CUSTODY MOTIONS

Family Law How-To's
A Practical Guide for Handling a Family Law Case

N.C. Advocates for Justice

December 10, 2009

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This manuscript was originally written by Jon B. Kurtz, and by Mary Craven Adams of Womble Carlyle Sandridge & Rice, PLLC. The manuscript was first presented at the 2007 Family Law Specialist Conference. This manuscript has been updated by Kurtz for this presentation. The author wishes to also express gratitude to the following people who have contributed sample motions for this manuscript: Charles Coltrane, Donna Davis, Monica Guy, Robin Stinson & Gary Tash.

The subject matter of this article is custody motions. The discussion, therefore, set forth herein will not address the multitude of actions that can arise in an initial custody action, and instead focuses on issues solely brought by motion before the court.

Attached to this manuscript are a variety of custody motions that offer examples of actual motions that have been filed in various courts around the state. This article will attempt to summarize many of the important issues that are addressed in some of these motions and provide guidance on when and how such motions should be filed.

Chapter 35A vs. Chapter 50-13.8

The motion attached as **Motion #1** is among the more interesting custody motions attached to this manuscript. It involves the interplay between a guardianship proceeding of an adult child of the Plaintiff and the Defendant, and a custody action under Chapter 50 of the North Carolina General Statutes.

Here, the Plaintiff and the Defendant are the parents of a 26-year-old child who is fully disabled, both mentally and physically. The child suffers from, *inter alia*, cerebral palsy and mental retardation. She has suffered from these conditions since birth. She has been, and continues to be, fully dependent upon both of her parents for her care and well-being.

Prior to the separation of the Plaintiff and the Defendant, the child was adjudicated an incompetent pursuant to a hearing by the Clerk of Superior Court of Forsyth County. Prior to said hearing, which took place pursuant to Chapter 35A of the North Carolina General Statutes, the child had attained the age of 18 years.

As a result of the incompetency hearing, Letters of Appointment - Guardian of the Person, were granted to the Plaintiff and the Defendant and they were granted the custody, care and control of the ward. This took place in 1998.

In 2004, the Plaintiff and the Defendant separated. The child continued to primarily live with her mother, but visited periodically with her father. In 2004, Plaintiff's counsel, at that time, filed an action for custody of the child pursuant to Chapter 50 of the North Carolina General Statutes. The Defendant, father, filed a counterclaim for custody of the minor child pursuant to Chapter 50, as well.

A custody hearing in the District Court was calendared and during said hearing, Plaintiff's new counsel filed the attached motion which sought the dismissal of the matter due to the District Court's lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure. Plaintiff argued that the subject matter should properly be before the Clerk of Superior Court pursuant to chapter 35A for a modification of the Guardianship of the Person that had been issued on behalf of both parents approximately 6 years prior.

The Plaintiff asserted the following in her motion:

- 35A-1103 provides that the Clerk of Superior Court has the original and exclusive subject matter jurisdiction for handling matters relating to the guardianship of incompetent persons. This statute establishes the exclusive procedure for adjudicating a person to be an incompetent adult.

- 35A-1107 provides that a respondent (the disabled child) is, as an adult, entitled to be represented by counsel of her choice or by an appointed guardian ad litem. In the initial proceeding in 1998, a guardian ad litem was appointed for her.

- 35A-1201 provides that guardianship should seek to preserve for the incompetent person the opportunity to exercise those rights that are within his comprehension and judgment, allowing for the possibility of error to the same degree as is allowed to persons who are not incompetent. To the maximum extent of his capabilities, an incompetent person should be permitted to participate as fully as possible in all decisions that will affect him.

- 35A-1203(a) provides that Clerks of Superior Court have original jurisdiction for the appointment of guardians of the person, guardians of the

estate or general guardians for incompetent persons and of related proceedings brought or filed under this subchapter.

- 35A-1203(b) provides that the Clerk shall retain jurisdiction following appointment of a guardian in order to ensure compliance with the Clerk's order and those of the Superior Court. The Clerk shall have authority to remove a guardian for cause and shall appoint a successor guardian…

- 35A-1203(c) provides that the Clerk shall have authority to determine disputes between guardians…

- 35A-1203(e) provides that the Clerk, upon motion of guardian, or trustee, or any other interested person, may designate that guardian or trustee or appoint another qualified person as guardian of the person…

- 35A-1290 provides that the Clerk of Superior Court has the power and authority to remove any guardian, appoint successor guardians, and to make rules or enter orders for the better management of the estates and better care and maintenance of wards and their dependents.

The court and opposing counsel relied upon North Carolina General Statutes § 50-13.8 which provides, in pertinent part, that "For the purpose of custody, the rights of a person who is mentally or physically incapable of self-support upon reaching his majority shall be the same as a minor child for so long as he remains mentally or physically incapable of self-support."

The court, relying on this provision, held that since the minor child was physically incapable of self-support both before reaching the age of majority, and since she continued to be after reaching majority, that she is to be treated as a minor child and that the Chapter 50 custody proceeding could go forward.

There is a void of case law which specifically addresses this issue, however, it is these authors' opinion that Chapter 35A should take priority in this circumstance for the following reasons:

1. There is a difference in the way that the court should treat minor children as compared with adults who are incompetent. A person who is granted legal and physical custody of a child has complete authority over that child. The child essentially has no rights, in a legal context, over his or her care and control. An adult who is disabled or incompetent does have rights under North Carolina General Statutes §35A and said statutory provision provides that said person should be represented by counsel of his choice or by an appointed guardian ad litem; that the guardianship should seek to preserve for the incompetent the opportunity to exercise those rights which are within his comprehension and judgment, allowing for the possibility of error to the same degree as is allowed to persons who are not incompetent.

2. Incompetent adults should be treated equally irrespective of whether their incompetency began prior to their attainment of the age of majority or after their attainment of the age of majority. Under North Carolina General Statutes § 50-13.8, there is no argument which would provide for a person, who, due to an automobile accident or other event after their attaining the age of 18, to be subject to a custody action pursuant to Chapter 50. Why then, shall an adult, who was incompetent prior to the attainment of the age of 18, be treated differently?

3. Original and subject matter jurisdiction lie with the Clerk of Superior Court for guardianship issues. In this particular case, the child was declared incompetent upon majority and guardianship was granted to both parents. Seemingly, the district court has no authority to alter the guardianship. Therefore, what would take precedent, a Chapter 50 custody order, or guardianship letters? It seems, that once a child has been emancipated, and a guardianship proceeding has taken place, that the appropriate mechanism for revising

any custodial/guardianship type arrangements should be with the Clerk of Superior Court pursuant to Chapter 35A.

4. Here, one could argue that if the custody action were brought prior to the child's turning 18 that the court could, under North Carolina General Statutes § 50-13.8 issue a custody order. It would appear that the court could continue to maintain its authority under Chapter 50 if the child remains incompetent after turning 18. Here, however, no custody action ever existed until after the child had attained the age of majority and until after the Clerk of Superior Court had issued guardianship papers on behalf of the child.

Ultimately, one must consider the rights of the incompetent and recognize the difference between a custody action as opposed to a guardianship action. In this case, the District Court retained jurisdiction of the matter under North Carolina General Statutes §50-13.8 and refused to send the matter back to the Clerk of Superior Court for a modification of the guardianship.

The Interplay Between 50-13.5(d)(2) & (d)(3) in Actions for Temporary Custody.

Motions for protective orders or motions for temporary custody and support are common in family law cases. Two statutes which are frequently used for this purpose are North Carolina General Statutes §50-13.5(d)(2) and (d)(3).

N.C. Gen. Stat §50-13.5(d)(2) provides: "If the circumstances of the case render it appropriate, upon gaining jurisdiction of the minor child the court may enter orders for the temporary custody and support of the child, pending the service of process or notice as provided herein." (see also, Hart v. Hart, 74 N.C. App. 1, 327 S.E.2d 631, 635 (1985), which

discusses jurisdiction issues under the now repealed UCCJA, but which discusses how an ex parte order may be entered upon the court gaining jurisdiction).

The key factor to be considered when filing a motion under this statute is that the living arrangements of the child or children are not being changed. The court must merely gain jurisdiction over the child or children and it can issue temporary orders for custody and child support. This may be done prior to service of process or notice and can therefore be made ex parte.

N.C. Gen. Stat §50-13.5(d)(3), on the other hand, provides: "A temporary order for custody which changes the living arrangements of a child or 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." (emphasis added).

Under this statute, the Legislature limits the allegations which may be made, ex parte and prior to service of process or notice, to three particular situations if the child's living arrangements will be changed by the entry of an order. These are:

- The child is exposed to a substantial risk of bodily injury;
- The child is exposed to a substantial risk of sexual abuse; or
- That there is a substantial risk that the child may be abducted or removed from the State.

The statutes discussed here are mechanisms for the grant of a temporary custody order. Temporary custody may be received either ex parte, or through a hearing with notice to the opposing party. The North Carolina Court of Appeals has noted that "All custody

orders are "temporary": they are subject to modification… and they terminate once the child reaches the age of majority… [y]et a distinction is drawn in our statutes… and in our case law… between "temporary" or "interim" custody orders and "permanent" or "final" custody orders." Regan v. Smith, 131 N.C. App. 851, 509 S.E.2d 452, 454 (1998). (Citations omitted).

"A permanent custody order establishes a party's present right to custody of a child and that party's right to custody indefinitely." *Id*. Permanent custody orders are found to arise in two ways: (1) The parties can enter into an agreement for permanent custody and the court enters a consent decree, or (2) permanent custody orders resolve a contested claim for permanent custody through a grant of permanent custody to one of the parties. Id.

By way of contrast, "temporary custody orders," establish a party's right to custody pending resolution of a claim for permanent custody – "that is, pending the issuance of a permanent custody order… A temporary custody order may be entered ex parte." Id.

When presenting a motion for temporary custody under North Carolina General Statutes § 50-13.5(d)(2) & (3), an order of the court may be made upon the affidavit of the movant or of the parties. Story v. Story, 57 N.C. App 509, 291 S.E.2d 923, 926 (1982). An award of permanent custody "may not be based upon affidavits." Id. at 927.

A temporary child custody order is normally interlocutory. Brewer v. Brewer, 139 N.C. App. 222, 553 S.E.2d 541, 546 (2000). The court's "mere designation of an order as "temporary" is not sufficient to make the order interlocutory and nonappealable, however. Rather an appeal from a temporary custody order is premature only if the court: (1) stated a clear and specific reconvening time in the order; and (2) the time interval between the two hearings was reasonably brief." Id.

In Brewer, the Court of Appeals held that an order was not interlocutory. In the temporary order, the trial court did set up a date to reconvene, however it was approximately one year later. This was not deemed to be a reasonably brief time. Id. Ultimately, the Court of Appeals found that one year is not "reasonably brief" in a case where there are no unresolved issues. The case of Dunlap v. Dunlap, 81 N.C. App. at 676, 344 S.E.2d at 807 has held that an "appeal is premature where the order provided for temporary custody pending a hearing date set three months later." [In sum, three months is an acceptable period before reconvening a hearing, but one year is too long.]

The case of Lavalley v. Lavalley, 151 N.C. App. 290, 564 S.E.2d 913 (2002), further discusses the effect of a delay in calendaring a "permanent" custody hearing. In Lavalley, a custody order was entered "without prejudice". No date was set in the order for a follow up hearing on custody. The matter was not set for trial for almost two years.

The Court of Appeals held that the language "without prejudice" was sufficient to support the determination that the Order was temporary in nature. Id. at 915. The Court held, however, that the Order was converted into a final order "when neither party requested the calendaring of the matter for a hearing within a reasonable time after entry of the Order." Id.

The Court held that "temporary orders are limited to reasonably brief intervals… and must necessarily convert into a final order if a hearing is not set within a reasonable time. Id. Emphases was placed on the word "**set**" rather than "**heard**" because the court recognized that court calendars are crowded and that a party "should not lose the benefit of a temporary order if she is making every effort to have the case tried but cannot get it heard because of the case backlog." Id.

Although many local jurisdictions require a hearing within ten days of the entry of an ex parte temporary custody order, not all do. There is not a requirement for a follow up hearing within any set period of time. In the case of Campen v. Featherstone, 150 N.C. App. 692, 564 S.E.2d 616 (2002), the North Carolina Court of Appeals discussed this issue. In this case, the Plaintiff and the Defendant had three daughters. In 1992 an order was entered giving the Plaintiff sole custody and which gave the Defendant visitation. In 1993, the Plaintiff filed a motion to modify the 1992 custody order, seeking revocation of the Defendant's visitation with the children. The basis for the revocation was that the Defendant had been charged with, inter alia, two counts of solicitation to commit murder of Plaintiff and her fiancée. Id. at 617. The trial court granted the Plaintiff's motion ex parte.

In 2001, Defendant filed a contempt motion against the Plaintiff for denying him visitation pursuant to the first order granted in 1992. Defendant alleged that the ex parte order had expired and was no longer in effect. He urged the court to find that pursuant to North Carolina General Statutes § 1A-1, Rule 65, that the ex parte order was a temporary restraining order which expired after 10 days. The court declined to accept this argument and instead held that Rule 65 had no application to this issue.

The Court of Appeals held instead that the order was a "temporary child custody order governed by N.C.G.S. § 50-13.5(d)(2) and (3)… [V]isitation privileges are but a lesser degree of custody… [and] Chapter 50 does not limit the duration of a temporary custody order to a specific length of time, such as ten days; nor does our case law establish a definite period of viability for temporary custody orders… We conclude, therefore, that the ex parte order did not expire automatically upon the passage of ten days." Id. at 618 (citations omitted).

Therefore, key issues to remember in filing temporary motions pursuant to N.C.G.S. § 50-13.5(d)(2) and (3) can be summarized as follows:

Rule	Authority
Affidavits are appropriate in motions for temporary custody.	Storey v. Storey
Temporary custody orders are interlocutory.	Brewer v. Brewer
Order is not interlocutory, however, if date to reconvene is not reasonably brief. One year is not reasonably brief (per Brewer) three months is acceptable (per Dunlap)	Brewer v. Brewer
Custody order entered "Without Prejudice" has been held to be temporary.	Lavalley v. Lavalley
But… if the temporary order is not set for hearing within a reasonable time, it is converted into final order.	Lavalley v. Lavalley
Temporary custody orders, even if ex parte, per 50-13.5(d)(2) & (3), do not need to be heard within ten days like Temporary Restraining Orders.	Campen v. Featherstone

Motion # 2 is an example of an action pursuant to 50-13.5(d)(2). Here, the Plaintiff father resided with the minor child in Forsyth County, North Carolina. The Plaintiff had lived in North Carolina since 1996, except from 2001 through 2005 when he was enlisted in the United States Navy. The Defendant, mother, lived in Florida for six months prior to the registration by the Plaintiff (in North Carolina) of the Florida court order, which had previously been entered.

The parties' child was born out of wedlock in March 2003 in the state of California. Paternity was established by court order in the State of Florida. A custody order was entered in Florida, and pursuant thereto, the minor child had lived with the Plaintiff in North Carolina for the 17 months prior to this motion being filed. The Florida court had awarded Plaintiff

the "permanent primary residential care" of the minor child and the order was entered in March 2006.

Plaintiff made the following allegations pursuant to § 50-13.5(2) for the purpose of obtaining an emergency protective order:

- Between June 20, 2007 and June 27, 2007, Defendant sent Plaintiff several emails demanding unsupervised visitation with the minor child in Forsyth County, North Carolina and requesting permission to bring her new boyfriend with her to pick up the minor child;
- The Defendant had asked the name and address of the child's day care facility in Forsyth County;
- The Plaintiff feared that the Defendant's motive was to obtain physical custody of the minor child and to abscond with her outside of North Carolina for the following reasons:

    a) In the past, the Defendant had taken the minor child out-of-state without telling the Plaintiff.

    b) The Defendant had been diagnosed with borderline personality disorder;

    c) The Defendant refuses to tell the Plaintiff the last name of her current boyfriend and she had requested permission to bring said boyfriend to pick up the child;

    d) The Defendant, upon information and belief, has a history of alcohol abuse and abuse of prescription medications;

    e) The Defendant works as a stripper and has been featured in numerous pornographic films. She is allegedly unstable and has threatened to attempt suicide on numerous occasions. The Plaintiff feared that any unsupervised visitation (or the absence of a gradual transition to reintroduce regular physical contact between mother and daughter after a 17 month

> absence would be detrimental to the minor child's physical and mental well-being.

The Court granted an emergency protective order on behalf of the Plaintiff preventing the Defendant from removing the minor child from the physical custody of the Plaintiff, and/or the State of North Carolina, and established that the Defendant's visitation privileges with the minor child must be supervised by the Plaintiff or by the Plaintiff's designee. The court further provided that law enforcement officers be authorized to ensure that the Defendant complies with the terms and provisions of the protective order.

Another example of a motion for an emergency custody order can be found in **Motion # 3**. This motion was also filed pursuant to 50-13.5(d)(2) and the following facts existed:

- Both Plaintiff and Defendant were citizens and residents of North Carolina;
- Two children were born of the parties, ages 11 and 6;
- January 6, 2004 a stipulated order was entered giving joint custody to the Plaintiff and the Defendant and providing that the parties equally divide the school Christmas holiday;
- School recessed on December 17, 2004 and was scheduled to resume January 4, 2005.
- Plaintiff has had the minor children since school recessed and Defendant alleged that his second half of the holiday should begin on December 26 2004;
- Plaintiff refused to return the minor children until December 27, 2004 and Defendant alleged that the Plaintiff was attempting to deny the children time with their father over the Christmas holiday;

- The Defendant requested an emergency custody order directing the Plaintiff to return the minor children to the Defendant on December 26, 2004; otherwise, they would not get to see some of their family (who were leaving town on December 27, 2004).

Motion # 4 is an example of § 50-13.5(d)(2) being used to seek custody subsequent to the entry of a domestic violence protective order, pursuant to North Carolina General Statutes § 50B.

The minor child of the parties was born out of wedlock in May 2003 and the Defendant established paternity in May 2004. The Plaintiff and the Defendant were never married, but since the child's birth, the parties resided together with the minor child from May 2003 through September 2003, and then from May 2004 until January 2005.

Until January 21, 2005 the parties resided together and the Plaintiff and the Defendant were allegedly equal caretakers of the minor child. The minor child has resided the majority of his life, and most recently at Defendant's residence with the child seeing the Defendant on an equal basis.

Upon information and belief, the Plaintiff was not allowing the Defendant to have physical custody of the minor child. An ex-parte domestic violence protective order was entered on January 21, 2005 and the terms of said ex parte order provided for the Defendant to visit with the minor child on Sunday, January 23, 2005. The Plaintiff refused.

A domestic violence protective order was entered against the Defendant on January 27, 2005 and no provisions for temporary custody were ordered, although the court found that the Defendant had provided adequate care for the minor child, that Plaintiff was not in

fear of the Defendant keeping the minor child, and that the Plaintiff was not in fear for the safety of the minor child while in the Defendant's custody.

The Defendant sought an emergency order pursuant to North Carolina General Statutes § 50-13.5(d)(2) for temporary custody of the minor child pending proper notice and a hearing on the merits.

Due to the closeness in time to the move of the Plaintiff from the Defendant's residence, Defendant should be able to argue that the child's living arrangements will not be changed by this order, if granted. If the Defendant were to delay, however, he may be restricted by § 50- 13.5(d)(3) because the de facto living arrangement of the child would be changed if the order were granted and it could then only be done, ex parte and prior to service of process and notice if one of the three elements of the § 50-15.5(d)(3) were properly alleged.

If the court in the domestic violence order issued a custody order favoring Plaintiff, § 50-13.5(d)(2) would not apply if any relief would change the child's living arrangements with the Plaintiff.

Third Party Intervenors

Motion # 5 consists of a motion, made by intervenors, maternal grandfather and his wife, on behalf of two minor children approximately an aged 6 and 3.

The Plaintiff is the intervenor's daughter. She and Defendant (father) were unmarried and had two minor children. They lived together for a period of time and separated on or about March 2003. This motion, for the maternal grandfather and his wife to intervene, was filed in June 2004. Plaintiff and Defendant had an action pending with the Plaintiff seeking custody and child support by complaint filed April 22, 2003. No orders

regarding custody or child support were ever entered and the Defendant never filed an answer. The Plaintiff failed to prosecute the action; however, the action remained open.

The Plaintiff and the minor children began residing with the intervenors in March 2003. Approximately December 12, 2003, Plaintiff vacated the residence without the minor children. Since then the intervenors have been virtually the sole source of care and support for the minor children.

Between December 12, 2003 and June 2004 [approximately 7 months] Plaintiff had only had the minor children with her approximately 5 nights (one child at a time) and provided no child support. Since December 12, 2003, the Defendant had not visited with the minor children except at his parent's home and had provided no support for the minor children.

Approximately May 16, 2004, Plaintiff, who is allegedly mentally challenged, moved to South Carolina without the children to be with a man she recently met through the internet. It was unknown where the Defendant resided. It was alleged, by the intervenors, that both the Plaintiff and the Defendant abandoned the children.

Allegations were made that the Plaintiff and the Defendant were unfit to have legal or physical custody of the minor children as they have abandoned them and shone complete indifference for their care, support and well-being and the minor children would allegedly be at risk if placed in the legal or physical care of the Plaintiff or the Defendant.

Since December 12, 2003, the intervenors have assumed the role of sole caretaker and caregiver for the minor children and solely provided for their support.

The intervenors, by their motion, sought temporary, permanent, full, legal and physical care custody and control of the minor children. They further allege that the parent's

conduct has been inconsistent with their constitutionally protected status as the children's natural parents and that therefore, Plaintiff and Defendant have no status superior to the intervenors regarding custody of the minor children.

In addition to a full custody and child support hearing, the intervenors requested, pursuant to § 50-13.5(d)(2) an ex parte order for temporary custody. Such an order would not change the living arrangements for the minor children.

Intervention is governed by North Carolina General Statutes § 1A-1, Rule 24. It sets forth a procedure for a nonparty to an action to join the action in order to protect some interest that he or she has regarding the subject matter at issue. Rule 24 allows intervention in two situations. Subsection (a)(1) allows intervention as a matter of right when a statute confers "an unconditional right to intervene." Subsection (b)(1) allows permissive intervention under a statute that confers "a conditional right to intervene."

North Carolina General Statutes § 50-13.5(e)(4) provides that "Any person required to be given notice as herein provided may intervene in an action or proceeding for support of a minor child by filing in apt time notice of appearance or other appropriate pleadings."

Rule 24 (c) provides the procedure to be followed when one seeks to intervene in an action. "The rule first directs that a motion to intervene be served "upon all parties affected thereby." The motion must be made by the party seeking to intervene, and cannot be brought by an existing party to the lawsuit. Leave of court is not necessary in order to file the motion. The rule further provides that the motion must state the grounds for intervention and be accompanied by a pleading setting forth the claim or defense of the intervenor. If the intervenor fails to comply with proper procedure, original parties may nevertheless waive any deficiencies unless objection is timely made, and the court may excuse technical defects

where no prejudice can be shown." G. Gray Wilson, *North Carolina Civil Procedure*, 2d ed., § 24-6 (1995).

The North Carolina Court of Appeals discussed intervention In the Matter of: Baby Boy Scearce, 81 N.C. App. 531, 345 S.E.2d 404 (1986). In this case, an unwed teenage mother released an infant to DSS for adoption and the child was placed with foster parents. DSS had filed a petition to terminate the parental rights of the father, who at that time was unknown. Once the father and his parents (the paternal grandparents) were identified, DSS was advised that the paternal grandparents wished to adopt the child and the father filed a motion in the cause asking the trial court to give exclusive care custody and control of the infant to him.

The guardian ad litem filed a reply along with a counterpetition and motion and asked the court to deny the father's motion in the cause requesting custody of the child.

The foster parents of the child then filed a motion to intervene and DSS filed an answer to the motion opposing intervention by the foster parents. The trial court permitted the foster parents to intervene pursuant to rule 24(b) of the North Carolina Rules of Civil Procedure.

DSS then filed a petition asking the court to award legal and physical custody of the child to his biological father. The trial court, instead, awarded legal custody of the child to the foster parents, subject to the father's rights of visitation. The father appealed and alleged, inter alia, that the intervention by the foster parents was improper.

The Court of Appeals found that the intervention pursuant to Rule 24(b) is permissive and within the discretion of the trial court. Id. at 409. The court noted that this case involves permissive intervention, not standing to bring an action. Id. at 410. "**Standing**

is a requirement that the Plaintiff had been injured or threatened by injury or have a statutory right to institute an action… an **intervenor by permission** need not show a direct personal or pecuniary interest in the subject of the litigation… it is in the court's discretion whether to allow permissive intervention pursuant to Rule 24(b)(2); and, absent a showing of abuse, the court's decision will not be overturned." Id. (emphasis added). The Court of Appeals held that the trial court did not err by allowing the foster parents to intervene where the trial court found that it was in the best interest of the child to allow the intervention.

One relatively common occurrence, with regard to intervention, relates to grandparents seeking visitation rights with their grandchildren. There are four statutes that address a grandparent's right to visitation with their grandchildren.

- **NCGS § 50-13.1(a)** which states "Any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided… Unless a contrary intent is clear, the word "custody" shall be deemed to include custody or visitation or both."
- **NCGS § 50-13.2(b1)** which states "An order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate. As used in this subsection, "grandparent" includes a biological grandparent of a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child…
- **NCGS § 50-13.2A** A biological grandparent may institute an action or proceeding for visitation rights with a child adopted by a stepparent or a

relative of the child where a substantial relationship exists between the grandparent and the child. Under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the child and where parental rights of both biological parents have been terminated, be entitled to visitation rights. A court may award visitation rights if it determines that visitation is in the best interest of the child. An order awarding visitation rights shall contain findings of fact which support the determination by the judge of the best interest of the child. Procedure, venue, and jurisdiction shall be as in an action for custody.

- **NCGS § 50-13.5(j)** which states "Custody and Visitation Rights of Grandparents. - In any action in which the custody of a minor child has been determined, upon a motion in the cause and a showing of changed circumstances pursuant to G.S. 50-13.7, the grandparents of the child are entitled to such custody or visitation rights as the court, in its discretion, deems appropriate…

Although the aforesaid four statutes provide for custody, "it appears that the Legislature intended to grant grandparents a right to visitation only in those situations specified in N.C. Gen. Stat. §§ 50-13.2 (b1), 50-13.5 (j), and 50-13.2A." Smith v. Smith, 2006 N.C. App. Lexis 1972 (p. 6). The Supreme Court in McIntyre v. McIntyre, 341 N.C. 629, 461 S.E.2d 745 (1995) held that NCGS § 50-13.1(a) does not grant Plaintiffs the right to sue for visitation when no custody proceeding is ongoing and the minor children's family is intact. Id. at 750.

In applying McIntyre, the Court of Appeals has stated "it follows that under a broad grant of § 50-13.1(a), grandparents have standing to seek visitation with their grandchildren when the children are not living in a McIntyre "intact family." Additionally, there are three specific statutes that grant grandparents standing to seek visitation with their grandchildren. N.C.G.S. § 50-13.2 (b1) (1995) (when "custody of minor child" at issue;…N.C.G.S. §50-13.5 (1995) (after custody of the minor child has been determined); N.C.G.S. § 50-13.2A (1995) (when child adopted by court stepparent or a relative of the child"). Smith, at p. 11. (Citing Fisher v. Gayden, 124 N.C. App. 442, 444, 477 S.E.2d 251, 253 (1996), disc. review denied, 345 N.C. 640, 483 S.E.2d 706 (1997)).

In the Smith case, *supra*, the Plaintiff and the Defendant had two children. They entered into a consent order in 1997 regarding the custody of their minor children. At that time the Defendant was disabled and was applying for social security benefits. The order provided for joint decision-making with Plaintiff having physical custody.

In 2005, Defendant filed a motion to modify the consent order. She alleged that there had been change in circumstances, including "an improvement in her medical condition and income level and the restoration of her driving privileges…" [O]n the same day, the Defendant's father ("the grandfather"), moved to intervene to obtain visitation rights with his grandchildren. The grandfather's motion was denied and he appealed.

In analyzing the case, the Court of Appeals noted that the grandchildren were living in a McIntyre intact family, and that they were therefore, required to address whether the grandfather had standing to seek visitation under one of the three specified statutes.

The court held that the pertinent statute in this case is North Carolina General Statutes § 50-13.2(b1). This statute applies only when custody of the minor children is an

ongoing issue and this requirement is met only when the custody of a child is "in issue" or "being litigated." Smith at 7-8.

As a result of Defendant's motion to modify, custody is in issue and being litigated. Therefore, under North Carolina General Statutes § 50-13.5(j) the grandfather's motion was based on an existing custody dispute between the parents. Therefore, the statute authorized the grandfather to file a motion to intervene so long as he showed a basis for granting visitation and a change of circumstances. Id. at 12-13. The trial court was reversed.

Motions to Modify Custody, Generally

Modifications may be requested by motion to the court pursuant to North Carolina General Statutes § 50-13.7. Pursuant to this statute, an order of a court for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested. The word "custody" also includes visitation. Najjar v. Najjar, 2005 N.C. App. Lexis 2674.

The Court of Appeals has noted that "Once the custody of a minor child is determined by a court, that order cannot be altered until it is determined (1) that there has been a substantial change in circumstances affecting the welfare of the child and (2) a change in custody is in the best interest of the child. A party seeking modification of a child custody order bears the burden of proving the existence of a substantial change in circumstances affecting the welfare of the child." Id. (citing, Evans v. Evans, 138 N.C. App. 135, 139, 530 S.E.2d 576, 578-79 (2000) (citations omitted)). (For a good explanation of specific circumstances that have been deemed to justify a finding of changed circumstances, see Shipman v. Shipman, 357 N.C. 471, 586 S.E.2d 250, 256 (2003).)

The change in circumstances need not be adverse as the Court has held that a change in circumstances that is, or is likely to be, "beneficial to the child may also warrant a change in custody." Browning v. Helff, 136 N.C. App. 420, 423, 524 S.E.2d 95, 98 (2000) (citations and quotations omitted).

In the attached **Motion # 6,** the Plaintiff filed a Motion to Modify Order Approving Parenting Agreement which was executed February 21, 2003. Said parenting agreement provided for the custody of the parties two minor children and stated, inter alia that:

- That the children reside with the Plaintiff every other weekend from 6 p.m. Friday until 6 p.m. Sunday;
- That the children will reside with the Plaintiff for two consecutive days each week in addition to every other weekend;
- That otherwise, the children would reside with the Defendant.

Plaintiff alleged, in his motion that since the entry of the Order Approving Parenting Agreement, that there has been a substantial change of circumstances adversely affecting the minor children which would now warrant the immediate modification of the provisions of the prior order concerning custody. These changes include the following:

- The Defendant married her Paramour;
- Although the children have always had their home in Kernersville, North Carolina, Defendant unilaterally removed the children from their home in Kernersville, and away from their father, friends and family and into a new residence in Raleigh, North Carolina;
- The relocation by the Defendant was not required by her employment, as both she and her new husband primarily worked out of their home;

- The minor children are now enrolled in school in Wake County and the children are being deprived of staying with their father two days and two nights each week;
- The Defendant's move with the minor children is depriving the children and the Plaintiff with invaluable time. As an example, the Plaintiff illustrated that he played football through college and has been active in the minor children's sports activities, yet one of the minor children plays football for a team in Wake County and has a schedule that prevents the Plaintiff from taking an active role.
- Plaintiff additionally alleges that the children are adversely affected by having to spend and inordinate time traveling between Raleigh and Kernersville in order to spend time with their father.

These allegations, if proven, would be sufficient for a court to find a change in circumstances has occurred. The court would then be able to apply a best interest and welfare test to the case in order to determine whether or not the provisions of the parenting agreement should be modified.

Motion # 7 is another motion in the cause to modify custody based upon a change in circumstances. In this case, the Plaintiff and the Defendant had two children during their marriage. They separated from one another in June 2003. An order was entered December 13, 2004, *nunc pro tunc,* October 15, 2004 which provided that the Defendant be granted the care custody and control of the parties' two minor children and that the Plaintiff be granted visitation. The Plaintiff was ordered to enroll in and to complete a parenting class before he was permitted unsupervised visitation with the children.

A memorandum of judgment/order was entered, subsequently, on March 29, 2005 which noted that the prior order remains in full force and effect and that the Plaintiff be given credit for attending parenting classes. The Plaintiff was allowed, by this order, unsupervised visitation with the minor children.

The Plaintiff filed this motion alleging a substantial and material change in circumstances affecting the best interests and general welfare of the parties' aforesaid two minor children including, but not limited to the following:

- The children are now approximately 2 1/2 years older;
- The Plaintiff had been single at the time of the prior orders, but is now married;
- At the time of the last hearing, Plaintiff lived with his parents. Now he lives with his wife and his own home. The home is two miles from both sets of the children's grandparents and is in an excellent school district;
- At the time of the last hearing, the Plaintiff had had little contact with the children and his parenting skills were undeveloped. Subsequent to the prior hearing, the Plaintiff completed parenting classes and now has a wonderful relationship with the children. The Plaintiff alleges that he is always available to be with or to assist the children. The Plaintiff further alleges that he supports and takes the minor children to their extracurricular activities and that he has been involved in the children's school in preschool;
- At the time of the last hearing, the Plaintiff had worked first and second shift and on weekends. The Plaintiff now works from 9 a.m. until 5 p.m. on weekdays where he is in a stable job with excellent benefits;

- The Plaintiff, at the time of the last hearing, was immature, lacked stability, and had low self-esteem. The Plaintiff alleges that he is now mature, responsible and dependable;
- At the time of the last hearing, the Plaintiff had not been a churchgoer, however, over the last year, the Plaintiff has been attending church and has grown spiritually;
- Since the entry of the aforesaid orders, the Plaintiff alleges that the Defendant has failed to abide by the spirit and letter of said orders, and, by way of illustration, alleges that the Defendant has denied the Plaintiff visitation with his minor children at times in the past.

The Plaintiff seeks that the court modify the prior orders and grant him the exclusive legal and primary physical care custody and control of the parties aforesaid two minor children. In the alternative, he is requesting that the court grant both he and the Defendant the joint legal care, custody and control of the parties two minor children, and that the children's primary physical care be granted to him.

Contempt in Custody Actions

Chapter 5A of the North Carolina General Statutes provides for Criminal and Civil Contempt. When a party violates the terms of a custody order, either Criminal Contempt under 5A-11, *et seq*. or Civil Contempt under 5A-21 *et seq*. are available remedies, however a person who is found in civil contempt shall not for the same conduct be found in criminal contempt. (NCGS § 5A-21(c)) and a person held in criminal contempt shall not, for the same conduct, be found in civil contempt. (NCGS § 5A-12(d)).

Motion # 8 is an example of a Motion for Contempt, For Order to Show Cause for Contempt and for Attorney Fees.

In this case, the Plaintiff moved pursuant to Chapter 5A of the North Carolina General Statutes for the enforcement of a prior Consent Order and for an order requiring Defendant to pay Plaintiff's attorney's fees in connection with the filing and hearing of this motion and/or for an order to punish the Defendant for her willful violation of a consent order.

On October 17, 2005, the parties entered into a consent order which provided for joint legal custody of the parties' two minor children and for the Defendant to have primary physical custody and the Plaintiff secondary physical custody of said children.

The Plaintiff alleged that the Defendant has violated the prior consent order of the parties by, inter alia:

- Failing to continue family counseling as previously ordered by the court;
- Interfering with the Plaintiff's ability to speak with the minor children by telephone as previously ordered by the court;
- Failing to communicate with the Plaintiff about the minor children as previously ordered;
- Failing to inform Plaintiff of the children's school activities as previously ordered;
- Failing to co-parent the minor children and follow the recommendations of the children's counselor or psychologist.

Assuming that a show cause order is entered in a case like this, a party who has allegedly violated the prior orders of a court must come to court and show cause as to why he

or she should not be held in contempt. Upon the judge signing a show cause order, the party who is allegedly in violation of the order bears the burden of proof that he or she is not in violation of the court's prior orders.

There are differences between criminal and civil contempt and some of the major differences are as follows:

Element	Criminal Contempt	Civil Contempt
What Constitutes Contempt	Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive or instruction or its execution. (Other elements apply. See, 5A-11).	• Failure to comply with an order of the court is continuing civil contempt so long as: • Order remains in force; • Purpose of the order may still be served by compliance; • Noncompliance is willful; • Ability to comply or to take reasonable measures that would enable the person to comply. 5A-21(a)
Punishment	• Censure • Imprisonment up to 30 days • Fine not to exceed $500.00 • Or, any combination thereof. • Fine or Imprisonment may not be imposed unless (1) the act or omission was willfully contemptuous; or (2) the act or omission was preceded by a clear warning by the court that the conduct is improper. • See, 5A-12	• Imprisonment as long as the civil contempt continues. 5A-21(b) • Released when civil contempt no longer continues. 5A-22 • Court can also impose attorney fees or other conditions for purging contempt.
Effect of Show Cause Order	• Order to appear at reasonable time and show cause why he/she should not be held in contempt. • Person charged may <u>not</u> be	• Alleged contemnor directed to appear in court at reasonable time and show cause why he/she should not be held in contempt.

	compelled to be a witness against himself in the hearing (5A-15(e)).	• Order or notice must be given at least five days in advance of the hearing unless good cause is shown. • Order is entered upon judicial official finding probable cause to believe there is civil contempt
Burden of Proof	• Facts must be established beyond a reasonable doubt. (5A-(f)).	• Civil standard of proof
Appeal	• May appeal in manner provided for appeals in criminal actions - in custody cases, this will be to Superior Court for hearing de novo.	• May appeal to the Court of Appeals

In most situations, a motion for civil contempt is preferable to a motion for criminal contempt. Since a person cannot be held in contempt both civilly and criminally for the same act, the movant should elect in his motion the relief being sought as either civil or criminal in nature. Filing for civil contempt is often easier because of its lower burden of proof, ability to force testimony by the alleged contemnor and because it is more difficult to appeal.

Motion # 9 is another contempt motion filed when the children, age 12, came out to the car and allegedly told their father they did not want to visit; mother then took the children out of state even though it was father's Thanksgiving with the children. This motion gets to the heat of the troublesome issue: How often have you had a client ask you what to do if the child does not want to go? Further, what do you do when your client is told the children "don't want to visit" and it seems clear as day that the other parent is the one who doesn't want the visitation to occur? The case law on contempt is varied as to the duty of the parents to make sure visitation occurs. Anderson and Hancock are great examples of this gray area.

In Hancock v. Hancock, 122 N.C.App. 518 (1996), the child was 11 years old. The father filed a motion for contempt after several attempts to pick the minor child up for visitation wherein father was told the minor child did not want to go. The testimony of the child was that his mother had always encouraged him to go. The mother testified she had the child ready, told him he had to go, and put his things outside. The Court of Appeals reversed the finding of contempt, stating:

> Plaintiff did everything possible short of using physical force or a threat of punishment to make the child visit with the father. While perhaps the plaintiff could have used some method to physically force the child to visit his father, even if she improperly did not force the visitation, her actions do not rise to a willful contempt of the consent judgment.
>
> Id. at 525.

In Anderson v. Lackey, 166 N.C. App. 279 (2004), the mother was found in civil contempt for failure to adhere to a schedule of visitation for the father. The Court of Appeals affirmed the finding of contempt. The trial court's order regarding the 15 year old son included the statement that "she shall not allow him a choice [regarding visitation with his father] anymore than she would allow him to refuse to eat healthy foods, refuse to go to school when he is not ill, or refuse a required immunization. The mother argued that Hancock controlled. The Court of Appeals distinguished Hancock on the grounds that the mother in Anderson was responsible for the child's refusal to visit.

As demonstrated above, the line may be arbitrary in determining whether a parent is in contempt. However, if the trial court is not going to impose a duty on a parent to make sure that the order is followed, who will? If a parent can "make" a child go to school, do homework, etc. a parent should be able to "make" a child attend visitation. If a parent is not willing to take some disciplinary measures if the child does not go, the message to the child is that the child has a choice. Giving the child a choice as to whether or not to visit is

inconsistent with the purpose and intent of almost all custody orders. If the problem is recurring, it may be advisable to involve a parenting coordinator.

Religion

Motion # 10 is from MacLagan v. Klein, 123 N.C. App. 557 (1996), the leading case on the ability of the court to grant one parent decision making authority as to religious training. In MacLagan, the parties differed on what extent the child should be raised Christian versus Jewish. (Note that that the court in Pulliam v. Smith, 348 N.C. 616, 501 S.E.2d 898, 900 (1998) disapproved a whole line of cases including MacLagan to the extent that these cases required a showing of adversity to the child as a result of changed circumstances to justify a change of custody). Pulliam does not change the holding as set out here relating to religion.

The Court of Appeals discussion is instructive:

> Plaintiff contends the trial court abused its discretion by granting defendant sole decision-making power as to the child's religious training because, in so doing, the court allegedly stated "an explicit preference for the father's Jewish faith as opposed to the mother's Christian religion." Plaintiff also refers us to cases from other jurisdictions for the proposition that courts must maintain impartiality regarding religious beliefs in child custody cases. *See, e.g., Ex parte Hilley,* 405 So.2d 708 (Ala. 1981); *Compton v. Gilmore*, 98 Idaho 190, 560 P.2d 861 (1977); *Kirchner v. Caughey*, 326 Md. 567, 606 A.2d 257 (1992); *Fisher v. Fisher*, 118 Mich.App. 227, 324 N.W.2d 582 (1982); *Munoz v. Munoz*, 79 Wash.2d 810, 489 P.2d 1133 (1971). However, these cases also illustrate that factual and legal circumstances can justify custodial restrictions upon religious activities in certain cases. As the *Munoz* court stated:
>
> Thus, the rule appears to be well established that the courts, should maintain an attitude of strict impartiality between religions and should not disqualify any applicant for custody or restrain any person having custody or visitation rights from taking the children to a particular church, *except where there is a clear and affirmative showing that the conflicting religious beliefs affect the general welfare of the child.* *Munoz*, 489 P.2d at 1135 (emphasis added). *See also Kirchner v. Caughey*, 326 Md. 15 577, 606 A.2d at 262 (holding that the "clear and affirmative showing" referred to in *Munoz* requires a factual finding of a causal relationship between the religious practices and the actual or probable harm to the child). The trial court in *Munoz* had awarded custody of the parties' children and sole control

> over the children's religious training to the mother, who was a Mormon, and specifically prohibited the father, who was Catholic, from taking his children to any Catholic services while the children were visiting him. The Supreme Court of Washington subsequently struck the trial court's order because it found no affirmative showing that the children were emotionally upset or emotionally disturbed by attending two churches, or that exposure to two religious beliefs had, or would have, any adverse effect on the children. *Munoz*, 489 P.2d at 1135-36.
>
> The present case, however, presents a different situation. Here, the trial court found: the parties had agreed to rear the minor child in the Jewish faith; the child has had a positive sense of identify as a Jew since she was three years old and has had substantial involvement with the Judea Reform Congregation Synagogue in Durham; and since her introduction into activities at the Edenton United Methodist Church, the child has experienced stress and anxiety as a result of her exposure to two conflicting religions which have had a detrimental effect on her emotional well-being. These findings are supported by the evidence and demonstrate affirmatively a causal connection between the conflicting religious beliefs and a detrimental effect on the child's general welfare. Accordingly, the findings support the trial court's order granting defendant charge of Ashley's religious training and practice and requiring plaintiff's cooperation with respect thereto.
>
> In addition, contrary to plaintiff's claim, we discern no impermissible expression of preference for one religion over another on the part of the trial court. The court's findings make it clear that its order giving defendant charge of the child's religious training is not based on a preference for Judaism, but rather arises from the fact that the child has had a positive Jewish self-identity since she was three years of age, and the fact that the parties had an undisputed agreement "to raise Ashley Danien Klein in accordance with tenents [sic] of Defendant's Jewish faith and heritage." We also reject plaintiff's claim that the order infringes upon her "constitutional right to the free expression of her religious beliefs." The trial court's order contains nothing which would prohibit plaintiff from following and/or engaging in the beliefs and practices of her chosen religion. The court properly limited its inquiry, and its order, to the detrimental impact of conflicting religions on the health and welfare of the child. Plaintiff's assignments of error are overruled.

Thus, in <u>MacLagan</u>, the trial court was not starting from scratch as to the religious training to be given to the child. She had a self-identity <u>and</u> the parties had made a prior agreement regarding the fact that she would be raised Jewish.

<u>CUSTODY EVALUATION</u>

Motions # 11 and 12 are motions for child custody evaluation. In **Motion # 11**, the mother was a lesbian and the father was a cross dresser. At the original custody hearing, the

court denied the motion for a custody evaluation and instead, required the parents to submit to individual psychological evaluation for the court to assess their respective abilities to parent. The eighth was filed after pornographic material was discovered on the father's computer. In the ensuing motion for modification, the mother's attorney renewed her request for a child custody evaluation. The father opposed the motion, but the motion for a child custody evaluation was granted by the trial court. The trial court ordered the same health care provider that had done the original evaluation to do the child custody evaluation.

Under N.C. Gen. Stat. § 1A-1, Rule 35(a), the trial court can order parties, as well as the minor children, to submit to examinations. *Smith v. Barban*, 170 N.C.App. 436 (2005) clarifies that an order to submit to an evaluation in a custody case is not a discovery order – accordingly, it is an order authorized under § 8C-1, Rule 706(a), and can thus be enforced by contempt. The Court can also order a party to consult with a counselor. *See Rawls v. Rawls*, 94 N.C.App. 670 (1989). An expert may be appointed under Rule 706 and assess the fees as "in such proportion and at such time as the Court directs and thereafter charged in like manner as other costs." While the Court has broad discretion over the assessment of costs, and most evaluators want to be paid "upfront," the Court can reserve the right to reapportion the costs. The Court could also, if one party has more liquidity at the time, order that one party pay 100% of the "upfront" costs, and the other reimburse for his or her share. Presumably, if one party wants to use an expert who is more expensive than the expert proposed by the other party, the Court could require the party wishing to employ the more expensive expert to make up the difference. The Court has wide discretion in the appointment of these costs.

SCHOOL DISTRICT

Motions # 13, 14, and 15 concern disputes about the schooling of the minor child arising after the original order. In **Motion # 13**, the father requested physical custody of the minor child be changed, and further requested that the Court order the parties to enroll the minor child at the middle school in his school district, regardless of whether physical custody was modified. The father cited as factors, among other things, that such an order was in the minor child's best interests given the respective schools in each district, the proximity of each party's residence from each school, the travel time, the prior school record of the child, and the propensity of the mother to relocate.

In **Motions # 14 and 15**, the dispute centered around whether the minor child should be enrolled in the Highly Academically Gifted ("HAG") program. The original order stated that the parties would "work together and collaborate on various possible school chores, as both public and private, as well as various academically gifted programs." The minor child was offered a position in the HAG program. The parties disagreed on whether the child should be enrolled in the program. After an impasse on the issue, the defendant allegedly directed the school to enroll the child in the HAG program. The parties disagreed on whether the child should be enrolled in the program. The other parent opposed the motion on the ground that the child had been enrolled in a school since kindergarten and should be allowed to remain with her friends in the third grade. The motion was filed a week prior to school starting, and the trial judge refused to change the child's school after the school year started. The legal dispute was whether the court could modify the order, and whether the trial cout even had jurisdiction to order the child to attend a particular school.

Diehl v. Diehl, 177 N.C.App. 642 (2006), is instructive on allocation of decision making.

In Diehl, the trial court ordered the following with respect to legal custody:

> The parties shall share permanent joint legal custody of the minor children with [mother] having primary decision-making authority. If a particular decision will have a substantial financial effect on [father] either party may petition the Court to make the decision, if necessary.

The father argued that the trial court erred by awarding the mother "primary decision-making authority" after awarding both parties joint legal custody.

The Court of Appeals proceeded to reverse the trial court's award of primary decision-making to the mother and remand for further proceedings regarding legal custody. The Court of Appeals specifically noted that the trial court could allocate to the mother specific areas wherein she had primary decision-making after the finding of facts sufficient to justify the allocation.

The discussion regarding legal custody is one of the better reported discussions on the topic:

> Although not defined in the North Carolina General Statutes, our case law employs the term "legal custody" to refer generally to the right and responsibility to make decisions with important and long-term implications for a child's best interest and welfare. *See Patterson v. Taylor*, 140 N.C.App. 91, 96, 535 S.E.2d 374, 378 (2000) (Legal custody refers to the right to make decisions regarding "the child's education, health care, religious training, and the like."); 3 Suzanne Reynolds, *Lee's North Carolina Family Law* § 13.2b, at 13-16 (5th ed. 2002) (Legal custody includes "the rights and obligations associated with making major decisions affecting the child's life."). This comports with the understanding of legal custody that has been adopted in other states. *See, e.g., In re Paternity of Joe*, 486 N.E.2d 1052, 1057 (Ind.Ct.App. 1985) (noting "legal custody" provided mother with right and responsibility to determine such things as the child's "education, health care, and religious training" (internal quotation marks omitted)); *Taylor v. Taylor*, 306 Md. 290, 296, 508 A.2d 964, 967 (1986) ("Legal custody carries with it the right and obligation to make long range decisions involving education, religious training, discipline, medical care, and other matters of major significance concerning the child's life and welfare."). *See also, e.g., Ga.Code Ann.* § 19-9-6 (2004) ("'Joint legal custody' means both parents have equal rights and responsibilities for major decisions concerning the child, including the child's education, health care, and religious training...."); Ind.Code § 31-9-2-67 (2003) ("'Joint legal custody', ... means that the persons awarded joint custody will share authority and responsibility for the

major decisions concerning the child's upbringing, including the child's education, health care, and religious training.").

Here, although the trial court awarded the parties joint legal custody, the court went on to award "primary decision making authority" on all issues to Ms. Diehl unless "a particular decision will have a substantial financial effect on [Mr. Diehl]...." In the event of a substantial financial effect, however, the order still does not provide Mr. Diehl with any decision-making authority, but rather states that the parties may "petition the Court to make the decision...." Thus, the trial court simultaneously awarded both parties joint legal custody, but stripped Mr. Diehl of all decision-making authority beyond the right to petition the court to make decisions that significantly impact his finances.

Mr. Diehl's consent was required, as his consent is sometimes difficult to obtain; and when John's school recommended he be evaluated to determine whether he suffered from any learning disabilities, Mr. Diehl refused to consent to the evaluation unless it would be completely covered by insurance. These findings are supported by competent evidence in the record and are, therefore, also binding on appeal. *See Evans*, 169 N.C.App. at 360, 610 S.E.2d at 267.

These findings, however, predominantly address the trial court's reasons for awarding Ms. Diehl primary physical custody of the children. *See* Reynolds, *supra* § 13.2c, at 13-16 ("[D]ecisions exercised with physical custody involve the child's routine, not matters with long-range consequences...."). Given the trial court's determination that "[b]oth parties are fit and proper to have joint legal custody of the minor children," only the court's findings regarding the parties' difficulty communicating and Ms. Diehl's occasional troubles obtaining Mr. Diehl's consent could be construed to indicate that anything other than traditional joint legal custody would be appropriate. <u>We cannot see, however, how those findings alone are sufficient to support an order abrogating all decision-making authority that Mr. Diehl would have otherwise enjoyed under the trial court's award of joint legal custody conclude that this approach suggests an award of "sole legal custody" to Ms. Diehl, as opposed to an award of joint legal custody to the parties</u>. *See* Reynolds, *supra* § 13.2b, at 13-16 ("If one custodian has the right to make all major decisions for the child, that person has sole 'legal custody.'").

This Court has acknowledged that the General Assembly's choice to leave "joint legal custody" undefined implies a legislative intent to allow a trial court "substantial latitude in fashioning a 'joint [legal] custody' arrangement." *Patterson*, 140 N.C.App. at 96, 535 S.E.2d at 378. This grant of latitude refers to a trial court's discretion to distribute certain decision-making authority that would normally fall within the ambit of joint legal custody to one party rather than another based upon the specifics of the case. *See, e.g., MacLagan v. Klein*, 123 N.C.App. 557, 565, 473 S.E.2d 778, 784 (1996) (awarding parties joint legal custody, but granting father exclusive control over child's religious upbringing), *overruled on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998). A trial court's decision to exercise this discretion must, however, be accompanied by sufficient findings of fact

> to show that such a decision was warranted. *See id.* at 564, 501 S.E.2d 898, 473 S.E.2d at 784 (finding that parties had agreed to raise child in father's Jewish faith, that the child had been so raised since birth and derived considerable mental well-being therefrom, and that the mother had recently begun pressuring the child to become Christian).
>
> In the present case, the trial court found that "[t]he parties are currently unable to effectively communicate regarding the needs of the minor children." As Mr. Diehl did not assign error to this finding, it is binding on appeal. *Holland v. Holland*, 169 N.C.App. 564, 569, 610 S.E.2d 231, 235 (2005). Moreover, the trial court also found that since the parties' separation: the children have resided only with Ms. Diehl, and Mr. Diehl has exercised only sporadic visitation; Mr. Diehl has had very little participation in the children's educational and extra-curricular activities; Ms. Diehl has occasionally found it difficult to enroll the children in activities or obtain services for the children.

Id. at 648. (Emphasis added).

The Court of Appeals further clarified this in the case of Hall v. Hall, 188 N.C. App. 527, 655 S.E.2d 901 (2008). The court held that a trial court may allocate decision-making authority between parties but that the court must set out specific findings as to why deviation from "pure" joint legal custody is necessary. In essence, "[t]hose findings must detail why a deviation from "pure" joint legal custody is in the best interest of the children. As an example, past disagreements between the parties regarding matters affecting the children, such as where they would attend school or church, would be sufficient but mere findings that the parties have a tumultuous relationship would not." *Id*, 655 S.E.2d at 907.

Under Diehl , Hall and MacLagan, the Court clearly has wide latitude in distributing legal decision making authority; the trial court simply has to find facts which support the allocation.

Motions Regarding Testimony of Minor Child

Motions # 16 and 17 center around issuing a subpoena to a minor child. Once again, these motions are from the record in MacLagan. The plaintiff requested the Court issue a subpoena to the minor child. The defendant moved to quash the subpoenas and for a protective order, alleging the court had already considered the issue of whether the minor child would appear in court to testify or meet with the judge in chambers, and the Court had ruled that it would not meet with the child in chambers.

These motions highlight the issue of when, how, and whether to take testimony from a minor child. The most prudent method, in the opinion of these authors, to secure a child's presence at hearing is to issue a subpoena for the child and the adult or guardian who will be exercising physical custody at the time of the hearing, and serve them both with the subpoena. If the other parties serves a motion to quash the subpoena, consider reserving the subpoenas for the child's appearance at the hearing on the motion to quash. If there is any dispute about the competency of the child to testify, you will need to be ready to make an offer of proof. See In the Matter of M.G.T. – B., 177 N.C. App. 771 (2006) (the mother of the minor child failed to preserve for appellate review her claim that the trial court erred in granting the motion to quash the subpoena for the minor child on the ground that the child was not competent, where the mother made no offer of proof).

As to the competency of a child to testify, there is no set age. N.C. Gen. Stat. § 8C-1, Rule 601, State v. Meadows, 581 S.E.2d 472 (2003). In State v. Ward, 118 N.C. App. 389 (1995), the trial court did not err in finding that a four year old (who was only two at the time of the alleged incident) was competent to testify even though there were contradictions in her knowledge of telling the truth and telling a "story." See also State v. McRae, 58 N.C. App.

225 (1982) where the children, age 3 and 4, were in the automobile at the time of the purported kidnapping, and found competent to testify. (cf. State v. Gibson, 221 N.C. 252 (1942) (finding 6 year old incompetent to testify).

MOTIONS

Motion #	Motion Description	Bates #
1.	Motion to Dismiss Chapter 50 Custody in Favor of Rule 35A Guardianship Proceeding	000001
2.	Motion for Emergency Protective Order to Prevent Removal of Child from Physical Custody of Parent Exercising Physical Custody	000009
3.	Motion for Emergency Custody Order Regarding Transfer of Child over Christmas Vacation	000019
4.	Motion for Temporary Custody Order After Entry of 50B Protective Order	000024
5.	Motion by Grandparents to Intervene in Custody Action Between Parents	000030
6.	Motion to Modify Parenting Agreement due to Change in Circumstances	000042
7.	Motion to Modify Custody Based on Change in Circumstances	000050
8.	Motion for Contempt for Violation of Custody Order	000057
9.	Motion for Contempt	000068
10.	Motion in the Cause (Religion)	000074
11.	Motion for Custody Evaluation	000084
12.	Motion for Psychological Evaluation	000088
13.	Motion in the Cause (School)	000094
14.	Motion in the Cause (School – whether to enroll in HAG program)	000104
15.	Response to Motion in the Cause and Motion to Dismiss (School)	000109
16.	Motion to Quash Subpoenas	000113
17.	Motion for the Court to Issue a Subpoena to a Minor Child	000118
18.	Motion in the Cause to Modify Child Custody, Child Support, and for the Release of Medical Records	000121