.C. Supreme Court, in the case of *In re Hughes*,[11] stated that

> Because the law presumes parents will perform their obligations to their children, it presumes their prior right to custody, but this is not an absolute right. The welfare of the child is the crucial test. When a parent neglects the welfare and interest of his child, he waives his usual right to custody.

The *Petersen* court concluded, based on the cited opinions of both the U.S. Supreme Court and the N.C. Supreme Court, that "absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail."[12] Concluding also that the same principles apply to claims for visitation, the court denied plaintiffs' request for visitation with the child. The court rejected plaintiffs' argument that the broad language of G.S 50-13.1(a) indicates that the General Assembly intended to give "any person" the right to seek court-ordered visitation. Instead, the *Petersen* court held that the General Assembly did not intend for G.S. 50-13.1(a) to overrule North Carolina case law providing that, in general, "parents with lawful custody of a child have the prerogative of determining with whom their children associate." According to *Petersen*,[13] G.S. § 50-13.1

> was not intended to confer upon strangers the right to bring custody or visitation actions against parents of children unrelated to such strangers; such a right would conflict with the constitutionally-protected paramount right of parents to custody, care, and control of their children.

Price v. Howard

The N.C. Supreme Court revisited the issue of parental rights in *Price v. Howard*,[14] wherein it reaffirmed the analysis and holding in *Petersen* but held that other parental conduct, in addition to unfitness or neglect, can justify application of the best interest of the child standard in a dispute between a parent and a nonparent.[15]

In *Price*, plaintiff and defendant resided together at the time the minor child was born. The defendant (the mother) represented to plaintiff and the minor child that plaintiff was the child's natural father. The couple stopped living together when the child was three, and after they separated the child resided with plaintiff. When the child was six, the mother indicated a desire to take custody of the child, and plaintiff refused. Plaintiff thereafter instituted a custody action. In her answer, defendant asserted for the first time that plaintiff was not the father of the child. After blood tests confirmed that plaintiff was not in fact the biological father, the trial court

11. 254 N.C. 434, 436–37, 119 S.E.2d 189, 191 (1961).

12. Petersen v. Rogers, 337 N.C. 397, 403–04, 445 S.E.2d 901, 905 (1994).

13. *Id*. at 406, 445 S.E.2d at 905.

14. 346 N.C. 68, 484 S.E.2d 528 (1997).

15. The N.C. Supreme Court also has held that a finding that a parent is fit and otherwise proper to exercise custody does not preclude a trial court from nevertheless concluding that the parent has waived his or her protected status by other conduct inconsistent with that protected status. *See* David N. & Deborah N. v. Jason N. & Charla B., 359 N.C. 303, 608 S.E.2d 751 (2005) (rejecting the decision by the court of appeals that the two findings are inherently inconsistent).

held it was bound by *Petersen* to award custody to the mother because there had been no showing that she was unfit or had neglected the welfare of the child. The court of appeals agreed that *Petersen* prohibited any other conclusion.[16]

In reviewing the decision of the court of appeals, the supreme court stated that the *Petersen* opinion contains only "general constitutional principles" relating to the interests of parents. *Price*, meanwhile, required a more detailed analysis to determine whether conduct other than unfitness or neglect is sufficient to allow a trial court to apply the best interest standard in a custody dispute between a third party and a parent. According to the *Price* opinion, the controlling constitutional right at issue is one of due process: "this decision requires a due-process analysis in which the parent's well-established paramount interest in the custody and care of the child is balanced against the state's well-established interest in protecting the welfare of children."[17]

However, the court did not resolve the case by engaging in such a due process balancing analysis. Rather, the court concluded that the question presented could be answered by examining "the nature and scope of defendant[mother]'s due-process interest in the companionship, custody, care, and control of her child."[18] The *Price* court reviewed federal and state court opinions regarding the constitutional protections afforded to parents and concluded that the protected status of parents is not absolute. Instead, it is a protected interest that may be lost, or never gained, based on "some facts and circumstances, typically those created by the parent."[19] The *Price* court concluded that, when a parent loses protected status, or never obtains protected status, application of the best interest standard in a custody dispute with a nonparent does not violate due process. However, the court also stated that when a parent enjoys protected status, "application of the 'best interest of the child standard' in a custody dispute with a non-parent would offend the Due Process Clause."[20]

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16. Price v. Howard, 122 N.C. App. 674, 471 S.E.2d 673 (1996), *rev'd and remanded*, 346 N.C. 68, 484 S.E.2d 528 (1997).

17. *Price*, 346 N.C. at 72, 484 S.E.2d at 530.

18. *Id.* at 75, 484 S.E.2d at 532.

19. *Id*.

20. *Id*. at 79, 484 S.E.2d at 534. *See also* Boseman v. Jarrell, No. 416PA08-2 (N.C. Dec. 20, 2010) (citing *Price v. Howard*, "So long as a parent has this paramount interest in the custody of his or her children, a custody dispute with a nonparent regarding those children may not be determined by application of the 'best interest of the child' standard.").

It is unclear how the *Price* court arrived at this conclusion without undertaking the due process balancing analysis the court stated was necessary to resolve the issue. However, the court very clearly concludes that application of the best interest test against a parent who has not waived his or her constitutional protection violates due process. Arguably, this conclusion is mandated by the holding in *Petersen*. However, the *Petersen* court did not engage in a due process analysis either. Therefore, despite this very clear statement by the court, it is possible that future decisions will recognize that there may be situations wherein application of the best interest of the child test against a fit parent who has not waived his or her constitutional protection does not violate due process. For example, other state courts have concluded that application of the standard to determine requests for visitation pursuant to grandparent visitation statutes does not violate due process, even when a parent is fit and proper. *See* Mizrali v. Cannon, 867 A.2d 490 (N.J. Super. App. Div. 2005) (visitation may be ordered if visitation is necessary to avoid harm to children); Hertz v. Hertz, 291 A.D.2d 91 (N.Y. App. Div. 2002) (visitation may be ordered unless it interferes with parent–child relationship); Blixt v. Blixt, 774 N.E.2d 1052 (Mass. 2002); Lopez v. Martinez, 102 Cal. Rptr. 2d 71 (Ct. App. 2000); King v. King, 828 S.W.2d 630 (Ky. 1992); Herndon v. Tuhey, 857 S.W.2d 203 (Mo. 1993). *But cf. In re* C.A.M.A., 109 P.3d 406 (Wash. 2005); Wickham v. Byrne,

To support the conclusion that the due process interest of parents is not absolute, the *Price* court explained that both North Carolina common law and the federal constitution grant parents the right to the care, custody, and control of their children to the exclusion of all others because of the presumption that parents will perform their obligations to their children and will "act in the best interest of the child."[21] Therefore, a parent does not obtain protected status or, rather, loses protected status when "his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child."[22] The court held that while "[u]nfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy[,]" other kinds of conduct also may "rise to this level." When a court finds that a parent has engaged in conduct inconsistent with his or her protected status, "custody should be determined by the 'best interest of the child' test mandated by the statute."[23]

The *Price* court explained that the determination of whether a parent enjoys protected status is one that must be made on a case-by-case basis.[24] Therefore, the court remanded the case to the trial court with instruction that the trial court determine whether the defendant had waived her superior right to custody of the child.

Standing

Petersen and *Price* define the current requirements in North Carolina for a custody or visitation claim to be properly presented by a nonparent against a parent.[25] A nonparent must allege facts sufficient to prove that a parent is unfit, has neglected the welfare of the child, or has otherwise acted in a manner inconsistent with his or her protected status as parent.[26] Once such allegation is proven, the trial court may proceed to determine custody or visitation by application of the best interest of the child standard. If the third party is not able to show that the parent has lost protected status, *Petersen* and *Price* appear to require that all claims against a parent be dismissed.

However, the court of appeals decided after *Price* that not all third parties have standing to bring a claim for custody or visitation against a parent, even if the third party alleges that the parent has waived his or her constitutional right to custody and control. In *Ellison v. Ramos*,[27] the court of appeals held that only parties who allege and prove a sufficient relationship with the child have the right to file a claim alleging that the parent has lost protected status. The court of appeals based this decision on the statement in *Petersen* (quoted above) that "G.S. 50-13.1 was not intended to confer upon *strangers* the right to bring custody or visitation actions against

769 N.E.2d 1 (Ill. 2002); Hawk v. Hawk, 855 S.W. 573 (Tenn. 1993). *See also* discussion of the U.S. Supreme Court decision in *Troxel v. Granville, infra* pp. *28*–29.

21. *Price*, 346 N.C. at 79, 484 S.E.2d at 534.

22. *Id*. at 79, 484 S.E.2d at 534.

23. *Id*. at 79, 484 S.E.2d at 534–35.

24. *See also* Boseman v. Jarrell, No. 416PA08-2 (N.C. Dec. 20, 2010) ("[T]here is no bright line beyond which a parent's conduct meets this standard.").

25. For visitation claims by grandparents, see the discussion *infra* pp. 22–27 regarding grandparent visitation statutes.

26. See discussion *infra* p. 20 regarding pleading requirements.

27. 130 N.C. App. 389, 502 S.E.2d 891 (1998).

parents of children unrelated to such strangers."[28] According to *Ellison*, a third party must allege the existence of a relationship sufficient to show that he or she is not a stranger to the child because "a relationship based on a simple assertion of interest in a child's welfare is insufficient to establish standing."[29] Therefore, "a third party who has no relationship with a child does not have standing under N.C. Gen. Stat § 50-13.1 to seek custody of a child from a natural parent."[30]

The court of appeals in *Ellison* declined to define what constitutes a sufficient relationship to establish standing, holding instead that such determinations must be made on a case-by-case basis. However, the court found that in the case at issue, the nonparent plaintiff properly alleged standing by claiming that she and the child had a "relationship in the nature of a parent–child relationship." The relationship in the "nature of a parent–child relationship" was established by the fact that the child had resided with plaintiff for a number of years and that plaintiff "is the only mother the minor child has known."[31]

The court in *Ellison* did not state specifically that any person biologically related to a child will have standing. However, in the case of *Yurek v. Baker*,[32] the court of appeals held that a sister and brother-in-law of the child's father had standing under G.S 50-13.1 without discussing whether those people actually had a personal relationship with the child whose custody was it issue. Rather, the court held that the unambiguous language of G.S. 50-13.1(a) stating that "[a]ny parent, *relative*, or other person . . . may institute an action or proceeding for the custody of such child" granted standing to these nonparent third parties.[33]

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28. Petersen v. Rogers, 337 N.C. 397, 405–06, 445 S.E.2d 901, 906 (1994); emphasis added.

29. *Ellison*, 130 N.C. App. at 394, 502 S.E.2d at 894.

30. *Id. See also* Krauss v. Wayne Cnty. DSS, 347 N.C. 371, 493 S.E.2d 428 (1997) (biological father whose parental rights had been terminated did not have standing under G.S. 50-13.1 to seek custody of the children).

31. It is interesting to note that the persons the *Petersen* court referred to as "strangers" were the potential adoptive parents who had cared for the child since birth. These people clearly had a relationship in the "nature of a parent/child" but nevertheless were referred to as strangers by the supreme court. *See also* Seyboth v. Seyboth, 147 N.C. App. 63, 554 S.E.2d 378 (2001) (stepparent had relationship in the nature of a parent–child relationship sufficient to give him standing to seek visitation); Mason v. Dwinnell, 190 N.C. App. 209, 660 S.E.2d 58 (2008) ("There can be no serious dispute that [plaintiff] established that she had standing" where complaint alleged she and defendant had jointly raised the child and had entered into an agreement wherein both agreed to act as parents of the child, that plaintiff had provided emotional and financial support for the child, and that plaintiff's relationship with the child had been presented to friends, family, and schools as one of parent and child.). *Cf.* Myers v. Baldwin & Baker, 698 S.E.2d 108 (N.C. Ct. App. 2010) (unrelated couple who cared for child for two months before filing action for custody "clearly" did not have a relationship with the child sufficient to grant them standing to bring custody action against parents); Tilley v. Diamond (unpublished), 184 N.C. App. 758 (2007) (neighbors of grandfather who filed custody action immediately after being given physical custody of young child by grandfather who was unable to care for child did not have relationship with child sufficient to grant them standing). In both *Myers v. Baldwin & Baker* and *Tilley v. Diamond*, the court of appeals held that custody orders granting custody to persons who did not have standing when the action was filed are void *ab initio*.

32. 678 S.E.2d 738 (N.C. Ct. App. 2009).

33. *Id*. at 744; emphasis added.

Who Enjoys Parental Preference?

Both *Petersen* and *Price* discuss the protected status of biological and adoptive parents, regardless of marital status. *Price* and *Petersen* involved unwed biological parents.[34] Other North Carolina appellate court opinions clarify that single, unwed parents enjoy the same constitutional rights as married parents.[35] Similarly, that parents were once married but then divorced appears to have no impact on the protected status of each parent.[36]

The North Carolina appellate courts also have held that, following the death of one parent, the surviving parent remains entitled to the constitutional protections articulated by *Petersen* and *Price*.[37] In addition, the court of appeals has recognized that a parent involved in a same-sex partnership is entitled to assert his or her constitutionally protected status in a custody case brought by a nonparent partner.[38] (Cases involving same-sex domestic partnerships are discussed below.)

The North Carolina courts have clarified that parents whose rights have been legally terminated lose all constitutional protections and lose all right to petition for custody or visitation pursuant to G.S. 50-13.1.[39] Similarly, the courts have held that stepparents do not enjoy the constitutional protections afforded to natural and adoptive parents. In *Seyboth v. Seyboth*,[40] the court held that a trial court erred in applying the best interest of the child test in a case between a parent and a stepparent without first concluding that the parent mother had waived her constitutional right to care, custody, and control of her child. The court held that the constitutional rights of the mother prohibited the court from awarding either custody or visitation to the stepparent as long as the mother enjoyed the protected status afforded by those rights.

Generally a parent can invoke the parental preference against any person who is not an adoptive or biological parent of the child. However, the court of appeals refused to allow a mother to assert her protected status against her former husband after blood tests showed that he was not

34. The case of *Troxel v. Granville,* decided by the U.S. Supreme Court and discussed below, also involved parents who never married.

35. *See* Adams v. Tessener, 345 N.C. 57, 550 S.E.2d 499 (2001) (father of illegitimate child); Fisher v. Gaydon, 124 N.C. App. 442, 477 S.E.2d 251 (1996) (single mother); Sharp v. Sharp, 124 N.C. App. 357, 477 S.E.2d 258 (1996) (unwed mother); *and* Lambert v. Riddick, 120 N.C. App. 480, 462 S.E.2d 835 (1995) (father of illegitimate child). In *Penland v. Harris*, 135 N.C. App. 359, 360, 520 S.E.2d 105, 106 (1999), the court of appeals stated that "raising a child out of wedlock does not constitute" conduct sufficient to establish a waiver of constitutional rights.

36. *See* Eakett v. Eakett, 157 N.C. App. 550, 579 S.E.2d 486 (2003) (mother still enjoyed constitutional preference even though she and the father of the child had divorced and litigated custody a year before this action initiated by a grandparent).

37. *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); Montgomery v. Montgomery, 136 N.C. App. 435, 524 S.E.2d 360 (2000); *and* Shaut v. Cannon, 136 N.C. App. 435, 524 S.E.2d 360 (2000). *See also* Davis v. McMillian, 152 N.C. App. 53, 567 S.E.2d 159 (2002) (parent has constitutional rights even though she is "very limited in her intellectual functioning").

38. *See* Estroff v. Chatterjee, 190 N.C. App. 61, 660 S.E.2d 73 (2008); Mason v. Dwinnell, 190 N.C. App. 209, 660 S.E.2d 58 (2008); Davis v. Swan, 697 S.E.2d 473 (N.C. Ct. App. 2010); *and* Heatzig v. MacLean, 191 N.C. App. 451, 664 S.E.2d 347 (2008).

39. *See* Kelly v. Blackwell, 121 N.C. App. 621, 468 S.E.2d 400 (1996); Krauss v. Wayne Cnty. DSS, 347 N.C. 371, 493 S.E.2d 428 (1997); Quets v. Needham, 682 S.E.2d 214 (N.C. Ct. App. 2009).

40. 147 N.C. App. 63, 554 S.E.2d 378 (2001).

the biological parent of the child. In *Jones v. Patience*,[41] the court held that the husband of the mother of a child born during marriage is entitled to the protected status of a parent because the law presumes that a husband is the father of all children born during a marriage. While acknowledging that the paternity presumption generally can be rebutted by blood grouping tests, the court in *Jones* held that, in the context of a custody dispute between the mother and her former husband, "the marital presumption is rebuttable only upon a showing that another man has formally acknowledged paternity, . . . or has been adjudicated to be the father of the child."[42]

Modification Actions

Soon after the *Petersen* opinion, the court of appeals held that the parental preference articulated in *Petersen* has no impact on the law regarding modification of existing custody or visitation orders pursuant to G.S. 50-13.7 if the earlier order granted custody or visitation to a nonparent third party. In *Bivens v. Cottle*,[43] the maternal grandparents had custody of a minor child pursuant to a custody order entered before *Petersen*. After *Petersen*, the mother of the child filed a motion claiming that because the trial court found her to be a fit and proper parent in the original custody order, the holding in *Petersen* required that the earlier custody order be modified to award custody to her. The trial court agreed, but the court of appeals reversed. According to the court of appeals, "[t]here are no exceptions in North Carolina law to the requirement that a change in circumstances be shown before a custody decree may be modified."[44] The court held that "once the custody of a minor child is judicially determined, that order of the court cannot be modified until it is determined that (1) there has been a substantial change of circumstances affecting the welfare of the child; and (2) a change in custody is in the best interest of the child."[45] The court reached the same conclusion on similar facts in the 1996 case of *Speaks v. Fanek*.[46]

In *Sloan v. Sloan*,[47] a custody order had been entered in a case between the parents of a child. That order also granted visitation rights to the grandparents. When the grandparents moved to modify the order to increase their visitation, the mother argued that the grandparents could not seek modification without first showing that she had waived her constitutional right to custody and control of her child. The court of appeals held that because the grandparents had been granted visitation in the earlier order, modification was controlled by application of G.S 50-13.7. Therefore, once the grandparents established a substantial change of circumstances, the trial court must apply the best interest test to determine whether the visitation should be modified.

However, in *Brewer v. Brewer*,[48] the court clarified that parents do not lose their constitutional protection from custody claims by third parties simply because they have litigated custody between themselves. In *Brewer*, a custody order had been entered in a case between the two

41. 121 N.C. App. 434, 466 S.E.2d 720 (1996).
42. *Id.* at 439, 466 S.E.2d at 723.
43. 120 N.C. App. 467, 462 S.E.2d 829 (1995).
44. *Id.* at 469, 462 S.E.2d at 831.
45. *Id.* (quoting Dobos v. Dobos, 111 N.C. App. 222, 226, 431 S.E.2d 861, 863 (1993)).
46. 122 N.C. App. 389, 470 S.E.2d 82 (1996)
47. 164 N.C. App. 190, 595 S.E.2d 228 (2004).
48. 139 N.C. App. 222, 533 S.E.2d 541 (2000).

natural parents. The order granted physical custody to the father and visitation to the mother. Thereafter, the father placed the children with an aunt and uncle. The aunt and uncle filed a motion seeking to modify the original order to grant custody to them, and the mother objected. The court of appeals held that to modify the existing custody order, the trial court must first find that there has been a substantial change of circumstances since the entry of the first order, as required by G.S. 50-13.7. But, the court held that if the trial court finds a substantial change, the court cannot apply the best interest test to determine whether custody should be granted to the nonparent third parties unless the court first finds that the mother has waived her superior constitutional right to the care, custody, and control of her children.[49]

Rebutting the Parental Preference

Unfitness

Price provides that parents lose protected status when they are unfit, have neglected the welfare of the child, or have acted in a manner otherwise inconsistent with their protected status as parents. The term "unfit" is not well defined in North Carolina law. In the context of child custody, unfit generally means that a person does not or cannot attend to the welfare of a child.[50]

Since *Petersen v. Rogers* first addressed the issue of parental rights in 1994, at least three published opinions by the court of appeals have reviewed whether specific parental conduct was sufficient to support a conclusion that a natural parent is unfit.[51] In *Raynor v. Odom*,[52] the trial court awarded custody to the paternal grandmother after finding the mother unfit. The court of appeals upheld the trial court's conclusion after conducting a de novo review by "examining the totality of the circumstances."[53] The appellate court held that facts supporting the trial court's conclusion of unfitness included: that the mother had several DWI convictions; that the child suffered from developmental problems that the mother had not recognized or treated and that resulted in part from her failure to adequately provide for the child "the motivation, opportunity and encouragement for normal and healthy development"; that the mother had been held in contempt of court several times during the history of the custody proceeding for failure to submit to drug screening and substance abuse counseling, to allow a home study, and to provide requested records; that she suffered blackouts and had a bad temper; and that she refused to visit the child unless the grandmother provided transportation.[54] According to the court in *Raynor*, "These facts paint a picture of a person who has substance abuse problems, does not respect authority, is unable to recognize her child's developmental problems, and is incapable of providing for the child's welfare."[55] However, the court also held that it was improper for the trial court

49. *See also* Eakett v. Eakett, 157 N.C. App. 550, 579 S.E.2d (2003) (despite the language in G.S. 50-13.5(j) grandparents cannot seek modification of a custody order entered more than one year earlier in case between parents without showing parents have waived their constitutional rights). G.S. 50-13.5(j) is discussed further below.

50. Suzanne Reynolds, Lee's North Carolina Family Law § 13.35 (5th ed. 1989–2002).

51. Decisions dealing with conduct that may be inconsistent with a parent's protected status even though the parent is not unfit are discussed further below.

52. 124 N.C. App. 724, 478 S.E.2d 655 (1996).

53. *Id*. at 731, 478 S.E.2d at 659.

54. *Id*. at 731–32, 478 S.E.2d at 659–60.

55. *Id.* at 732, 478 S.E.2d at 660.

to consider the socioeconomic status of the grandmother in reaching the conclusion that the mother was unfit.

In *Sharp v. Sharp*,[56] the maternal grandparents filed an action seeking custody of their minor grandchildren. The trial court dismissed the complaint, finding the grandparents had no standing to bring a claim for custody against the biological parent. The court of appeals reversed, holding that grandparents, like other third parties, have standing to seek custody against a parent when there are allegations of parental unfitness or neglect of welfare. The court of appeals held that the following assertions in the grandparents' complaint would be sufficient to achieve standing if proven to be fact: the mother had failed to provide a safe or stable home for her children; the mother had relationships with several men and had moved around North Carolina and Pennsylvania; the mother had not contributed to the support of her children since they began residing with the grandparents; the mother was not emotionally stable enough to care for her children, leading to a substantial risk of harm if they were put in her custody.

In a third opinion, *Davis v. McMillian*,[57] the court of appeals upheld the trial court's conclusion that the defendant (the mother) was unfit to provide care for her child and that her failure to provide adequate care in the past amounted to conduct inconsistent with her protected status as a parent. In addition, the court of appeals approved of the trial court's decision to take judicial notice of a determination of unfitness made in an earlier custody proceeding involving the mother. According to the court of appeals, when determining fitness, a trial court is free to consider any past conduct or circumstance of a parent that could have an impact on the present or the future of the child, and there is no requirement that the conduct or circumstance exist at the time of trial.[58]

In *Davis*, the trial court incorporated the findings of fact from the earlier custody order and made additional findings based on evidence presented at the trial in the present case. The earlier order had included findings that the mother had failed to recognize or treat the child's numerous, serious medical conditions and that the mother regularly drove a car with the child inside but not sitting in a car seat. Findings from the present trial showed that mother was "very limited in her intellectual functioning"[59] and was "unable to take on normal adult responsibilities such as acquiring a driver's license, getting and maintaining a job, [and] taking care of her living expenses."[60] Other findings indicated that defendant had difficulty caring for another child who was living in her home and that relatives visited her home on a daily basis to take care of the child. A number of opinions decided before *Petersen* and *Price* define conduct sufficient to support a conclusion of parental unfitness or neglect.[61]

56. 124 N.C. App. 357, 477 S.E.2d 258 (1996).

57. 152 N.C. App. 53, 567 S.E.2d 159 (2002).

58. *See also* Speagle v. Seitz, 354 N.C. 525, 557 S.E.2d 83 (2001) (discussed below).

59. *Davis*, 152 N.C. App. at 61, 567 S.E.2d at 164.

60. *Id*. at 62, 567 S.E.2d at 165.

61. For examples of unfitness or neglect, *see In re* Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984); *In re* Hughes, 254 N.C. 434, 119 S.E.2d 189 (1961); Browning v. Humphrey, 241 N.C. 285, 84 S.E.2d 917 (1954); Campbell v. Campbell, 63 N.C. App. 113, 304 S.E.2d 262 (1983); *In re* Edwards, 25 N.C. App. 608, 214 S.E.2d 215 (1975). *But cf. In re* Wehunt, 23 N.C. App. 113, 208 S.E.2d 280 (1974); Pendergraft v. Pendergraft, 23 N.C. App. 307, 208 S.E.2d 887 (1974); *In re* Jones, 14 N.C. App. 334, 188 S.E.2d 580 (1972).

Inconsistent Conduct

There also are a number of appellate decisions reviewing trial court decisions regarding whether a parent has acted in a manner inconsistent with his or her protected status, and those decided by the N.C. Supreme Court are discussed below. Nonetheless, the supreme court's decision in *Price v. Howard* still offers the most comprehensive guidance on this issue because it articulates the assumptions underlying the protected status. It is critical to understand these assumptions in order to determine when a parent is acting or has acted in a manner that is inconsistent with them.

The *Price* court held that the underlying rationale for the common law and constitutional protection of parents is the presumption that parents will act in a child's best interest and will "shoulder the responsibilities that are attendant to rearing a child."[62] The court also held that protected status will be lost by the failure of a parent to fulfill these parental responsibilities.[63] In addition, the court noted that while conduct sufficient to support a termination of parental rights may support a finding of conduct inconsistent with the protected status of parents, conduct sufficient to rebut the parental preference "need not rise to the statutory level warranting termination of parental rights."[64] And, decisions of the U.S. Supreme Court relied upon by the court in *Price* indicate that some parents never obtain protected status.[65]

In dealing with the facts of the case before it, the *Price* court held that a period of voluntary relinquishment of custody may support a finding of conduct inconsistent with the protected status of parents if the parent failed to make clear that the period of noncustody was intended to be temporary. In *Price*, the mother and child had resided with plaintiff for three years; the mother had told both the plaintiff and the child that the plaintiff was the father, and she left the child in plaintiff's custody for an additional three years after she separated from plaintiff. The court held that the agreement between plaintiff and defendant at the time defendant left the child in plaintiff's exclusive custody was critical to the determination of whether she waived her superior rights. Accordingly, "if defendant and plaintiff agreed that plaintiff would have custody of the child only for a temporary period of time and defendant sought custody at the end of that time period, defendant would still enjoy a constitutionally protected status absent other conduct inconsistent with that status."[66]

The *Price* court emphasized that many circumstances may justify a parent's temporary relinquishment of custody of a child and listed as examples relinquishments pursuant to "a

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62. Price v. Howard, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997).

63. *See also* Penland v. Harris, 135 N.C. App. 359, 520 S.E.2d 105 (1999) (appropriately fulfilling parental responsibilities includes making decisions regarding "the child's associations, education and religious upbringing"), *and* Hill v. Newman, 131 N.C. App. 793, 509 S.E.2d 226 (1998) (parental responsibilities include "the right to control of their children's associations").

64. *Price*, 346 N.C. at 79, 484 S.E.2d at 534.

65. *See* Lehr v. Robertson, 463 U.S. 248, 262 (1983) (unwed father not entitled to constitutional protection where he had "never had any significant custodial, personal, or financial relationship with [the child], and he did not seek to establish a legal tie until after she was two years old"), *and* Quillion v. Walcott, 434 U.S. 246 (1978) (court held that best interest of the child analysis was appropriate in case against unwed father who for more than eleven years had not taken steps to support or legitimate the child).

66. *Price*, 346 N.C. at 83, 484 S.E.2d at 537. In *Boseman v. Jarrell*, No. 416PA08-2 (N.C. Dec. 20, 2010), the N.C. Supreme Court articulates the holding in *Price* as follows: "[U]nder *Price*, when a parent brings a nonparent into the family unit, represents that the nonparent is a parent, and voluntarily gives custody of the child to the nonparent without creating an expectation that the relationship would be terminated, the parent has acted inconsistently with her paramount parental status."

fosterparent agreement or during a period of service in the military, a period of poor health, or a search for employment."[67] However, to preserve his or her protected status, the parent must clarify to the custodian that the relinquishment of custody is temporary, and "the parent should avoid conduct inconsistent with protected parental interests[,] . . . [such as] failure to maintain personal contact with the child and failure to resume custody when able."[68]

Three N.C. Supreme Court opinions reviewing parental conduct in third party custody cases have been issued since *Price v. Howard*. In *Adams v. Tessener*,[69] the court held that the conclusion that a parent has waived his or her right to custody by conduct inconsistent with the protected status of a parent must be supported by clear and convincing evidence.[70] The *Adams* court also reviewed and upheld the trial court's conclusion that the father of a child born out of wedlock had waived his protected status by failing to take responsibility for the child until after being contacted by DSS regarding child support several months following the birth of the child.

In *Speagle v. Seitz*,[71] the supreme court held that the trial court's findings of fact concerning defendant mother's past conduct and past actions were sufficient to support the conclusion that she had waived her constitutional right to custody even though there was no evidence that the mother was engaging in such conduct at the time of the hearing. The trial court had found that, for a period of time ending approximately three years before the custody trial, the defendant (the mother) had worked as a topless dancer and changed residences frequently and that while she worked late into the night, she left her child in the care of a woman who had been warned by DSS that she kept too many children in her home. Based on these findings, along with findings about the mother's sexual relationship with a man who eventually killed the father of the child, the trial court concluded that defendant's "'lifestyle and romantic involvements' resulted in her 'neglect and separation from the minor child.'" [72]

On review, the court of appeals held that it was error for the trial court to base the conclusion that the mother had waived her constitutional right to custody solely on the past conduct of the mother. The trial court findings indicated that, during the three years immediately preceding the custody trial, the mother remarried and established what appeared to be a more stable home life. The supreme court disagreed, stating that "any past circumstance or conduct which could impact either the present or the future of the child is relevant" to the determination of whether a parent has waived his or her constitutional right to custody.[73]

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67. *Price*, 346 N.C. at 83, 484 S.E.2d at 537.

68. *Id*. at 83–84, 484 S.E.2d at 537. *See also* Grindstaff v. Byers, 152 N.C. App. 288, 567 S.E.2d 429 (2002) (father did not abandon children where he left them in the care of their grandparents because his temporary work schedule made it impossible for him to care for the children and where he "supported his children emotionally and financially" during the time they were in the care of their grandparents); Cantrell v. Wishon, 141 N.C. App. 340, 540 S.E.2d 804 (2000) (remanded with instructions that trial court determine whether mother had voluntarily abandoned her children to the care of an aunt and uncle where there was evidence that she had signed a document in the past relinquishing custody of the children).

69. 354 N.C. 57, 550 S.E.2d 499 (2001).

70. *See also* David N. & Deborah N. v. Jason N. & Charla B., 359 N.C. 303, 608 S.E.2d 751 (2005) (order finding parent has waived his or her constitutional right to custody will be remanded if it does not show that trial court applied the clear and convincing evidentiary standard); Bennett v. Hawks, 170 N.C. App. 426, 613 S.E.2d 40 (2005) (same).

71. 354 N.C. 525, 557 S.E.2d 83 (2001).

72. *Id*. at 528, 557 S.E.2d at 85.

73. *Id*. at 531, 557 S.E.2d at 87. *See also* Cantrell v. Wishon, 141 N.C. App. 340, 540 S.E.2d 804 (2000) (error for trial court to refuse to hear evidence of mother's past misconduct).

Finally, in *Owenby v. Young*,[74] the supreme court held that the appellate courts must accept a trial court's findings of fact if supported by competent evidence even if other evidence might have supported contrary findings. In *Owenby*, the trial court, concluding that the grandmother did not meet her burden of proving that the father had waived his rights, dismissed her complaint. The court of appeals reversed, holding that the grandmother's assertions that the father had been convicted twice of drunk driving, had continued to drive after having his license revoked, and had an unstable employment and financial history was sufficient to support a conclusion that the father had acted in a manner inconsistent with his protected status. The supreme court reversed the court of appeals and reinstated the trial court's dismissal of the grandmother's complaint after concluding that the trial court had considered and rejected each allegation concerning the father's misconduct. While the father was convicted of DWI twice in a five-year period, the trial court specifically found that there was no evidence that he engaged in heavy drinking on a regular basis. The supreme court noted that the children were not present on either occasion when the father was arrested for DWI. In addition, the trial court found that the only time the father drove on public roads after having his license revoked was when he drove to get the children the night their mother was killed. Finally, the trial court's conclusion that the father had a stable work history was supported by evidence that he had been employed by the same company for more than eight years. The supreme court held that the trial court's findings supported the conclusion that the grandmother had failed to prove by clear and convincing evidence that the father had waived his constitutional right to custody.[75]

Inconsistent Conduct: Granting Permanent Parental Rights to Third Party

In *Price*, the supreme court held that a temporary relinquishment of custody of a child is not sufficient to support the conclusion that a parent has acted inconsistently with his protected status as parent. However, the court also indicated that a relinquishment not intended to be temporary may well amount to a waiver of constitutional rights. The *Price* court remanded the case to the trial court for a determination of the mother's intent at the time she gave physical custody of her child to the plaintiff.[76] In a subsequent opinion issued by the supreme court in the case of *Boseman v. Jarrell*, No. 416PA08-2 (N.C. Dec. 20, 2010), the supreme court articulated the holding in *Price* as follows: "when a parent brings a nonparent into the family unit, represents that the nonparent is a parent, and voluntarily gives custody of the child to the nonparent

74. 357 N.C. 142, 579 S.E.2d 264 (2003).

75. As stated by the court in *Price*, whether a parent has waived his or her constitutional rights is a factual determination to be made on a case-by-case basis. For other opinions reviewing trial court determinations on this issue, *see* 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 the child while she finished school; grandparents' allegations that they could offer child a higher standard of living were held to be irrelevant to the issue); McDuffie v. Mitchell, 155 N.C. App. 587, 573 S.E.2d 606 (2002) (trial court properly dismissed grandparent complaint for custody against father where complaint alleged only that father "had been estranged from the children for some time and currently enjoys limited visitation with the minor children"; allegations were insufficient as a matter of law to support a finding that father had waived his right to custody); *and* Ellison v. Ramos, 130 N.C. App. 389, 502 S.E.2d 389 (1998) (pleading sufficient to withstand dismissal where caretaker alleged she had cared for child since birth and that father had placed child in care of others who were unable to care for child's medical conditions resulting in hospitalization).

76. Price v. Howard, 346 N.C. 68, 83, 484 S.E.2d 528, 537 (1997).

without creating the expectation that the relationship would be terminated, the parent has acted inconsistently with her parental status."

The appellate courts have applied and extended this aspect of the *Price* analysis to resolve custody disputes concerning children born into same-sex domestic partnerships. In *Boseman* and in four cases decided to date by the court of appeals, the courts have held that when a biological parent relinquishes her right to exclusive care and control of a child by granting parental status to her partner and the parent intends at the time of granting that the status will be permanent, the biological parent has waived her constitutional protection.[77] When the trial court determines that there has been such a waiver of protected status by the biological parent, the trial court has authority to apply the best interest analysis to resolve disputes regarding the custody of the child.

Two opinions issued by the court of appeals on the same day in 2008 were the first to address this situation, and the contrasting fact scenarios in these two cases gave the court a unique opportunity to illustrate clearly how the specific facts of the case will impact application of the legal principles adopted by the court. In *Mason v. Dwinnell*,[78] the appellate court upheld the trial court's application of the best interest analysis to determine custody, whereas in *Estroff v. Chatterjee*[79] it upheld the trial court's conclusion that application of the best interest test would violate the biological parent's constitutional right to exclusive care, custody, and control of the child.

Mason v. Dwinnell

Plaintiff and defendant had lived together as same-sex domestic partners for eight years when they decided to become parents. The two participated in a commitment ceremony attended by family and friends and together decided that the defendant (Dwinnell) would undergo artificial insemination to become pregnant. The couple together chose an anonymous sperm donor who had physical characteristics similar to the plaintiff (Mason), and both attended all prenatal appointments and childbirth classes during the pregnancy. Mason was present at the child's birth, and both asked that her name be listed on the birth certificate, but the request was denied by the hospital. The child was named Mason Dwinnell to reflect the surnames of both plaintiff and defendant. The couple held a baptismal ceremony in which they presented themselves as a family unit to their friends and families and acknowledged the parents of both plaintiff and defendant as grandparents of the child.

The couple then lived as a "family unit," with plaintiff and defendant sharing all parenting responsibilities for the child, including daily caretaking, financial support, and school and health care decision making. When the child was three years-old, the parties executed a "Parenting Agreement" prepared by an attorney wherein each party acknowledged and agreed that

77. The four opinions are *Mason v. Dwinnell*, 190 N.C. App. 209, 660 S.E.2d 58 (2008) (biological parent waived protected status); *Estroff v. Chaterjee*, 190 N.C. App. 61, 660 S.E.2d 73 (2008) (biological parent did not waive protected status); *Heatzig v. McLean*, 191 N.C. App. 451, 664 S.E.2d 347 (2008) (biological parent probably waived protected status, but trial court opinion lacked sufficient detail for review; court of appeals reiterated analysis set out in *Mason* and *Estroff* and remanded case to trial court for clarification); and *Swan v. Davis,* 697 S.E.2d 473 (N.C. Ct. App. 2010) (biological parent waived protected status). The appellate court upheld the trial court decision regarding waiver in all of the cases except *Heatzig*, where the court remanded the case for further findings of fact.

78. 190 N.C. App. 209, 660 S.E.2d 58 (2008).

79. 190 N.C. App. 61, 660 S.E.2d 73 (2008).

they "jointly decided to conceive and bear a child," that Mason would adopt the child with the consent of Dwinnell if North Carolina law allowed second-parent adoptions, that Mason was a "de facto" parent of the child, and that both agreed the relationship between Mason and the child should be promoted and protected. They further agreed upon a plan for shared custody of the child should the parties cease living together. This document specifically stated: "Each party acknowledges and agrees that all major decisions regarding their child, including but not limited to, residence, support, education, religious upbringing and medical care shall be made jointly by the parties."[80] In addition, when completing various school and medical forms for the child, Dwinnell generally marked through the term "father" and "husband" and inserted the term "co-parent," listing plaintiff Mason in that place.

Even after the couple ceased living together the parties continued to co-parent the child. However, after three years of sharing almost equal time with the child while living in separate residences, Dwinnell attempted to limit Mason's access to the child. Mason filed a complaint seeking joint custody. The trial court determined that Dwinnell had waived her constitutional right to exclusive care, custody, and control of the child and then concluded that joint custody between the parties was in the child's best interest.

Dwinnell appealed the trial court's decision, but the court of appeals affirmed. The appellate court first held that the trial court was correct when it applied the *Price* analysis to this situation. Rejecting defendant's argument that this case raised issues of public policy more appropriately left to the General Assembly to resolve through the legislative process, the court of appeals held that "[r]ather than a question of legislative intent or State public policy, this appeal primarily presents a question of constitutional law."[81] The court also stated that "the factual context of this case—involving same sex domestic partners—is immaterial to the proper analysis of the legal issues involved."[82] Rather, according to the court of appeals, the question presented is the same one presented in *Price*, that is, "whether, under the facts of this case, the trial court was required to hold that defendant's constitutionally protected interest in the companionship, custody, care, and control of her child must prevail or whether the statutorily prescribed 'best interest of the child' test should have been applied to determine custody."[83]

In upholding the decision of the trial court, the court of appeals stated that "like all parents, Dwinnell had the constitutionally-protected right to 'maintain a zone of privacy' around her and her child. . . . Indeed, since no biological father was present, Dwinnell exercised exclusive and autonomous parental authority in relation to her child." However, the trial court correctly concluded that Dwinnell "gave up her right to unilaterally exclude Mason (or unilaterally limit contact with Mason) by choosing to cede to Mason a significant amount of parental responsibility and decision-making authority to create a permanent parent-like relationship with her child."[84] The court of appeals cited the significant amount of evidence supporting the trial court's ultimate findings that Dwinnell had "encouraged, fostered, and facilitated the emotional and psychological bond between the minor child and [Mason]," that she had chosen "to share her decision-making authority with Mason," and that she "intended that this parent-like relationship be a

80. *Mason*, 190 N.C. App. at 213, 660 S.E.2d at 61.
81. *Id*. at 216, 660 S.E.2d at 63.
82. *Id*. at 211, 660 S.E.2d at 60.
83. *Id*. at 216–17, 660 S.E.2d at 63 (citing Price v. Howard, 346 N.C. 68, 74, 484 S.E.2d 528, 531 (1997)).
84. *Id*. at 226, 660 S.E.2d at 69.

permanent relationship for her child."[85] The court of appeals held that these facts established that "Dwinnell, after choosing to forego as to Mason her constitutionally-protected parental rights, cannot now assert those rights in order to unilaterally alter the relationship between her child and the person whom she transformed into a parent."[86]

The court of appeals rejected Dwinnell's argument that the *Price* decision does not contemplate that "good acts" by a parent nevertheless can be conduct inconsistent with the parent's constitutional rights. She argued that she had not abandoned or relinquished all control over the child and had not abused or neglected the child. She acknowledged that the relationship between Mason and the child had been good for the child for many years and argued that conduct which does not harm the child cannot be conduct inconsistent with her constitutional status. The court of appeals responded to this argument by stating that "the focus is not on whether the conduct [of the parent] consists of 'good acts' or 'bad acts.' Rather, the gravamen of 'inconsistent acts' is the volitional acts of the legal parent that relinquish otherwise exclusive parental authority to a third party."[87] However, the court of appeals also stated that while establishing the relationship with Mason may not have been "bad" for her child, Dwinnell's conduct in "encouraging a child to view a third person, with whom the child lives, as a parent and to develop a parent-child bond with that person with the expectation that it would continue and then severing that relationship cannot be viewed as benign conduct."[88]

Also, though concluding that Dwinnell acted inconsistently with regard to her constitutional protection, thereby enabling the trial court to apply the best interest analysis to determine custody between Dwinnell and Mason, the court of appeals made a point of clarifying the limits of this opinion. First, the court noted that it was not holding that agreements between same-sex domestic partners, such as the one executed between Mason and Dwinnell, are enforceable in North Carolina. In responding to Dwinnell's argument that such agreements violate public policy, the court of appeals clarified that the trial court did not enforce the contract. Rather, the trial court "relied upon the agreement as a manifestation of Dwinnell's intent to create a permanent family unit involving two parents and a child that would continue even if the relationship between Dwinnell and Mason did not."[89] In other words, the agreement was used only as evidence of Dwinnell's intent and conduct. Therefore, neither the trial court nor the court of appeals was called upon to decide whether such agreements are enforceable in North Carolina. Second, the court of appeals clarified that the decision in this case did not grant Mason legal status as a parent, only the right to have the trial court apply the best interest analysis to determine custody. While Dwinnell's choice to share parental rights with Mason did result in the waiver of her right to object to the best interest test, "[h]er choice does not mean that Mason is entitled to the rights of a legal parent."[90]

85. *Id*. at 223, 660 S.E.2d at 67.
86. *Id*. at 227, 660 S.E.2d at 70.
87. *Id*. at 228, 660 S.E.2d at 70.
88. *Id.* at 229, 660 S.E.2d at 70.
89. *Id*. at 224, 660 S.E.2d at 68.
90. *Id*. at 227, 660 S.E.2d at 70. The court also stated that this case does not present the issue of whether a former domestic partner may acquire the status of a legal parent, and "[t]herefore, we decline to address the doctrine of parent by estoppel adopted in other jurisdictions." *Id.* at 218, 660 S.E.2d at 64.

Estroff v. Chatterjee

Plaintiff Estroff and defendant Chatterjee[91] also resided together in a same-sex domestic partnership at the time twin children were born to Chatterjee through artificial insemination. However, based on evidence that Chatterjee never intended to confer parental status on Estroff and that she intended to be and remain the only parent of the children at the time of their birth and throughout the time the parties resided together, the trial court concluded that Chatterjee had not engaged in conduct inconsistent with her constitutionally-protected status as a parent and therefore dismissed Estroff's complaint seeking joint custody of the twins. On appeal, the court of appeals distinguished the facts found by the trial court in this case from those found in *Mason* and upheld the ultimate conclusion of the trial court.

Unlike *Mason*, wherein the trial court found that the parties made a joint decision to become parents, the trial court in *Estroff* found that Chatterjee decided to become pregnant and thereafter obtained Estroff's approval to raise the child in the context of their relationship and in their jointly owned house. While Estroff made statements to family and friends that the parties were "co-parents" to the twins, Chatterjee did not make such statements and actually stated to hospital staff at the time of the babies' birth that she was not comfortable with others referring to Estroff as a "mom" to the children. The trial court also found that Chatterjee reminded Estroff that Estroff was not a parent of the children and that she "was and always would be their only mother." While Estroff provided daily care and financial support to the children, and developed a strong bond with the twins, the trial court concluded that this relationship was one where Chatterjee viewed Estroff "as a significant, loving adult caretaker but not as a parent."[92]

According to the court of appeals, when deciding whether a parent in this situation has acted inconsistently with her protected status, the focus of the trial court "must be on whether the legal parent has voluntarily chosen to create a family unit and to cede to the third party a sufficiently significant amount of parental responsibility and decision-making authority to create a permanent parent-like relationship with his or her child."[93] In making this determination, both the intent and the conduct of the legal parent are relevant. While conduct such as allowing a nonparent to provide significant caretaking and financial support and to develop a significant bond with the child gives a nonparent standing to file an action for custody, those actions alone will not result in waiver of protected status unless the parent also intends to permanently share parental status with the third party. The court of appeals quoted language from the court's earlier decision in *Seyboth v. Seyboth*,[94] where the court addressed a claim for custody filed by a stepfather, and then stated: "Further evidence and findings—beyond just the parent-like relationship and strong parent-child bond between the stepfather and child—were necessary to comply with the standard in *Price*."[95]

91. 190 N.C. App. 61, 660 S.E.2d 73 (2008).
92. *Id*. at 74, 660 S.E.2d 81.
93. *Id.* at 70, 660 S.E.2d at 78.
94. 147 N.C. App. 63, 554 S.E.2d 378 (2001).
95. *Estroff*, 190 N.C. App. at 75, 660 S.E.2d at 81.

Davis v. Swan

With facts very similar to both *Mason* and *Estroff*, the opinion in the case of *Davis v. Swan*[96] illustrates that a court can find that a parent has ceded parental authority to a domestic partner even when the partners did not formally acknowledge the relationship in a written parenting agreement as the parties had done in *Mason*. In *Davis*, the court of appeals upheld the trial court's conclusion that the defendant (Swan) waived her constitutional right to exclusive custody, thereby allowing the court to apply the best interest test and award joint custody to the parties.

Despite the absence of an explicit written statement of intent by the biological parent, the court of appeals held that the following facts clearly established "Swan's intent jointly to create a family with Davis and intentionally to identify her as a parent of the minor child": the partners jointly decided to have a child and agreed that Swan would be the one to get pregnant, Davis helped choose the sperm donor and attended doctor's appointments, the parties had a baby shower and planned the nursery together, Swan allowed Davis to be present at the birth of the child, the parties sent birth announcements to friends and family referring to the child as "our daughter," the parties gave the child the surname Swan–Davis, and the parents of both parties were identified publically as grandparents of the child.[97]

According to the court of appeals however, the most important findings of the trial court in *Davis* were that "'the parties jointly decided to create a family and intentionally took steps to identify Plaintiff as a parent of the minor child'; Swan 'encouraged, fostered, and facilitated the emotional and psychological bond between [Davis] and the minor child up until the parties' separation'; and Swan 'testified that, prior to and at the time of [minor child]'s birth, she assumed both of the parties would be parents to [minor child].'"[98] These facts were sufficient to support the conclusion that Swan intended to grant parental status to Davis and that she intended that the parent–child relationship between Davis and the minor child would be permanent.

Boseman v. Jarrell

The North Carolina Supreme Court held in *Boseman v. Jarrell*[99] that the analysis adopted by the court of appeals in *Mason* described above is an appropriate application of the principles set forth in *Price v. Howard.* In *Boseman*, the supreme court upheld the conclusion of the trial court that a birth mother had waived her constitutional protection by conduct substantially similar to the conduct of the birth mothers in both *Mason* and *Davis*. Because the mother had waived her constitutional right to exclusive care and control of the child, the supreme court held that the trial court correctly applied the best interest test to determine custody between the birth mother and her partner.

In *Boseman*, the supreme court held that the following facts amounted to clear and convincing evidence sufficient to support the conclusion that the biological parent had acted inconsistently with her protected status:

> [D]efendant [birth mother] intentionally and voluntarily created a family unit in which plaintiff [nonparent] was intended to act—and acted—as a parent. The parties jointly decided to bring a child into their relationship, worked together to

96. 697 S.E.2d 473 (N.C. Ct. App. 2010).
97. *Id*. at 478.
98. *Id*.
99. No. 416PA08-2 (N.C. Dec. 20, 2010).

> conceive a child, chose the child's first name together, and gave the child a last name that "is a hyphenated name composed of both parties' last names." The parties also publically held themselves out as the child's parents at a baptismal ceremony and to their respective families. The record also contains ample evidence that defendant allowed plaintiff and the minor child to develop a parental relationship. Defendant even "agrees that [plaintiff] . . . is and has been a good parent."
>
> Moreover, the record indicates that defendant created no expectation that this family unit was only temporary. Most notably, defendant consented to [an adoption] proceeding before the adoption court relating to her child.[100] . . . In asking the adoption court to create such a relationship, defendant represented that she and plaintiff "have raised the [minor child] since birth and have jointly and equally provide[d] said child with care, support and nurturing throughout his life." Defendant explained to the adoption court that she "intends and desires to co-parent with another adult who has agreed to adopt a child and share parental responsibilities."

Pleading Requirements

The pleading of a nonparent seeking custody against a parent must allege facts sufficient to allow the trial court to find that the parent has waived her constitutionally protected status by unfitness, neglect of the child's welfare, or conduct otherwise inconsistent with the parent's protected status. If such allegations are missing from the pleading, the complaint is subject to dismissal pursuant to Rule 12(b)(6) of the Rules of Civil Procedure for failure to state a claim.[101]

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100. In *Boseman*, plaintiff had adopted the child. In a separate part of the opinion, the supreme court held that the adoption was void because it purported to allow plaintiff to adopt the child without defendant losing all parental rights as required by the adoption statutes.

101. *See* Perdue v. Fuqua, 673 S.E.2d 145 (N.C. Ct. App. 2009) (allegations by grandmother that father had lost his job, began working third shift, left very young girlfriend alone to care for child, and left child in her custody for four months were insufficient to state a claim for custody against father); *and* McDuffie v. Mitchell, 155 N.C. App. 587, 573 S.E.2d 606 (2002) (trial court properly dismissed grandparent complaint for custody against father where complaint alleged only that the father "had been estranged from the children for some time and currently enjoys limited visitation with the children"; allegations were insufficient as a matter of law to support a finding that father had waived his right to custody). *Cf.* Ellison v. Ramos, 130 N.C. App. 389, 502 S.E.2d 389 (1998) (pleading sufficient to withstand dismissal where caretaker alleged she had cared for child since birth and that father had placed child in care of others who were unable to care for child's medical conditions resulting in child's hospitalization); Grindstaff v. Byers, 152 N.C. App. 288, 567 S.E.2d 429 (2002) (complaint was sufficient where grandmother alleged that parents had left children in her care and had visited the children infrequently and inconsistently and had not shown they were capable of caring for and supervising the children); *and* Sharp v. Sharp, 124 N.C. App. 357, 477 S.E.2d 258 (1996) (*see supra* p. 11 for facts alleged in the grandparents' complaint).

Best Interest Determines Custody

According to *Price v. Howard*, application of the best interest test in a case between a parent and a nonparent violates the Due Process Clause as long as the parent retains his or her fundamental liberty interest in the exclusive care, custody, and control of the child.[102] Therefore, a conclusion that a parent has waived his or her constitutionally protected status allows a court to examine best interest, but it does not determine custody of the child. The appellate courts have recognized that a parent may be entitled to custody or visitation even if the parent's actions have been inconsistent with her or his constitutionally protected status, if the trial court determines such custody is appropriate after conducting the best interest analysis.[103]

Grandparents

Many people argue that as a matter of public policy, claims by grandparents for custody and visitation of their grandchildren should be treated differently from those of other third parties. According to supporters of expanded grandparent rights, the benefits children receive from strong relationships with grandparents should be promoted in part by allowing courts to award visitation rights to grandparents when that visitation is shown to be in the best interest of the particular child. And, in response to this perceived need to promote and protect strong relationships between children and their grandparents, legislatures in all fifty states have enacted some type of statute or statutes specifically granting grandparents the right to seek court-ordered visitation with their grandchildren. (The three North Carolina grandparent visitation statutes are discussed below.) However, grandparent visitation statutes throughout the country have been subjected to constitutional scrutiny, and many state courts have been called upon to review their statutes in light of the decision by the U.S. Supreme Court reviewing one of these statutes in *Troxel v. Granville* (discussed below), with varying results.[104]

To date, North Carolina appellate courts have not addressed the constitutionality of granting grandparents any type of protected or distinguished status in custody or visitation claims. However, when a grandparent seeks full or joint custody of a grandchild against a parent pursuant to G.S. 50-13.1(a), the North Carolina appellate courts have consistently required grandparents to prove that the parent is unfit, has neglected the welfare of the child, or has otherwise acted inconsistently with his or her protected status before a trial court can apply the best interest of the child test to determine custody.[105] If grandparents allege facts sufficient to establish that the

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102. See previous discussion of *Price supra* pp. 4–6.

103. *See* Speagle v. Seitz, 354 N.C. 525, 557 S.E.2d 83 (2001) (mother waived constitutional rights by neglecting child; trial court award of liberal visitation upheld); McRoy v. Hodges, 160 N.C. App. 381, 585 S.E.2d 441 (2003) (trial court can determine father should have primary custody even after abandoning son but remanded for further findings to support best interests analysis); Davis v. Swan, 697 S.E.2d 473 (N.C. Ct. App. 2010) (biological mother waived protected status but awarded joint custody with former same-sex partner); Mason v. Dwinnell, 190 N.C. App. 209, 660 S.E.2d 58 (2008) (same).

104. 539 U.S. 57 (2000). A review of the case law in other states is beyond the scope of this bulletin. *See* note 138.

105. *See* Owenby v. Young, 357 N.C. 142, 579 S.E.2d 264 (2003) (discussed in previous section); *Speagle*, 354 N.C. 525, 557 S.E.2d 83 (discussed in previous section); McDuffie v. Mitchell, 155 N.C. App. 587, 573 S.E.2d 606 (2002) (grandparents requested custody after child's mother died; court dismissed claim even though mother had been the custodial parent of the child and father had exercised only sporadic

parent or parents have waived their constitutional right to custody, grandparents can pursue custody pursuant to G.S. 50-13.1, as can any other third party.[106]

Grandparent Visitation Statutes

The present state of the law in North Carolina with regard to claims for grandparent visitation, as opposed to full or joint custody, is less clear and is being developed by appellate case law. There are four statutes that appear to give grandparents the right to seek visitation in North Carolina courts. The first is G.S. 50-13.1, the general grant of standing to "any . . . person . . . claiming the right to custody" (or visitation). This is the statute at issue in both *Petersen v. Rogers* and *Price v. Howard.* In addition, there are three statutes that specifically address visitation claims by grandparents; each is discussed more fully below: G.S. 50-13.2(b1) (grandparent visitation can be ordered as part of "an order for custody"); G.S. 50-13.5(j) (existing custody determination may be modified to include grandparent visitation); and G.S. 50-13.2A (visitation may be ordered following a relative or step-parent adoption). While there have been a number of appellate opinions addressing the application of these statutes, the North Carolina appellate courts have not yet addressed directly the constitutionality of any of these statutes in light of the parental preference articulated in *Petersen* and *Price*. Rather, the appellate courts have addressed the constitutional rights of parents only indirectly by limiting application of the visitation statutes to cases where parents are involved in an "ongoing" custody dispute.

G.S. 50-13.1

The N.C. Supreme Court was presented with a direct constitutional challenge to the first statute, G.S. 50-13.1, in the case of *McIntyre v. McIntyre*.[107] However, the court did not reach the constitutional issue and instead resolved the case by concluding that the General Assembly did not intend that statute to be "a broad grant to grandparents of the right to visitation when the natural parents have legal custody of their children and are living as an intact family."[108]

In *McIntyre*, the plaintiff grandparents filed an action seeking visitation against their son and his wife, who lived together with their children. The grandparents alleged that visitation would be in the best interest of the children and that G.S. 50-13.1 therefore gave them the right to ask the trial court to consider their request. The trial court dismissed plaintiffs' case after concluding that G.S. 50-13.1 was unconstitutional in light of the N.C. Supreme Court's recent ruling in *Petersen v. Rogers*. The trial court reasoned that because G.S. 50-13.1 states that literally any

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visitation with the child); Penland v. Harris, 135 N.C. App. 359, 520 S.E.2d 105 (1999) (maternal grandparents requested joint custody of child who had lived with them while mother attended school; allegations not sufficient to support a conclusion that mother had waived her constitutional right to custody). *But cf.* Everette v. Collins, 176 N.C. App. 168, 625 S.E.2d 796 (2006) (in case between parents, trial court did not err in awarding primary physical custody to dad with "specific approval of placement of the child in the home of [paternal grandmother]" without first finding that child's mother had waived her constitutional right to custody; court of appeals held the constitutional rights of the parents were not implicated because the trial court did not grant custodial rights to the grandmother).

106. *See* Eakett v. Eakett, 157 N.C. App. 550, 579 S.E.2d 486 (2003) (clarifying that the "intact family analysis" discussed below regarding grandparent visitation claims does not apply to custody claims); Sharp v. Sharp, 124 N.C. App. 357, 477 S.E.2d 258 (1996) (rejecting trial court conclusion that grandparents have no standing pursuant to G.S. 50-13.1).

107. 341 N.C. 629, 461 S.E.2d 745 (1995).

108. *Id*. at 634, 461 S.E.2d at 749.

person can seek visitation at any time simply by claiming that the visitation would be in the best interest of the child, application of that statute violated the right of defendant parents to control with whom their children associate.

On appeal, the supreme court reviewed the statute together with the three specific grandparent visitation statutes, none of which were implicated by the facts of this particular case. The court applied rules of statutory construction to conclude that the broad language of G.S. 50-13.1 cannot be read to create a cause of action for grandparents seeking visitation against parents "whose family is intact and where no custody proceeding is ongoing."[109] The court reasoned that because all three of the grandparent visitation statutes give extended rights only in those cases where there has been some type of family disruption, the broad reading of G.S. 50-13.1 advocated by plaintiffs "would nullify any need for" the three grandparent statutes. According to the court in *McIntyre*, "the legislature intended to grant grandparents a right to visitation only in those situations specified in [the] three [grandparent visitation] statutes."[110]

The *McIntyre* court concluded that G.S. 50-13.1 is not a grandparent visitation statute, as are the three statutes discussed below.[111] However, it seems clear that G.S. 50-13.1 remains available to grandparents, as it is available to all third parties, "in those situations where a parent's paramount right to custody may be overcome—for example, when a parent is unfit, has abandoned or neglected the child, or has died."[112]

G.S. 50-13.2(b1)

This grandparent visitation statute states: "An order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate." According to the court of appeals, this statute does not allow grandparents to initiate an independent action for visitation. Instead, it allows them to be granted visitation as part of a custody dispute being litigated between parents.[113]

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109. *Id*. at 635, 461 S.E.2d at 750.

110. *Id.* at 634, 461 S.E.2d at 749.

111. One case from the court of appeals causes some confusion on this issue. In the case of *Fisher v. Gaydon*, 124 N.C. App. 442, 444, 477 S.E.2d 251, 253 (1996), the court acknowledged the holding in *McIntyre* that grandparents cannot seek visitation when children live in an intact family and no custody proceeding is ongoing. However, the court then stated that "it follows that under the broad grant of section 50-13.1(a), grandparents have standing to seek visitation with their grandchildren when those grandchildren are *not* living in a *McIntyre* 'intact family.'" To the contrary, *McIntyre* states that G.S. 50-13.1 is available only when (1) parents have lost their paramount right to custody or (2) custody is at issue between the parents. When custody is at issue between the parents, G.S. 50-13.2(b1) applies rather than G.S. 50-13.1. *See* the following discussion regarding G.S. 50-13.2(b1).

112. *McIntyre*, 341 N.C. at 632, 461 S.E.2d at 748. Despite this statement by the supreme court regarding the death of a parent, the appellate courts have held consistently that a surviving parent remains entitled to constitutional protection following the death of the other parent. *See*, *e.g.*, 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); Shaut v. Cannon, 136 N.C. App. 435, 524 S.E.2d 360 (2000).

113. *See* Sharp v. Sharp, 124 N.C. App. 357, 363, 477 S.E.2d 258, 262 (1996) ("This procedural provision [G.S. 50-13.2(b1)] simply makes clear that grandparents have the right to file suit for custody or visitation during an ongoing proceeding."); Moore v. Moore, 89 N.C. App. 351, 353, 365 S.E.2d 662, 663 (1988) (G.S. 50-13.2(b1) authorizes the court to provide for visitation rights of grandparents when custody of minor children is at issue in an ongoing proceeding but does not allow the court to enter a visitation order when custody is not in dispute.).

There has been one unpublished decision and two published opinions applying this grandparent visitation statute since the supreme court issued the decisions in *Petersen* and *Price*, but none of the three addresses the constitutionality of the statute.[114] In the unpublished opinion, in the case of *Smith v. Smith*,[115] the court of appeals held that G.S. 50-13.2(b1) gave a grandfather the right to intervene and request visitation in a case between the parents of his grandchild because he filed his motion at the same time the mother filed a motion to modify the existing custody order. The court of appeals stated that a grandparent's "right to visitation is dependent on there either being on ongoing case where custody is an issue between the parents or a finding that the parent or parents are unfit." The court of appeals held that there was on ongoing case between the parents in this case because the mother's motion to modify had put custody of the child "at issue." Therefore, G.S. 50-13.2(b1) applied to give the grandfather the right to request visitation.[116]

The two published opinions both address the issue of when a case between the parents is "ongoing." In *Smith v. Barbour*,[117] the trial court conducted a custody trial and determined that the father should have primary physical custody of the child. However, the court left open the issue of the mother's visitation in order to gather more information. The grandmother filed a motion to intervene after the custody trial but before visitation was resolved. The father argued that there was no "ongoing" dispute between the parents at the time the grandmother filed her motion because the custody trial had concluded. The court of appeals disagreed, holding that because the issue of the mother's visitation remained open, the order entered by the trial court after the hearing was only a temporary order and the claim between the parents remained pending. Therefore, the court held that G.S. 50-13.2(b1) gave grandmother the right to intervene in the case.

In *Quesinberry v. Quesinberry*,[118] grandparents intervened in a case initially filed by one parent against the other. Thereafter the parents resolved their dispute through a consent custody order, but that order did not address the pending grandparent visitation claim. The parents argued that because their dispute was no longer "ongoing," the trial court lacked jurisdiction to address the grandparents' claim. The court of appeals disagreed, holding that their claim had been filed when there was a case being litigated between the parents. The unilateral action of the parents in resolving their dispute by consent could not defeat the court's jurisdiction to consider the grandparent's claim for visitation, which had attached when the claim was filed.[119]

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114. *See also* Eakett v. Eakett, 157 N.C. App. 550, 579 S.E.2d 486 (2003) (distinguishing G.S 50-13.2(b1) from the grandparent visitation statute at issue in that case, G.S. 50-13.5(j)).

115. 634 S.E.2d 641 (N.C. Ct. App. 2006).

116. Interestingly, because there was an existing custody order, the court in *Smith* held that the grandfather had to request intervention pursuant to G.S. 50-13.5j (discussed below) and first prove a substantial change of circumstances before requesting visitation pursuant to G.S. 50-13.2(b1).

117. 195 N.C. App. 244, 671 S.E.2d 578 (2009).

118. 196 N.C. App. 119, 674 S.E.2d 775 (2009).

119. The court cited *In re Peoples*, 296 N.C. 109, 146, 250 S.E.2d 890, 911 (1978), wherein the court stated that "[j]urisdiction is not a light bulb which can be turned off or on during the course of the trial. Once a court acquires jurisdiction over an action it retains jurisdiction over that action throughout the proceeding."

G.S. 50-13.5(j)

This grandparent visitation statute provides:

> In any action in which the custody of a minor child has been determined, upon a motion in the cause and a showing of changed circumstances pursuant to G.S. 50-13.7, the grandparents of the child are entitled to such custody or visitation rights as the court, in its discretion, deems appropriate.

This statute recognizes the general principle codified in G.S. 50-13.7 that once a court enters an order regarding custody or visitation of a child, the court retains authority to modify that order if the party seeking modification can show that circumstances regarding the child have changed substantially since the original order was entered and that modification is in the best interest of the child. This grandparent visitation statute specifies that grandparents can seek visitation by intervening in the existing custody case and alleging facts sufficient to support each required conclusion.[120]

The court of appeals has clarified that grandparents may not use this statute to intervene in a custody action between parents after one of the parents dies because the action actually abates upon the death of one party. In *Price v. Breedlove*,[121] a custody order had been entered in a case between the biological parents of the child. Following the death of the grandparent's child, the grandparent attempted to intervene in the case between the parents. The court of appeals held that when the parent died, the trial court lost jurisdiction over the case. Therefore, there was no action in which the grandparent could intervene. However, the court distinguished a similar situation in *Sloan v. Sloan*,[122] where the grandparents seeking modification had been awarded visitation in the original custody order that settled custody between the parents. Following the death of the grandparents' child, the grandparents filed a motion to modify the original visitation order. The court held that because only one of the parties to the original action died, the trial court retained jurisdiction over the case to consider any motion filed by one of the remaining parties. Because the grandparents had been awarded visitation in the original proceeding between the parents, the trial court was required to apply G.S. 50-13.7 to resolve the claim. Once the grandparents established a substantial change of circumstances, the trial court was required to apply the best interest test to determine whether the existing visitation order should be modified.

The appellate courts have not addressed directly the constitutionality of G.S. 50-13.5(j). However, in *Eakett v. Eakett*,[123] the court of appeals acknowledged that application of the statute must be limited to protect the constitutional rights of parents. Applying what it termed to be the "intact family rule," the *Eakett* court upheld the dismissal of a grandfather's claim brought pursuant to G.S. 50-13.5(j) and stated that a "grandparent cannot initiate a lawsuit for visitation rights unless the child's family is already undergoing some strain on the family relationship, such as an adoption or an ongoing custody battle."[124]

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120. *See* Hedrick v. Hedrick, 90 N.C. App. 151, 368 S.E.2d 14 (1988) (the substantial change of circumstances requirement may be met by showing that the grandparents were able to visit the children before the earlier custody order was entered but have since been denied access to the children).

121. 138 N.C. App. 149, 530 S.E.2d 559 (2000).

122. 164 N.C. App. 190, 595 S.E.2d 228 (2004).

123. 157 N.C. App. 550, 579 S.E.2d 486 (2003).

124. *Id*. at 554, 579 S.E.2d at 489.

The plaintiff in *Eakett* was the paternal grandfather of the minor child. The mother and father had divorced, and the mother had been granted custody of the child. Approximately one year after the custody order was entered in the case between the parents, the paternal grandfather filed a motion to intervene in that action pursuant to G.S. 50-13.5(j). He alleged that he had cared for the child while the mother worked following her divorce but that the mother had subsequently refused him access to the child. He argued that G.S. 50-13.5(j) should be read literally to allow him to intervene and request visitation at any time after an original custody order is entered, assuming he can meet his burden of showing a change of circumstances. The trial court dismissed his claim, and the court of appeals affirmed.

The court of appeals cited the supreme court opinion in *Petersen v. Rogers* and stated that a parent has the right "to determine with whom [her] children associate." According to the court, the literal interpretation of the statute advocated by the grandfather "would authorize interference with [the mother's] constitutionally protected rights." The court explained that the "intact family rule" protects the constitutional rights of a parent by restricting application of the grandparent visitation statutes to those situations involving an ongoing disruption of the family unit. The court held that because "no action had been taken in reference to the child's custody for over one year before intervenor filed his complaint," the mother and her child constituted an intact family.[125]

Unfortunately, the court in *Eakett* did not explain the constitutional analysis that would support the conclusion that parents do not enjoy protected status while they are litigating custody between themselves. However, *Eakett* also raises significant questions as to when and under what circumstances this second grandparent statute can be applied. According to *Eakett*, G.S. 50-13.5(j) requires that a grandparent show a substantial change of circumstances since the entry of a custody order between the parents. Therefore, the statute appears to apply only when the custody dispute between the parents is settled rather than ongoing.[126] Hopefully future case law will clarify the constitutional analysis and give more guidance on when, if ever, G.S. 50-13.5(j) is an appropriate basis for a grandparent visitation claim.

G.S. 50-13.2A

This final visitation statute provides:

> A biological grandparent may institute an action or proceeding for visitation rights with a child adopted by a stepparent or relative of the child where a substantial relationship exists between the grandparent and the child. . . . A court may award visitation rights if it determines that visitation is in the best interest of the child.

Generally, adoption of a child severs all legal ties between the child and the biological family. All three grandparent visitation statutes specify that "under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both parents have been terminated, be entitled to visitation rights." However, G.S. 50-13.2A creates an exception where relatives adopt a child or where only one parent has given up or lost parental rights and that parent's role has been legally assumed by a

125. *Id.*

126. If a dispute is ongoing between the parents, G.S. 50-13.2(b1) will apply rather than G.S. 50-13.5(j). *See* Smith v. Smith, 634 S.E.2d 641 (N.C. Ct. App. 2006) (unpublished opinion).

stepparent or other relative. According to the court of appeals, this statute promotes the "conceivably legitimate governmental interest" in maintaining the biological family bond that continues to exist when a child is adopted by relatives or a stepparent.[127]

This statute requires the grandparents to show the existence of a "substantial relationship" between themselves and the grandchild. The court in *Hedrick v. Hedrick*[128] affirmed the determination by the trial court that a sufficient relationship existed where the grandparents had maintained regular visitation with the children since their births, including having the children stay in their home during the day and overnight and taking the children on outings, such as shopping trips. The court also rejected the parents' argument that the grandparents could not show the required relationship because they had not visited with the children in the year immediately preceding the filing of the claim. The court held that it was clear from the evidence that the grandparents had not seen the children during that year only because the parents had prohibited contact.

Again, the appellate courts have not reviewed the constitutionality of this visitation statute in light of the *Petersen* and *Price* opinions. However, the court of appeals did affirm application of the statute following those two opinions in the case of *Hill v. Newman*.[129] In *Hill*, the children had been adopted by their maternal aunt and her husband. A dispute arose between the adoptive parents and the biological maternal grandmother concerning the amount of time the grandmother should be allowed to visit with the children. The grandmother filed her claim pursuant to G.S. 50-13.2A. The adoptive parents argued that the grandmother had no "standing" to bring the action, but the trial court denied their motion to dismiss. Following a hearing, the trial court concluded that visitation with the grandmother was not in the best interest of the children due to the hostility between the adoptive parents and the grandmother.

The court of appeals agreed with the conclusion of the trial court that G.S. 50-13.2A gave the grandmother the statutory right to request visitation. The court held that evidence was sufficient to show that the grandmother in this case had a significant relationship with the children. She had been very involved in caretaking them since their birth, and the children had resided with her for a period of more than eight months before the adoption by the maternal aunt and her husband. While the court of appeals discussed *Petersen* in relation to its review of the trial court's best interest analysis, the court did not discuss the impact of either *Petersen* or *Price* on the application of the visitation statute in general. Instead, the court of appeals applied the statute as written and held that the trial court properly decided the case on the merits after concluding that the children had been adopted by relatives and that the grandmother had a significant relationship with the children. The court of appeals also upheld the trial court's conclusion that visitation was not in the best interest of the children. According to the court, "it is the best interests of the *child*, and not the best interests of the *grandparent*, that is the polar star in [these cases]."[130]

127. *See* Hedrick v. Hedrick, 90 N.C. App. 151, 368 S.E.2d 14 (1988) (rejecting a claim that this statute violates the Equal Protection Clause).

128. *Id.*

129. 131 N.C. App. 793, 509 S.E.2d 226 (1998).

130. *Id.* at 799, 509 S.E.2d at 231.

Troxel v. Granville

Three years after the N.C. Supreme Court issued the opinion in *Price v. Howard*, the U.S. Supreme Court reviewed a grandparent's claim for visitation in the case of *Troxel v. Granville*.[131] In *Troxel*, the court affirmed that parents have a fundamental liberty interest in the custody and control of their children that is protected by the Due Process Clause of the Fourteenth Amendment to the federal constitution. In addition, the court in *Troxel* acknowledged that this fundamental liberty interest restricts a trial court's authority to apply the best interest standard in custody and visitation cases between parents and nonparent third parties. However, the opinion does not give more than very general guidance about the extent of this limitation on the authority of state courts to apply the best interest of the child test in a grandparent visitation case.

The court in *Troxel* examined a Washington state visitation statute with language very similar to that of North Carolina G.S. 50-13.1. The Washington statute stated: "Any person may petition the court for visitation at any time, including but not limited to custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child."[132] Paternal grandparents filed a claim in Washington state court pursuant to that statute, requesting that the trial court order increased visitation with their grandchildren. The grandparents alleged that the mother of the children had restricted their visitation unreasonably following the death of their son, the father of the children. The mother allowed the children to visit the grandparents one day each month, but the trial court found that the grandparents should see the children one weekend each month, one week during the summer, and for four hours on each grandparent's birthday.

The Washington Supreme Court reversed the trial court after concluding that the visitation statute was unconstitutional as written because it violated the fundamental right of parents to rear their children free from governmental interference. According to the Washington court, the statute had two problems: First, the statute allowed a trial judge to award visitation over a parent's objection without first finding that the child would be harmed by a lack of visitation with the grandparents. That court held that only a showing of harm can establish the compelling state interest sufficient to justify interference with a fundamental right. Second, the statute was overly broad because it allowed a court to award visitation at any time, to any person, with the only requirement being that the court determine that visitation is in the best interest of the child. The court held that the Due Process Clause prohibits the state from overriding a parent's determination of best interest based solely on the premise that a judge can make a "better decision" than the parent.

The U.S. Supreme Court, in *Troxel*, affirmed the result reached by the Washington Supreme Court but was unwilling to declare the statute unconstitutional as written. Instead, the Court held that the Washington statute was unconstitutional as applied in this particular case. The Court did not adopt the compelling state interest standard of review that had been adopted by the Washington Supreme Court. Therefore, the Supreme Court declined to hold in this case that harm to a child must be shown before a court can override a parent's decision regarding visitation. However, the Court did not reject the compelling state interest standard either. Instead the court concluded that it did not need to "define the precise scope of parental due process rights in the visitation context" because the case could be decided on other grounds.[133]

131. 530 U.S. 57 (2000).
132. Wash. Rev. Code § 26.10.160(3) (1996).
133. *Troxel*, 530 U.S. at 71.

The *Troxel* Court first held that parents do have a fundamental liberty interest in the "care, custody, and control" of their children protected by the Fourteenth Amendment. Further, the court held that fit parents are presumed to act in the best interest of their own children. According to the court, "so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."[134] Therefore, according to the Court, application of the best interest of the child test without the showing of "special factors" or appropriate "deference" to the parent violates due process.

The Court then held that the Washington statute was unconstitutional as applied in this particular case for three basic reasons. First, the trial court's interpretation of the statute was "breathtakingly broad" because it allowed any person seeking visitation to subject any decision by a parent concerning visitation to state court review. The Court noted that because the best interest determination is based "solely in the hands of the judge," the judge always will prevail when a judge and a parent disagree. The Court held that the ease with which a fit parent's decision could be overridden by a trial judge made the application of the statute impermissibly broad.

Second, the Court found fault with the fact that the decision by the mother to limit visitation was given "no deference" by the trial court. Instead, the trial court assumed that visitation with the grandparents was good for the children and placed the burden on the mother to show why visitation should not be allowed. According to the Court, "if a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination."[135]

Finally, the Court concluded that there were no "special factors" involved in this case to justify interference with the mother's constitutional rights. According to the Court, "this case involves nothing more than a simple disagreement between the Washington [state] Court and [the mother] concerning her children's best interests."[136] The Court held that due process does not permit a state to infringe on the fundamental rights of parents "simply because a state judge believes a 'better' decision could be made."[137]

Many state courts have reviewed their grandparent visitation statutes in light of *Troxel*, with varying results.[138] And, any constitutional review of the North Carolina grandparent visitation statutes must consider the *Troxel* opinion. Unfortunately, *Troxel* does not answer the ultimate question of whether grandparent statutes can be applied without violating the due process rights of parents. Even more unfortunate is the fact that the opinion does not provide clear guidance on the appropriate constitutional analysis required to answer that ultimate question.

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134. *Id.* at 68–69.

135. *Id*. at 70.

136. *Id.* at 60–61.

137. *Id*. at 73.

138. A review of state court decisions interpreting *Troxel* is beyond the scope of this bulletin. For more information on the response by other states, see Kristine Roberts, *State Supreme Court Applications of* Troxel v. Granville *and the Courts' Reluctance to Declare Grandparent Visitation Statutes Unconstitutional*, 41 Fam. Ct. Rev. 14 (2003); and John Dewitt Gregory, *The Detritus of Troxel*, 40 Fam. L.Q. 133 (2006).

Conclusion

Petersen, *Price*, and *Troxel* clearly establish that parents have a fundamental liberty interest in the care, custody, and control of their children. That right includes the right to control with whom their children associate. Each opinion also explains that this liberty interest impacts the ability of a state court to apply the best interest of the child standard to determine custody and visitation disputes between parents and nonparent third parties. While the U.S. Supreme Court did not specify the extent of this impact in the *Troxel* opinion, the N.C. Supreme Court did adopt an analysis in the *Petersen* and *Price* opinions that places significant restrictions on claims by nonparent third parties and gives significant protection to parents. When a third party, including a grandparent, seeks full or joint custody, the constitutional and common law rights of parents as articulated by the N.C. Supreme Court appear to prohibit North Carolina trial courts from determining best interest under any circumstances.[139] The determination of a child's best interest is left to the parent until it is established that the parent has lost his or her constitutionally protected status.

Both *Petersen* and *Price* indicate that the same analysis applies to claims for visitation. Therefore, these two decisions raise significant questions about the constitutionality of the three statutes enacted by the General Assembly to give grandparents expanded rights with regard to their grandchildren. In addition, the *Troxel* opinion indicates that, at the very least, trial courts must take care to show appropriate deference to the opinions of parents regarding the needs and interests of their children.

With regard to grandparent visitation, the North Carolina appellate courts have addressed the constitutional issues raised by the three opinions only indirectly by attempting to limit application of the visitation statutes to situations where a family is involved in an ongoing custody dispute. However, it remains unclear whether this approach will satisfy the constitutional requirements identified by *Peterson, Price*, and *Troxel*.

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139. *But see* discussion *supra* note 20.

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