
MANAGING A CHILD CUSTODY CASE

By

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CHAPTER III
MANAGING A CHILD CUSTODY CASE
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I. INTRODUCTION

The rules governing the determination of child custody and visitation privileges have been altered considerably over time, especially within the last few years. This evolution reflects the changes that have taken place in society, which have affected our views of the family, the child-parent relationship, men's and women's roles, and childhood itself. In addition, the courts have become increasingly free to exercise a broad range of discretion in making a child custody award.

The primary consideration in determining child custody and visitation cases today is the best interest of the child. This standard encompasses the numerous factors which may be relevant in the particular case, and is affected by a variety of presumptions, such as the presumption that siblings should not be separated, or that children are better off in the custody of a natural or adoptive parent than in the custody of a non-parent.

While there are guidelines and presumptions, the practitioner should note well that emotions run high in child custody cases and that each case is as different from any other case as the people and personalities involved are different from one another. Patience, tolerance, compassion and a certain degree of firmness are essential traits for the family law practitioner who dares to be involved in child custody matters. However, the rewards are great for those who venture more than tacitly into this most vital area of human relationships.

The scope of this paper will touch only on the very basic principles of custody and visitation, dealing exclusively with matters contained in Chapters 50 and 50A of the North Carolina General Statutes, and the reader is encouraged to refer to the bibliography section at the end of this paper for more in-depth reading and study. It is my hope that the sample of pleadings and orders contained in the Appendix, also at the end of this paper and itemized on a guide preceding the samples, will be especially useful to the practitioner and will serve as the beginning for his or her own loose-leaf and tabbed form file.

II. STATUTORY BASIS

A. Custody

As with most areas of law, most of our guidelines in dealing with child custody determination come from case law. Nevertheless, North Carolina General Statutes Sections 50-13.1 through 50-13.9 provide the statutory basis for custody and related matters, subject to the jurisdictional requirements set out in Chapter 50A of the North Carolina General Statutes, known as the Uniform Child-Custody Jurisdiction and Enforcement Act, Sections 50A-101 through 50A-317, which will be discussed later in this paper.

North Carolina General Statutes Section 50-13.1 provides that any parent, relative, or other person, agency, organization, or institution claiming the right to custody of a minor child (who has not as yet attained the age of eighteen years) may institute an action or proceeding for the custody of such child. This may be done by instituting an

independent action, by filing a counterclaim in an action for absolute divorce, divorce from bed and board, annulment, alimony, or postseparation support, by filing a crossclaim in one of the foregoing actions, by filing a motion in the cause in one of the foregoing actions, or upon the court's own motion in one of the foregoing actions. N.C.G.S. 50-13.5(b).

1. Welfare of the Child

The welfare of the child is the paramount consideration in custody matters. Goodson v. Goodson, 32 N.C. App. 76, 231 S.E.2d 178 (1977). The best interest and welfare of the child is the paramount consideration in determining the right to custody, as well as in determining visitation rights, and neither of these rights should be permitted to jeopardize the best interest and welfare of the child. In re Stancil, 10 N.C. App. 545, 179 S.E.2d 844 (1971). The welfare of the child is the "polar star" by which the discretion of the court is to be guided. Green v Green, 54 N.C. App. 571, 284 S.E.2d 171 (1981).

In determining the welfare of the child, our Supreme Court has said, with regard to custody decisions, that the trial judge is entrusted (since custody is not for consideration by a jury) with the delicate and difficult task of choosing an environment which will, in his/her judgment, best encourage full development of the child's (a) physical, (b) mental, (c) emotional, (d) moral and (e) spiritual faculties. Blackley v. Blackley, 285 N.C. 358, 204 S.E.2d 678 (1974).

In a custody proceeding, it is not the function of the court to punish or reward a parent by withholding or awarding custody of minor children; the function of the court in such a proceeding is to diligently seek to act for the best interest and welfare of the minor child. In re McCraw Children, 3 N.C. App. 390, 165 S.E.2d 1 (1969).

In keeping with other significant changes enacted by the General Assembly in Chapter 50B, North Carolina General Statutes Section 50-13.2(a) was amended (effective October 1, 1996) to add: "In making the determination [of child custody], the court shall [emphasis added] consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party and shall make findings accordingly."

2. Right of Parents to Custody

(a) As against third persons

Parents have the legal right to have the custody of their children unless clear and cogent reasons exist for denying them this right. This right is not absolute, and it may be interfered with or denied, but only for the most substantial and sufficient reasons, and is subject to judicial control only when the interest and welfare of the children clearly require it. In re Jones, 14 N.C. App. 334, 188 S.E.2d 580 (1972).

When third parties challenge natural parents for custody of a minor child, the standard of proof required to overcome the presumption of parents to have

custody of their children is "clear and convincing evidence." When a trial court awards custody of a minor child to a non-parent over a parent, if the record does not indicate that the trial court applied the clear and convincing evidence standard, the appellate court must reverse the trial court's order and remand the case for findings of fact in accordance with the proper standard. Bennett v. Hawks, 170 N.C. App. 426, 613 S.E.2d 40 (2005). A trial court's finding of fact that a parent is a fit and proper person to care for a minor child does not preclude an additional finding of fact that the same parent has also engaged in conduct inconsistent with that parent's constitutionally protected status, but the trial court must utilize the clear and convincing standard with regard to the evidence of the inconsistent conduct. David N. v. Jason N., 359 N.C. 303, 608 S.E.2d 751 (2005).

Prior North Carolina case law indicated that the welfare of the child is the paramount consideration to which all other factors, including common-law preferential rights of the parents, must be deferred or subordinated, and the trial judge's discretion is such that he/she is not required to find a natural parent unfit for custody as a prerequisite to awarding custody to a third person. Comer v. Comer, 61 N.C. App. 324, 300 S.E.2d 457 (1983); Best v. Best, 81 N.C. App. 337, 344 S.E.2d 363 (1986); Matter of Baby Boy Scearce, 81 N.C. App. 531, 345 S.E.2d 404 (1986).

However, in 1994, the North Carolina Supreme Court overruled Best, *supra*, and held in an initial custody proceeding, absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, that "the constitutionally-protected paramount right of parents to custody, care and control of their children must prevail" over the custody claims of third parties. Petersen v. Rogers, 337 N.C. 397, 403-404, 445 S.E.2d 901, 905 (1994), *rev'g*, 111 N.C. App. 712, 433 S.E.2d 770 (1993).

Nevertheless, in a subsequent dissenting opinion, Judge Greene stated that the Petersen presumption should only apply when there is a dispute between a parent, who is living with a child in an intact family, and a third party. Price v. Howard, 122 N.C. App. 674, 471 S.E.2d 673 (1996). In reversing the Court of Appeals, Justice Orr, writing for the Supreme Court, states:

However, conduct inconsistent with the parent's protected status, which need not rise to the statutory level warranting termination of parental rights . . . would result in application of the "best interest of the child" test without offending the Due Process Clause. Unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy. Other types of conduct, which must be viewed on a case-by-case basis, can also rise to this level so as to be inconsistent with the protected status of natural parents. Price v. Howard, 346 N.C. 68, 74-75, 484 S.E.2d 528, 534-535 (1997), *rev'g*, 122 N.C. App. 674, 471 S.E.2d 673 (1996).

Although the issue may still be somewhat unclear [see Judge Greene's concurring in the result opinion], in cases where initial permanent custody had been awarded to third parties (*e.g.*, grandparents), a natural parent seeking a modification of a custody order must still comply with the provisions of N.C.G.S. 50-13.7 and show that there has been a substantial change in circumstances affecting the welfare of the child, but,

after meeting that burden, the constitutionally based paramount right to custody of the natural parent is not dependent on the existence of a "family unit" and apparently takes priority over the "best interest" test in a custody modification case between a natural parent and third parties who previously had been awarded custody. Bivens v. Cottle, 120 N.C. App. 467, 462 S.E.2d 829 (1995), *disc. rev. allowed*, 342 N.C. 651, 467 S.E.2d 704 (1996), *appeal dismissed per curiam*, 346 N.C. 270, 485 S.E.2d 296 (1997).

(b) As between parents

At one time under the common law, the father was generally entitled to the custody of his minor children. Brooks v. Brooks, 12 N.C. App. 626, 184 S.E.2d 417 (1971). Modern day courts instead have adhered to the principle that the welfare or best interest of the child is the paramount consideration. *Id.* In past decades, this newer approach often resulted in an "informal prejudice" in the minds of some judges in favor of the mother, whose temperament and general availability in the home seemed to make her the better custodian. Today, however, with more and more women in the work force, fathers have achieved a "new equality" in the eyes of judges and, as a practical matter, are winning more custody actions. If any judicial prejudice still exists, it is with regard to mothers appearing better suited to meet the needs of infants and very young children. Nevertheless, North Carolina General Statutes Section 50-13.2(a) is very clear in stating that, between the mother and father, whether natural or adoptive, there is no presumption as to who will better promote the interest and welfare of the child.

If the court were to find one of the parents "unfit," it is obvious that the court would be proper in granting custody of minor children to the other parent. When the court finds that both parents are fit and proper persons to have custody of their minor children, and then finds that it is in the best interest of the children for one of the parents to have custody of said children, such a holding will be upheld on appeal when the decision by the judge is supported by competent evidence. Hinkle v. Hinkle, 266 N.C. 189, 146 S.E.2d 73 (1966). It is for this very reason that I generally prefer to utilize the conclusion of law that both parents are fit and proper persons to exercise custody in the orders that I draft when the court has granted custody of minor children to my client, even when the evidence against the other parent is atrocious, because the appellate courts might disagree with the trial court's conclusion of law that one parent is "unfit," but will generally not disturb the exercise of discretion by the trial judge in granting custody to one parent after finding that both parents are fit and proper.

For a case upholding the trial court's decision to grant custody to the father after finding that both parents are fit and proper persons to exercise custody, see Ingle v. Ingle, 53 N.C. App. 227, 280 S.E.2d 460 (1981).

For a case upholding the trial court's decision to grant custody to the mother after finding that both parents are fit and proper persons to exercise custody, see Hardee v. Mitchell, 230 N.C. 40, 51 S.E.2d 884 (1949).

When a trial court entered an order granting the mother the primary physical custody of a 28-month-old female child and referred in its findings the

existence of a "natural bond that develops between infants and a mother, especially when the mother breast-feeds the infant," the North Carolina Court of Appeals reversed and remanded, stating that relying on gender and a variation of the tender years' presumption constituted error. Greer v. Greer, ___ N.C. App. ___, 624 S.E.2d 423 (2006).

A trial court's custody order granting the legal and primary physical custody of a minor child with the father is supported by competent evidence when the record reflects that the mother's serious medical condition caused the mother to leave the child in the care of the father and the paternal grandmother, and that the mother's medical condition continued at the time of the hearing to be uncertain; and the trial court does not trigger the presumption of custody with a natural parent (and its higher standard of proof) when the trial court grants legal and primary physical custody to the father and also approves physical placement with the paternal grandmother (a non-parent). Everette v. Collins, 625 N.C. App. 796, 625 S.E.2d 796 (2006).

Although North Carolina General Statutes Section 50-13.2(b) allows a trial judge to grant joint legal custody to both parents, many judges may conclude that the fact that the parents are engaged in litigation over the custody of their minor children is a *prima facie* indication that the parents are not capable of the requisite ability to cooperate with one another with regard to the welfare of their children. Therefore, while joint legal custody is becoming a popular phenomenon today, I would suggest that expectations for such results are best reserved for consent orders and separation agreements, rather than following contested custody hearings before the court. Nevertheless, by stressing how the parents have been able to cooperate with one another in the past concerning the welfare of their minor children, and with the assistance of a psychologist's recommendation, the custody practitioner can persuade the court to award joint legal custody at the conclusion of a contested custody hearing. Also see Annot., Propriety of Awarding Joint Custody of Children, 17 A.L.R.4th 1013. However, in drafting an order providing for "joint legal custody," the practitioner should be specific as to the parties' respective responsibilities and obligations, since the Court has determined that the term "joint custody" is ambiguous and does not in and of itself imply specifics without consideration of all relevant extrinsic evidence of intent being required. Patterson v. Taylor, 140 N.C. App. 91, 535 S.E.2d 374 (2000).

A trial court's custody order which awarded the parties "joint legal custody," while simultaneously granting the mother the "primary decision-making authority" was reversed by the North Carolina Court of Appeals because the trial court's custody award was inconsistent. Diehl v. Diehl, COA05-416, ___ N.C. App. ___, 630 S.E.2d 25 (2006).

Pursuant to North Carolina General Statutes Section 50-13.2(b), absent an order of the court to the contrary, each parent shall have equal access to the records of the minor child involving the health, education and welfare of the minor child.

In keeping with other significant changes enacted by the General Assembly in Chapter 50B, North Carolina General Statutes Section 50-13.2(b) was amended (effective October 1, 1996) to add: "If the court finds that domestic violence has

occurred, the court shall [emphasis added] enter such orders that best protect the children and party who were the victims of domestic violence. Such orders may include a designation of time and place for the exchange of children away from the abused party, the participation of a third party, or supervised visitation. If a party is absent or relocates with or without the children because of an act of domestic violence, the absence or relocation shall not be a factor that weighs against the party in determining custody or visitation."

3. Wishes of the Child

Most states that have enacted statutory provisions outlining the factors to be considered by the court in determining who shall be awarded custody of a minor child include consideration of the child's wishes as to his or her custodian. Depending upon the statute in a particular jurisdiction, consideration of the child's preference by the trial judge may be either mandatory or discretionary. In North Carolina, the only statutory guidance, contained in N.C.G.S. 50-13.2(a), is that which shall "best promote the interest and welfare of the child." In North Carolina, we must look to the appellate decisions which indicate that the trial judge may properly consider the preference or wishes of a child of suitable age and discretion. In re Peal, 305 N.C. 640, 290 S.E.2d 664 (1982); and Mintz v. Mintz, 64 N.C. App. 338, 307 S.E.2d 391 (1983).

The wishes of a child of sufficient age to exercise discretion in choosing a custodian are entitled to considerable weight when the contest is between the parents, but are not controlling. Hinkle v. Hinkle, *supra*. A child may be a competent witness and ought to be examined in that character. Indeed, being the party mainly concerned, he/she has a right to make a statement to the court as to his/her feelings and wishes upon the matter. This ought to be allowed serious consideration by the court, in the exercise of its discretion. Kearns v. Kearns, 6 N.C. App. 319, 170 S.E.2d 132 (1969), overruled on other grounds; Stephenson v. Stephenson, 55 N.C. App. 250, 285 S.E.2d 281 (1982); Griffin v. Griffin, 81 N.C. App. 665, 344 S.E.2d 828 (1986).

Where the contest for custody is between a parent and one not connected by blood to the child, the desire of the child will not ordinarily prevail over the natural right of the parent, unless it is essential to the child's welfare. In re Stancil, *supra*.

Although there has been much speculation about at what age a child should be considered of sufficient age to exercise discretion in choosing a custodian, some saying twelve, and others fourteen, chronological age may not necessarily be determinative of the child's ability to express an enlightened and independent judgment. The test is whether the child has the mental capacity and comprehension to make a reasoned opinion. Hinkle v. Hinkle, *supra*.

While a child has a right to have his/her testimony heard, the weight to be attached to such testimony is within the discretion of the trial judge, in light of all of the surrounding circumstances. Kearns v. Kearns, *supra*.

In an initial custody action, the children's wishes are entitled to consideration, but are not controlling. Brooks v. Brooks, *supra*. In a modification of

custody action, the children's wishes are not a sufficient change in circumstances, where there is no evidence that either parent's ability or fitness to provide a suitable home had changed. In re Harrell, 11 N.C. App. 351, 181 S.E.2d 188 (1971). In either type of custody action, the failure of the trial court to include in its findings of fact the preferences of the minor children is insufficient to upset its order of custody on appeal. Brooks v. Brooks, *supra*. However, see the case of Kowalick v. Kowalick, 129 N.C. App. 781, 501 S.E.2d 671 (1998), where the North Carolina Court of Appeals affirmed the trial court's changing custody based solely upon the adamant and consistent wishes of a 13-year old daughter to live with her mother after the custody of her and her two siblings had previously been granted to her father.

As a matter of personal preference, I always seek a stipulation in a child custody hearing to have the trial judge interview minor children separately and privately in chambers, without the presence of counsel or the parties. This procedure not only allows the children to make their preferences known, but permits them to do so candidly without fear of hurting either parent or of being intimidated by either parent. If my client is in a position to know and has related the preferences of the children to me, I usually prefer not to interview the children myself before the hearing in order that I can argue to the court that I have not attempted to influence the children's decision, which is especially helpful in cases when I am contending that the opposing party has demonstrated his or her unsuitability to be selected as the custodial parent because he or she has been applying "pressure" on the children. While the input of children is important and should be considered, I believe that it is vital for their healthy relationship with both parents that children understand that it is the judge and not they who must make the ultimate choice. [See Annot., Child's Wishes as Factor in Awarding Custody, 4 A.L.R.3d 1396]

4. Discretion of the Trial Court

Determining the custody of minor children is never within the province of a jury, but is a matter solely within the discretion of the trial judge and exclusively in the civil jurisdiction of the District Court Division of the General Court of Justice, subject only to appellate review. Stanback v. Stanback, 270 N.C. 497, 155 S.E.2d 221 (1967).

The trial judge, who has the opportunity to see and hear the parties and the witnesses, is vested with broad discretion in cases involving the custody of minor children. Blackley v. Blackley, *supra*.

Where the trial judge enters a custody order that, in his/her judgment, is in the best interest of the child, the appellate division should not reverse that judgment and hold, as a matter of law, that the trial judge was obliged to have reached a different opinion, in the absence of a clear showing of abuse of discretion. Decisions in custody cases are never easy, and the trial judge has the opportunity to see the parties in person and to hear the witnesses. He/she can detect tenors, tones and flavors that are lost in the bare printed record read months later by appellate judges. Newsome v. Newsome, 42 N.C. App. 416, 256 S.E.2d 849 (1979); Glesner v. Dembrosky, 73 N.C. App. 594, 327 S.E.2d 60 (1985).

The trial court's findings of fact modifying a child custody order are conclusive on appeal if supported by competent evidence, even though there is evidence to the contrary. Vuncannon v. Vuncannon, 82 N.C. App. 255, 346 S.E.2d 274 (1986); Hamilton v. Hamilton, 93 N.C. App. 639, 379 S.E.2d 93 (1989).

To support an award of custody, the order of the trial court should contain findings of fact which sustain the conclusion of law that custody of the child is awarded to the person who will best promote the interest and welfare of the child. Story v. Story, 57 N.C. App. 657, 291 S.E.2d 923 (1982). A custody order is fatally defective where it fails to make detailed findings of fact from which the appellate court can determine that the order is in the best interest of the child, and custody orders are routinely vacated where the findings of fact consist of mere conclusional statements that the party being awarded custody is a fit and proper person to have custody and that it is in the best interest of the child to award custody to that person. Dixon v. Dixon, 67 N.C. App. 73, 312 S.E.2d 669 (1984).

Because of the wide discretion granted to District Court judges in child custody proceedings, thorough preparation in advance of the hearing and adequate knowledge of the judge's attitudes in such matters by counsel is perhaps more important in child custody cases than in any other type of civil litigation. Because adequate findings of fact supporting appropriate conclusions of law will withstand almost any appeal, counsel's time and diligence in preparing orders after hearings are essential to the maintenance of an effective family law practice in custody cases.

For cases where our appellate courts have affirmed trial court determinations based upon "sufficient" findings of fact, see: Dreyer v. Smith, 163 N.C. App. 155, 592 S.E.2d 594 (2004); In re Rholetter, 162 N.C. App. 653, 592 S.E.2d 237 (2004); Jordan v. Jordan, 162 N.C. App. 112, 592 S.E.2d 1 (2004); Shipman v. Shipman, 357 N.C. 471, 586 S.E.2d 250 (2003); Pass v. Beck, 156 N.C. App. 597, 577 S.E.2d 180 (2003). For cases where our appellate courts have reversed trial court determinations based upon "insufficient" findings of fact, see: Moore v. Moore, 160 N.C. App. 569, 587 S.E.2d 74 (2003); Lamond v. Mahoney, 159 N.C. App. 400, 583 S.E.2d 656 (2003).

Although a parent's obligation to provide child support may be extended, per the provisions of N.C.G.S. 50-13.4(c)(2), beyond the child's eighteenth birthday until the child graduates from secondary school (although not normally beyond the child's twentieth birthday), the trial court loses jurisdiction to make an initial or modification determination with regard to custody or visitation as soon as the child ceases to be a "minor" on the child's eighteenth birthday, even though the child may still be enrolled in secondary school. N.C.G.S. 50-13.1 and 50-13.7.

In addition, it is respectfully submitted by this author that the trial court lacks jurisdiction to enter an initial custody determination as long as the two natural parents who are married to one another continue to reside in the same household, unless the custody matter is consolidated for hearing with an action for divorce from bed and board that is before a judge without a jury being requested for the latter issue. In most cases, the

practitioner may wish to try the divorce from bed and board separately before a custody hearing is scheduled.

B. Visitation

1. In General

The trial court has discretionary power either to divide custody between contending parents for alternating periods, or to award general custody to one parent, subject to reasonable visitation privileges in favor of the non-prevailing parent. Griffin v. Griffin, 237 N.C. 404, S.E.2d 133 (1953).

The cases, statutes and principles discussed hereinabove with regard to custody are equally applicable to the determination of visitation privileges, that is: the statutory guideline in establishing visitation is whatever will promote the welfare of the child; parents have a right to visit with their children generally; the wishes of the child involved should be taken into consideration by the court and weighed in the court's discretion; and the court has wide discretion in determining visitation which will not be disturbed on appeal if adequate findings of fact support appropriate conclusions of law and there is no clear showing of abuse of discretion.

Visitation privileges are but a lesser degree of custody. Clark v. Clark, 294 N.C. 544, 243 S.E.2d 129 (1978); Hackworth v. Hackworth, 87 N.C. App. 284, 360 S.E.2d 472 (1987). The same standards that apply to changes in child custody determinations are also applied to changes in visitation determinations. Simmons v. Arriola, 106 N.C. App. 671, 586 S.E.2d 803 (2003).

2. Denial

At least once in every practitioner's family law career, a client will appear requesting, if not demanding, that his or her spouse be prohibited from visiting with the minor children of the parties. This expectation on the part of the client should be immediately dispelled by the attorney who wishes the attorney-client relationship to flourish beyond the initial interview. While the court may be quick to grant custody of the children to the client, and may even be persuaded to severely restrict the visitation privileges of the other parent with regard to place and time or by requiring supervision, my experience is that the court will balk at an absolute denial of visitation privileges. The only avenue in that regard would be through adoption proceedings, with or without the consent of the other parent, or in the event that grounds exist for terminating the parental rights of the other parent pursuant to Chapter 7A of the North Carolina General Statutes.

A parent's right of visitation with his or her child is a natural and legal right, and, when awarding custody of a child to another, the court should not deny a parent's right of visitation at appropriate times unless the parent has by conduct forfeited the right or unless the exercise of the right would be detrimental to the best interest and welfare of the child. In re Stancil, *supra*.

Courts are generally reluctant to deny all visitation rights to the divorced parent of a child of tender age, but it is generally agreed that visitation rights should not be permitted to jeopardize a child's welfare. Swicegood v. Swicegood, 270 N.C. 278, 154 S.E.2d 324 (1967); Hedrick v. Hedrick, 90 N.C. App. 151, 368 S.E.2d 14 (1988); Correll v. Allen, 94 N.C. App. 464, 380 S.E.2d 580 (1989).

The trial court has wide discretion in protecting the welfare of minor children, and, in an appropriate factual situation, the court may condition visitation upon consultation by a parent with a psychologist or psychiatrist. Rawls v. Rawls, 94 N.C. App. 670, 381 S.E.2d 179 (1989).

3. Determination

Although separation agreements and consent orders frequently employ broad general language in establishing visitation privileges for the noncustodial parent, such as "at such times as the parties hereto may determine upon mutual agreement in advance," the court, as a result of presiding over a contested hearing, should never delegate the responsibility and authority for determining visitation privileges to the custodial parent, but should instead safeguard the visitation privileges of the noncustodial parent by specific provisions in its order. To give the custodial parent such authority or "veto power" would be tantamount in some cases to denying visitation privileges when such was not the intent of the court. In re Stancil, *supra*. Although every order determined by the court should define and establish the time, place and conditions under which such visitation privileges may be exercised, in situations where the parties have demonstrated by their prior actions that they are incapable of being flexible or cooperating with one another, it may be necessary to be very explicit by dotting all of the "i's" and crossing all of the "t's."

4. Relation to Child Support

Despite the fact that most clients see a direct correlation between the exercise of visitation privileges and the payment of child support, the simple fact is that the two are not dependent upon each other as a matter of law. If a noncustodial parent is failing to pay child support, the custodial parent is not justified in suspending visitation privileges. Likewise, if a custodial parent is interfering with the exercise of normal visitation privileges, the noncustodial parent is not justified in withholding child support payments. Both child support and visitation are in the best interest of the child, and for one parent to terminate one of those benefits in an attempt to punish the other parent for terminating the other benefit only serves to doubly punish the innocent child. In each case, the remedy is to bring the noncomplying parent before the court in a contempt proceeding. Appert v. Appert, 80 N.C. App. 27, 341 S.E.2d 342 (1986). However, for a case holding that the trial court may use reduction in the amount of child support to enforce visitation rights, see Mather v. Mather, 70 N.C. App. 106, 318 S.E.2d 548 (1984).

C. Joinder of Multiple Claims and Venue

A civil action for determination of child custody and visitation privileges may be brought at any time during the minority of the child, either as an independent action or joined with actions for absolute divorce, divorce from bed and board, annulment and alimony without divorce, and may be instituted before or after, as well as during the pendency of, an action for absolute divorce. In this regard, see N.C.G.S. 50-13.5 and 50-19, as well as 58 N.C.L. Rev. 1471 (1980) and 61 N.C.L. Rev. 991 (1983). The better practice in joining a request for custody with other causes of action previously listed is to set out the child custody request as a separate identifiable claim for relief within the complaint.

The venue of a child custody action in North Carolina, pursuant to the provisions of Chapter 50 of the North Carolina General Statutes, is set out with specificity in N.C.G.S. 50-13.5(f), and the practitioner would be well advised to read such subsection in its entirety.

D. Mediation

Most states, including North Carolina, have established mandatory court mediation programs with regard to the determination of child custody and visitation privileges. While striving to achieve a level of compromise and cooperation between parents would only serve to improve the environment for children, the court never should and never will relinquish its role of looking out for the best interest and welfare of minor children. If the practitioner represents a client who is involved in a court mediation program, the attorney should monitor the situation by checking periodically with his or her client to make certain that legal rights are at least remembered, if not insisted upon. Some attorneys may elect to participate in person in the court mediation process with their clients, but, in so doing, great care should be exercised by the practitioner to avoid making the mediation session as litigious as the courtroom.

In addition to court mandated mediation programs, many North Carolina practitioners are appearing with their clients in private mediation sessions, with the parties selecting and paying a third family law practitioner to mediate the custody dispute.

The Court of Appeals of North Carolina has held that it was error for the trial court to rule on the custody issue in an action before allowing the parties to attend custody mediation. In vacating the trial court's order, the Appellate Court stated, pursuant to N.C.G.S. 50-13.1, that mediation was mandatory unless, upon motion of either party or on the trial court's own motion, good cause was shown to waive mediation. Chillari v. Chillari, 159 N.C. App. 670, 583 S.E.2d 367 (2003).

E. Relation to Equitable Distribution

Although a judicial determination of the equitable distribution of the parents' marital property would probably not affect the outcome of a child custody action (except possibly with regard to each parent's ability to provide for the "physical" needs of the

children), it does appear that child custody provisions may have an impact on subsequent equitable distribution determinations.

In Patterson v. Patterson, 81 N.C. App. 255, 343 S.E.2d 595 (1986), the Court of Appeals held, pursuant to N.C.G.S. 50-20(c)(4), that the wife's status as the parent with custody of the parties' minor child alone justified an unequal distribution of the parties' marital property without requiring the trial judge to simply recite other statutory factors to be considered in determining whether an equal division of the marital property upon divorce is equitable.

However, see Geer v. Geer, 84 N.C. App. 471, 353 S.E.2d 427 (1987), wherein the Court of Appeals held that the trial court did not abuse its discretion in requiring the wife to execute a deed of the marital residence to the husband, notwithstanding the fact that the wife, and not the husband, was the custodial parent, upon the trial judge determining that an unequal distribution of the marital property was required due to the husband's direct and indirect contributions to the wife's medical education during their marriage.

F. Relation to Chapter 50B Domestic Violence Actions

Although the trial court in a Chapter 50 child custody action may enter an order providing for a different custodial arrangement for a minor child than the custodial arrangement that was previously decreed in a separate Chapter 50B domestic violence order, the doctrine of collateral estoppel precludes the trial court in the subsequent Chapter 50 action from rejecting the findings of fact and the conclusions of law in the previous Chapter 50B order (entered as the result of a 10-day hearing in the previous Chapter 50B action) and basing its decision on findings of fact at odds with the prior 50B order. In other words, although it appears that subsequent Chapter 50 child custody orders supersede and take priority over previous Chapter 50B domestic violence orders that deal with physical custody issues, with the Chapter 50 trial court not being required to find a substantial and material change in circumstances in order to provide for a different custodial arrangement for a minor child, it does appear that the Chapter 50 trial court at a subsequent hearing will be bound by the findings of fact and the conclusions of law in the previous order of the Chapter 50B trial court. Doyle v. Doyle, ___ N.C. App. ___, 626 S.E.2d 145 (2006).

G. Relation to Chapter 7B Juvenile Proceedings

North Carolina General Statutes Section 7B-200(c) provides: When the District Court obtains jurisdiction over a juvenile as the result of a petition alleging that the juvenile is abused, neglected, or dependent:

- (1) Any other civil action in this State in which the custody of the juvenile is an issue is automatically stayed as to that issue, unless the juvenile proceeding and the civil custody action or claim are consolidated pursuant to N.C.G.S. 7B-200(d) or the court in the juvenile proceeding enters an order dissolving the stay.

- (2) If an order entered in the juvenile proceeding and an order entered in another civil custody action conflict, the order in the juvenile proceeding controls as long as the court continues to exercise jurisdiction in the juvenile proceeding.

The foregoing two subsections of N.C.G.S. 7B-200, which may or may not be influenced by legislation regarding pilot programs for holding family court within District Court judicial districts, appears to be contrary to what many family law attorneys (including the author of this manuscript) and family law professors at North Carolina law schools had previously believed was the status of the law in this State with regard to whether or not Chapter 50 child custody civil actions and orders take priority over Chapter 7B juvenile proceedings and orders.

Notwithstanding the provisions of N.C.G.S. 50-13.5(f) dealing with the proper venue for a Chapter 50 child custody action, the court in a juvenile proceeding, pursuant to N.C.G.S. 7B-200(d), may order that any Chapter 50 civil action or claim for child custody is filed in the same judicial district be consolidated with the juvenile proceeding. If a Chapter 50 civil action or claim for child custody is filed in a different judicial district of North Carolina, the court in the juvenile proceeding for good cause and after consulting with the court in the other judicial district, may: (1) order that the Chapter 50 civil action or claim for custody be transferred to the county in which the Chapter 7 juvenile proceeding is filed; or (2) order a change of venue in the Chapter 7B juvenile proceeding and transfer the juvenile proceeding to the county in which the Chapter 50 civil action or claim or custody is filed. The court in the Chapter 7B juvenile proceeding may also proceed in the juvenile proceeding while the Chapter 50 civil action or claim for custody remains stayed or dissolve the stay of the Chapter 50 civil action or claim for custody and stay the Chapter 7B juvenile proceeding pending the resolution of the Chapter 50 civil action or claim for custody.

III. VOLUNTARY AGREEMENTS

A. Separation Agreements

Custody and visitation are proper subjects to be included among the terms and conditions of a written separation agreement between married parents who are separating. Parents, as the natural custodians of their children, have the right to enter into contracts providing for the welfare of those minor children. Because such a determination of custody and visitation minimizes the stress between parents and maximizes the cooperation level between them, the minor children are the obvious beneficiaries of such settlements. As circumstances change, the parents can modify their agreement by signing written amendments thereto. While actions for specific performance and breach of contract would be applicable with regard to the issue of child support, they would not be appropriate with regard to custody and visitation issues. Instead, if the parents are unwilling to follow the terms of their agreement with regard to custody and visitation, or if they cannot agree on changes desired by one of the parties, court involvement would be in the nature of an initial custody and visitation determination, with the court considering the terms of the separation agreement, but not being bound thereby, and always maintaining for itself the right to determine what will promote the welfare of the children. By their terms, separation

agreements may or may not be incorporated into subsequent decrees of absolute divorce. If they are so incorporated, these separation agreements, like initial consent orders, become orders of the court and are modifiable and enforceable as any court orders would be that had been entered by the court as the result of contested hearings concerning custody and visitation. Walters v. Walters, 307 N.C. 381, 298 S.E.2d 338 (1983). If such separation agreements are not incorporated into subsequent decrees of absolute divorce, then they remain simply as contracts between the parties.

B. Effect of Separation Agreement on Subsequent Court Action

As discussed hereinabove, if a separation agreement is incorporated in a subsequent decree of absolute divorce, its terms and conditions with regard to custody and visitation become like any other court-ordered provisions and are enforceable through the contempt powers of the court and are modifiable without the consent of the parties upon a showing of changed circumstances. *Id.* It should be noted, when a motion is filed to modify the custody provisions of an agreement that was previously incorporated in a court order, that the circumstances to be compared with the current circumstances are those that existed on the date that the agreement was incorporated and not on the date that the agreement was executed. Cavanaugh v. Cavanaugh, 317 N.C. 652, 347 S.E.2d 19 (1986).

If, however, a separation agreement is never incorporated into a subsequent decree of absolute divorce and therefore remains simply a contract between the parties, and if one of the parties should bring the matters of custody and visitation before the court through a proper pleading (either a complaint in an independent action or a motion in an already existing action), then the court would deal with those issues as it would otherwise in an initial custody determination without needing to find a substantial change in circumstances in order to determine provisions that may differ from the original separation agreement terms. Boyd v. Boyd, 81 N.C. App. 71, 343 S.E.2d 581 (1986).

While the marital and property rights of the parties under the provisions of a valid separation agreement cannot be ignored or modified by the court without the consent of the parties, such separation agreements are not final and binding as to the custody and visitation privileges of minor children. Soper v. Soper, 29 N.C. App. 95, 223 S.E.2d 560 (1976). It is the court's duty to award custody in accordance with the best interest of the child in accordance with N.C.G.S. 50-13.2(a), and no agreement, consent, or condition between the parents can interfere with this duty or bind the court. Spence v. Durham, 283 N.C. 671, 198 S.E.2d 537 (1973), *cert. denied*, 415 U.S. 918, 94 S. Ct. 1417, 39 L. Ed. 2d 473 (1974).

The existence of a valid separation agreement containing provisions relating to the custody, visitation and support of minor children does not prevent one of the parties to the agreement from instituting an action for a judicial determination of those same matters. Winborne v. Winborne, 41 N.C. App. 756, 255 S.E.2d 640, *cert. denied*, 298 N.C. 305, 259 S.E.2d 918 (1979).

While the court is not bound by the terms of a valid separation agreement with regard to provisions for child custody and visitation privileges, the trial court should at

least consider that the agreement represents what the parties believed at the time of its execution was in the best interest of their children, just as the court would consider other evidence in the case in making its own determination.

IV. COURT ACTION

A. Strategy

1. Preliminary Discussion with Client

Initial client interviews and case evaluations play a crucial role in all types of matrimonial litigation. This is especially true in the area of child custody and visitation disputes. Clearly, if the practitioner preliminarily fails to adequately build a proper foundation and elicit the client's trust for the subsequent litigation phases, it will usually lead to mounting problems, which could have been avoided, or, at least, readily ameliorated.

Although there are many viable approaches to the effective handling of initial client interviews and case evaluations, practitioners should strive to maintain an overall flexible approach, keyed to the needs and capacities of the individual client and the special circumstances of each case.

First of all, during an initial client interview, I attempt to ascertain whether custody is genuinely in issue, or whether one party is using custody as a threat to gain some other advantage, or perhaps one party who is asking for custody is really asking for just extended visitation. After determining the status of the parents (divorced, separated or separating, and whether other family law actions may be involved), and after exploring the possibilities of reconciliation or at least a negotiated settlement, I next attempt to determine whether the client's expectations and goals, considering his or her particular set of circumstances, are realistic. While it is and will always remain the client's case and not mine, meaning that the decisions should be his or hers based upon advice from me, I generally consider strategy to be the province of the practitioner, and I am not interested in simply being a "mouthpiece" for someone's unrealistic expectations.

After determining such factors as the client's accommodations for children, his/her time availability to supervise children and his/her past experiences and present relationship with the children, and comparing those with the other parent's circumstances, I next attempt to determine if it is advisable to interview the children themselves and the most effective approaches to interviewing them, in order to ascertain their preferences if they are of sufficient age and discretion.

Finally, the matter of counsel fees and payment should be candidly and frankly discussed with the client during the initial conference. I prefer to utilize a written retainer agreement, which provides for a non-refundable retainer fee to be paid before any work is commenced and establishing an hourly rate for itemized time expended on behalf of the client thereafter. A realistic discussion of counsel fees at the beginning of the relationship will avoid the client getting in over his/her head and will minimize later misunderstandings.

2. Best Interest of Child/Fitness of Parents

As discussed hereinabove, the welfare of the child is the paramount consideration in custody matters. Goodson v. Goodson, *supra*. When conflict exists between the two, the right of the parent to have custody of his or her child must yield to what will promote the best interest of the child. Greer v. Greer, 5 N.C. App. 160, 167 S.E.2d 782 (1969). When the welfare of the child and the goals of the parent-client are in accord, all is well, and I can enthusiastically represent such a client at the negotiating table or in the courtroom. When however, the two appear to be in conflict, then perhaps it is time for attorney and client to sit down together in order to re-evaluate the circumstances and redefine goals. The "polar star" in custody cases should be the motivation for the practitioner, as well as for the court.

3. Proof

In persuading the court in custody cases, the burden of proof, as in most civil cases, is by the greater weight of the evidence. In determining what evidence to introduce at a custody hearing, the practitioner should remember that the trial judge will be striving to choose an environment which will, in his/her judgment, best encourage full development of the child's (a) physical, (b) mental, (c) emotional, (d) moral and (e) spiritual faculties. Blackley v. Blackley, *supra*. Witnesses that can establish the parent-client's suitability for meeting these enumerated needs of the child should be sought and interviewed in organizing testimony to be offered at the hearing. While witnesses should not be "coached" or rehearsed for the hearing, the practitioner should know firsthand what they will say before they are called to the witness stand.

With regard to evidence that may be introduced, it is interesting to note that the vicarious consent doctrine with respect to the North Carolina Electronic Surveillance Act, specifically N.C.G.S. 15A-287, permits a custodial parent to vicariously consent to the recording of a minor child's conversations with the other parent, as long as the custodial parent has a good faith, objectively reasonable belief that the interception of the conversations is necessary for the best interest of the minor child (e.g., to protect the child). Kroh v. Kroh, 152 N.C. App. 347, 567 S.E.2d 760 (2002).

4. Psychological Evaluation

Since two of the five factors enumerated in the Blackley case above involve mental and emotional fitness of a parent to provide care and supervision for minor children, it would appear desirable, particularly in close cases, to obtain a psychological evaluation of both parents and the minor child. Whenever possible and feasible, one psychologist should evaluate all parties involved so that legitimate comparisons and conclusions can be developed. If opposing counsel will not cooperate, or if the two of you cannot agree on one psychologist, then it may be advisable to file a motion, pursuant to the provisions of Rule 706 of the North Carolina Rules of Evidence, requesting that the court order such an evaluation and select its own psychologist, dividing the cost therefor equally

between the parties or otherwise as appropriate, perhaps waiting until after the hearing to tax the expenses as part of the court costs.

5. Pleadings

Since specificity of allegations is not required in child custody actions as it is in alimony actions, and because the court, upon request, will make a custody determination between parents without having to find either parent "unfit," I strongly recommend keeping pleadings general and alleging only that the practitioner's client is a fit and proper person to have the exclusive care custody and control of the minor children, without alleging a lot of negative things about the other parent which may weaken the case if they are not proved at the hearing to the satisfaction of the trial judge. An exception to this general procedure of not pleading "unfitness" would, of course, be when the practitioner is representing a non-parent against a parent [see Petersen v. Rogers, *supra*]. Such positive pleading is also not possible when the parties are still living together, and your client wants his or her spouse moved out of the marital residence, which requires proving that grounds for alimony exist, even if an award of alimony is not sought.

6. Orders

Whether by consent or as the result of a contested hearing, all child custody orders should include adequate findings of fact to support appropriate conclusions of law. Such explicit findings of fact establish a basis for determining at a later date whether or not a substantial change in circumstances has occurred which would justify a modification of the previous court order. When in doubt, it is better to have too many findings of fact rather than not enough. In contested cases, an order replete with findings of fact will more likely than not be affirmed on appeal. When a settlement is reached on the day of the hearing, the provisions thereof should immediately be reduced in the form of handwritten memorandum of judgment to be signed right then and there by both parties, respective counsel and the trial judge, with an express condition that the parties authorize their attorneys to execute the more formal typewritten consent order to be drafted at a later date without requiring their signatures in order to avoid changes of mind before the typing can be done. As previously mentioned, but worthy of reiteration, I strongly recommend that practitioners maintain sample orders (and pleadings) in loose-leaf notebooks with tabs for easy future reference and reduced future dictation time (of course, word-processing master discs are also helpful to practitioners who have more clients than time).

B. Children Born Out-Of-Wedlock

In the case of Jolly v. Queen, 264 N.C. 711, 142 S.E2d 592 (1965), the North Carolina Supreme Court had previously held that there is a common law presumption that custody of an illegitimate child should be awarded to the mother unless the mother is unfit or is otherwise unable to care for the child. Under the holding of this case, it became incumbent upon the fathers of children born out-of-wedlock to legitimate the minor child, pursuant to North Carolina General Statute Section 49-10, before filing an action for either custody or visitation in the District Court, pursuant to N.C.G.S. 50-13.1 et seq. Paternity,

custody and visitation issues have always, of course, been possible to establish in one consent order entered by the District Court.

However, in the subsequent case of Rosero v. Blake, 357 N.C. 193, 581 S.E.2d 41 (2003), *rev'g* 150 N.C. App. 251, 563 S.E.2d 248 (2002), the North Carolina Supreme Court held that the trial court did not err in using the best-interest-of-the-child standard to determine custody between the mother and the father of a child born out-of-wedlock, even though the father had not previously legitimated the child pursuant to North Carolina General Statutes Section 49-10 or had not previously obtained a judicial determination of paternity pursuant to North Carolina General Statutes Section 49-14 [but had only previously signed an acknowledgment of paternity pursuant to N.C.G.S. 100-132(a)], stating that case law and statutory amendments since the 1965 Jolly case have abrogated the common law presumption in favor of mothers of illegitimate children. Also see David v. Ferguson, 106 N.C. App. 89, 584 S.E.2d 102 (2003).

In Conley v. Johnson, 24 N.C. App. 122, 210 S.E.2d 88 (1974), the Court of Appeals held that the District Court was authorized to grant the father of an illegitimate child visitation privileges and to punish the mother for refusing to allow the father to visit with his illegitimate child.

In all cases where there is any doubt whatsoever as to the paternity of the child, a blood grouping or DNA print identification test should be sought and obtained.

For recent decisions involving paternity and/or legitimation issues, please see the following cases: Guilford County ex rel. Lisa Manning v. Richardson, 149 N.C. App. 663, 562 S.E.2d 67 (2002); Bright v. Falskrud, 148 N.C. App. 710, 559 S.E.2d 286 (2002); Rice v. Rice, 147 N.C. App. 505, 555 S.E.2d 924 (2001).

C. Grandparents' Rights

In addition to qualifying under the provisions of North Carolina General Statutes Section 50-13.1, along with other "third parties," to institute an action or proceeding for the custody of a minor child, subject to the priority given to the right of natural and adoptive parents as previously discussed herein, grandparents have expressly been granted visitation privileges by N.C.G.S. 50-13.2(b1) with their grandchildren in the discretion of the trial judge, except with regard to biological grandparents of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated. Also see N.C.G.S. 50-13.5(j).

In making custody decisions between a parent and a grandparent or other third party, the court must balance two doctrines. The first, the "parental right" doctrine, holds that ordinarily, and in the absence of particular circumstances, the custody of a child should be given to the parent in preference to the grandparent, if the parent is found to be fit to have custody and can supply a proper home. The second doctrine, the "best interest of the child" doctrine, holds that custody should be awarded in accordance with the best interest of the child regardless of the fitness of the parents. Campbell v. Campbell, 63 N.C. App. 113, 304 S.E.2d 262, *cert. denied*, 309 N.C. 460, 370 S.E.2d 362 (1983). See also,

Walker v. Walker, 224 N.C. 751, 32 S.E.2d 318 (1944); In re Stancil, *supra*; Moore v. Moore, 89 N.C. App. 351, 365 S.E.2d 662 (1988); and Hedrick v. Hedrick, *supra*; Kerns v. Southern, 100 N.C. App. 664, 397 S.E.2d 651 (1990).

However, in 1994, the North Carolina Supreme Court overruled Best, *supra*, and held in an initial custody proceeding, absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, that "the constitutionally-protected paramount right of parents to custody, care and control of their children must prevail" over the custody claims of third parties. Petersen v. Rogers, *supra*. Those Petersen exceptions were expanded by the subsequent North Carolina Supreme Court decision in Price v. Howard, *supra*.

Declaring that parents have a "fundamental right to make decisions concerning the care, custody and control of their children," the Supreme Court of the United States of America ruled on June 5, 2000, in a 6-3 vote, that a Washington state law went too far in permitting a trial judge to order visitation rights for paternal grandparents over a mother's objection (where the children's father was deceased). Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). This decision does not appear to alter or affect existing North Carolina statutory and case law. For example, see Montgomery v. Montgomery, 136 N.C. App. 435, 524 S.E.2d 360 (2000).

Decisions of our appellate courts treat third-party requests (by grandparents and others) concerning minor children differently, based upon whether they are actions initiated pursuant to N.C.G.S. 50-13.1(a) for custody, or whether they are motions to intervene for visitation privileges pursuant to N.C.G.S. 50-13.5(j). In the former situation, grandparents would have standing to seek custody if they are able to show that a custodial parent is either unfit or has taken action inconsistent with a parent's constitutionally protected right to the care, custody and control of the minor child. However, in the latter situation, a grandparent's right to visitation arises either in the context of an ongoing custody proceeding or where the minor child is in the custody of a stepparent or a relative, and the grandparent's request for visitation that does not allege that the minor child is not part of an "intact" family will be dismissed for failure to state a claim upon which relief can be granted. Eakett v. Eakett, 157 N.C. App. 550, 579 S.E.2d 483 (2003).

For cases where our appellate courts have upheld dismissals by trial courts of grandparents' complaints seeking custody on the basis of failure to allege and/or to prove facts sufficient to support a conclusion that the custodial parent had waived his constitutionally protected status as a parent, see: McDuffie v. Mitchell, 155 N.C. App. 587, 573 S.E.2d 606 (2002), *review denied*, 357 N.C. 165, 580 S.E.2d 368 (2003) [failure to allege]; Owenby v. Young, 357 N.C. 142, 579 S.E.2d 264 (2003), *rev'g* 150 N.C. App. 412, 563 S.E.2d 611 (2002).

Although only the father and the mother were named parties at the time of the initial custody hearings, and despite the fact that the child was living with the mother in an "intact family" following the father's death, the Court of Appeals of North Carolina affirmed the trial court's decision to allow the paternal grandparents to intervene in the case and also to grant the paternal grandparents increased visitation privileges with the minor child over

the objection of the surviving mother, on the basis that the paternal grandparents had been previously made "de facto parties" when the trial court initially granted the paternal grandparents rights with regard to the minor child under the trial court's previous orders. Sloan v. Sloan, 595 N.C. App. 228, 595 S.E.2d 228 (2004). The Court of Appeals also held that the trial court had made numerous findings of fact that would support a conclusion of law that a change in circumstances had occurred, most of which findings were based upon the potential harm to the child in cutting off the child's relationship with the paternal grandparents. *Id.*

A grandparent seeking custody of (or visitation with) a minor child will not be successful in the following situations: (1) pursuant to the provisions of N.C.G.S. 50-13.2(a) if there is no proof that the natural parent(s) is/are unfit or have engaged in such conduct as to forfeit their constitutionally protected priority claim to custody of their child, (2) pursuant to the provisions of N.C.G.S. 50-13.2(b1) if where there is not an ongoing custody dispute, and (3) pursuant to the provisions of N.C.G.S. 50-13.5(j) if the grandparent fails to allege and prove a substantial and material change in circumstances pursuant to N.C.G.S. 50-13.7. Adams v. Wiggins, ___ N.C. App. ___, 621 S.E.2d 342 (2005). However, the North Carolina Court of Appeals has held that a grandparent could intervene in a case after a child custody order had been entered when one of the natural parents filed a motion in the cause several years later to modify the custody provisions of that order pursuant to the provisions of N.C.G.S. 50-13.7. Smith v. Smith (North Carolina Lawyers Weekly October 2, 2006, No. 06-16-1062, 10 pages), ___ N.C. App. ___, ___ S.E.2d ___ (2006) (*unpublished*).

D. Temporary Orders

If the circumstances of the case render it appropriate, North Carolina General Statutes Section 13.5(d)(2) authorizes the court, upon gaining jurisdiction of the minor child, to enter orders for the temporary custody and support of the child, pending the service of process or notice as herein provided.

Such temporary custody orders are appropriate when their entry would promote the welfare of the minor child and when they are necessary to preserve the status quo, to provide stability for the minor child, to prevent the questionable removal of the child from the jurisdiction, to return the child to the rightful custodian(s), or to protect the child from harm. Such temporary orders are entered *ex parte* upon a verified affidavit or pleading, and must be reviewed by the court within ten days before being continued in full force and effect or terminated.

However, North Carolina General Statutes Section 50-13.5(d)(3) provides that a temporary order for custody which changes the living arrangements of a child, or which changes custody, shall not be entered *ex parte* and prior to service of process or notice, unless the court finds that the child is exposed to a substantial risk of bodily injury or sexual abuse or that there is a substantial risk that the child may be abducted or removed from the State of North Carolina for the purpose of evading the jurisdiction of North Carolina courts.

Such temporary orders, which do not determine the ultimate issues, but simply direct some further proceeding preliminary to a final decree, are "interlocutory" in nature, and, as such, are nonappealable. Dunlap v. Dunlap, 81 N.C. App. 675, 344 S.E.2d 806 (1986).

A temporary order becomes a permanent order when an "unreasonable" amount of time passes. LaValley v. LaValley, 151 N.C. App. 290, 564 S.E.2d 913 (2002). However, the Court of Appeals of North Carolina has held that a temporary consent order was not converted into a permanent order due to the lapse of twenty (20) months between the entry of the order and the subsequent motion to modify the provisions thereof. Senner v. Senner, 161 N.C. App. 78, 587 S.E.2d 675 (2003). However, even where an order grants only temporary custody, it is not interlocutory unless the trial court states a clear and specific reconvening time in the order and the time interval between the two hearings is reasonably brief. McRoy v. Hodges, 160 N.C. App. 381, 585 S.E.2d 441 (2003).

If a child custody or visitation order is considered "temporary," the applicable standard of review for any proposed modifications is the best interest of the child, and not a substantial change in circumstances. Simmons v. Arriola, *supra*.

E. Right to a Hearing and Required Notice

North Carolina General Statutes Sections 50A-205 and 50A-108 provide that, before the court can make a decree of custody, reasonable notice and opportunity to be heard must be given to the contestants, to any parent whose parental rights have not been previously terminated, and to any person who has physical custody of the child.

North Carolina General Statutes Section 50-13.5(d)(1) provides that service of process in civil actions for the custody of minor children shall be as in other civil actions. In this regard, see Rules 4(j)(1), 4(j)(2), 4(j1) and 4(j3) of the North Carolina Rules of Civil Procedure.

Rule 6(d) of the North Carolina Rules of Civil Procedure requires that all written motions be served before a hearing. North Carolina General Statutes Section 50-13.5(d)(1) requires that motions for custody of a minor child in a pending action may be made on 10 days notice to the other party or parties and after compliance with N.C.G.S. 50A-205, and further that motions for support of a minor child in a pending action may be made on 10 days notice to the other party or parties and compliance with N.C.G.S. 50-13.5(e).

The minimum 10-day notice period is applicable regardless of whether the opposing party resides in-state or resides out-of-state, although N.C.G.S. 50A-108 authorizes notice and proof of service to be made by any method allowed by either the state which issues the notice or the state where the notice is received.

Rule 6(e) of the North Carolina Rules of Civil Procedure, in effect, extends the minimum 10-day notice period to 13 days when notice is served by mail. See Wilson, North

Carolina Civil Procedure, 2nd ed., Michie [now Matthew Bender, LexisNexis Group] (Charlottesville, VA) (1995) [with 2004 cumulative supplement] ch. 6 at page 114.

Notice of the temporary hearing scheduled for the sole purpose of reviewing an *ex parte* temporary custody order issued pursuant to N.C.G.S. 13.5(d)(2), by its very nature, does not have to be given 10 days in advance.

Although North Carolina General Statutes Section 50A-105 requires that foreign countries are to be treated as states for the purposes of the Uniform Child-Custody Jurisdiction and Enforcement Act, attorneys should be cautioned about service and notice in foreign countries. Countries have their own rules on service which must usually be followed. Attorneys should consult the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 36, T.I.A.S. 6638 (1965). See "Official Comment" printed below N.C.G.S. 50A-108 on page 369 of Volume 8 of the General Statutes of North Carolina, Annotated, 2005 edition.

F. Reports from Third Parties

Whenever the trial court is determining the best interest of a child, any evidence which is competent and relevant to a showing of the best interest of the child must be heard and considered by the trial court, subject to the court's discretionary powers to exclude cumulative testimony. In the Matter of Loretta Diane Shue, 311 N.C. 586, 319 S.E.2d 567 (1984); N.C.G.S. 7A-640 and 7A-657.

1. Guardian Ad Litem

Considering the importance of custody decisions and their virtual finality as rendered by the District Court, trial judges are becoming more agreeable to obtaining and considering testimony and input from as many informed and objective sources as possible. See In the Matter of Gwaltney, 68 N.C. App. 686, 315 S.E.2d 750 (1984), where the Court of Appeals held that, in child custody matters, the trial court may consider the recommendation of the child's guardian ad litem concerning the needs of the minor child. Also, see Matter of Baby Boy Searce, *supra*.

2. Department of Social Services

Rather than hear testimony from a parade of traditional witnesses including neighbors, relatives and friends, with regard to such matters as the physical residence of the parties and their reputations in the community, many judges are granting motions filed by the parties requesting that the local Department of Social Services conduct a "home study" of all persons involved in custody actions. Such reports condense the relevant facts in a concise, objective and professional manner that provide the trial court with a more accurate picture of all the surrounding circumstances than would otherwise be possible. By stipulation, such reports may be received by the court in writing only, with copies being made available to counsel for both of the parties prior to the hearing. Absent a stipulation to the contrary, the social worker who compiled the report would be required to appear in person in court to testify and be subject to cross-examination by counsel for the

parties. If the practitioner believes that such a report would benefit his or her client, then he or she may wish to obtain a stipulation for the admissibility of the written report from opposing counsel before the "home study" is undertaken.

3. Psychologist

It is now accepted that the best interest of the child standard encompasses a consideration of the psychological and emotional welfare of the child as well as the child's physical well-being. Therefore, the legal profession has turned to experts in the field in order to obtain insight into the perceived needs of children generally, as well as the psychological factors actually involved in a particular custody dispute, such as the psychology of the children and the parties involved as well as the dynamics of the relationships between them.

When I was a District Court judge, it was only on the basis of compelling testimony from several psychologists that contact between a boy and his homosexual father would assist the child in dealing with the stigma attached to such a circumstance and the teasing that he was receiving from his peers at school, in addition to certain other assurances dealing with the child's safety and protection, that I even considered granting the father overnight visitation privileges with the boy. The Court of Appeals affirmed my decision in that case in Woodruff v. Woodruff, 44 N.C. App. 350, 260 S.E.2d 775 (1979). However, after the Court of Appeals had ruled that mere speculation that father's active homosexuality might impose burden upon children by reason of social condemnation did not constitute a substantial change in circumstances warranting modification of child custody, on July 30, 1988, the Supreme Court reversed and ruled that a gay father who lived with his male partner could not retain custody of his two sons, stating that the father's sexual activity (or any sexual relationship between unmarried persons) could expose the boys to "improper influences," even though the children did not actually witness any of it. Pulliam v. Smith, 348 N.C. 616, 501 S.E.2d 898 (1998), *rev'g*, 124 N.C. App. 144, 476 S.E.2d 446 (1996).

Recently, in a custody case in which I was involved, testimony from a social worker and a detective about allegations of sexual abuse by a father with his three-year-old daughter alone could not convince a District Court judge in Forsyth County to suspend visitation privileges by the father with the girl, pending the full hearing on the merits the following month, although the judge did require supervised visitation at the home of the paternal grandmother. It was not until I offered the testimony of a psychologist with regard to the psychological harm that could result from forcing the girl to visit with her father pending the completion of the DSS and criminal investigations in defense of a contempt proceeding against my client that the judge modified his order and suspended further visitation privileges.

Please note that a psychologist may not ethically talk with a minor child without the custodial parent's permission when the minor child is brought into the psychologist's office by the noncustodial parent. White v. State Board, 97 N.C. App. 144, 388 S.E.2d 148 (1990).

4. Parenting Coordinator

Effective October 1, 2005, the General Assembly created the position of a parenting coordinator, an individual holding a masters or doctorate degree in psychology, law, social work, counseling, medicine, or a related subject area, to assist the Court, counsel for the parties and the parties themselves in high-conflict child custody cases. See N.C.G.S. 50-90 through 50-100. These parenting coordinators may be appointed at any time during the proceedings of a child custody action if all of the parties consent to the appointment. The Court may appoint a parenting coordinator without the consent of the parties upon the entry of a custody order (other than an *ex parte* order), or upon the entry of a parenting plan only if the Court also makes specific findings of fact that the action is a high-conflict case, that the appointment of the parenting coordinator is in the best interest of any minor child in the case, and that the parties are able to pay for the cost of the parenting coordinator.

G. Continuing Jurisdiction of Court

Once the District Court obtains jurisdiction over a minor child, its jurisdiction continues until terminated by court order or until the minor attains the age of eighteen years or is sooner emancipated as a matter of law. In the Matter of Botsford, 75 N.C. App. 72, 330 S.E.2d 23 (1985).

For purposes of the rule that once jurisdiction of the court attaches it exists for all time until the cause is fully and completely determined, in actions for child custody and support, only the majority of the child or the death of the party fully and completely determines the cause, and nothing in the statutory scheme providing for the election of procedures in actions for child custody or support alters this rule. Latham v. Latham, 74 N.C. App. 722, 329 S.E.2d 721 (1985).

Likewise, once jurisdiction is acquired, it is generally not divested by subsequent events. Neal v. Neal, 69 N.C. App. 766, 318 S.E.2d 255 (1984).

Although parents have the right to determine the custody and visitation privileges with regard to their minor children by a written separation agreement, once the court is asked to assume jurisdiction and does so with regard to those issues, the parties are no longer free to determine such matters between themselves without court approval in the form of a consent order. In other words, only the court can modify a court order, and, once an order is entered by the court with regard to child custody, the parents lose their right to contract with regard to that issue subsequently throughout the minority of their children.

The trial court of original venue which enters the divorce decree and the initial order of child custody and support has the discretion to transfer the venue of the ongoing action for custody or support to the county to which the ex-wife and the children move, for the convenience of witnesses and the parties, and in the best interests of justice and the parties. Broyhill v. Broyhill, 81 N.C. App. 147, 343 S.E.2d 605 (1986).

H. Enforcement of Orders in General

North Carolina General Statutes Section 50-13.3(a) provides that an order providing for the custody of a minor child is enforceable by proceedings for civil contempt, and its disobedience may be punished by proceedings for criminal contempt, as provided in Chapter 5A of the North Carolina General Statutes, and the same is true with regard to the enforcement of court-ordered visitation privileges. Appert v. Appert, *supra*.

A trial judge has the power to enter an order forcing a minor child to visit with the noncustodial parent. However, before the drastic action of incarceration of the custodial parent may be utilized, the circumstances must be compelling, and due process requires the court to do the following: afford the parties a hearing upon proper notice in advance; create a proper court order based on findings of fact and conclusions of law determined by the judge to justify and support the order; and make findings that include at a minimum that such incarceration of the custodial parent is reasonably necessary for the promotion and protection of the best interest and welfare of the minor child. Mintz v. Mintz, *supra*.

In situations where older children (who are capable of forming their own opinions and of articulating their own reasons therefor) refuse to visit with the noncustodial parent, the trial court may not find the custodial parent to be in contempt of the visitation order where there is no evidence that the custodial parent encouraged the children's refusal to visit or attempted in any way to prevent the visitation. In other words, the mere failure of the custodial parent to use physical force or threat of punishment to make the children visit with the noncustodial parent does not rise to the level of willful contempt. Hancock v. Hancock, 122 N.C. App. 518, 471 S.E.2d 415 (1996). Where the custodial parent does not prevent visitation, but takes no action to force visitation when the children refuse to visit, the proper method to force visitation is not a contempt proceeding, but is for the noncustodial parent to ask the trial court to modify its order to compel visitation. *Id.*

However, in an unpublished opinion where the custodial mother did not prevent visitation, the Court of Appeals of North Carolina affirmed a finding of civil contempt against her by the trial court and held that the custodial mother was not excused from complying with a visitation order because her fifteen-year-old son refused to go see his father (even where the evidence revealed that the teenager locked himself in his bedroom to avoid one of the visits), because the custodial mother had previously "poisoned the mind" of the minor child against his father. Anderson v. Lackey, 163 N.C. App. 246, 593 S.E.2d 87 (2004). In so ruling, the Supreme Court distinguished its 1996 holding in Hancock supra by stating that the custodial mother's sex abuse accusations against the boy's father in Anderson took the case outside the rule in Hancock, that contempt is a "fact-specific inquiry" and that the holding in Anderson was limited "to the facts of the case before us."

In contempt proceedings, the trial court's findings of fact are conclusive on appeal when supported by any competent evidence and are reviewable on appeal only for the purpose of passing on their sufficiency to warrant the judgment entered. Glesner v. Dembrosky, *supra*.

I. Enforcement of Orders During Appeal

North Carolina General Statutes Section 50-13.3(a) provides that, notwithstanding the provisions of North Carolina General Statutes Section 1-294, an order pertaining to child custody (and therefore also with regard to visitation privileges) which has been appealed to the appellate division is enforceable in the trial court by proceedings for civil contempt during the pendency of the appeal. Said statute further provides, upon motion of an aggrieved party, that the court of the appellate division in which the appeal is pending may stay any order for civil contempt entered for child custody until the appeal is decided, if justice so requires.

The trial court has the power to issue, while a previous order awarding custody of minor children to the father was on appeal, an *ex parte* order requiring the mother to relinquish custody of the children to the father and to appear before the trial court and show cause why she should not be held in contempt of court for violating the previous order, where the father made a showing that the mother was in violation of such order and wrongfully had custody of the children. Wolfe v. Wolfe, 67 N.C. App. 752, 314 S.E.2d 132 (1984).

Although an order pertaining to child custody may be enforceable in the trial court during the pendency of an appeal (absent a stay order), the writer is aware of at least one unpublished opinion of the Court of Appeals of North Carolina indicating that the trial court has no jurisdiction to modify a child custody order during the pendency of an appeal from that order.

The North Carolina Supreme Court discusses the scope of N.C.G.S. 7B-1003 regarding the ability and jurisdiction of a trial court to issue temporary orders affecting custody during the pendency of appeals from custody orders in the case of In re RTW, ___ N.C. ___, 614 S.E.2d 489 (2005).

J. Modification of Orders

North Carolina General Statutes Section 50-13.7 provides that an order of a court of this State for custody of a minor children may, subject to the provisions of North Carolina General Statutes 50A-3, be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested.

An order awarding custody of minor children is based upon conditions found to exist at the time that it is entered. The order is subject to such change as is necessary to make it conform to changed conditions when they occur. Owen v. Owen, 31 N.C. App. 230, 229 S.E.2d 49 (1976).

The phrase "changed circumstances" has been held to mean such a change as affects the welfare of the minor child. In re Harrell, *supra*.

There must generally be a substantial change of circumstances before an order of child custody is changed. Todd v. Todd, 18 N.C. App. 458, 197 S.E.2d 1 (1973).

The moving party has the burden of showing a substantial change of circumstances affecting the welfare of the minor child. Barnes v. Barnes, 55 N.C. App. 670, 286 S.E.2d 586 (1982). The burden of proof, as in most civil actions, with regard to a change of circumstances is by the preponderance of the evidence. Allen v. Allen, 7 N.C. App. 555, 173 S.E.2d 10 (1970).

Traditionally, before the court would modify a custody order, a long line of Court of Appeals decisions had held that it must be shown that the circumstances have so changed that the welfare of the minor child would be adversely affected unless the custody provision was modified. Rothman v. Rothman, 6 N.C. App. 401, 170 S.E.2d 140 (1969); Perdue v. Perdue, 76 N.C. App. 600, 334 S.E.2d 86 (1985). However, this rather strict burden of requiring a showing of adversity to the child as a result of changed circumstances to justify a change in custody has been expressly disapproved by our Supreme Court in Pulliam v. Smith, *supra* [although this writer speculates that the disapproval in the Pulliam opinion is driven more by the particular set of facts in that case than by a conscious intention on the part of the Supreme Court to make all custody orders easier to modify in the future].

Visitation privileges are but a lesser degree of custody. Therefore, the word "custody," as used in Chapter 50 of the North Carolina General Statutes, was intended to encompass visitation rights as well as general custody. Simmons v. Arriola, *supra*; Clark v. Clark, *supra*.

Interference with visitation of the noncustodial parent which had a negative impact on the welfare of the minor child (poisoning the mind of the child) could constitute a substantial change of circumstances sufficient to warrant the court granting a change of child custody. Woncik v. Woncik, 82 N.C. App. 244, 346 S.E.2d 277 (1986); Jordan v. Jordan, *supra*.

A child's poor health and conduct when with the mother, and the child's improved state when with the father, if supported by competent evidence, could justify the trial court in changing the custody arrangement then in force from the mother to the father. Teague v. Teague, 84 N.C. App. 545, 353 S.E.2d 242 (1987). In child custody matters, the child's welfare, rather than the conduct of the parties, is the controlling factor. *Id.*

In a case wherein the mother admitted that she had had two illegitimate children since her divorce and currently had insufficient income to provide for herself and the three children, the Court of Appeals of North Carolina held that there was a substantial change in circumstances affecting the welfare of the parties' child which warranted modification of the previous order by transferring custody from the mother to the father. White v. White, 90 N.C. App. 553, 369 S.E.2d 92 (1988). But see also, Kelly v. Kelly, 77 N.C. App. 632, 335 S.E.2d 780 (1985); Dean v. Dean, 32 N.C. App. 482, 232 S.E.2d 470 (1977).

For a case finding that the unstable living arrangement of the custodial parent constitutes a substantial and material change in circumstances that would justify the modification of a child custody order, see Johnson v. Johnson, ___ N.C. App. ___, 623 S.E.2d 89 (2005) (*unpublished*).

For a case finding that parental disagreement or lack of communication between the parents does not constitute a substantial and material change in circumstances justifying the modification of a child custody order where the evidence is not "substantial," and where the use of alcohol by the custodial parent does not constitute a substantial and material change in circumstances justifying the modification of a child custody order where there is no evidence that such alcohol use "affects" the minor children, see Ford v. Wright, 170 N.C. App. 89, 611 S.E.2d 456 (2005).

For a case affirming the existence of a substantial and material change in circumstances affecting a minor child that would justify the modification of a child custody order if the findings of fact include a change that implicitly affects the welfare of the minor child and recite that there has been an effect on the minor child even if neither the findings of fact nor the conclusions of law draw a connection between the "change" and the "effects," see Karger v. Wood, ___ N.C. App. ___, 622 S.E.2d 197 (2005).

With regard to the wishes of minor children, although the children's wishes are entitled to consideration (albeit not controlling) in an initial custody action [Brooks v. Brooks, *supra*], in a modification of custody action, the children's wishes are not a sufficient change in circumstances, where there is no evidence that either parent's ability or fitness to provide a suitable home had changed. In re Harrell, *supra*. However, see the case of Kowalick v. Kowalick, *supra*, where the North Carolina Court of Appeals affirmed the trial court's changing custody based solely upon the adamant and consistent wishes of a 13-year old daughter to live with her mother after the custody of her and her two siblings had previously been granted to her father.

Although a change of residence of the custodial parent does not in and of itself amount to a substantial change in circumstances, the effect of the move on the welfare of the minor child may constitute a change in circumstances requiring modification of the original child custody order. O'Briant v. O'Briant, 70 N.C. App. 360, 320 S.E.2d 277 (1994), *rev'd on other grounds*, 313 N.C. App. 432, 329 S.E.2d 370 (1985). The practitioner involved in a parental relocation case must also consider Ramirez-Barker v. Barker, 107 N.C. App. 71, 418 S.E.2d 675 (1992), in which Judge Greene, who authored the opinion, noted that it would be a rare case where a relocation would not adversely affect the minor child, indicating that a custodial parent who wishes to move may indeed have a heavy burden. *Id.* at 79, 418 S.E.2d at 680.

Although relocation of a custodial parent in and of itself does not constitute a material and substantial change in circumstances, the North Carolina courts consider various factors in determining whether or not a modification of custody may be appropriate when a custodial parent relocates: (1) the advantages of the relocation in terms of its capacity to improve the life of the child; (2) the motives of the custodial parent in seeking the move; (3) the likelihood that the custodial parent will comply with visitation orders when

the custodial parent is no longer in North Carolina; (4) the integrity of the non-custodial parent in resisting the relocation; and (5) the likelihood that a realistic visitation schedule can be arranged which will preserve and foster the parental relationship with the non-custodial parent. Evans v. Evans, 138 N.C. App. 135, 530 S.E.2d 576 (2000).

For additional cases finding that a move may in fact constitute a material and substantial change in circumstances warranting modification of a child custody order, see Morrill v. Morrill, ___ N. C. App. ___, 625 S.E.2d 204 (2006) (*unpublished*); and Carpenter v. Ratliff, ___ N. C. App. ___, 621 S.E.2d 340 (2005) (*unpublished*).

For an additional case finding that a move does not constitute a material and substantial change of circumstances warranting modification of a child custody order, see Najjar v. Najjar, ___ N.C. App. ___, 623 S.E.2d 89 (2005) (*unpublished*).

While allegations concerning adversity to the child are acceptable factors for the trial court to consider and will support modification, a showing of a change in circumstances that is, or is likely to be beneficial to the child may also warrant a change in custody. Shipman v. Shipman, *supra*. For purposes of modifying child custody, in situations where a substantial change in circumstances involves a discrete set of circumstances such as a move on the part of the custodial parent, the custodial parent's cohabitation, or a change in the custodial parent's sexual orientation, the effects of the change on the welfare of the child are not self-evident and therefore necessitate a showing of the evidence directly linking the change to the welfare of the child. *Id.*

Although evidence may be introduced during a hearing to modify custody that would support a finding of changed circumstances, the trial court is not required to find and/or to conclude that there has occurred a "substantial" change in circumstances that would justify the trial court's modification of the existing custody order. Scott v. Scott, 157 N.C. App. 382, 579 S.E.2d 431 (2003).

Although the introduction of evidence at a modification hearing is generally restricted solely to events that have transpired since the entry of the order for which the moving party is seeking modification, see Newsome v. Newsome, *supra*, and consider how the holding in this case might enable the moving party to introduce into evidence events that transpired prior to the entry of a consent order that was entered in a child custody action without the court hearing any evidence or "adjudicating" those issues.

Although, if a child custody or visitation order is considered "final" or "permanent," the court may not make any modifications to that order without first determining that there has been a substantial change in circumstances in the case, if a child custody or determination order is considered "temporary," the applicable standard of review for proposed modifications is the best interest of the child and not a substantial change in circumstances. Simmons v. Arriola, *supra*.

Although an order pertaining to child custody may be enforceable in the trial court during the pendency of an appeal (absent a stay order), this writer is aware of at least one unpublished opinion of the Court of Appeals of North Carolina indicating that the trial

court has no jurisdiction to modify a child custody order during the pendency of an appeal from that order.

The trial court's findings of fact in modifying a child custody order are conclusive on appeal if they are supported by competent evidence, even though there is some evidence to the contrary. Vuncannon v. Vuncannon, *supra*; Hamilton v. Hamilton, *supra*.

K. Attorney Fee Awards

North Carolina General Statutes Section 50-13.6 provides that, in an action or proceeding for the custody of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody, the trial court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expenses of the suit.

Unlike alimony actions, the award of attorney fees in child custody cases is not limited to the prevailing party; and, unlike child support cases, the award of attorney fees in custody cases does not depend upon some unreasonable refusal by the other party.

The preparation of a written affidavit for counsel fees (which itemizes the time expended) generally produces better results.

V. UNIFORM CHILD-CUSTODY JURISDICTION AND ENFORCEMENT ACT (UCCJEA)

All fifty states and the District of Columbia had previously adopted the Uniform Child Custody Jurisdiction Act (UCCJA), which became effective in North Carolina on July 1, 1979, and comprised Chapter 50A of the North Carolina General Statutes " 50A-1 through 50A-25.

Effective October 1, 1999, and applicable to causes of action arising on or after that date, North Carolina adopted the new Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA), which still comprises Chapter 50A of the North Carolina General Statutes, but which substitutes for former Sections 50A-1 through 50A-25 new Sections 50A-101 through 50A-317.

Not all of the states have as yet adopted the new UCCJEA, and therefore the practitioner in interstate child custody actions should immediately determine whether the other state is still operating under the former UCCJA or the newer UCCJEA. In dealing with the laws of the other state (either UCCJA or UCCJEA), the practitioner should also realize that the other state (in adopting the former or newer Act) may have made some of its own modifications, so that any differences that exist between former or current North Carolina law and the other state in question should be identified and compared at the outset. McCahey, Kaufman, Kraut, Zett and Bailey, Child Custody & Visitation Law and Practice, Matthew Bender (1986).

The purposes of the former UCCJA were set out in Section 50A-1(a), but are not contained in the new UCCJEA. However, the official comment to North Carolina General Statutes Section 50A-101 makes it clear that the new UCCJEA should be interpreted according to the same purposes set out in former North Carolina General Statutes Section 50A-1(a), as follows:

- (1) Avoid jurisdictional competition and conflict with courts of other States in matters of child custody which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being;
- (2) Promote cooperation with the courts of other States to the end that a custody decree is rendered in that State which can best decide the case in the interest of the child;
- (3) Discourage the use of the interstate system for continuing controversies over child custody;
- (4) Deter abductions of children;
- (5) Avoid relitigation of custody decisions of other States in this State; [and]
- (6) Facilitate the enforcement of custody decrees of other States.

To over-simplify the purposes of both the former UCCJA and the current UCCJEA would be to state that the Act attempts to avoid jurisdictional competition and conflicts with courts of other states in matters of child custody. The entire Uniform Child-Custody Jurisdiction and Enforcement Act covers forty pages in Volume 8 of the North Carolina General Statutes and should be read and study in its entirety. The best way to become familiar with the Act is to become involved in a child custody case involving the court of another state and therefore to discover its application in a practical and realistic situation. For now, it is sufficient to know that the Act exists and to remember where it can be found.

Although the intent of the current UCCJEA is to bring North Carolina law more in accordance with the Federal Parental Kidnapping Prevention Act (PKPA) infra, this presenter is of the opinion that some differences still exist between North Carolina's current UCCJEA and the federal PKPA.

The Uniform Child-Custody Jurisdiction and Enforcement Act basically provides four grounds for determining jurisdiction: (1) home state; (2) best interest of the child based upon a significant connection or available substantial evidence concerning the child and the family; (3) abandonment or emergency; and (4) no state having or exercising jurisdiction. The UCCJEA is intended to prevent forum shopping for the convenience of competing

parents to the detriment of the real interest of the minor child. Holland v. Holland, 56 N.C. App. 96, 286 S.E.2d 895 (1982); Davis v. Davis, 53 N.C. App. 531, 281 S.E.2d 411 (1981).

In compliance with the Act, practitioners must provide certain information in any initial pleading raising the issue of child custody in accordance with the provisions of North Carolina General Statutes Section 50A-209.

The jurisdictional prerequisites of the Uniform Child-Custody Jurisdiction and Enforcement Act only govern in permanent child custody situations (as opposed to juvenile court proceedings). In the Matter of Arends, 88 N.C. App. 550, 364 S.E.2d 169 (1988). Interstate adoption matters are governed by the provisions of the Interstate Compact on the Placement of Children (N.C.G.S. 110-57.1 *et seq.*), and not by the Uniform Child-Custody Jurisdiction and Enforcement Act. However, it has been suggested that any apparent conflicts in the application of these two acts to any particular situation should be resolved in favor of applying the provisions of the Interstate Compact on the Placement of Children (ICPC) over the conflicting provisions of the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA). Adoption Law And Practice, section 3-A.11, at page 3A-16, Matthew Bender (1988).

If a wife/mother residing in the State of North Carolina files a complaint for absolute divorce and child custody in North Carolina, and if the husband/father residing in another state files an answer in the North Carolina action in which he does not contest the court's personal jurisdiction, then the husband/father has made a general appearance such that the husband/father has waived his challenge to the North Carolina court's exercise of personal jurisdiction in the wife's/mother's subsequent motion in the cause for child support. Stern v. Stern, 89 N.C. App. 689, 367 S.E.2d 7 (1988); N.C.G.S. 1-75.7.

Pursuant to North Carolina General Statutes Section 50A-208(b), a North Carolina trial court may properly decline to exercise jurisdiction to modify a foreign child custody decree, despite the physical presence of the mother and the child in the State of North Carolina, if the North Carolina court determines that the mother is guilty of misconduct in removing the child from the foreign jurisdiction in violation of the provisions of the foreign child custody decree. Danna v. Danna, 88 N.C. App. 680, 364 S.E.2d 694, *cert. denied*, 322 N.C. 479, 370 S.E.2d 221 (1988).

A trial court's order, pursuant to the Uniform Child-Custody Jurisdiction and Enforcement Act, retaining jurisdiction to determine custody is not a final determination of the issue involved; rather it simply determines where the children's custody issue will be heard. Such an order is interlocutory and nonappealable because it affects no substantial right of a party which cannot be protected by timely appeal subsequently from the trial court's ultimate disposition of the entire controversy on the merits. Walleshouser v. Walleshouser, 100 N.C. App. 594, 397 S.E.2d 371 (1990).

In a case involving an initial custody determination dispute between two states, where one state was the child's home state, and where the other state had a significant connection with the child and at least one contestant, the Court of Appeals of North Carolina, in an opinion written by Judge John, has held that "home state" jurisdiction

[NCGS 50A-201(a)(1)] takes priority over "significant connection" jurisdiction [NCGS 50A-201(a)(2)]. Potter v. Potter, 131 N.C. App. 1, 505 S.E.2d 147 (1998).

For a discussion of what constitutes a "temporary absence" under the provisions of the UCCJEA for the purpose of determining the "home state" of minor children, see the case of Chick v. Chick, 164 N.C. App. 444, 596 S.E.2d 303 (2004).

For an excellent discussion of the current UCCJEA, please see the manuscript prepared by the Honorable Clarence E. Horton, Jr., and by Mary Nell Craven, Esquire, of the law firm of Womble Carlyle Sandridge & Rice in Winston-Salem, Forsyth County, North Carolina, for the North Carolina Bar Foundation in the continuing legal education seminar entitled "Family Law Practice in the New Millennium," which was presented at the North Carolina Bar Center in Cary on Friday, September 15, 2000.

VI. PARENTAL KIDNAPPING PREVENTION ACT (PKPA)

Following the promulgation in 1968 of the Uniform Child Custody Jurisdiction Act (UCCJA), 9 U.L.A. 115 (1988) [as adopted by North Carolina in 1979 as Chapter 50A of the North Carolina General Statutes], it became clear that the UCCJA had not accomplished its purpose. In 1980, Congress enacted the Parental Kidnapping Prevention Act (PKPA), Pub. L. No. 96-611, Sec. 7(b), 94 Stat. 33568, 3568-69 (1980), reprinted in 28 U.S.C.A. Section 1738A (West Supp. 1992), with the intent to federalize child custody jurisdiction law. Under the supremacy clause of the United States Constitution, this federal Act preempts any inconsistent provisions of the UCCJA. Meade v. Meade, 812 F.2d 1473, 1475 (4th Cir. 1987).

The substantive terms of the PKPA are similar to those of the UCCJA, but the drafters expanded the exclusive jurisdiction rule to cover initial as well as modification cases. Amazingly, however, a number of state court decisions (including North Carolina) still ignore the PKPA entirely. In addition, some states have even reached the untenable holding that the PKPA does not preempt state law at all. The United States Supreme Court has added to the problem by refusing to recognize a federal cause of action under the Act and by refusing to accept certiorari when the highest courts of two states issue competing custody decisions. The end result is that the law of the child custody jurisdiction continues to be in a state of chaos, with state courts interpreting the UCCJA and the PKPA loosely (and frequently inaccurately) to accomplish what they believe is in the best interest of the minor children involved in a particular case, although the adoption of the newer UCCJEA has helped somewhat.

The specific jurisdictional test for determining where an action should be heard consists of two parts. First, the court must consider whether or not it has jurisdiction under the terms of the relevant statutes. Secondly, if the court has jurisdiction, the Court must determine whether or not to exercise that jurisdiction. The first part of the test involves a question of law, while the second part of the test involves a question of discretion.

In determining whether or not a court has jurisdiction, both the PKPA and the UCCJA [and now the UCCJEA] divide actions into two groups: (1) actions seeking an initial

custody order, and (2) actions seeking a modification. An action seeking an initial custody order is an action commenced at a time when there is neither a pending foreign custody action nor a prior foreign custody decree. A modification action is defined to be any case which is filed when there is an outstanding custody order from another state or there is a pending custody action in another state. In other words, if a foreign action is pending, the local action must be treated for jurisdictional purposes as a modification action, even if there is no order as yet in place in the other state.

Under both the PKPA and the UCCJA [and now the UCCJEA], there are four separate and independent bases for jurisdiction for obtaining initial jurisdiction: (1) home state jurisdiction; (2) significant connection jurisdiction; (3) emergency jurisdiction; and (4) default jurisdiction. If the requirements for any one of the foregoing four requirements are met, then the local court has initial jurisdiction over the case, and there is little if any difference between the PKPA and the UCCJA in this regard. In modification cases, both the PKPA and the UCCJA [and now the UCCJEA] involve two elements. The first element, which must be considered before the second element, provides simply that a state shall not exercise jurisdiction over a modification action if the initial decretal state retains jurisdiction over the case. If the answer to this first element does not prevent the state from exercising jurisdiction, then the local court must then consider the second element that lists the same four bases for jurisdiction as the test for initial jurisdiction: (1) home state jurisdiction; (2) significant connection jurisdiction; (3) emergency jurisdiction; and (4) default jurisdiction. If one state presently has jurisdiction over a child custody action, then no other state can exercise concurrent jurisdiction, even if that second state meets one of the foregoing four jurisdictional bases.

It is with regard to the exercise of jurisdiction in modification actions where most states reach divergent conclusions, and also where the UCCJA and the PKPA "appear" most to be in conflict. Under the PKPA and the newer UCCJEA, it appears clear that the initial decretal state would retain jurisdiction for modification purposes for as long as the minor child or either of the contestants continues to reside in such state. On the other hand, most state court decisions interpreting the former UCCJA tend to be guided (blindly) by the home state jurisdictional test and tend to conclude (erroneously) that the decretal state "loses" jurisdiction once the minor child has been absent from the decretal state for more than six months, even though one of the contestants continues to reside in the initial decretal state, and even though the minor child continues to have a significant connection with the initial decretal state. For a clear and concise critical analysis of the PKPA and the UCCJA, refer to an excellent two-part article written by Brent R. Turner entitled "Deciding Who Decides: A Critical Review of the Law of Jurisdiction in Child Custody Cases," published in Volume 4, Nos. 8 and 9, of Divorce Litigation (Aug. and Sep. 1992) [much, but not all, of which would also be applicable to the UCCJEA].

Although the current UCCJEA is designed to be more in accord with the PKPA than was the former UCCJA, some differences still exist, and it is submitted that the PKPA would therefore still preempt any inconsistent provisions of the UCCJEA. Meade v. Meade, *supra*.

For cases correctly holding that the initial decretal state retained jurisdiction to modify its prior custody order(s) [despite the fact that the child(ren) no longer resided in such state], see: Meade v. Meade, *supra*; Wilson v. Wilson, 121 N.C. App. 292, 465 S.E.2d 44 (1996); Beck v. Beck, 123 N.C. App. 629, 473 S.E.2d 789 (1996); Gasser v. Sperry, 93 N.C. App. 72, 376 S.E.2d 478 (1989); Danna v. Danna, *supra*; Neal v. Neal, *supra*; Jerson v. Jerson, 68 N.C. App. 738, 315 S.E.2d 522 (1984); Naputi v. Naputi, 67 N.C. App. 351, 313 S.E.2d 179 (1984); and Nabors v. Farrell, 53 N.C. App. 345, 280 S.E.2d 763 (1981).

VII. CONCLUSION

The art of representing a client in a child custody case is one that develops over time with experience, knowledge of the bench and commitment to the "polar star" of constantly striving to accomplish what is in the best interest and what would promote the general welfare of the minor child involved. The trial practitioner's reputation with the bench for honesty, candor, sincerity, ethical conduct and genuine interest in and concern for the minor children involved will pay dividends to his or her clients in those "close" cases. In judicial districts where selecting particular judges is possible, it is submitted that it is almost malpractice not to do so. In judicial districts where selection of particular judges is not possible, there can be no substitute for the trial practitioner "knowing" all about his or her hearing judge. The hearing judge in a child custody case determines the trial techniques at the hearing more than any other single factor.

There is no such thing as a "little custody case," and, if the family law practitioner believes in the importance of such cases, and will spend as much time in preparation before the hearing and in drafting the Order following the hearing as continuing to hone his or her trial techniques during the hearing, then his or her child custody practice, although frequently somewhat frustrating, will also always be ultimately rewarding!

In addition to the specific trial techniques and strategies discussed in more detail in the main body of this manuscript, below, in summary, are listed some suggested general guidelines to be followed in most child custody actions that must go to court:

- (1) Know your judge (and opposing counsel)!
- (2) Utilize your client as a resource for gathering background information, developing evidence and obtaining witnesses for the hearing (but retain control of the strategy in court for yourself). Interview personally all witnesses in advance (in person, if feasible, and certainly by telephone) in order to ascertain and evaluate their demeanor, as well as the substance and relevance of their testimony.
- (3) Make certain that your client understands in advance what will be happening and why, as well as what your strategy is in his or her particular case and why. Also, always have a follow-up conference with your client after the hearing, and after the Order has been entered, to make certain that your client understands the Court's decision and what the client's rights and obligations are pursuant to the Order.

(4) Consider utilizing an impartial court-ordered psychologist, either by consent with opposing counsel or as the result of a court order following a motion made pursuant to Rule 706 of the North Carolina Rules of Evidence.

(5) Plan in advance if your client comes to you before the parties separate and utilize *ex parte* orders to obtain temporary custody for your client before there is an attorney on the other side. If the shoe is on the other foot, insist on equal custody time for your client "without prejudice" pending the full hearing on the merits, either by consent or as the result of a temporary hearing, in order to insure "fairness" to both parties at the child custody hearing in chief.

(6) Utilize marked calendars and client journals to develop a pattern of custody and involvement by your client in the life of his or her minor child.

(7) Rule of thumb for all clients: "Don't do anything you would not be proud to have the judge hear all about!" Also attempt to keep in regular contact with your client to avoid "situations" developing.

(8) Consider advising your client to counsel confidentially with his or her own separate psychologist (or to enroll in an appropriate parenting class) in order that the client may learn or improve his or her own child-rearing skills.

(9) Utilize private investigators to establish the "lifestyle" of the opposing party as that lifestyle may impact on the general welfare of the minor children.

(10) Urge your client to be involved with his or her child's school, church, medical/dental treatment and extracurricular activities. Also have your client prepared to testify in detail about the "plan" that he or she has developed for the benefit of the child (e.g., school attendance, daycare provisions, daily schedule, extracurricular activities, contact with the other parent and relatives, etc.).

Children's Rights

Children, whose divorcing parents are involved in a custody dispute, should have the right

- < Not to be asked to choose sides
- < Not to be told the nasty details of the legal proceedings
- < Not to be told "bad things" about the other parent
- < Not to be quizzed about the other parent
- < Not to be used as a messenger between parents
- < Not to be asked to tell lies about the other parent
- < Not to be a parent's legal confidant
- < To express their feelings and to choose not to express certain feelings
- < To be shielded from parental "warfare"
- < Not to feel guilty for loving both parents

Source: Parent Education and Custody Effectiveness
