

# FAMILY LAW BULLETIN

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## THIRD PARTY CUSTODY AND VISITATION ACTIONS: THE PRESENT STATE OF THE LAW IN NORTH CAROLINA

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When parents turn to the court to resolve a dispute between themselves regarding custody of their child, North Carolina law clearly provides that the dispute is resolved by application of the best interest of the child standard. That is, the court imposes a custody and visitation plan upon 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 his or her decision-making process. *See In re Pearl*, 305 N.C. 640, 290 S.E.2d 664 (1982).

However, the legal analysis becomes more complicated when the custody or visitation dispute is between a parent and a non-parent 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. There has been a significant amount of litigation in the last two decades, both within North Carolina and throughout the country, concerning 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, the article reviews statutory and case law dealing specifically with grandparents to

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determine whether custody and visitation claims by grandparents are treated differently from claims by other third parties.<sup>2</sup>

### **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. North Carolina General Statutes (hereinafter G.S.) 50-13.1(a) 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 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. *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)(step-grandmother allowed to seek visitation over parent's objection). Further, regardless of the legal or biological status of the parties, the court of appeals held that the trial court should resolve all custody and visitation disputes by application of the best interest of the child analysis. *See Black v. Glawson*, 114 N.C. App. 442, 442 S.E.2d 79

<sup>2</sup> 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.

(1994)(third parties do not have to prove a parent unfit in order to gain custody or visitation).

#### ***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*, 337 N.C. 397, 445 S.E.2d 901 (1994), the supreme court held that despite the seemingly broad language of the statutes, the right of a non-parent 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 non-parent 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 birth of the child, mother Pamela Rowe had placed the child with the Department of Social Services for adoption. The Petersens had taken physical custody of the child within days of the child's birth, and petitioned for adoption. An adoption order was entered, but that order was subsequently set aside by the North Carolina Supreme Court. When the adoption was set aside, custody of the child reverted to the Department of Social Services pursuant to G.S. 48-20(c) (1991). The Department 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 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 defendant natural parents because the trial court had found the natural parents to be "fit and proper" to care for the child and that they had not neglected the welfare of the child.

In reaching this decision, the court in *Petersen* pointed out that the Supreme Court of the United States has held that "[t]he 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.” *Petersen*, 337 N.C. at 400, 445 S.E.2d at 903 (citations omitted). In addition, the Petersen court noted that the United States 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.” *Id.* at 401, 445 S.E.2d at 903 (citations omitted). Given these protections, the United States Supreme Court also has stated that “as long as a parent is fit, the interest of the State in caring for children is de minimis.” *Stanley v. Illinois*, 405 U.S. 645, 657-58, 92 S.Ct. 1208, 1216, 31 L.Ed.2d 551, 562 (1972).

The *Petersen* court also noted that the United States 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 interest 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 interest 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.

507 U.S. 272, 113 S.Ct. 1439, 1448, 123 L.Ed.2d 1, 18 (1993). The *Petersen* court also 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*, where the court stated:

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

264 N.C. 711, 715, 142 S.E.2d 592, 596 (1965). And, even before *Jolly v. Queen*, the North Carolina Supreme Court stated in the case of *In re Hughes* 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.

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

The *Petersen* court concluded, based on the cited opinions by the United States Supreme Court and by the North Carolina 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.” *Petersen*, 337 N.C. at 403-04, 445 S.E.2d at 905.

The *Petersen* court also concluded that the same principles apply to claims for visitation. Therefore, 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*:

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.

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

***Price v. Howard***

The North Carolina Supreme Court revisited the issue of parental rights in *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997). The court in *Price* 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 non-parent.

In *Price*, plaintiff and defendant resided together at the time the minor child was born. Defendant mother represented to plaintiff and the minor child that plaintiff was the natural father of the child. The parties stopped living together when the child was 3 years old and the child resided with plaintiff after the separation. When the child was 6 years old, defendant 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 he was not the biological father, the trial court held it was bound by *Petersen* to award custody to defendant 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. *Price v. Howard*, 122 N.C. App. 674, 471 S.E.2d 673 (1996).

In reviewing the decision of the court of appeals, the supreme court stated that the *Petersen* opinion contains only “general principals” of law relating to the constitutional interests of parents. This case, according to the court, 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. The court stated “[t]his 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 child.” *Price*, 346 N.C. at 72, 484 S.E.2d at 530.

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.” *Id.* at 75, 484 S.E.2d at 532. 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.” *Id.* at 75, 484 S.E.2d at 532. 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 non-parent 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.” *Id.* at 79, 471 S.E.2d at 534.<sup>3</sup>

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.” *Id.* Therefore, a parent does not obtain protected status or 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.” *Id.* The court held that while “[u]nfitness, neglect and abandonment clearly constitute conduct inconsistent with the protected

<sup>3</sup> 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 v. Rogers*. 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 best interest of the child 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 Blixt v. Blixt*, 774 N.E.2d 1052 (Mass. 2002); *Lopez v. Martinez*, 102 Cal.Reptr.2d 71 (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*, 769 N.E.2d 1 (Ill. 2002); *Hawk v. Hawk*, 855 S.W. 573 (Tenn. 1993).

status that parents enjoy[,]” other types 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.” *Id.*, at 79, 471 S.E.2d at 534-35.

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. Therefore, the court remanded the case to the trial court with instruction that the trial court determine whether defendant mother 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 non-parent against a parent.<sup>4</sup> A non-parent 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. 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*, 130 N.C. App. 389, 502 S.E.2d 389 (1998), 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 v. Rogers* that “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.” *Petersen*, 337 N.C. at 405-06, 445 S.E.2d at 906. 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 an assertion of interest in a child’s welfare is

<sup>4</sup> For visitation claims by grandparents, see discussion below regarding grandparent visitation statutes.

insufficient to grant standing.” *Ellison*, 130 N.C. App. at 394, 389 S.E.2d at 894. Therefore, “a third party who has no relationship with a child does not have standing under G.S. 50-13.1 to seek custody from a natural parent.” *Id.* See also *Krauss v. Wayne County DSS*, 347 N.C. 371, 493 S.E.2d 428 (1997)(a biological father whose parental rights had been terminated did not have standing under G.S. 50-13.1 to seek custody of the children).

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 non-parent plaintiff properly alleged standing by claiming 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 child has known.” 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).<sup>5</sup>

The court in *Ellison* did not state specifically that any person biologically related to a child will have standing. And, there has been no North Carolina appellate opinion to date dealing with the standing of persons who are biologically related but who do not have a significant personal relationship with the child. The cases dealing with grandparents, discussed below, do not address the issue of standing. So it remains unclear whether the fact of a biological relationship alone will be sufficient to establish standing under *Ellison* or whether the appellate courts will require a showing of some type of bond between the individual child and the biological relative. The *Ellison* court stated that while a trial court must determine that the relationship between the child and the third party is such that the third party is not a “stranger”, it recognized that a variety of circumstances exist that would support such a finding. The *Ellison* decision does not indicate that the relationship must be as significant and close as was the relationship between the child and the third party in that particular case.

<sup>5</sup> 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.

## 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.<sup>6</sup> Other North Carolina appellate court opinions clarify that single, unwed parents enjoy the same constitutional rights as married parents. 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, 520 S.E.2d 105(1999), the court of appeals stated “[r]aising a child out of wedlock does not constitute conduct sufficient to establish a waiver of constitutional rights.” Similarly, the fact that parents were once married but then divorced appears to have no impact on the protected status of each parent. 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).

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*. 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); *Davis v. McMillian*, 152 N.C. App. 53, 567 S.E. 2d 159 (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).

The North Carolina courts have clarified that parents whose rights have been legally terminated lose all constitutional protections and lose all rights to petition for custody or visitation pursuant to G.S. 50-13.1. See *Kelly v. Blackwell*, 121 N.C. App. 621, 468 S.E.2d 400 (1996); *Krauss v. Wayne County DSS*, 347 N.C. 371, 493 S.E.2d 428 (1997). Similarly, the courts have held that stepparents do not enjoy the constitutional protections afforded to natural and adoptive parents. In *Seyboth v. Seyboth*, 147 N.C. App. 63, 554 S.E.2d 378(2001), 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 he was not the biological parent of the child. In *Jones v. Patience*, 121 N.C. App. 434, 466 S.E.2d 720 (1996), 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 rebutted only upon a showing that another man has formally acknowledged paternity, ... or has been adjudicated to be the father of the child." *Jones v. Patience*, 121 N.C. App. at 439, 466 S.E.2d at 723.

## 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 non-parent third party. In *Bivens v. Cottle*, 120 N.C. App. 467, 462 S.E.2d 829 (1995), the maternal grandparents had custody of a minor child pursuant to a custody order entered before *Petersen*. After *Petersen*, the natural mother filed a motion claiming that because the trial court found her to be a fit and proper parent, 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.” *Bivens*, 120 N.C. App. at 469, 462 S.E.2d at 831. The court held that “once the custody

<sup>6</sup> The case of *Troxel v. Granville* decided by the United States Supreme Court and discussed below also involved parents who never married.

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) that a change in custody is in the best interest of the child.” *Id.*, quoting *Dobos v. Dobos*, 111 N.C. App. 222, 226, 431 S.E.2d 861, 863 (1993). The court reached the same conclusion on similar facts in the case of *Speaks v. Fanek*, 122 N.C. App. 389, 470 S.E.2d 82 (1996).

In *Sloan v. Sloan*, 164 N.C. App. 190, 595 S.E.2d 228 (2004), 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 grandparents moved to modify the order to increase their visitation, mother argued that grandparents could not seek modification without first showing 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 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*, 139 N.C. App. 222, 533 S.E.2d 541(2000), 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 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, if the court finds a substantial change, the court cannot apply the best interest test to determine whether custody should be granted to the non-parent third parties unless the court first finds that the mother has waived her superior constitutional right to the care, custody and control of her child. *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)(discussed further below), 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).

## 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.<sup>7</sup>

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. In *Raynor v. Odom*, 124 N.C. App. 724, 478 S.E.2d 655 (1996), 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.” *Id.* at 731, 478 S.E.2d at 659. The appellate court held that facts supporting the trial court’s conclusion of unfitness included: the mother had several DWI convictions; the child suffered from developmental problems that the mother had not recognized or treated, and which resulted in part from her failure to adequately “provide for the child the motivation, opportunity and encouragement for normal and healthy development;” 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, for failure to allow a home study, and for failure to provide requested records; that she suffered blackouts and had a bad temper; and she refused to visit the child unless the grandmother provided transportation.” *Id.* at 731-32, 478 S.E.2d at 659-60. 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.” *Id.* at 732. However, the court held it was improper for the trial

<sup>7</sup> Reynolds, *Lee’s Family Law*, sec. 13.35.

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

In *Sharp v. Sharp*, 124 N.C. App. 357, 477 S.E.2d 258 (1996), the maternal grandparents filed an action seeking custody of 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 facts alleged in the grandparents' complaint would be sufficient if proven to support a conclusion that the mother was unfit: the mother had failed to provide a safe or stable home for the children; she had relationships with several men and had moved around North Carolina and Pennsylvania; the mother had not contributed to the support of the children since the children resided with the grandparents; there is a substantial risk of harm to the minor children if in the custody of the mother; and the mother was not emotionally stable enough to care for the children.

Finally, in *Davis v. McMillian*, 152 N.C. App. 53, 567 S.E. 159 (2002), the court of appeals upheld the trial court's conclusion that defendant 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, a trial court is free to consider any past conduct or circumstance of a parent that could impact either the present or future of the child when determining fitness and there is no requirement that the conduct or circumstance exist at the time of trial. See also *Speagle v. Seitz*, 354 N.C. 525, 557 S.E.2d 83(2001)(discussed below).

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 defendant mother had failed to recognize and care for the child's numerous, serious medical conditions, and that the mother regularly drove a car with the child inside without a car seat. Findings from the present trial showed that mother was "very limited in her intellectual ability" 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." Other findings indicated that defendant had difficulty caring for another child living in her home and that defendant's relatives visited her home on a daily basis to take care of the child.

There are a number of opinions decided before *Petersen* and *Price* defining conduct sufficient to support a conclusion of parental unfitness or neglect. 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).

The North Carolina 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 conduct inconsistent with that protected status. See *Deborah N. v. Jason N. and Carla 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).

### 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 North Carolina Supreme Court are discussed below. However, 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 responsibilities that are attendant to rearing a child." *Price*, 346 N.C. at 79, 484 S.E.2d at 534. The court held that protected status will be lost by the failure of a parent to fulfill these parental responsibilities. 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)(responsible parental activities include “exercising control over a child’s associations”). The court in *Price* 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.” *Price*, 346 N.C. at 79, 484 S.E.2d at 534.

The decisions of the United States Supreme Court relied upon by the court in *Price* indicate that some parents never obtain protected status. See *Lehr v. Robertson*, 463 U.S. 248, 77 L.Ed.2d 614 (1983)(unwed father was 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, 54 L.Ed.2d 511 (1978)(court held that best interest of the child analysis was appropriate in case against unwed father who had not taken steps to support or legitimate the child for over 11 years).

In dealing with the facts of the case before the court, *Price* 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 the *Price* case, the mother and child had resided with plaintiff for 3 years, the mother told both plaintiff and child that plaintiff was the father of the child, and she left the child in plaintiff’s custody for an additional 3 years after she separated from plaintiff. The court in *Price* 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. According to *Price*, “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, she would still enjoy a constitutionally protected status absent other conduct inconsistent with that status.” *Price*, 346 N.C. at 83, 484 S.E.2d at 537.

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 foster-parent agreement or during a period of service in the

military, a period of poor health, or a search for employment.” *Id.* 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 the protected parental interests[,] ... [such as] failure to maintain personal contact with the child or failure to resume custody when able.” *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 financially and emotionally” 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).

There are three North Carolina Supreme Court opinions issued since *Price v. Howard* addressing parental conduct in third party custody cases. In *Adams v. Tessener*, 354 N.C. 57, 550 S.E.2d 499 (2001), 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. See also *David N. and Deborah N. v. Jason N. and Carla 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). The court in *Adams* 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*, 354 N.C. 525, 557 S.E.2d 83 (2001), 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.

In *Speagle*, the trial court made findings that, for a period of time ending approximately three years before the custody trial, defendant mother worked as

a topless dancer and changed residences frequently. The trial court found that while defendant mother worked late into the night, the minor child was left 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 defendant 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." *Id.* at 531, 557 S.E.2d at 87.

On review, the court of appeals held that it was error for the trial court to base the conclusion that 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 with the court of appeals, 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/her constitutional right to custody.

Finally, in *Owenby v. Young*, 357 N.C. 142, 579 S.E.2d 264 (2003), 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 that case, the trial court concluded that the grandmother did not meet her burden of proving that father had waived his rights and dismissed her complaint. The court of appeals reversed, holding that grandmother's proof that 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 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 father's misconduct. While the father was convicted of DWI twice in a 5-year period, the trial court specifically found that there was no evidence he engaged in heavy drinking on a regular basis. The supreme court noted that the children were not present when father was arrested for DWI on either occasion. In addition, the trial court found that the only time father drove on public roads after having his license revoked was when he drove to the children on the night their mother was killed. Finally, the trial court's conclusion that 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 grandmother had failed to prove by clear and convincing evidence that father had waived his constitutional right to custody.

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; grandparent 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 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); 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 child's hospitalization).

## 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, 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 recent decision by the United State Supreme Court in *Troxel v. Granville*, discussed below, with varying results.<sup>8</sup>

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 inconsistent with his or her protected status before a trial court can apply the best interest of the child test to determine custody. *See Owenby v. Young*, 357 N.C. 142, 579 S.E.2d 264 (2003)(discussed in previous section); *Speagle v. Seitz*, 354 N.C. 525, 557 S.E.2d 83 (2001)(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 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). *Cf. Everette v. Collins*, 625 S.E.2d 796 (N.C.App., February 21, 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). If grandparents allege facts sufficient to establish that the 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. *See Eakett v. Eakett*, 157 N.C. App. 550, 579 S.E.2d 486 (2003) (clarifying that the "intact family analysis" discussed below regarding 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).

### 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 the cases of *Petersen v. Rogers* and *Price v. Howard*. In addition, there are three statutes that deal specifically with visitation claims brought by grandparents, each discussed more fully below: G.S. 50-13.2(b1)(grandparent visitation can be ordered as part of "any custody order"); 50-13.5(j)(existing custody determination may be modified to include grandparent visitation); and 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 North Carolina 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*, 341 N.C. 629, 461 S.E.2d 745 (1995). 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 in an intact family." *McIntyre*, 341 N.C. at 634, 461 S.E.2d at 749.

In *McIntyre*, 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

<sup>8</sup> A review of the case law in other states is beyond the scope of this Bulletin. *See* note 11.

was unconstitutional in light of the North Carolina Supreme Court's recent ruling in *Petersen v. Rogers*. The trial court reasoned that because G.S. 50-13.1 states that literally any 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 on-going." 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 the need for" the three grandparent statutes. According to the court in *McIntyre*, "the legislature intended to grant grandparents visitation only in those situations specified in [the] three [grandparent visitation] statutes." *McIntyre*, 341 N.C. at 634, 461 S.E.2d at 749.

The *McIntyre* court concluded that G.S. 50-13.1 is not a grandparent visitation statute, as are the three statutes discussed below.<sup>9</sup> 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

<sup>9</sup> One case from the court of appeals causes some confusion on this issue. In the case of *Fisher v. Graydon*, 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 G.S. 50-13.1(a), grandparents have standing to seek visitation with those 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. 50-2(b1) applies rather than G.S. 50-13.1. See discussion that follows regarding G.S. 50-13.2(b1).

parent is unfit, has abandoned or neglected the child, or has died." *Id.*, at 632, 461 S.E.2d at 748.<sup>10</sup>

### 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. *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 it clear that grandparent have the right to file suit for visitation during an on-going 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.).

Unlike the two other visitation statutes discussed below, there are no published appellate opinions involving application of this statute since the supreme court issued the decisions in *Petersen* and *Price*. *But see 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)). However, in the unpublished opinion in the case of *Smith v. Smith*, (unpublished), 634 S.E.2d 641 (N.C. App., September 19, 2006), the court of appeals held that G.S. 50-13.2(b1) gave grandfather the right to intervene and request visitation in a case between the parents of the child because he filed his motion at the same time the mother filed a motion to modify the existing custody order. While the court of appeals did not address the constitutionality of the statute, the court stated that a grandparent's "right to visitation is dependent on there either being an ongoing case where custody is at issue between the parents or a finding that the parent or parents are unfit." The court of appeals held

<sup>10</sup> 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).

that there was an 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 grandfather the right to request visitation.<sup>11</sup>

#### **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 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 and 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. 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).

The court of appeals has clarified that grandparents may not intervene in a custody action between parents after one of the parents dies. In *Price v. Breedlove*, 138 N.C. App. 149, 530 S.E.2d 559 (2000), 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.*

<sup>11</sup> Interestingly, because there was an existing custody order, the court in *Smith* held that 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).

*Sloan*, 164 N.C. App. 190, 595 S.E.2d 228 (2004). In *Sloan*, 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. 50-13.2(j). However, in *Eakett v. Eakett*, 157 N.C. App. 550, 579 S.E.2d 486 (2003), 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 court in *Eakett* upheld the dismissal of a grandfather's claim brought pursuant to G.S. 50-13.2(j) and stated that "a grandparent cannot initiate a lawsuit for visitation rights unless the child's family is experiencing some strain on the family relationship, such as an adoption or an ongoing custody battle." 157 N.C. App. 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 mother had been granted custody of the child. Approximately one year after the custody order was entered in the case between the parents, plaintiff paternal grandfather filed a motion to intervene in that action pursuant to G.S. 50-13.5(j). Grandfather 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 on-going 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.

The opinion in *Eakett* indicates that the court of appeals would support application of the first grandparent visitation statute discussed above, G.S. 50-13.2(b1), as written because it allows a grandparent to seek visitation as part of an on-going custody dispute. 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.<sup>12</sup> 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

<sup>12</sup> If a dispute is ongoing between the parents, G.S. 50-13.2(b1) will apply rather than G.S. 50-5(j). See *Smith v. Smith*, (unpublished opinion), 634 S.E.2d 641 (N.C. App., September 19, 2006).

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 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 step-parent. 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).

This statute requires the grandparent to show the existence of a "substantial relationship" between themselves and the grandchild. The court in *Hedrick* affirmed the determination by the trial court that a sufficient relationship existed where 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 plaintiff parents' argument that the grandparents could not show the required relationship because the grandparents 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*, 131 N.C. App. 793, 509 S.E.2d 226 (1998). 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. Grandmother filed her claim pursuant to G.S. 50-13.2A. The adoptive parents argued 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

grandmother had a significant relationship with the children in this case. Grandmother had been very involved in the caretaking of the children 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 v. Rogers* 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 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 interest of the child, and not the best interest of the grandparent, that is the polar star in [these cases]." *Hill v. Newman*, 131 N.C. App. at 799, 509 S.E.2d at 231.

### ***Troxel v. Granville***

Three years after the North Carolina Supreme Court issued the opinion in *Price v. Howard*, the United States Supreme Court reviewed a grandparent's claim for visitation in the case of *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). 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 non-parent 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 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 ...". Wash. Rev. Code sec. 26.10.160(3)(1996). 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 United States Supreme Court in *Troxel* affirmed the result reached by the Washington Supreme Court, but the court 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. *Troxel*, 530 U.S. at 71, 120 S.Ct. at 2064.

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 fit parent adequately cares for his or her children, 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." *Id.* at 68, 120 S.Ct. at 2061. 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 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." *Id.* at 70, 120 S.Ct. at 2062.

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 interest." *Id.* at 72, 120 S.Ct. 2063. 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." *Id.* at 73, 120 S.Ct. at 2064.

Many state courts have reviewed their grandparent visitation statutes in light of *Troxel*, with varying results.<sup>13</sup> 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.

## 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 non-parent third parties. While the United States Supreme Court did not specify the extent of this impact in the *Troxel* opinion, the North Carolina Supreme Court did adopt an analysis in the *Petersen* and *Price* opinions that places significant restrictions on claims by non-parent 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 North Carolina Supreme Court appear to prohibit North Carolina trial courts from determining best interest under any circumstances.<sup>14</sup> 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

<sup>13</sup> A review of state court decisions interpreting *Troxel* is beyond the scope of this article. For more information on the response by other states, see Roberts, Kristine, *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 Gregory, John Dewitt, *The Detritus of Troxel*. 40 Family Law Quarterly 133 (2006).

<sup>14</sup> *But see* discussion in footnote 3.



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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