CIVITAS INSTITUTE
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February 19, 2020

North Carolina Judicial Standards Commission
P.O. Box 1122
Raleigh, 27602

Re: Complaint against
Tobias (Toby) Hampson
North Carolina Court of Appeals (Seat No. 2)

As a citizen of North Carolina and the chief executive officer of a public policy non-profit organization interested in public integrity and the rule of law, I file the following official complaint against State Appeals Court Judge Toby Hampson in Holmes v. Moore (No. COA19-762).

Judge Hampson was the author of a preliminary injunction, an injunction on the state's voter identification law pending a final decision.

However, as a candidate for this office, Judge Hampson declared is public opposition to requiring photo identification for voting. In a questionnaire for the People's Alliance PAC (Durham 2018) Mr. Hampson was asked:

> *24. How will you vote if the November ballot contains constitutional amendment referenda in favor of voter identification, "Marsy's Law," and the filling of judicial vacancies?*

Mr. Hampson answered: *"I intend to vote no on each of the proposed amendments."*

With this answer, Judge Hampson violated Canon 1 of the North Carolina Code of Judicial Conduct by failing to uphold the integrity and independence of the judiciary personally observing, appropriate standards of conduct to ensure that the integrity and independence of the judiciary shall be preserved.

Further, Judge Hampson violated Canon 2 by failing to conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

As it was highly foreseeable that some type of voter identification case(s) would come before the Court of Appeals, Judge Hampson violated Canon 3 by making public comment about the merits of a pending proceeding or controversy arising in North Carolina.

Further, in advice previously made available through Judicial Standards from the University of North Carolina School of Government, judicial candidates are instructed that they should not respond to survey questions if the answers would "not promote public confidence in the integrity and impartiality

of the judiciary and/or could cast substantial doubt on capacity to decide the impartiality any issue that may come before you.

These appear to be violations of the North Carolina Code of Judicial Standards dealing with a subject matter of high public interest. Your attention is requested and required for the citizens of North Carolina.
Best Regards,

Donald Bryson
President & CEO
919. 834-2099| nccivitas.org
Facebook | Twitter: @nccivitas

CANON 7 OF THE
N.C. CODE OF JUDICIAL CONDUCT

A judge may engage in political activity consistent with his status as a public official.

> The provisions of Canon 7 are designed to strike a balance between two important but competing considerations: (1) the need for an impartial and independent judiciary and (2) in light of the continued requirement that judicial candidates run in public elections as mandated by the Constitution and laws of North Carolina, the right of judicial candidates to engage in constitutionally protected political activity. To promote clarity and to avoid potentially unfair application of the provisions of this Code, subsection B of Canon 7 establishes a safe harbor of permissible political conduct.

A. Terminology. For the purposes of this Canon only, the following definitions apply.

(1) A Acandidate@ is a person actively and publicly seeking election to judicial office. A person becomes a candidate for judicial office as soon as he makes a public declaration of candidacy, declares or files as a candidate with the appropriate election authority, authorizes solicitation or acceptance of contributions or public support, or sends a letter of intent to the chair of the Judicial Standards Commission. The term Acandidate@ has the same meaning when applied to a judge seeking election to a non-judicial office.

(2) To Asolicit@ means to directly, knowingly and intentionally make a request, appeal or announcement, public or private, oral or written, whether in person or through the press, radio, television, telephone, Internet, billboard, or distribution and circulation of printed materials, that expressly requests other persons to contribute, give, loan or pledge any money, goods, labor, services or real property interest to a specific individual's efforts to be elected to public office.

(3) To Aendorse@ means to knowingly and expressly request, appeal or announce publicly, orally or in writing, whether in person or through the press, radio, television, telephone, Internet, billboard or distribution and circulation of printed materials, that other persons should support a specific individual in his efforts to be elected to public office.

B. Permissible political conduct. A judge or a candidate may:

(1) attend, preside over, and speak at any political party gathering, meeting or other convocation, including a fund-raising function for himself, another individual or group of individuals seeking election to office and the judge or candidate may be listed or noted within any publicity relating to such an event, so long as he does not expressly endorse a candidate (other than himself) for a specific office or expressly solicit funds from the audience during the event;

(2) if he is a candidate, endorse any individual seeking election to any office or conduct a joint campaign with and endorse other individuals seeking election to judicial office, including the solicitation of funds for a joint judicial campaign;

(3) identify himself as a member of a political party and make financial contributions to a political party or organization; provided, however, that he may not personally make financial contributions or loans to any individual seeking election to office (other than himself) except as part of a joint judicial campaign as permitted in subsection B(2);

(4) personally solicit campaign funds and request public support from anyone for his own campaign or, alternatively, and in addition thereto, authorize or establish committees of responsible persons to secure and manage the solicitation and expenditure of campaign funds;

(5) become a candidate either in a primary or in a general election for a judicial office provided that he should resign his judicial office prior to becoming a candidate either in a party primary or in a general election for a non-judicial office;

(6) engage in any other constitutionally protected political activity.

C. Prohibited political conduct. A judge or a candidate should not:

(1) solicit funds on behalf of a political party, organization, or an individual (other than himself) seeking election to office, by specifically asking f or such contributions in person, by telephone, by electronic media, or by signing a letter, except as permitted under subsection B of this Canon or otherwise within this Code;

(2) endorse a candidate for public office except as permitted under subsection B of this Canon or otherwise within this Code;

(3) intentionally and knowingly misrepresent his identity or qualifications.

D. Political conduct of family members. The spouse or other family member of a judge or a candidate is permitted to engage in political activity.

Political Conduct For All Judges

WHAT YOU CAN DO

$ Attend political gatherings, including political party meetings and conventions, political organization meetings, and campaign events and fundraisers for candidates for public office - 7B(1) (Mere attendance at a candidate=s campaign events and fundraisers will not be construed as a public endorsement of that candidate in violation of 7C(2).)

$ Speak to political gatherings - 7B(1)

$ Be a member of a political party and identify yourself as such - 7B(3)

$ Contribute to a political party or organization - 7B(3) (A candidate=s campaign committee is not a Apolitical organization@ within the meaning 7B(3) therefore you may not contribute to it unless it is your own or a joint judicial campaign of which you are a part. *In re Wright*, 313 N.C. 495 (1985).)

$ Act as a leader or hold any office in a political party at the national, state, or local level - 4C, 5B(2) and 7B(6)

$ Serve as an officer, director, *etc.* of a political organization, defined by the Commission as Aa political party or other group, a principal purpose of which is to further the election or appointment of candidates to political office,@ because such an organization is Aconducted for the...political advantage of its members@ - 5B

$ Allow your spouse or other family members to be politically active - 7D

$ Make speeches in support of a political organization, including a political party - 7B(1) and 7B(6)

WHAT YOU CANNOT DO

$ Solicit funds for a political organization, including a political party - 7C(1)

$ Make a financial contribution or loan to any individual seeking election to any office - 7B(3)

Examples:

May you serve as an ex-officio member of the county party executive committee to select the successor to a county elected public official such as the sheriff, clerk of superior court, register of deeds, or county commissioner? Yes, this conduct is permissible pursuant to 4C and 7B(1), and the same reasoning would allow your service as your precinct=s representative on the county=s party platform committee.

May you serve on the board of directors of the Lincoln Forum? Yes, service would allowed as per 4C and 5B(2) provided such service does not cast substantial doubt on your ability to decide impartially any issue that may come before you.

May you attend a party convention, party legislative reception, party fundraising event, or Young Dem/Young Rep meeting? Yes, attendance at such events is allowed by 7B(1), and you could pay for a ticket to such functions because 7B(3) permits you to contribute to a political party or organization.

May you speak to a Young Dem/Young Rep meeting re: judicial campaigning? Yes, 7B(1) allows you to attend and speak at political gathering.

May your name be listed as a special guest, guest of honor, contributor, etc. on the invitation to a political party fundraising event? Yes, a listing of this nature would be permitted by 7B(1), so long as you do not expressly endorse a candidate (other than yourself) for a specific office or expressly solicit funds from the audience during the event. However, you may not be listed as a sponsor, as the Commission considers sponsorship analogous to assistance in raising funds, prohibited by 4C and 5B(2). You may never solicit funds for a political party, organization or individual as per 7C(1).

May you work in the Rep/Dem party booth at the county/state fair handing out literature, including candidates= campaign literature? Yes, if you are a candidate as defined by 7A(1), you may publicly endorse other candidates. However, while you

are working at the booth, contributions to the party **may not** be accepted.

May you contribute to non-judicial candidates who are not family members? No, 7B(3) prohibits such contributions whether or not you are a judicial candidate and whether or not you are related to the individual. In fact, the Court censured the respondent judge in *In re Wright*, 313 N.C. 495 (1985), for contributing to the campaign committees of a senatorial and a gubernatorial candidate, one of whom had appointed the respondent to his judgeship and both of whom, if elected, would be in positions to appoint/recommend the appointment of judges, and declared the conduct to be Aconduct prejudicial to the administration of justice.@

May your name be listed as a special guest on the invitation to a judicial candidate=s campaign fundraising event? Yes, 7B(1) allows you to be listed or noted within any publicity relating to such an event. However, at the event you may not expressly endorse a candidate (other than yourself) for a specific office nor expressly solicit funds from the audience.

May you attend a $100.00 reception for a judicial candidate? Yes, 7B(1) allows you to attend such political gatherings, however you can pay no more than the reasonable cost of any food and beverage provided because the excess would be a contribution in violation of 7B(3).

May you contribute to the campaign of a cousin to whom you are close? No, 7B(3) provides that you may not personally make financial contributions or loans to any individual seeking election to office (other than yourself) except as part of a joint judicial campaign.

May your spouse contribute to her sister=s campaign for the legislaure? Yes, 7D allows your spouse to make political contributions, but it must be made solely in your spouses name.

May you use official court letterhead for a letter recommending an individual for appointment to a judgeship? No, personal stationery must be used so that the recommendation does not lend the prestige of judicial office to advance the appointment candidate=s private interests in violation of 2B. However, should your recommendation be formally requested by the appointing official, then your response would be in furtherance of your public duties, thereby necessitating use of official court letterhead.

Political Conduct Rules Apply Differently to Those of You Who Are Candidates

WHAT YOU CAN/CANNOT DO			
Attend candidates= campaign events, including fundraisers	Non-Candidate Judge: Yes	7B(1)	Candidate Judge: Yes
Contribute to family member candidate	No	7B(3)	No
Recommend an individual=s appointment to judgeship	Yes	2B	Yes
Make speeches in support of, publicly endorse, or solicit non-monetary support for:			
non-judicial candidates	No	7B(2)	Yes
judicial candidates	No	7C(2)	Yes
Solicit funds for candidates	No	7C(1)	No
Contribute to:			
non-judicial candidates	No	7B(3)	No
judicial candidates	No		No

Examples:

May you endorse candidates even if you are an unopposed judicial candidate? Yes, 7B(2) allows judicial candidates to endorse any individual seeking election to any office, and it contains no requirement that your candidacy be opposed.

May you, as a judicial candidate, run and pay for a campaign ad that asks people to vote for you and 3 other judicial candidates? Yes, such an ad would be allowed pursuant to 7B(3), and even though your campaign pays for it and thereby makes a contribution to the other candidates= campaigns.

May you and the other judges in your judicial district issue an invitation to a

non-fundraising reception for a judicial candidate? Yes, but *only* those judges who are themselves judicial candidates, because issuance of the invitation constitutes a public endorsement and solicitation of support allowed by 7B(2) for judicial candidates, but prohibited by 7C(2) for judges who are not candidates.

Political Conduct Related to a Judicial Candidate=s Own Campaign

WHAT YOU CAN DO

$ Form a campaign committee to solicit and manage the expenditure of campaign funds - 7B(4)

$ Personally solicit campaign funds and public support for your candidacy - 7B(4)

$ Conduct a joint campaign with other judicial candidates - 7B(3)

WHAT YOU CANNOT DO

$ Allow public officials/employees subject to your direction or control to do for you what you cannot do yourself - 3B(2)

$ Intentionally or negligently misrepresent any fact - 2A

$ Intentionally and knowingly misrepresent your identity or qualifications - 7C(3)

$ Preside in certain proceedings in which particular individuals involved in your or your opponent=s campaign appear - 3C(1)

$ Continue to hold judicial office once you become a candidate for election to non-judicial office - 7B(5) (A Acandidate@ is defined as one who makes a public declaration of candidacy, declares or files with the appropriate election authority, or authorizes the solicitation or acceptance of contributions or public support or sends a letter of intent to the chair of the Judicial Standards Commission - 7A(1))

$ Use or allow the use of campaign funds for your/your family=s private benefit - 2A and 2B and state law

Examples:

May you solicit campaign support from defendants and attorneys appearing before you where the solicitations occurred, respectively, in the courtroom during court and in a courthouse hallway during a recess? No, the Court ordered the respondent=s censure in *In re Stephenson*, 354 N.C. 201(2001), for such conduct which the Court declared to be willful misconduct in office and conduct prejudicial to the administration of justice in violation of Canons 1, 2A and 3A(1) of the Code.

May your name and biographical information be included in a political party=s mailing to promote its slate of candidates, including non-judicial candidates? Yes, you may identify yourself as a member of a political party as per 7B(3) and endorse other candidates as per 7B(2).

May you post a campaign sign in a conspicuous location in a building where you are holding court? No, the use of public property for campaign purposes violates Canons 1 and 2 and may be against the law.

May you use official court letterhead for a letter seeking campaign contributions or support for your candidacy? No, this would use State resources for campaign purposes in violation of Canons 1 and 2 and possibly the law.

May you use stationery bearing the State seal and your official mailing address and telephone number for a campaign mailing if a statement appears at the bottom making it clear that State funds were not used for printing and mailing? No, a personal/campaign address and telephone number need to be used so it will be clear that State resources are not being used for campaign purposes in violation of Canon 2 and possibly the law.

May your campaign committee issue a fundraising event invitation where the return envelope notes it is for your personal attention, the return address includes your name, and the response card begins with a promise of support to you personally? Yes, 7B(4) allows you to personally solicit campaign funds and request public support from anyone for your own campaign.

May your campaign committee distribute a campaign mailing comprised of an informational letter signed by you and an enclosure on which forms of

support, including monetary support, could be indicated? Yes, you may authorize or establish a committee of responsible persons to secure and manage the solicitation and expenditure of campaign funds as per 7B(4).

May you or your campaign committee contribute your campaign funds to non-judicial candidates? No, pursuant to 7B(3) you may not make financial contributions or loans to any individual seeking election to office (other than yourself) except as part of a joint judicial campaign as permitted in 7B(2).

May you hold a campaign fundraiser in your home to benefit your candidacy? Yes, 7B(4) allows you to personally solicit campaign funds and request public support from anyone for your own campaign.

May you advertise your political party affiliation on yard signs, brochures, *etc.* during your campaign even though the election will be non-partisan? Yes, 7B(3) allows a judicial candidate to Aidentify himself as member of a political party,@ and it includes no limitation as to partisan/non-partisan or opposed/unopposed elections.

May you respond to a survey form from a special interest group? Yes, but you should not respond to any portion of the survey soliciting responses that would:

1) not promote public confidence in the integrity and impartiality of the judiciary - 2A;
2) convey the impression that the group is in a special position to influence you - 2B;
3) cast substantial doubt on capacity to decide impartially any issue that may come before you - 4;

<u>Closing Cautionary Notes</u>

1) Be sure that participation in permissible political and campaign conduct does not result in running afoul of other Code provisions.

2) Emergency and Special judges are subject to the Code, including Canon 7.

3) Do not use State or other public resources in connection with political and campaign conduct.

People's Alliance PAC 2018 Questionnaire
For North Carolina Appellate Division Judicial Candidates

Candidate's Name:	Tobias (Toby) Hampson
Judicial Office Sought:	North Carolina Court of Appeals (Seat No. 2)
Address:	9650 Strickland Road, Suite 103-365, Raleigh, NC 27615
Email Address:	campaign@tobyhampsonforjudge.com
Phone:	919-218-6773

1. Are you conservative or liberal? Please choose one and then explain your answer.

   I submit that others would describe me as liberal in political terms. However, as a candidate for the NC Court of Appeals, neither conservative nor liberal are labels I would apply to myself in terms of a judicial philosophy. Rather, each case which comes before me will be decided on the merits and without political influence. As an elected Court of Appeals judge, one's service to North Carolina is for all the people of North Carolina. This is accomplished by a faithful application of the law to each case which comes before you irrespective of who the parties may be or the interests they represent. It is this faithful application of precedent, legal principles and constitutional provisions through which, fundamentally, the judiciary maintains its independence and adheres to Canon 3(A) of the N.C. Code of Judicial Conduct which provides in part: "A judge should be unswayed by partisan interests, public clamor, or fear of criticism."

   As Justice Sandra Day O'Connor said in a 2010 NPR interview: "The founders realized there has to be someplace where being right is more important than being popular or powerful, and where fairness trumps strength. And in our country, that place is supposed to be the courtroom." I am committed to doing right and to be unswayed by partisan interests, public clamor, or fear of criticism. Through these overarching principles, if elected, I will serve all North Carolinians as a Judge on the North Carolina Court of Appeals.

2. Please describe how your religious and philosophical beliefs may affect your conduct and decision-making if you are elected.

   Consistent with both my religious and philosophical beliefs, those beliefs would not impact any particular decision. This is because both my commitment to the philosophical undergirding of our state and country, along with my Methodist faith, teaches that a separation of church and state is healthy for both church and state. However, there are certain fundamental concepts of philosophy and faith that do guide my life and conduct. I believe that all persons are created equal and entitled to equal justice under the law no matter who they are, where they come from, or how much or little they have.

3. Have you ever been convicted of a criminal offense (other than a minor traffic or drug offense)? If the answer is yes, please describe the circumstances and the outcome.

   No.

4. Have you personally ever been a party in a civil legal proceeding? If the answer is yes, please explain the circumstances and the outcome of the case.

   No.

5. Please describe your practice as a lawyer. Describe the areas of your practice and your specialties. If, over time, your practice has evolved or changed, describe the changes. Describe your various client bases as a part of your answer.

   I began my law career serving as a law clerk at the Court of Appeals for the Hon. K. Edward Greene, Hon. Wanda Bryant, and Hon. Robert (Bob) C. Hunter from 2002-2004. I entered private practice in 2004, with the firm of Patterson Dilthey handling various civil litigation matters at both the trial and appellate levels.

   In 2007, I rejoined my mentor Eddie Greene at the Raleigh firm of Wyrick, Robbins, Yates & Ponton, LLP, where I have focused my practice on handling appellate matters in the Court of Appeals and North Carolina Supreme Court. I have also assisted in representing the Towns of Wake Forest and Zebulon in municipal matters.

   Currently, I am the Appellate Practice Group Leader at Wyrick and a partner in the firm. Since joining Wyrick and focusing on appellate practice, I have had the opportunity to handle practically every type of case that comes before the Court of Appeals. I have also been fortunate to represent a broad range of individuals, businesses and municipalities in our Courts. My cases have included representing indigent parents whose parental rights are at risk, along with representing individuals and businesses in complex business cases, criminal defense appeals, products liability, personal injury, medical malpractice, fraud, real estate, municipal zoning matters, administrative agency appeals, will caveat actions, family law matters, and others. By way of illustration, the Court of Appeals and Supreme Court on-line docket sheets show me as counsel of record for 307 cases dating back to 2004 and Westlaw shows 280 decisions listing me as counsel of record (including motions, petitions, and decisions) in the North Carolina appellate courts – including approximately 185 published and unpublished opinions.

   I am certified by the North Carolina State Bar Board of Legal Specialization as an Appellate Specialist. I am a member of the North Carolina Bar Association Appellate Rules Committee which helps provide recommendations for revisions and changes to the N.C. Rules of Appellate Procedure to the NC Supreme Court.

6. If you have been a member of an appellate division court, please choose a recent decision you have written for the court which you feel best illustrates your learning, values, skills, outlook and temperament as a jurist. If the decision is published, you may simply cite it. If the decision you have selected is unpublished, please provide us with a copy. Please explain why you selected the decision and tell us how it demonstrates your particular fitness to hold the judicial office you are seeking.

   N/A

7. If you have not been a member of an appellate division court, please describe your practice in that division. Please provide us with the citation of an appellate decision in a case in which you advocated as a lead attorney for one of the parties. The decision you choose should best illustrate the learning, values, skills, outlook, and temperament you would bring to the court as the holder of the judicial office you seek. If the decision you have chosen is unpublished, please provide us with a copy. You must also provide us with the brief you wrote in that case. Explain why you selected that decision.

   As noted above, I have been fortunate to have an extensive and successful appellate practice in both the NC Court of Appeals and NC Supreme Court. My cases have ranged from multi-million dollar lawsuits to helping an indigent parent fight for her parental rights as she fought to overcome her addictions.

   The one case I would point to in response to this question, however, is Hunt v. Long, 235 N.C. App. 217, 763 S.E.2d 338 (2014) (unpublished) (COA13-1455, filed 14 July 2014) (enclosed). I selected this case because it illustrates a situation in which the law when properly applied results in a practical result that makes common sense in its application. In summary, my client, Ms. Long's daughter had passed away leaving a young boy in Ms. Long's care. Ms. Long's grandson and daughter had lived with Ms. Long the boy's entire life. The boy's father had little to no involvement in the boy's life. However, after the mother's death, the father filed for custody of the child. The trial judge indicated he had no other choice under the law but to award full custody to the father as the sole parent meaning Ms. Long had absolutely no standing to seek custody or even visit with her grandson – the only remaining care giver this child had ever known.

   The trial judge was clearly bothered by the decision but felt duty-bound to rule this way, even stating at one point in ruling: "Unfortunately, the law is not always right, but the law is the law. I'm going to have to follow it." (T p 69). The trial court later apologized: "I'm sorry, Ms. Long. It's not – it's not life, but it's the law." (T p 71). I successfully argued on appeal that the evidence supported reversal of the decision because the father had effectively abdicated his responsibilities and, thus, Ms. Long should have an opportunity to seek custody of her grandson. Thus, when properly applied, the law did reflect real life. My brief in the case is enclosed with this response document.

8. Please describe the nature and extent of any pro bono legal work or other volunteer work you have done. Is there a pro bono or volunteer effort your contribution to which best illustrates your values as a lawyer and as a person?

   Some of the most fulfilling work I have done as a lawyer has either been on a pro bono or "low bono" (or reduced fee) basis, particularly in our appellate courts. This has included representing indigent parents in termination of parental rights and abuse/neglect/dependency cases at substantially reduced rates. Presently, I have taken on a pro bono matter representing a servicemember who is currently on active duty in appealing a trial court's decision in a child custody action to not grant the automatic stay provided by federal law to those serving in our military.

   I have also undertaken significant volunteer work to help improve the administration of justice, including serving actively on the NC Bar Association's Appellate Rules Committee since 2008, along with having previously served on the NCBA's Law School Liaison Committee and Delivery of Legal Services Committee, which focused on providing legal services to the underserved. I serve on the North Carolina Bar's Appellate Specialization Committee. In addition, I chair Wyrick Robbins' Bar Activities Committee.

   Additionally, it is important to me to teach and write as part of my public service commitment to help improve the legal profession. Most recently, this has included taking part in the inaugural Training Program for the North Carolina Appellate Pro Bono Program in April 2018.

   Between 2008 and 2013, I was a member of the Board of NC Voters for Clean Elections, serving as President for several years, which advocated for publicly financed, non-partisan "Voter Owned" elections, including judicial elections.

   More recently, my community activities have generally centered on my church, Windborne United Methodist, where I recently finished my term as Trustee chair, and am now the leader of the Men's Group and serve on the Kemp Edwards Memorial Scholarship Committee. I also sit on the church council.

   It is my hope that each of these areas of service, in their own way, reflect my values as a person and lawyer.

9. Have you ever been the subject of a complaint to the North Carolina State Bar or the North Carolina Judicial Standards Commission? If the answer is yes, please explain the circumstances and the outcome.

   No.

10. What is your position on the death penalty?

My position is that the death penalty remains part of the law of North Carolina, irrespective of any personal views to the contrary. It is the role of the Courts to review cases under the law as it is and not how any one judge might wish it would be. The Courts – and indeed, all the decisionmakers in the judicial system, including District Attorneys who make the initial determination to pursue the death penalty – must make sure, as long as the death penalty remains on the books or until overturned by a higher court, when it is imposed it occurs only after fair trial before a jury of peers, free of prejudicial error in which the defendant received due process and the benefit of all constitutional protections.

11. What, if anything, should be done to improve access to the courts for people with limited financial means?

The biggest changes needed to our judicial system all relate to closing the access gap and removing financial, physical and technological impediments to accessing our court system to meet the state constitutional mandate that "right and justice shall be administered without favor, denial, or delay." N.C. Const. Art. I, Sec. 18. Modernizing our judicial system will increase efficiency, which in turn will create greater accessibility to justice.

First, a comprehensive electronic case management system should be implemented to (A) track cases, flag delays, and improve scheduling of Court dates and times; (B) ensure proper allocation of staffing and resources; and (C) provide for electronic filing of pleadings and remote access to dockets and court calendars.

Second, providing alternate avenues for citizens to address minor or routine issues. This may include self-help automated kiosks or payment stations, or staffed assistance centers to provide basic forms and materials or again, providing secured portals for litigants to access their cases. This would have the dual benefit of increasing access to the Courts and decreasing the administrative burden on our Clerks' offices.

Third, increase physical accessibility to courthouses by (A) ensuring every Courthouse has adequate funding to ensure it is fully accessible to those with disabilities or with limited mobility or can simply handle the day-to-day courthouse traffic to prevent delays and missed appearances; and (B) by providing for alternative methods of appearing for minor matters other than physically appearing in Court through the use of technology to permit video-conferencing or other remote appearances.

Fourth, modernizing the criminal justice system to provide for specialized treatment courts, diversion programs for youthful offenders, and to properly fund indigent defense programs.

These ideas are not novel or new, in fact they are generally laid out in the March 2017 Final Report of the North Carolina Commission on the Administration of Justice commissioned by the Chief Justice of North Carolina. Hopefully, though, these modernizations will be implemented in the near future.

12. North Carolina incarcerates an extraordinary number of people, including persons convicted of non-violent crimes. Those who are incarcerated are disproportionately people of color. What can you do in your role as an appellate judge to address the issues of mass incarceration and racial bias in the administration of justice?

    First, and foremost, the most direct impact an appellate judge can have is to decide their own cases – including appeals and pre- and post-judgment petitions – efficiently and through an equal and just application of the law.

    More broadly, however, an appellate judge, consistent with Canon 4 of the North Carolina Code of Judicial Conduct, "may engage in activities concerning the economic, educational, legal or governmental system, or the administration of justice[,]" including appearing before executive or legislative bodies or officials at public hearings or consulting with executive or legislative bodies or officials. It is through these activities an appellate judge can address issues of mass incarceration and racial bias in the administration of justice.

13. Do you think that racial discrimination in the use of peremptory strikes in jury selection is a problem, and, if so, what can be done to address it?

    Any time a trial is infected with racial discrimination at any phase it is a problem. The issue of racial bias in peremptory challenges is consistently and continuously one that continues to be raised in our appellate courts – for example, there are at least 4 Court of Appeals decisions issued in 2018 addressing objections to peremptory challenges on racial bias grounds under the seminal U.S. Supreme Court case of Batson v. Kentucky. See State v. Hobbs, (No. COA17-1255; N.C. Ct. App. July 17, 2018) (unpublished); State v. Hewitt, (No. COA17-1157; N.C. Ct. App. June 19, 2018) (unpublished); State v. Crump, (No. COA17-488; N.C. Ct. App. Apr. 17, 2018); State v. Miller, 812 S.E.2d 692, 694 (N.C. Ct. App. Mar. 6, 2018).

    The way this may be remedied is first through continuing education of both prosecutors and defense attorneys on this issue and continuing education on concepts like intrinsic bias which is becoming a greater focus of the legal community at large. Second, for purposes of appellate review of Batson challenges, these must be preserved very carefully in the trial courts and with a sufficient record for an appellate court to conduct a review of these challenges on the merits. It is the duty of our appellate courts to review properly preserved Batson challenges to ensure a Defendant receives a fair trial before a jury of peers.

14. Would you support legislation designed to protect gay, lesbian, and transgender people from discrimination in housing, employment, public accommodation, and access to government processes, benefits, and services?

    Yes.

15. Should magistrates, judges, or other government officials be excused from performing their lawful duties because of their religious beliefs?

    As a general rule, no. However, where religious beliefs render a magistrate or judge from making an impartial decision or where it results in a situation where a judge's impartiality may reasonably be questioned, a judge should be excused from a particular case.

16. Should state agencies with licensing, environmental protection, consumer protection, or similar functions make the final decisions in enforcement or other contested cases or should the final decisions in such matters be made by administrative law judges? What should North Carolina's law and policy be with regard to the deference courts afford regulatory agencies? What should out state's law and policy be with regard to who is an "aggrieved person" in cases of environmental law violations?

    In 2011, the General Assembly, over Governor Perdue's veto, enacted legislation it entitled the "Regulatory Reform Act" (N.C. Sess. Law 2011-398) which, in part, modified the authority of ALJs, in most instances, providing they would make the final decision in contested cases before administrative agencies rather than having the ALJ's decision be advisory and the Agency itself making a Final Agency Decision. This procedure remains the law until if and when the General Assembly amends or rewrites this law. Under this statute, an ALJ must give "due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency." N.C. Gen. Stat. § 150B-34(a).

    The deference afforded by courts to regulatory agencies depends primarily on the nature of the challenge to the agency decision. If a challenge to an administrative decision is on the grounds it is: (1) in violation of constitutional provisions; (2) in excess of statutory authority or jurisdiction; (3) made upon unlawful procedure; or (4) affected by error of law, a court may review a final decision of an agency or ALJ under a <u>de novo</u> standard meaning, consistent with the law, the court may substitute its judgment for that of the decisionmaker below on these questions of law. N.C. Gen. Stat. Ann. § 150B-51. If the challenge is based on the sufficiency of evidence or a claim the agency action was arbitrary or capricious, a more deferential "whole record" review is applied to see whether there is any competent evidence in the record sufficient to support the decision. <u>Id</u>.

However, even under a de novo review: "It is a tenet of statutory construction that a reviewing court should defer to the agency's interpretation of a statute it administers 'so [ ] long as the agency's interpretation is reasonable and based on a permissible construction of the statute.'" Cty. of Durham v. N. Carolina Dep't of Env't & Nat. Res., 131 N.C. App. 395, 397, 507 S.E.2d 310, 311 (1998) (internal citations omitted). Nevertheless, this deference is not absolute. For example, where an agency's statutory interpretation is either a misinterpretation of case law or contrary to the plain language of a controlling statute, the agency's interpretation is not entitled to deference. See Hospice At Greensboro, Inc. v. N. Carolina Dep't of Health & Human Servs., 185 N.C. App. 1, 13–14, 647 S.E.2d 651, 659–60 (2007).

Under the Administrative Procedure Act, a "Person aggrieved" is a defined term and "means any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision." N.C. Gen. Stat. § 150B-2(6). In environmental cases, the standard is generally set out in Justice Whichard's opinion in Empire Power Co. v. N. Carolina Dep't of Env't, 337 N.C. 569, 588, 447 S.E.2d 768, 780 (1994) (holding where adjacent downwind property owner alleged "he and his family will suffer injury to their health, the value of their property, and the quality of life in their home and their community" this satisfied the aggrieved person threshold).

17. Did you support "Raise the Age"? Are you satisfied with the current law?

Yes, I supported the "Raise the Age" bill. Much depends on the implementation of the bill. I still believe there is potentially room to divert youthful offenders ages 16 and 17 charged with "high felonies" not covered by the Act from adult criminal courts.

18. Should judges be appointed or elected in North Carolina? If you believe judges should be appointed, who should appoint them? If you believe judges should be elected, what system should be employed to elect them? Should judicial elections be partisan?

The preamble to the State Constitution expressly provides it was ordained and established by "the people of the State of North Carolina." This responsibility to, and authority derived from, the people is further preserved and protected by the Constitutional mandate in Article IV, Sec. 16 that state court judges be elected by the "qualified voters." The people of North Carolina have made clear state judges should be elected by the voters. If we are going to have judicial elections, there is no basis to limit the electorate and, thus, the general electorate should decide. The decision as to whether judicial races should be partisan or not is one for the General Assembly. Unfortunately, in recent months and years, the General Assembly has undertaken to introduce a number of provisions which only serve to increase the level of partisanship in judicial races and in our trial and appellate courts. Judges, no matter their political leanings, should endeavor to uphold the independence of our Courts.

19. What is the most important decision of the Supreme Court of North Carolina in the last five years and why?

I would submit any one of several cases addressing the issue of the separation of powers decided recently would qualify, but I return to Justice Ervin's majority decision in City of Asheville v. State, 369 N.C. 80, 83, 794 S.E.2d 759, 763 (2016), for two reasons: (1) it reasserted the judiciary's obligation to review the constitutionality of legislative acts, including the level of deference to be afforded to the legislature; and (2) it addresses the interplay of state and local governmental authority as set out in the NC Constitution, particularly as it applies to local acts in violation of the prohibition under Article II, Section 24 against local bills targeting health and sanitation. Here, the Supreme Court held a local bill requiring the involuntary transfer of the City of Asheville's public water system to a new entity was unconstitutional.

20. Did you support or oppose the bill passed by the North Carolina General Assembly in 2017 that will reduce the number of Court of Appeals judges? How many judges should sit on that court?

I opposed the bill. The Court has operated very well with 15 judges since it was expanded from 12 and given the consistently heavy workload of the Court, it should remain at 15 members.

21. What changes, if any, would you make in the relative jurisdiction of the North Carolina Court of Appeals and the Supreme Court of North Carolina?

The relative jurisdiction of the Court of Appeals and Supreme Court is for the General Assembly to decide. I do, however, have concerns that recent legislation altering the relative jurisdiction of those courts has not been accomplished to serve the administration of justice but rather ulterior ends. I would submit the recent change of jurisdiction over termination of parental rights from the Court of Appeals to the Supreme Court, which will go into effect in the coming months, will present significant challenges to the administration of justice in those highly important cases, particularly where the Court of Appeals has a long institutional history of deciding those cases in an efficient and fair manner with procedures in place and a large body of case law to guide its decisions.

22. How are you registered to vote? Have you ever changed your voter registration? If you have changed your registration, please explain why?

I am a registered Democrat. I have not changed my voter registration.

23. Who did you vote for in the 2012 and 2016 presidential and gubernatorial elections? Who did you vote for in the 2014 U.S. Senate race?

In 2012, I voted for President Barak Obama and in 2016 I voted for Hillary Clinton for President.

In 2012, I voted for Walter Dalton for NC Governor, and in 2016 I voted for Governor Cooper.

In 2014, I voted for Kay Hagan for US Senate.

24. How will you vote if the November ballot contains constitutional amendment referenda in favor of voter identification, "Marsy's Law", and the filling of judicial vacancies?

I intend to vote no on each of the proposed amendments.

TOBIAS (TOBY) S. HAMPSON

Candidate for N.C. Court of Appeals 2018

8634 Murray Hill Drive
Raleigh NC 27615

EDUCATION:

Campbell University — Buies Creek, NC
Norman Adrian Wiggins School of Law — May 2002
Juris Doctor with Honors

The American University — Washington, DC
School of International Service — May 1998
B.A. International Studies/History with University Honors

North Carolina School of Science and Mathematics — Durham, NC
May 1994

EXPERIENCE:

Wyrick, Robbins, Yates & Ponton, LLP, — Raleigh, NC
Partner (2014-present) — May 2007-present
Associate Attorney (2007-2014)

- Appellate Practice Group leader responsible for supervising and handling all aspects of appellate practice including oral argument, briefing, motions and petition practice
- Extensive experience in the North Carolina Court of Appeals and North Carolina Supreme Court in a wide array of areas of law including complex commercial litigation, family law, juvenile abuse/neglect and termination of parental rights cases, estate litigation, workers' compensation, products liability, personal injury, criminal, and administrative agency appeals
- Serving the Towns of Wake Forest and Zebulon in zoning, police power, and other general matters including litigation

Patterson, Dilthey, Clay & Bryson, LLP — Raleigh, NC
Associate Attorney — July 2004-May 2007

- Responsible for briefing, arguing and assisting in appellate work
- Conducted a broad range of litigation practice, including all aspects of general civil litigation, workers' compensation, and legal malpractice defense
- Handled administrative hearings, depositions, motions and trial practice

North Carolina Court of Appeals — Raleigh, NC
Law Clerk — Aug. 2002-July 2004

- Served as Research Assistant for Hon. K. Edward Greene, (Ret.) (2002); Hon. Wanda Bryant (2003); Hon. Robert C. Hunter, (Ret.) (2003-2004);
- Assisted in drafting majority, dissenting, and concurring opinions
- Researched and briefed issues pending before the Court to prepare Judges for arguments and bench conferences

ADMISSIONS: United States Supreme Court; 4th Circuit Court of Appeals; all North Carolina State and Federal District Courts;

CERTIFICATION: North Carolina State Bar Board of Legal Specialization Certified Specialist in Appellate Practice (2011) (recertified 2015);

MEMBERSHIPS: NC Bar Association, (*Litigation and Appellate Practice Sections, Appellate Rules Committee)*; Wake County Bar Association and Tenth Judicial District Bar; American Bar Association; NC State Bar (*Appellate Specialization Committee)*;

PROFESSIONAL RECOGNITION: Campbell University School of Law Board of Visitors (2016-2018);
North Carolina Superlawyers Magazine: Appellate Practice (2014-2018); Rising Star (2010-2013); Top 100 in NC (2015, 2017, 2018); Top 25 in Raleigh (2017, 2018);
Business North Carolina Magazine Legal Elite (Appellate Law 2018; Young Guns 2010, 2012);
NC Lawyers Weekly "Emerging Legal Leader" (2010);

EDUCATIONAL HONORS: Notes and Comments Editor, *Campbell Law Review;*
Order of Barristers;
Campbell Law Fred O. Dennis Award;
2002 National Trial Team member;
2001 John Marshall International Moot Court in Information Technology and Privacy Law;
2001 William and Mary Spong Invitational Moot Court;
Book Awards: Jurisprudence; Torts II; Wills & Trusts; First Amendment; Family Law; Law Office Operation and Management; Civil Rights Litigation; North Carolina Criminal Procedure
Honors: Federal Courts; Federal Crimes; Immigration Law; Appellate Advocacy;

PERSONAL & COMMUNITY: Married to Kristin, attorney/owner at Hampson Family Law; 3 daughters; Member of Windborne United Methodist Church (past Trustee chair; Church Council Member; Men's Group leader; Kemp Edwards Memorial Scholarship Committee); Past-President of NC Voters for Clean Elections (2010-2013; Board Member 2008-2013);

PUBLICATIONS & PRESENTATIONS: "Nuts and Bolts of Appellate Practice" panel member on seeking further review of Court of Appeals decisions, Training Program for the North Carolina Appellate Pro Bono Program, (April 2018);

"The Better Part of Valor: Arguing an Abuse of Discretion Standard in North Carolina's Appellate Courts," Hampson, T., Per Curiam NCBA Appellate Practice Section Newsletter, (Summer 2016);

National Institute of Trial Advocacy, Southeastern Deposition Skills Seminar faculty member (2016, 2014);

"Appellate Mediation Primer," Greene, K. Edward, Hampson, T., NC Bar Association Appellate Practice Section annual CLE, (October 2015);

"Appealing with Integrity," Greene, K. Edward, Orr, R., Hampson, T., NC Bar Association Appellate Practice Section annual CLE, (October 2014);

Co-Course Coordinator, The Anatomy of an Appeal, N.C. Bar Association Appellate Practice annual CLE, (October 2013);

"Nine Rules to Help Win Your Case in the North Carolina Appellate Courts," Greene, K. Edward, Hampson, T., The Litigator, NC Bar Association Litigation Section Newsletter, (December 2012);

Co-Presenter "Post-Trial Issues – the Gray Area Between Entry of Judgment and Notice of Appeal," NC Bar Association Family Law Intensive CLE, (February 2012);

"Appeal 'Proof': Suggestions for Drafting Orders and Judgments to Withstand Appellate Review," Family Forum, NC Bar Association Family Law Section Newsletter, (May 2010);

"Reduction in Alimony Obligation upon Retirement," NC Bar Association Family Law Section Intensive Family Law Seminar, Asheville, NC, October 2009 and Raleigh, NC, (February 2010);

Speaker, "The Structure and Overview of the Court System," The Mechanics of North Carolina Civil Procedure seminar, Raleigh, NC, (December 2009);

Speaker, "Complying with the Rules of Evidence" and "Using Evidence to Build Your Case," Evidence: Strategies for Finding, Preserving and Using Evidence to Support Your Case, Raleigh and Greensboro, NC, (September 2008);

Speaker, Advanced Workers' Compensation seminar "Case Law and Legislative Update" and "Employer Pitfalls and Protections," Raleigh, NC, (March 2007);

"Court Costs Clarified(?): What We Know from Recent Court of Appeals Decisions on Court Costs, What We Don't Know, and What's Next," NCADA's The Defender, (Spring 2007);

NO. COA13-1455 13A JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

* *

THOMAS LEWIS HUNT, Plaintiff,	)	
v.	)	From Columbus County No. 12 CVD 1501
VELMA LONG, Defendant.	)	

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DEFENDANT-APPELLANT'S BRIEF

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NO. COA13-1455 13A JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

* *

THOMAS LEWIS HUNT,	)	
	)	
Plaintiff,	)	
	)	From Columbus County
v.	)	No. 12 CVD 1501
	)	
VELMA LONG,	)	
	)	
Defendant.	)	

ISSUE PRESENTED

I. WHETHER THE TRIAL COURT ERRED IN DISMISSING DEFENDANT'S COUNTERCLAIM FOR CUSTODY OF HER GRANDSON AND AWARDING SOLE AND EXCLUSIVE LEGAL CARE, CUSTODY AND CONTROL TO PLAINTIFF WHERE THE CHILD WAS NOT RESIDING IN AN INTACT FAMILY AT THE TIME THIS ACTION WAS INSTITUTED, PLAINTIFF HAD NOT ESTABLISHED PATERNITY PRIOR TO FILING THIS LAWSUIT, PLAINTIFF ALLOWED DEFENDANT TO SERVE AS A DE FACTO PARENT, DEFENDANT PROVIDED HOUSING AND SUPPORT FOR THE CHILD, AND THE TRIAL COURT EXPRESSLY FOUND DEFENDANT HAD NOT SUPPORTED OR VISITED WITH THE CHILD TO THE EXTENT HE SHOULD HAVE DONE.

STATEMENT OF THE CASE

Thomas Lewis Hunt (Plaintiff) initiated this action by filing a Complaint on 4 December 2012 alleging claims for: (1) establishment of paternity; (2) child custody; and (3) entry of temporary order seeking sole and exclusive custody of the then five year old minor child involved in this case. (R pp 3-7). The Complaint alleged the minor child's mother had passed away and the child, both prior to his mother's death and at the time, was residing with Defendant Velma Long (Velma), the child's maternal grandmother. (Id.). An *Ex Parte* Temporary Order issued the same day requiring Velma to turn over the minor child to Plaintiff. (R pp 8-10). Velma was not served with the Complaint until 7 December 2012. (R p 13). An amended *Ex Parte* Temporary Order issued on 10 December 2012, including provisions authorizing the Columbus County Sheriff to arrest the child's grandmother, if the child was not turned over on demand. (R pp 14-15).

On 17 January 2013, the parties entered into a consent order memorializing the parties' agreement to temporary provisions, including provisions in which Plaintiff agreed to permit Defendant custodial time with the minor child over a period of several weeks in January 2013. (R pp 20-22). On 18 January 2013, the trial court entered an order finding a DNA test established Plaintiff was the biological father of the child and temporarily awarding custody of the child to

Plaintiff pending further orders of the court but still providing for Velma to have visitation. (R pp 23-24).

On 22 January 2013, Velma filed an Answer and Counterclaim asserting her own claim for custody of the minor child. (R pp 25-31). The matter was tried on 11-12 June 2013 before the Honorable Jerry Arnold Jolly in Columbus County District Court. (R p 1). On 10 September 2013, the trial court entered its Order awarding Plaintiff sole and exclusive legal care, custody, and control of the minor child and dismissing Velma's claim for custody. (R pp 35-37). Velma timely filed a Notice of Appeal on 23 September 2013 and filed an Amended Notice of Appeal to correct a clerical error as to the date on which the Notice of Appeal was signed and served. (R pp 38-39, 40-41).

STATEMENT OF THE FACTS

Velma is the maternal grandmother of the minor child in this case. (T 6/11/13 p 11; R pp 4, 27). Velma's daughter, Tanya, and the Plaintiff were in a dating relationship which resulted in the birth of the minor child in June 2007. (T 6/11/13 pp 125-6). Around April 2008, when the child was less than a year old, Tanya left Plaintiff following an argument and moved into Velma's home. (T 6/11/13 p 126).

Velma would watch the minor child while Tanya was working. (T 6/11/13 p 128). After about a year, Tanya and Landon placed a mobile home on Velma's

property behind Velma's house. (T 6/11/13 p 138). The minor child, however, still stayed with Velma more than Tanya. (Id.) Velma bathed, fed, and changed the child's diapers, and helped potty train him. (T 6/11/13 p 139). Velma testified the child was with her probably seventy percent (70%) of the time. (T 6/11/13 p 144). Shortly after the child's birth, the child required surgery at Duke. While Plaintiff and Tanya stayed at motel, Velma stayed in the hospital with her grandson. (T 6/11/13 p 148). The minor child had medical issues requiring frequent and regular trips to the doctor. Velma and Tanya would accompany the child to all of these visits. (T 6/11/13 p 150). Velma took on a large role in assisting with homework, enrolling the child in school, paying for uniforms and providing supplies and transportation. (T 6/11/13 p 165).

Tanya died in October 2012. (T 6/11/13 pp 171-2). At the funeral, Plaintiff and Velma had a conversation in which Plaintiff indicated he would leave the child in Velma's custody, because that was where the child has been. (T 6/11/13 pp 171-72). Another family friend testified Plaintiff also stated he was not going to take the child, but leave him with Velma. (T 6/12/13 p 15).

In December 2012, Plaintiff filed this lawsuit in part seeking to establish his paternity and obtain custody of the minor child. (R p 3-7). An order establishing Plaintiff's paternity of the child was entered in January 2013. (R p 23). Plaintiff has not had a drivers' license since 2008 as the result of DUI convictions. (T

6/11/13 p 53). Plaintiff saw his son once or twice a month. (T 6/11/13 p 43). Plaintiff attended none of his son's doctor's visits. (T 6/11/13 p 45). After Tanya died, Plaintiff saw his son twice: once at the funeral and again when he went to Velma's house to swab the child's mouth for the DNA tests. (T 6/11/13 p 46).

Plaintiff testified he earned approximately $54,000 per year. (T 6/11/13 p 8). He testified he had provided a total of approximately $3,500 in support for the child between 2010 and 2012. (T 6/11/13 p 58). Other evidence showed the actual amounts were closer to $1,600. (T 6/11/13 p 60). Defendant testified he did not recall any communication with Velma about his son after Tonya died. (T 6/11/13 p 13). He acknowledged the two did talk at the funeral. (T 6/11/13 p 13). He admitted he never asked Velma to turn over custody of the child to him. (Id.).

Once temporary orders were entered granting Plaintiff custody, Plaintiff relies on his parents to take the child to school and medical appointments, because he leaves for work on Monday mornings and does not return until between Thursday and Friday. (T 6/11/13 pp 48, 52-53). During these periods, the child actually lives and stays with Plaintiff's parents who care for him in Plaintiff's absence. (T 6/11/13 pp 22-24). On 10 September 2013, the trial court entered its Order awarding Plaintiff sole and exclusive legal care, custody, and control of the minor child and dismissing Velma's claim for custody. (R pp 35-37). Velma has

not been permitted to see her grandson by Plaintiff and his family since March 2013. (T 6/11/13 p 159).

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

The trial court's 10 September 2013 Order resolved all pending claims in this matter. As a final judgment of the District Court in this matter, appeal lies directly to this Court. N.C. Gen. Stat. § 7A-27(c).

STANDARD OF REVIEW

This Court reviews the trial court's findings of fact in child custody matters to determine "if there is evidence to support them." Browning v. Helff, 136 N.C. App. 420, 423, 524 S.E.2d 95, 97 (2000). This Court reviews the conclusions of law in a custody matter de novo. Id.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SOLE AND EXCLUSIVE LEGAL CARE CUSTODY AND CONTROL OF THE MINOR CHILD TO PLAINTIFF AND DISMISSING DEFENDANT'S CLAIM FOR CUSTODY.

The facts of this case are tragic. A single mother dies leaving behind a young son in the care of his maternal grandmother with whom the child has lived for practically his entire life. The putative father swoops in and asserts full control of the child claiming "grandparents don't have custody rights." (T p 79). The trial court feels its hands are tied by the law and – no matter how harsh the result – duty-bound rules for the father and the child is ripped and isolated from the only

home he has ever known. The trial court even acknowledges had it been able to, it may well have found it in the best interests of the child to be legally placed in his grandmother's custody. Even Plaintiff's trial lawyer expressed to the court that Plaintiff had been a bad father for his son's first four years of life.[1] (T p 65).

While the sincerity, forthrightness and commitment of the trial court to follow what it perceived as the law cannot be questioned, the trial court's conviction in its application of the law in this case, is belied by the trial court's rendering of its order in which the trial court prefaced: "Unfortunately, the law is not always right, but the law is the law. I'm going to have to follow it." (T p 69). The trial court later apologized to Velma: "I'm sorry, Ms. Long. It's not – it's not life, but it's the law." (T p 71).

These disclaimers reflect the trial court was in much the same position as the trial judge in In re Gibbons. There, much like as in this case, a trial court felt compelled to remove custody of a child from his maternal grandparents with whom the child had been living following his mother's death in favor of the child's father. The Supreme Court concluded "It seems that the learned Judge felt so 'cramped by his opinion that in law' the respondent had a primary right to the custody of the boy, that he overlooked the interest and welfare of the boy. This was error." In re Gibbons, 247 N.C. 273, 282, 101 S.E.2d 16, 23 (1957). Indeed, much like the trial

[1] Plaintiff's lawyer actually used a more colorful term to describe his client. (T 6/12/13 p 65).

court in this case, the Gibbons trial court's ruling manifested the trial court "was gravely perturbed" over the result of his ruling. Id.

In this case, ultimately, the trial court misapprehended that North Carolina law involving child custody does, in fact, represent life. It recognizes the actions of a biological parent may result in a child developing a "de facto" parental relationship with a third party closer than any purely biological relationship. This may include legal strangers, step-parents, same-sex partners, and, of course, grandparents. Where a biological parent allows this de facto relationship to be created they do act inconsistently with their parental rights by ceding their counterpart responsibility – in whole or in part – to shoulder the obligations of raising their children with a non-parent. Having ceded their responsibility, the biological parent can no longer claim a superior interest in the custody of his child and the proper test is the best interests of the child.

The trial court's fundamental error in this case was requiring proof of total abandonment, non-support, abuse or neglect was absolutely required to show acts inconsistent with a parent protected status. It is not necessary a parent abuse or neglect their child as those terms are legally defined to cede their parental rights to another in the context of a custody action and it is unnecessary for the parent to completely abandon or fail to support their child. In this case, the trial court acknowledged the child had lived primarily with his mother and Velma and

Plaintiff had failed to provide sufficient support or engage in adequate visitation with his own son. Because of the trial court's misapprehension of the law, it made no further inquiry into whether Plaintiff's acts and omissions in this case constituted clear and convincing evidence of acts inconsistent with Plaintiff's protected status as a parent – and instead, on very limited findings of fact, dismissed Defendant's claim for custody of her grandson and ordered sole and exclusive custody of the child be granted to Plaintiff. This was error.

A. THE TRIAL COURT'S FINDING OF FACT #8 IS UNSUPPORTED BY THE EVIDENCE.

As an initial matter, in Finding of Fact #8, the trial court found: "That the Plaintiff testified he is employed, earning a yearly gross salary of between $45,000 and $50,000." (R p 36). The transcript, however, reflects Plaintiff was asked by his attorney "What is your gross monthly and/or yearly income?" Plaintiff responded: "Probably about $54,000." (T 6/11/13 p 8). Plaintiff went on to testify this had been fairly consistent for the last 18 years. (T 6/11/13 p 8). Thus, this finding by the trial court is not supported by the evidence. This finding is relevant to the ultimate decision in this case because it emphasizes how little support Plaintiff paid for the care of his child relative to the amount of money he earned, which goes directly to whether Plaintiff acted inconsistently with his status as a parent in this case. Indeed, even with the erroneous finding as to Plaintiff's income, the trial

court still ultimately found Plaintiff had not provided support to the extent he should have done. (R p 36).

B. DEFENDANT HAD STANDING TO BRING HER CUSTODY COUNTERCLAIM.

Plaintiff's argument to the trial court – and, indeed, the trial court's rendered order make reference to "standing" as the basis for dismissing Velma's counterclaim for custody. (T 6/12/13 pp 64, 70). The trial court's written ruling, however, was based on the erroneous determination Plaintiff had not acted inconsistently with his constitutionally protected status as a natural parent. (R p 36). Indeed, at the conclusion of the hearing both Plaintiff's counsel and the trial court appeared to conflate separate concepts of standing, the intact family doctrine, and the "acts inconsistent" standard for third-party custody actions. Neither standing nor the intact family doctrine concepts appear in the trial court's entered order. Nevertheless, in the context of this case, it is important to understand Velma did, in fact, have "standing" to pursue this custody action as a grandparent.

N.C. Gen. Stat. § 50-13.1(a) provides: "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 . . .." N.C. Gen. Stat. § 50-13.1(a) (2013). This Court has expressly held this statute conveys standing upon a maternal grandparent to bring a custody action. Grindstaff v.

Byers, 152 N.C. App. 288, 293, 567 S.E.2d 429, 432 (2002); Sharp v. Sharp, 124 N.C. App. 357, 477 S.E.2d 258 (1996).

C. THE INTACT FAMILY DOCTRINE IS INAPPLICABLE TO CASES WHERE A GRANDPARENT SEEKS CUSTODY AND, IN ANY EVENT, THE CHILD WAS NOT RESIDING IN AN INTACT FAMILY WHEN THIS LAWSUIT WAS FILED.

Similarly, Plaintiff's trial counsel in arguments before the trial court cited case law addressing the intact family doctrine, which restricts a grandparent's right to seek *visitation* with their grandchild where there is no pending custody action and the child is living in an "intact family." See Price v. Breedlove, 138 N.C. App. 149, 151, 530 S.E.2d 559, 560-61 (2000) (citing McIntyre v. McIntyre, 341 N.C. 629, 461 S.E.2d 745 (1995)).

However, this Court has recognized a clear distinction between a grandparent seeking grandparent visitation with a grandchild who is living with a natural parent, and an action in which the grandparent is asserting a right to gain custody of the child. "When grandparents initiate custody lawsuits under G.S. § 50–13.1(a), those grandparents are not required to prove the grandchild is not living in an intact family in order to gain custody. . . . Instead, the grandparent must show that the parent is unfit or has taken action inconsistent with [his] parental status in order to gain custody of the child." Eakett v. Eakett, 157 N.C. App. 550, 553, 579 S.E.2d 486, 489 (2003) (citations omitted). Consequently, in

this case, where Velma was seeking custody of the minor child – not merely grandparent visitation – the intact family doctrine is irrelevant to the analysis.[2]

Moreover, any application of the intact family doctrine to this case fails for perhaps an even more fundamental reason: the child was not living in an intact family when this matter was initiated or when Defendant filed her counterclaim for custody. The intact family doctrine bars a grandparent's visitation claim, "when the natural parents have legal custody of their children and are living with them as an intact family." McIntyre v. McIntyre, 341 N.C. 629, 634, 461 S.E.2d 745, 749 (1995); Fisher v. Gaydon, 124 N.C. App. 442, 477 S.E.2d 251(1996).

In this case, the minor child was living with his mother, Tanya, and Velma, his grandmother, when Tanya passed away. At that point, the minor child was effectively an orphan. He had no legal father, as Plaintiff had failed to establish paternity. He did not reside with plaintiff after his Mother' death, but rather, with Plaintiff's knowledge, resided with Velma.

Even after the filing of this action, while the trial court entered temporary orders addressing physical custody and visitation pending further hearings and final orders, these orders did not address legal custody and, furthermore, as

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[2] Indeed, this principle makes complete sense. For example, where a parent is neglectful or unable to properly care for a child, or otherwise acts inconsistent with their parental status, it would be absurd to hold a grandparent could not seek custody of the child simply because the child was residing with that same parent who was failing to live up to their parental obligations and responsibilities.

temporary orders, were entered without prejudice to the parties' custodial rights to be determined at a final adjudication. Senner v. Senner, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003) (identifying characteristics of a temporary custody order as: "(1) it is entered without prejudice to either party, (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues"). Consequently, the child was not living in an intact family – he had no legal parent and was not living with a parent.

Indeed, this case is easily distinguishable on those facts from cases relied on by Plaintiff's trial counsel. (T 6/12/13 p 64). For example, in Montgomery v. Montgomery, when the paternal grandparents, filed their action, their grandchild resided with her mother. The grandparents contend that since their son-the child's father-was deceased and the parents were separated at the time of his death, the child was not living in an "intact family." Montgomery, 136 N.C. App. 435, 438, 524 S.E.2d 360, 362 (2000). This Court disagreed and held as long as the child was in the legal custody of one parent, the intact family doctrine applied. Id. Likewise, in Price v. Breedlove, this Court addressed a similar factual scenario where the maternal grandparents sought visitation following their daughter's death where the children resided with Defendant who had been awarded custody by a court order following his separation from the children. Price v. Breedlove, 138 N.C. App. 149,

530 S.E.2d 559 (2000). Thus, in both cases, the children were in the actual custody of a parent upon the death of a non-custodial parent.

Similarly, in McDuffie v. Mitchell, the separated parents of the child were in the midst of a custody action, when the mother (the custodial parent) passed away – thus, ending the custody action. The maternal grandparents sought visitation with their grandchildren. This Court held upon the death of a custodial parent the custody action terminated and – absent allegations the father was not a fit parent – the legal custody of the children automatically vested in the father, and the intact family doctrine, thus, applied. McDuffie v. Mitchell, 155 N.C. App. 587, 573 S.E.2d 606 (2002). Unlike McDuffie, however, in this case Plaintiff had not legally established himself as the father at the time of Tanya's death or the filing of this action; Velma did allege Plaintiff was not a fit and proper person to have primary custody of the minor child (R pp 28-9); and, again, Velma's claim was not merely for visitation but to retain custody of the child. Consequently, the "intact family doctrine" has no application in this case and Velma had standing and authority to bring a custody action in this matter.

D. THE TRIAL COURT'S FINDINGS DO NOT SUPPORT THE CONCLUSION PLAINTIFF DID NOT ACT INCONSISTENTLY WITH HIS PROTECTED STATUS AS A PARENT.

The trial court concluded, based on its limited findings of fact, "the Plaintiff has not acted inconsistently with his constitutionally protected rights and status as

a natural parent." (R p 36). Having made this conclusion, the trial court further concluded: "That while the evidence and testimony presented may indicate that the best interests of the child would be served by placing him in Defendant's custody, said Defendant has failed to show that the Plaintiff has violated his constitutionally protected rights and status, or that he has abused or neglected the minor child; that as such, the Defendant's action for custody should be dismissed." (R p 36). Based on these conclusions, the trial court awarded sole custody to Plaintiff. (R p 36).

The trial court's findings of fact establish the following: Plaintiff established paternity in January 2013. (R p 35). After the child's birth, the now six year old child lived and resided primarily with Velma and Tanya. Following his mother's death, the child continued to live and reside primarily with Velma, until the trial court entered temporary orders. (R p 35). Plaintiff has not been an ideal or model parent. (R p 36). Plaintiff has visited with the child and, as of 2010, provided some support. However, he did not visit or provide support to the extent he should have done. (R p 36). Plaintiff's own evidence revealed at most he had provided a total of $2,200 to the child's mother as support throughout the life of his son. (R p 36). Plaintiff testified he earned approximately $54,000 per year and had been earning that amount consistently over the past 18 years. (T 6/11/13 p 8). Plaintiff testified he had visited the child one or two times a month. (T 6/11/13 p 12). The trial court

further found there had not been any abuse or neglect committed by Plaintiff relative to the child. (R p 36).

In determining custody of a child, N.C. Gen. Stat. § 50-13.2(a) requires a trial court to "award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child." N.C. Gen. Stat. § 50-13.2(a) (2013). However, in a dispute between a parent and a nonparent, the parent does have a paramount constitutionally protected right to the custody, care, and control of his or her child. Petersen v. Rogers, 337 N.C. 397, 406, 445 S.E.2d 901, 906 (1994).

This constitutionally protected right is, however, not absolute. It carries with it the duty to carry out parental responsibility. Thus, "[a] natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child." Price v. Howard, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997). "Therefore, the parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child." Id. Such conduct inconsistent with a parent's protected status need not rise to the level warranting termination of parental rights under the juvenile code. Id.

"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." Id. at 79, 484 S.E.2d at 534. Consequently, "a natural parent may lose his constitutionally protected right to the control of his children in one of two ways: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent's conduct is inconsistent with his or her constitutionally protected status." David N. v. Jason N., 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005).

Consequently, while the trial court found Plaintiff had neither "neglected" nor "abused" the child, this does not end the analysis. Indeed, Velma's custody claim alleged Plaintiff was unfit to parent his son. (R p 29). The trial court did not make any ultimate finding or conclusion on the question of whether Plaintiff was a "fit" parent.

Furthermore, the trial court did find Plaintiff had not visited with or supported his son to the extent he should have. (R p 36). The trial court, however, was under the impression because Plaintiff had provided any support, no matter how minimal, and visited his child, if only on limited occasions, this precluded a fining of conduct inconsistent with a parent's protected status. If that analysis was correct, however, and only total abandonment or non-support could constitute acts

inconsistent, this would undermine the Supreme Court's holding in David N. and Price which make clear the standard is not the same for termination of parental rights. For example, in Price, the Supreme Court expressly noted the parent "had a custodial, personal, and financial relationship with the child for a period of time; she lived with plaintiff and the child in a family unit for the child's first three years of life." Id. Despite this relationship, the Supreme Court noted "a period of voluntary nonparent custody rather than unfitness or neglect" could constitute conduct inconsistent and remanded to the trial court for such a determination. Price, 346 N.C. at 82, 484 S.E.2d at 536.

Furthermore, our Courts have made clear even the concept of "abandonment" itself does not require total abandonment. "[A]bandonment requires neither continuous absence nor an utter lack of concern on the part of the abandoning parent." In re Estate of Lunsford, 359 N.C. 382, 390-91, 610 S.E.2d 366, 371 (2005) (citing Pratt v. Bishop, 257 N.C. 486, 503, 126 S.E.2d 597, 609 (1962)). "As explained in Pratt, a child's physical and emotional needs are constant, and a parent's duties to care for and maintain a child cannot be discharged on an *ad hoc*, intermittent basis." Id. In Lunsford, the Supreme Court held the father's provision of some support, other offers to provide support, and ongoing, albeit intermittent, contact with his daughter did not preclude a finding of abandonment. Id.

In this case the trial court's finding Plaintiff had neither supported nor spent time with his son to the extent he should have, at a minimum, compels a further analysis of whether Plaintiff's acts and omissions were inconsistent with his protected status as a parent. Indeed, this finding should compel a determination Plaintiff "failed to shoulder the responsibilities that are attendant to rearing a child." Price, supra.

This becomes even more evident when considered in the context of the trial court's finding "after the child's birth, he lived and resided primarily with his now deceased mother and/or the Defendant." (R p 35). Our Courts recognize the act of allowing others to provide parental care and support for a child may constitute acts inconsistent with a parent's protected status. Notably, this includes both instances in which a parent leaves a child in the custody of a third party, see Price, supra, but also even where custody and child rearing responsibilities are shared by the parent and non-parent. Mason v. Dwinnell, 190 N.C. App. 209, 225-226, 660 S.E.2d 58, 69 (2008). In Mason, this Court quoted the South Carolina Supreme Court with approval: "'[W]hen a legal parent invites a third party into a child's life, and that invitation alters a child's life by essentially providing him with another parent, *the legal parent's rights to unilaterally sever that relationship are necessarily reduced.*" Id. (quoting Middleton v. Johnson, 369 S.C. 585, 597, 633 S.E.2d 162, 169 (S.C.Ct.App.2006) (emphasis added)).

Our Supreme Court in Gibbons stated the same concept recognizing the subordination of a surviving parent's rights based on their own actions in allowing their child to develop a parental-type bond with a non-parent:

> the surviving parent has voluntarily permitted the child to remain continuously in the custody of others in their home, and has taken little interest in it, thereby substituting such others in his own place, so that they stand *in loco parentis* to the child, and continuing this condition of affairs for so long a time that the love and affection of the child and the foster parents have become mutually engaged, to the extent that a severance of this relationship would tear the heart of the child, and mar his happiness.

In re Gibbons, 247 N.C. 273, 280, 101 S.E.2d 16, 21-22 (1957).

In this case, Plaintiff allowed his son to reside with Tanya and Velma – and after Tanya's death, Velma, for the vast majority of the child's life. Plaintiff did not merely abdicate his role of parent – he never took on the role to begin with, making no effort to legitimize his son or establish paternity prior to Tanya's death. He provided little support and little of his time to his son. He made no meaningful effort to share custody of his son and allowed the bond between Velma and his son to flourish.

Plaintiff now seeks to eradicate his own son's close bond and relationship with Velma who has been an integral part in raising Plaintiff's son practically since birth – far more integral than Plaintiff himself. On the facts of this case, and even on the limited findings of the trial court, it is evident, as in Gibbons: "The dictates

of humanity must prevail over the whims and caprice of a parent." Id. Consequently, this Court should reverse the trial court and remand this matter to the trial court for a determination of whether the evidence of Plaintiff's failure to meet his parental responsibilities and obligation to support and visit with his son to the extent he should have, leaving his son in the care and custody of others without legitimizing his son, and by allowing his son to live with and develop a close familial bond with Velma his maternal grandmother, along with other evidence of general unfitness not amounting to abuse and neglect, constitutes clear and convincing evidence Plaintiff acted inconsistently with his protected status as a parent warranting a best interests analysis to determine custody of the minor child in this case.

CONCLUSION

Wherefore for the foregoing reasons, Defendant-Appellant respectfully requests this Court reverse the trial court's 10 September 2013 Order and remand this matter to the trial court to determine whether there is clear and convincing evidence Plaintiff acted inconsistently with his protected status as a parent or is otherwise unfit to have custody on the facts of this case.

Respectfully submitted this the 7th day of March 2014.

WYRICK ROBBINS YATES & PONTON LLP

By: 

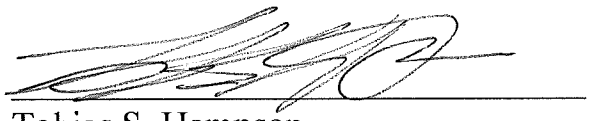
Tobias S. Hampson
N.C. Bar 28557
Post Office Drawer 17803
Raleigh, North Carolina 27619
Telephone: (919) 781-4000
Facsimile: (919) 781-4865
thampson@wyrick.com

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for Appellant certifies that the foregoing brief, which is prepared using a proportional font, contains no more than 8,750 words (excluding cover, indexes, tables of authorities, certificate of service, this certificate of compliance and appendixes) as reported by the word processing software.

This the 7th day of March, 2014.

WYRICK ROBBINS YATES & PONTON LLP



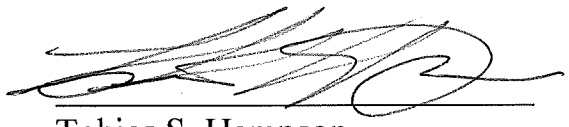
Tobias S. Hampson

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date the foregoing Defendant-Appellant's Brief was served upon Plaintiff-Appellee shown below by mail enclosed in a postage-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service, addressed to:

Thomas Hunt
304 N. Elm Street
Chadbourn, NC 28431
Pro se

This the 7th day of March, 2014.



Tobias S. Hampson

235 N.C.App. 217
Unpublished Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
Court of Appeals of North Carolina.

Thomas Lewis HUNT, Plaintiff,
v.
Velma LONG, Defendant.

No. COA13–1455.
|
July 15, 2014.

Opinion

***1** Appeal by defendant from order entered 10 September 2013 by Judge Jerry A. Jolly in Columbus County District Court. Heard in the Court of Appeals 3 June 2014.

Attorneys and Law Firms

No brief filed for plaintiff-appellee.

Wyrick Robbins Yates & Ponton LLP, by Tobias S. Hampson, for defendant-appellant.

HUNTER, Robert C., Judge.

Velma Long ("defendant") appeals from an order granting sole and exclusive custody of her grandson, L.J. [1], with L.J.'s biological father, Thomas Lewis Hunt ("plaintiff"). On appeal, defendant argues that the trial court's findings of fact do not support its conclusion of law that plaintiff did not act inconsistently with his constitutionally protected status as L.J.'s natural parent, or in the alternative, that the trial court failed to enter findings of fact or conclusions of law addressing plaintiff's fitness to be a parent.

After careful review, we reverse the trial court's order and remand for further proceedings.

Background

The following evidence was presented before the trial court: Defendant's daughter, Tanya, and plaintiff were involved in a romantic relationship that resulted in the birth of L.J. in June 2007. Tanya and L.J. lived with plaintiff in his home in Chadbourn, North Carolina. Around April 2008, Tanya ended the relationship with plaintiff and moved into defendant's home with L.J. A year later, Tanya and L.J. moved into a mobile home on defendant's property.

Defendant testified that she was L.J.'s primary caretaker even though he lived with Tanya. She estimated that L.J. was with her roughly seventy percent of the time due to Tanya's work obligations. When L.J. was an infant, defendant would bathe him, feed him, change his diapers, and help potty train him. L.J. required frequent trips to the doctor, during which defendant would accompany him. Defendant also took a large role in helping to educate L.J. by enrolling him in school and paying for his uniform, supplies, and transportation costs.

Throughout this time period, plaintiff would visit L.J. one or two times per month. Conflicting testimony was presented regarding how much plaintiff paid in child support; plaintiff testified that he provided Tanya with $3,523.09 in support from 2010 to 2012, but the check stubs admitted into evidence as proof of plaintiff's payments amounted only to $1,545.00. Plaintiff testified that he made repeated efforts to see L.J., but Tanya and defendant would ignore his phone calls.

Defendant testified that she thought plaintiff had an alcohol problem, but plaintiff denied that allegation. However, he admitted to being convicted of two DWIs and being charged with a third, with his driver's license being revoked after being convicted of a DWI in 2008. Jeanne Suggs, defendant's niece and an acquaintance of plaintiff and Tanya, testified that she frequently saw plaintiff drinking to excess, sometimes beginning as early as ten o'clock in the morning. She also described an instance where plaintiff drove under the influence of alcohol after his license was revoked in 2008. Defendant further testified that she stopped L.J. from going fishing with plaintiff on one occasion because plaintiff had been drinking. Plaintiff testified that he did not think he had an alcohol problem, but he admitted to drinking three or four beers after work to relieve stress.

***2** Tanya died in October 2012. Defendant testified that after the funeral, she had a conversation with plaintiff in which he intimated a desire to leave L.J. in defendant's custody. Plaintiff testified that he remembered having a conversation with defendant at the funeral, and he admitted that he did not ask defendant to give him custody of L.J. at that time.

In December 2012, plaintiff filed suit to establish paternity and obtain full custody of L.J. After plaintiff's paternity was established, the trial court entered an order giving him temporary physical custody over L.J., with visitation rights for defendant. On 22 January 2013, defendant filed an answer and counterclaim for full custody over L.J. After conducting a hearing on 11 and 12 June 2013, the trial court entered an order on 10 September 2013 awarding sole legal custody to plaintiff and dismissing defendant's counterclaim. Defendant filed timely notice of appeal.

Discussion

I. Custody Award

Defendant's sole argument on appeal is that the trial court erred by granting sole and exclusive legal custody over L.J. to plaintiff. Because the trial court failed to enter findings of fact and conclusions of law as to whether plaintiff was fit to receive custody over L.J., we reverse the trial court's order and remand for further proceedings.

Under N.C. Gen.Stat. § 50–13.2(a) (2013), the trial court generally must "award the custody of [a] child to such person, agency, organization or institution as will best promote the interest and welfare of the child." *See also Hedrick v. Hedrick,* 90 N.C.App. 151, 156, 368 S.E.2d 14, 17 (1988) ("The best interests of the children are and have always been the polar star in determining custody actions[.]"). However, a parent has an "interest in the companionship, custody, care, and control of [his or her children that] is protected by the United States Constitution ." *Price v. Howard,* 346 N.C. 68, 73, 484 S.E.2d 528, 531 (1997). So long as a parent has this paramount interest, a custody dispute between a parent and a nonparent may not be determined by the "best interest of the child" test; rather, the parent benefits from a presumption that he or she will act in the best interest of the child. *Price,* 346 N.C. at 79, 484 S.E.2d at 534. However, "a natural parent may lose his constitutionally protected right to the control of his children in one of two ways: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent's conduct is inconsistent with his or her constitutionally protected status." *David N. v. Jason N.,* 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005). Because a finding of parental fitness does not preclude a finding that a parent's conduct is inconsistent with his or her constitutionally protected status, *David N.,* 359 N.C. at 307, 608 S.E.2d at 753, this test has been described as "disjunctive" by our Courts, *Mason v. Dwinnell,* 190 N.C.App. 209, 222, 660 S.E.2d 58, 66 (2008).

***3** Defendant specifically alleged in her counterclaim that plaintiff was unfit to be a parent. At the hearing, significant inquiry was made into defendant's contention that plaintiff was an alcoholic. Plaintiff admitted at the hearing that he had been convicted on two DWI charges and had been charged with a third. His driver's license was revoked in 2008 as a result of his second DWI, and as of the date of the hearing on 11 June 2013, he had not renewed his license. Plaintiff testified that he drinks three or four beers after work to relieve stress, but does not drink every day. Defendant and a number of witnesses who took the stand on her behalf testified extensively as to various encounters they had with plaintiff during L.J.'s lifetime where plaintiff appeared drunk, had passed out due to excessive alcohol consumption, or had driven under the influence of alcohol without a license.

Despite this evidence, the trial court failed to address the alleged substance abuse issues or plaintiff's fitness to be a parent in its order. Rather, it concluded only that plaintiff had not acted inconsistently with his constitutionally protected status as L.J.'s natural parent and therefore declined to use the "best interest of the child" test in its award of custody to plaintiff. This Court has previously held that DWI convictions and substance abuse are relevant considerations in determining whether a parent is fit to have custody over a child. *See Raynor v. Odom,* 124 N.C.App. 724, 731–32, 478 S.E.2d 655, 659–60 (1996). We take no position as to whether the evidence presented here was sufficient to support a finding of unfitness. However, because unfitness is one avenue through which a nonparent can reach the "best interest of the child" test in a custody dispute with a natural parent, *David N.,* 359 N.C. at 307, 608 S.E.2d at 753, this issue required determination by the trial court. *See Cunningham v. Cunningham,* 171 N.C.App. 550, 558, 615 S.E.2d 675, 682

(2005) ("[T]he trial court must resolve all issues raised by relevant evidence that directly concern the fitness of a party to have care, custody and control of a child[.]"); *Witherow v. Witherow,* 99 N.C.App. 61, 63, 392 S.E.2d 627, 629 (1990) ("[T]he trial court need not make a finding as to every fact which arises from the evidence; rather, the court need only find those facts which are material to the resolution of the dispute.").

Conclusion

Because the trial court failed to address in its order whether plaintiff was fit to have full care, custody, and control over L.J., we reverse the trial court's order and remand for further proceedings.

REVERSED AND REMANDED.

Judges McGEE and ELMORE concur.
Report per Rule 30(e).

All Citations

235 N.C.App. 217, 763 S.E.2d 338 (Table), 2014 WL 3510595

Footnotes

1 A pseudonym will be used to protect the identity and privacy of the minor involved in this case.