

# Child Custody Law for School Personnel: Frequently Asked Questions

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By Cheryl D. Howell

As most school personnel know, significant numbers of students do not reside in homes with both parents. So-called nontraditional family structures are today more common than uncommon. As a result, school officials frequently are called upon to decide which adults in a student's life have legal rights to (1) have contact with the student during school hours, (2) access the student's school records, or (3) make educational decisions on the student's behalf. While other issues certainly arise, these are the most common.

This article uses a question-and-answer format to outline what school personnel need to know about the legal relationships between children and their parents or caretakers. Readers should keep in mind that the article provides general information only. Issues relating to specific children may require school officials to consult with their local school board attorney. In addition, state and federal laws relating to schools and school records, as well as state and local school policy, may influence the answers to the questions set out below. However, school law and school policy are beyond the scope of this article, which focuses instead on issues directly related to child custody.

## General Information

### 1. What is the legal definition of *custody*?

Custody generally refers to both the state of having physical charge and control of a child and the responsibility for supervising and caring for that child. In North Carolina neither the appellate courts nor the General Assembly has defined specifically what it means to have custody of a child. Rather, the law, as defined by statutes and appellate decisions, deals primarily with a court's authority to grant or deny custodial rights to various persons.<sup>1</sup>

Courts and lawyers often distinguish between *physical custody* and *legal custody*.<sup>2</sup> While other states have defined these two terms by statute, North Carolina law, again, has not done so.<sup>3</sup> However, as one North Carolina appellate decision notes, "the bench [i.e., judges] and the bar [i.e., lawyers] have proven adept at distinguishing in practice between physical and legal custody."<sup>4</sup>

Sometimes the term *physical custody* is used to describe *de facto* arrangements, such as where the child resides when no

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This article updates in part an earlier article by Janet Mason entitled "Child Custody and Related Issues." *School Law Bulletin* 20 (Spring 1989): 5–11. The present article incorporates much of the information contained in Mason's article.

1. Statutes relating to a court's authority to grant or deny custody rights are found in N.C. GEN. STAT. Chapters 50, 50A, 50B, and 7B (hereinafter G.S.).

2. See, e.g., *Thomas v. Thomas*, 259 N.C. 461, 467, 130 S.E.2d 871 (1963) (upholding trial court's order awarding custody of two children to their father on condition that physical custody be vested in the grandparents); *Wetherow v. Wetherow*, 99 N.C. App. 61, 392 S.E.2d 627 (1990) (upholding award of joint legal custody to both parents with primary physical custody to mother); *Patterson v. Taylor*, 140 N.C. App. 91, 95, 535 S.E.2d 374, 376 (2000) (acknowledging distinction between legal and physical custody).

3. See, e.g., CAL. FAM. CODE §§ 3002–3004 (West 1994); GA. CODE ANN. § 19-9-6 (1999); IND. CODE § 31-9-2-67 (1997); MICH. COMP. LAWS § 722.26a (1992); N.M. STAT. ANN. § 40-4-9.1 (Michie 1999); OR. REV. STAT. § 107.169 (1999). In addition, a "Model Code on Child Custody," adopted by the Commissioners on Uniform State Laws, contains a definition of both terms.

4. *Patterson*, 140 N.C. App. at 95, 535 S.E.2d at 376.

legal determination of custody has been made or when the child is living with someone other than the person to whom a court has awarded custody. Court-ordered custody sometimes is referred to as *legal custody*.

However, in the context of a court order or definitions of individuals' specific rights and responsibilities toward a child, the terms physical and legal custody are understood to have more precise meanings. In these contexts, *physical custody* refers to having actual physical charge and control of a child. In other words, physical custody refers to an adult's right of physical access to a child. *Visitation* describes a form of physical custody in which an adult has the right to have charge and control of a child for a specific and limited period of time.<sup>5</sup> *Legal custody*, a broader term, encompasses decision-making authority and responsibility for the child's overall welfare and best interest.<sup>6</sup> Legal custody, however, does not necessarily give an adult the right of physical access to a child. For example, a parent with legal custody may have very limited visitation privileges that can be exercised only with the permission of the other parent or other caretaker.

## 2. How is custody established?

In North Carolina the district courts have authority to determine and define custodial rights with respect to individual children. Section 50-13.1 of the North Carolina General Statutes (hereinafter G.S.) allows the court to decide custody disputes between parents or others claiming a right to custody, and G.S. 50-13.2(a) specifies that the court must award custody to the person or agency that "will best promote the interest and welfare of the child." In addition, court orders resolving custody disputes must include terms relating to the child and the parties that the court finds are necessary to "best promote the interest and welfare of the child."<sup>7</sup> Court proceedings pursuant to G.S. 50-13.1 and 13.2 resolve custodial disputes such as those between separated or divorced parents and between parents who have never been married to each other, as well as between parents and other individuals (e.g., grandparents). Such proceedings result in a court order awarding and defining custody, although some orders contain much more detail than others with regard to the specific rights and responsibilities awarded to the various parties.<sup>8</sup>

Married parents who are separated or contemplating divorce also have the right to define the custodial rights of each

parent in a separation agreement. Separation agreements must be in writing and acknowledged by both parties before a certifying officer.<sup>9</sup> Such agreements are legally binding contracts between the parties and can define their custodial rights with regard to children. Although a court considering custody is not bound by the agreement and can change any custody arrangement created by the parents, the agreement is enforceable until it is either modified by the parties or replaced by a subsequent court order.<sup>10</sup> Parties may incorporate separation agreements into a court order but are not required to do so. Like court orders, agreements vary with regard to the amount of detail they include about each parent's rights and responsibilities.

In addition to its authority to resolve custody disputes pursuant to G.S. 50-13.1, the district court in a juvenile proceeding can order a child it finds to be abused, neglected, dependent, undisciplined, or delinquent (as these terms are defined by statutes) placed in the custody of a parent or other relative, the department of social services, or some other person or agency.<sup>11</sup> Such a court order does not abrogate all the parents' rights and may specify the rights of parents and others in regard to visitation and other matters.

Orders and agreements pertaining to custody often provide for a sharing of custodial rights and responsibilities, an arrangement referred to as *joint custody*. Indeed, G.S. 50-13.2(a) requires a court hearing cases between parents to consider awarding joint custody if requested, although the statute does not define the term. One North Carolina court has stated that the term *joint custody* "implies a relationship where each parent has a degree of control over, and a measure of responsibility for, the child's best interest and welfare."<sup>12</sup> However, neither statute nor case law defines the term with any more specificity, and judges and parents have broad discretion in fashioning a joint custody arrangement that will accommodate the needs of the child.<sup>13</sup> Without further clarification in an order or agreement, joint custody does not mean that both parties have equal access to a child. *Equal physical custody* arrangements are relatively rare due to the difficulty of arranging a child's schedule to assure equal time

tion. A successful mediation results in a *parenting agreement* that defines the custodial rights of the parties but avoids use of the term *custody*. Instead, the agreement focuses on defining specifically the obligations and responsibilities of the parties and the child. Such agreements become court orders and have the same legal effect as any other court order defining custody. G.S. 50-13.1(g).  
9. G.S. 52-10.1.

10. See *Hudson v. Hudson*, 299 N.C. 465, 263 S.E.2d 719 (1980) (Parents may contract concerning custody, but no contract will deprive the court of inherent authority to protect and provide for minor children.); *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1974) (same).

11. See G.S. Chapter 7B, Articles 9 and 25 (hereinafter G.S. 7B, Art.).

12. *Patterson v. Taylor*, 140 N.C. App. 91, 95, 535 S.E.2d 374, 377 (pointing out that the term *joint custody* is not defined in the law and urging lawyers drafting separation agreements to remember that the term needs to be defined as clearly as possible).

13. *Id.*

5. See G.S. 50-13.1 ("Unless a contrary intent is clear, the word 'custody' shall be deemed to include custody or visitation or both."). See also *McIntyre v. McIntyre*, 341 N.C. 629, 461 S.E.2d 745 (1995) (stating that visitation is a form of physical custody), citing *Clark v. Clark*, 294 N.C. 554, 575-76, 243 S.E.2d 129 (1978) ("[V]isitation privileges are but a lesser degree of custody.")

6. See *Patterson*, 140 N.C. App. at 95, 535 S.E.2d at 376 (Legal custody refers to a parent's control over, and responsibility for, the child's best interest and welfare.).

7. G.S. 50-13.2(b).

8. Pursuant to G.S. 50-13.1(b), many judicial districts in North Carolina now refer parents and others involved in a custody dispute to custody media-

with both parents. Although the law is unclear, school personnel can assume that joint custody implies equal decision-making authority with regard to school matters that do not involve having physical contact to the child—unless a particular court order or agreement specifies otherwise.

### 3. Once established, can custody be changed?

All custody orders entered by a court are subject to modification, but *only* by a court order—meaning that parties cannot change such custody arrangements solely by agreement between themselves.<sup>14</sup> A district court has discretion to modify an earlier custody order established pursuant to G.S. 50-13.1 when it determines that a substantial change of circumstances affecting the child's welfare has occurred.<sup>15</sup> When such a change has occurred, a court may create a new custodial arrangement that serves the needs and interests of the child. Custody orders entered in juvenile court also can be modified when the court determines that it is in the best interest of the child to do so. Similarly, in the absence of a court order, parents who have made a separation agreement that includes custody provisions can modify those provisions when both parents agree to the change.<sup>16</sup> Modified orders and agreements replace and supersede the original custody arrangement. School personnel, therefore, need to request parents or custodians to provide the school with a copy of the most recent version of a custody order or separation agreement.

### 4. What is a *guardian* and how is guardianship different from custody?

Some children have legal guardians whose authority is much like that of a parent. Unlike custody, guardianship has rights and responsibilities that are more clearly defined by North Carolina law. There are several kinds of guardianship, and a guardian's authority varies depending on both the type of guardianship and the terms of the court order establishing it. A *guardian of the person* has authority only in relation to the child's care, custody, and control.<sup>17</sup> A *guardian of the estate* has authority only in relation to a child's property.<sup>18</sup> A *general guardian* is simply one who has authority over both the person and the estate of the minor child.<sup>19</sup> School officials are most

likely to encounter guardians of the person or general guardians exercising their authority as guardians of the person. The courts consider parents the "natural" guardians of the person of their minor children and put another person in that position only under unusual circumstances.<sup>20</sup>

In North Carolina a guardian of the person can be appointed for a minor either in a proceeding before the clerk of superior court or in a juvenile proceeding presided over by a district court judge. Both proceedings result in a court order designating a guardian. A county social services director also may become a child's temporary legal guardian of the person without a court order when, for example, the child has been abandoned or is otherwise in need of social services.<sup>21</sup>

The clerk of superior court has authority to appoint a guardian of the person or a general guardian *only* if the child has no natural guardian—meaning no parent.<sup>22</sup> A custody action or juvenile proceeding in district court may be appropriate when a child has a living parent but needs to have someone else assume legal authority over him or her—such as when a parent is temporarily incapacitated or away on military duty. A petition to the clerk for the appointment of a guardian is not appropriate under these circumstances. In addition, when a petition is filed alleging that a juvenile is abused, neglected, dependent, undisciplined, or delinquent, a district court judge may find it in the juvenile's best interest to appoint a guardian of the person, even when the child has a living parent.<sup>23</sup> In both cases, unless the order appointing the guardian provides otherwise, the guardian is entitled to and responsible for the care, custody, and control of the minor (referred to as the *ward*) and can provide medical, educational, and other kinds of consent on the minor's behalf.

### 5. What are restraining orders and protective orders and how do they affect the rights of a parent with regard to his or her child?

While courts may enter restraining orders in a variety of contexts, the most common form encountered by school personnel are court orders entered pursuant to G.S. 50B, which was enacted to protect victims of domestic violence. These orders are actually called *protective orders*, but many people refer to them as *restraining orders* due to the nature of the provisions and restrictions they contain.

14. See *Massey v. Massey*, 121 N.C. App. 263, 465 S.E.2d 313 (1996).

However, parties who agree that an order needs to be modified and concur on a new custodial arrangement may present a *consent order* to the court for consideration. Once a consent order is signed by a judge, it has the same force and effect as an order entered after a full hearing or trial.

15. G.S. 50-13.7; *Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998). A court may consider modifying a custody order entered pursuant to G.S. 50-13.1 only when requested to do so "by either party or anyone interested."

16. If the agreement has been incorporated into a court order, it is treated as a court order in all respects. See *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983). Therefore, it can be modified only by another court order. See *Tyndall v. Tyndall*, 80 N.C. App. 722, 343 S.E.2d 284 (1986).

17. G.S. 35A-1202(10).

18. G.S. 35A-1202(9).

19. G.S. 35A-1202(7).

20. See G.S. 35A-1201(a)(6).

21. G.S. 35A-1220. This statute provides that the director will remain the guardian of the person until a guardian is appointed by the clerk or a judge, or until custody of the child is awarded by the court to another person.

22. G.S. 35A-1203(a). A small exception is the case of an incompetent minor who is within six months of reaching majority (turning eighteen). Because the minor probably will need a guardian when he or she becomes an adult, the law allows for incompetency to be determined and a guardian to be appointed before the minor reaches majority. G.S. 35A-1225. Clerks of superior court have authority to appoint a guardian of the estate of any minor, regardless of whether the minor has parents.

23. G.S. 7B-600(a) and -2001.

Because G.S. 50B is intended to protect victims of domestic violence, orders pursuant to the statute can be entered only against persons with whom the aggrieved person has a personal relationship. However, G.S. 50B-1(b) defines persons in a *personal relationship* broadly to include those who are

- current or former spouses;
- persons of the opposite sex who live together or who have lived together;
- related as parents and children, including others acting *in loco parentis* to a minor child, or as grandparents and grandchildren. For purposes of this subdivision, an aggrieved party may not obtain an order of protection against a child or grandchild under the age of 16;
- parents of a child in common;
- current or former members of the same household;
- persons of the opposite sex who are in a dating relationship or have been in a dating relationship.<sup>24</sup>

So school personnel may encounter protective orders entered against a child's married or unmarried parent, but also against brothers and sisters, grandparents and grandchildren, or students who are dating or have dated in the past. Such orders may be intended to protect a student, or they may be entered against a student himself or herself.

G.S. 50B-3 allows a district court judge to include in protective orders whatever terms he or she finds necessary to "bring about a cessation of acts of domestic violence."<sup>25</sup> The statute specifically allows the court to award temporary custody of minor children to one party and to establish visitation rights. Although the law is not clear on this point, it is best for school personnel to assume that a custody or visitation provision in a protective order supersedes any previous custody order or agreement relating to the child. Similarly, it is best to assume that the custody and visitation provisions included in a protective order also supersede the right of a guardian of the person or a general guardian to have charge and control of a child.

In addition, G.S. 50B-3(13) specifies that the court can include in the protective order "any additional prohibitions and requirements that the court deems necessary to protect any party or any minor child." Pursuant to the authority granted in this provision, protective orders frequently restrain a defendant from being present in places where the victim or minor child of the victim may be present, including the child's home, school, or after-school care site. Again, school personnel can assume that such provisions in a protective order supersede any right of access to a child granted by an earlier court order or separation agreement.

<sup>24</sup> G.S. 50B-1(b).

<sup>25</sup> G.S. 50B-3(a); *Brandon v. Brandon*, 132 N.C. App. 646, 513 S.E.2d 589 (1999). Any person who knowingly violates any term of a protective order is guilty of a Class A1 misdemeanor. G.S. 50B-4.1(a).

Protective orders are intended to be of limited duration. G.S. 50B-3(b) requires the court to enter orders for a fixed period of time not to exceed one year. The expiration date should appear on the face of the protective order. However, the statute also allows a court to renew a protective order for subsequent periods of time, with each extension not to exceed one year. Each new expiration date that results from such a renewal also should appear on the face of the protective order.

#### 6. Can court orders from other counties or from other states determine custodial rights with regard to a child living in my county?

Yes. Any court with appropriate jurisdiction has the authority to enter an order regarding custody of a child that is binding on the parties to the proceeding and enforceable throughout the country. The Uniform Child Custody Jurisdiction and Enforcement Act (hereinafter Uniform Act), a law adopted in some form in every state, determines when a state has jurisdiction to enter an enforceable order defining custodial rights with regard to a particular child.<sup>26</sup> If a court exercises jurisdiction in accordance with the Uniform Act, the child custody determination it makes is entitled to be recognized and enforced in every other state.<sup>27</sup> School officials' questions regarding a particular custody order from another state should be addressed to the local school attorney.

If North Carolina has jurisdiction to make a custody determination for a particular child under the Uniform Act, any district court in the state can enter a custody order regarding the child that will be enforceable throughout the state.<sup>28</sup>

<sup>26</sup> North Carolina's uniform act is found in G.S. 50A and is called the Uniform Child Custody Jurisdiction and Enforcement Act (hereinafter Uniform Act). Many states have the same statute. However, some states still have an earlier version of the uniform law known as the Uniform Child Custody Jurisdiction Act. The two versions are substantially similar. The uniform law determines jurisdiction of a court to enter orders in "child custody proceedings." The definition of *child custody proceedings* is broad and includes proceedings to determine legal or physical custody or visitation, juvenile court proceedings, and domestic violence proceedings, as well as proceedings to establish guardianship. G.S. 50A-102(4).

<sup>27</sup> See G.S. 50A-303(a) ("A court of this State shall recognize and enforce a child-custody determination of a court in another state if the latter exercised jurisdiction in substantial conformity with this Article."). See also G.S. 50B-4.1(d) (A valid protective order entered by the courts of another state or the courts of an Indian Tribe shall be accorded full faith and credit by the courts of North Carolina.).

<sup>28</sup> Some statutes and case law define the state court—that is, the most appropriate court—to make a custody determination regarding a specific child. See, e.g., G.S. 50-13.5(f) (action for custody pursuant to G.S. 50-13.1 may be maintained in any county where the child resides or is physically present or in a county where the parent resides.). The appropriate court is referred to as the court with *venue*. However, venue is not jurisdictional. See, e.g., *Brooks v. Brooks*, 107 N.C. App. 44, 418 S.E.2d 534 (1992). This means that if the parties to the case do not object before an order is entered by the court, the order is valid and enforceable throughout the state. See also G.S. 50B-4.1(c) (Domestic violence protective orders are enforceable by law enforcement officers throughout the state.).

**7. Why are teachers required to be witnesses in so many court cases regarding the custody of minor children, and is there a limit on the number of times a teacher can be required to attend court regarding the same child?**

Any judge making a custody determination must decide how best to promote the overall interest and welfare of the child. This *best interest of the child standard* is often referred to as the “polar star” that guides a judge in any case concerning child custody.<sup>29</sup> In determining best interest, a judge needs to know as much as possible about a child’s particular needs, and about the child’s relationship with the adults involved in the court proceeding. In addition, the judge needs to be informed about the adults’ fitness to promote the child’s best interest and welfare.<sup>30</sup>

Because most children spend a great deal of time at school, teachers can provide very important information that a judge making a custody decision needs to know: for example, how the child is doing in school, both academically and socially, as well as whether he or she has education-related needs that any future custodian must be able to support appropriately. In addition, teachers can provide information about an adult’s past involvement in the child’s education and about the teacher’s observations of interactions between the adult and child. Teachers are important, reliable, and generally unbiased sources of information that judges can depend on when making what are often very difficult decisions.

Unfortunately, North Carolina courts have more cases than they have resources to efficiently process them. It is not uncommon for a custody trial to be rescheduled several times before it actually occurs. Most lawyers and judges work hard to minimize the inconvenience suffered by persons called to testify, but it is impossible to avoid it altogether. Attorneys must issue subpoenas to their witnesses each time a trial is scheduled, and no law limits the number of times a case can be rescheduled.<sup>31</sup> However, if the parties and their attorneys agree, witnesses such as teachers can prepare affidavits setting out the needed information and those affidavits can be submitted to the judge in the place of actual testimony offered in court. However, this can be done only with the consent of all parties and their counsel—unlikely in contested cases.<sup>32</sup>

29. See *In re Pearl*, 305 N.C. 640, 290 S.E.2d 664 (1982); *Tucker v. Tucker*, 288 N.C. 81, 216 S.E.2d 1 (1975).

30. See G.S. 50-13.2(a) (In determining best interest, the judge must consider “all relevant factors.”); *In re Shue*, 311 N.C. 586, 319 S.E.2d 567 (1984) and *In re O’Neal*, 140 N.C. App. 254, 535 S.E.2d 620 (2000) (both holding that a court must consider all evidence offered by parties relating to the child or the adults seeking custody that is not “incompetent, irrelevant or cumulative”).

31. For information about subpoenas and responding to subpoenas, see John Rubin, “Subpoenas and School Records: A School Employee’s Guide,” *School Law Bulletin* 30 (Spring 1999): 1.

32. See *In re Griffin*, 6 N.C. App. 375, 170 S.E.2d 84 (1969).

**Access to Minor Children at School**

**8. When a child lives with only one parent, does the other parent have the right to remove the child from school grounds?**

Yes, unless a court order or agreement limits a parent’s right to physical custody of the child. Until their rights are limited, both parents have equal authority to remove a child from school grounds in accordance with school policies.

Parents’ custodial rights arise naturally out of their status as parents.<sup>33</sup> In other words, unless a court order or an agreement between the parents limits the custodial rights of one or both parents, a child’s parents have both physical and legal custody. When a child is born to unmarried parents—that is, to people who are not married to anyone or who are married but not to each other—the father must establish legal paternity before he acquires parental rights. However, once paternity is established,<sup>34</sup> the father’s rights and responsibilities with regard to the child are the same as they would be if he were married to the mother.<sup>35</sup>

Today it is generally accepted that both parents have equal custodial rights and authority in relation to their child, absent a court order or appropriate agreement between the parents indicating otherwise. Therefore, both a mother and a father have an equal right to physical custody and control of a child and to make decisions concerning the child’s welfare and education.<sup>36</sup>

School personnel therefore may be called upon to determine whether a court order or an agreement between parents limits one parent’s access to the child. As discussed under Question 2, some court orders and contracts contain more specific information than others do about each parent’s rights

33. *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997). The term *parent* refers to both natural and adoptive parents.

34. There are several ways in which a child’s paternity can be legally established. See G.S. 49, Art. 1 (by a district court as part of a criminal prosecution for failure to pay child support); G.S. 49-10 (by the clerk of superior court after a father asks to have the child declared legitimate); G.S. 49-12 (automatically by law when the mother and father marry after the birth of the child); G.S. 49, Art. 3 (by a district court after the father, mother, child, or personal representative of the mother or child asks the court to determine paternity); and G.S. 110-132 (by a father’s written acknowledgment of paternity and the mother’s sworn, written affirmation of his paternity, filed with the court).

35. See G.S. 49-15. See also *Rosero v. Blake*, 357 N.C. 193, 581 S.E.2d 41 (2003) (Once paternity of a child born out of wedlock is established, there is no presumption in favor of either parent in a custody dispute.).

36. Parents have not always shared equal status under the law. For example, under the common law, the father’s parental authority and right to custody were greater than the mother’s. See, e.g., *In re TenHoppen*, 202 N.C. 223, 226–27, 162 S.E. 619, 620 (1932). For some considerable time, appellate court opinions acknowledged a maternal preference in custody disputes involving young children. See, e.g., *Spence v. Durham*, 283 N.C. 671, 198 S.E.2d 537 (1973). However, G.S. 50-13.2 now provides that “[b]etween the mother and father, whether natural or adoptive, no presumption shall apply as to who will better promote the interest and welfare of the child.” See also *Rosero v. Blake*, 357 N.C. 193, 581 S.E.2d 41 (2003).

and responsibilities. Moreover, as the law does not clearly define what terms judges and lawyers must include in such court orders and contracts, school officials determining whether a parent's access to the child is restricted will need to decide on a case-by-case basis—often with the assistance of the local school board attorney.

The ideal custody order or agreement specifies clearly which parent has physical custody and which has legal custody, or whether the parties share some rights and responsibilities. For example, an order might provide for joint legal custody, with primary physical custody granted to one parent and secondary physical custody to the other. Such an order would indicate that parents share decision-making authority and responsibility for the child's welfare but that one parent has limited physical custody rights.

Unfortunately, many lawyers and judges assume that general terms such as *custody* and *visitation* are sufficient to explain the rights of the parties. It is not uncommon for orders and contracts to simply grant "custody to [one parent] with [the other parent] to have appropriate visitation." Without any further explanation, such a description implies that the parent with "custody" has the right to control the other parent's access to the child and that the other parent has a right, perhaps limited, to some access to the child. It does not indicate what, if any, legal custody rights the court or the signers of the agreement intend the parent with visitation rights to retain. Some orders and agreements include schedules and set forth specific dates and times for visitation. However, due to the lack of clarity in the law about the rights and responsibilities associated with the term *visitation*, school officials should not assume that the parent with visitation rights, often referred to as the *noncustodial parent*, has the authority to remove the child from school grounds without permission from the custodial parent unless the order or contract specifies that he or she has that right.

#### 9. When a child lives with only one parent, does the other parent have the right to visit the child at school?

The answer to this question is the same as to the question immediately above—because visitation during school hours is simply a more limited form of access to the child. Unless a court order or agreement limits the parent's right to physical custody of the child, a parent is entitled to visit a student at school in accordance with the school's policy about parental visitation during school hours. If a parent's right to physical custody is limited, access should be permitted only with the consent of the parent with physical custody, unless the order or agreement specifically allows the visitation. Again, difficulties arise when the order or agreement does not specify clearly the rights and responsibilities of each parent.

#### 10. Do persons other than parents have the right to remove a child from school grounds or visit with the child at school?

Parents' natural and constitutional right to the care, custody, and control of their children includes the right to control with whom their children associate.<sup>37</sup> Thus, in the absence of a court order providing otherwise, a parent determines who may have personal contact with their children. No other category of persons has a natural or automatic legal right to be with a child.<sup>38</sup> Because parents control access, they can, for example, authorize a babysitter or a relative to pick the child up from school. School personnel should require parents to provide them with the names of those individuals before releasing the child.

Other persons may acquire rights with regard to the child either by operation of law or by specific court order. As discussed above, the district court in North Carolina has the authority to award custodial rights to persons or organizations that will best promote the interest and welfare of the child. This authority includes the right to award custody rights to persons other than parents. Also as discussed above, a clerk of superior court or a judge in juvenile court may designate someone other than a parent to be a guardian of the person or a general guardian for the child. Both types of guardians have physical custody rights with regard to their wards.

*In loco parentis* means, literally, in place of a parent. It is not a very precise legal term. Generally, it refers to someone who, without court involvement or sanction, has voluntarily assumed a full-time, parentlike role in relation to a child. Generally, a court must decide on a case-by-case basis whether a person stands *in loco parentis* to a child and whether that person has the same authority as a parent in a given situation.<sup>39</sup>

#### 11. When a child lives with a grandparent or other relative, do the parents have the right to remove the child from the school grounds or visit with the child while at school?

As explained above, parents have full custodial rights with regard to their children until those rights are limited by court

37. *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994).

38. *See McIntyre v. McIntyre*, 341 N.C. 629, 461 S.E.2d 745 (1995) (Grandparents do not have a right to seek custody or visitation with a minor grandchild except in very limited circumstances.); *Seyboth v. Seyboth*, 147 N.C. App. 63, 554 S.E.2d 378 (2001) (For purposes of custody, stepparents have the same status as all other nonparent third parties.). *Cf. Ellison v. Ramos*, 130 N.C. App. 389, 502 S.E.2d 891 (1998) (Persons with a relationship "in the nature of a parent-child relationship" have standing to ask a court to determine whether a parent has waived his or her constitutional right to care, custody, and control of a child such that a court can consider whether the nonparent should be awarded custody rights.).

39. *See Liner v. Brown*, 117 N.C. App. 44, 449 S.E.2d 905 (1994), *cert. denied*, 340 N.C. 113, 456 S.E.2d 315 (1995); SUZANNE REYNOLDS, *Persons Standing in Loco Parentis to Child*, in LEE'S NORTH CAROLINA FAMILY LAW, 5th ed. (Michie: Charlottesville, Va., 1993-), 3 (2002): 15-135-44.

order or a contract between the parents.<sup>40</sup> It may be that a court would find that a grandparent or other relative has acquired custodial rights by acting as the primary caretaker, but that determination would depend on the facts and circumstances of the individual case.<sup>41</sup>

**12. When a child is in the custody of a department of social services and is living with foster parents or in a group home, do parents have the right to remove the child from school grounds or visit him or her at school?**

The answer to this question depends on the circumstances of the individual case. The department of social services should explain the status of the parents and child to school officials as soon as the child is placed in its custody.

A department of social services can acquire custodial rights with regard to a child in a variety of circumstances. A judge in juvenile court who finds that a child is abused, neglected, dependent, undisciplined, or delinquent may place the juvenile in the custody of the department. The judge's order does not abrogate all the parents' rights and may specifically provide for rights of visitation and other matters. A social services department may also gain custody of a child or children when (1) parents relinquish a child for adoption; (2) a planned adoption has failed; (3) a court has terminated the parents' rights; and (4) parents have voluntarily placed a child or children in the department's custody. Again, the status of the parents with regard to their children will depend on the individual circumstances of the case, which the department of social services should explain to school personnel.

Children in the custody of a social services department may remain in their own homes with departmental supervision, be placed in licensed foster or group homes, or be placed with relatives. When a child is in foster care, the department, not the foster parent, has legal custody and delegates the caretaking responsibility to foster parents. Local social services departments need to clarify for school officials the scope of foster parents' authority in school-related issues.

40. Agreements between parents and grandparents or other caretakers regarding the custody of a child are common. However, it is not clear that such agreements are sufficient to abrogate a parent's custodial rights, even if the agreement appears to grant full custodial rights to the caretaker. *See, e.g., Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997) (Whether a parent has waived his or her constitutional right to care, custody, and control of their child depends on the facts and circumstances of the case. A parent loses those rights only when he or she is unfit, has neglected the welfare of the child, or has otherwise acted in a manner inconsistent with their protected status as parent.).

41. See discussion above regarding persons who stand *in loco parentis* to a child.

**Access to School Records and Related Information**

**13. Does a parent's custodial status affect that parent's right to have access to school records and related information about a minor child?**

G.S. 50-13.2(b) states that "[a]bsent an order of the court to the contrary, each parent shall have equal access to the records of the minor child involving the health, education and welfare of the child." This statute means that a parent's right to education-related "records" is not affected by that parent's custodial status unless a court specifically orders that the parent not have access to such information. Therefore, when, for example, a custody order or agreement grants a parent only limited physical custody, such as visitation every other weekend, that parent nevertheless retains a right of access to school-related information, even though the custody order does not appear to grant him or her legal custody rights. Although the statute does not define "records," the purpose of the statute is best served by broadly interpreting the term to include all education-related information normally available to parents.

**14. Are there other persons entitled to the same access as a parent to school records and related information about a minor child?**

Persons granted legal custody rights by court order have the same custodial rights and responsibilities with regard to a child as parents do, unless those rights and responsibilities are specifically limited in the order. Similarly, a guardian of the person or a general guardian of a student has the same legal custodial rights as a parent, unless specifically limited by the order creating the guardianship. Wives or husbands of a child's parent do not acquire parental rights based solely on their status as stepparents.<sup>42</sup>

**15. When a child lives with a grandparent or other relative, do the parents of the child have the right to access school records and other information about a minor child?**

As they do with reference to the right of personal contact with a child at school (discussed in Questions 8 and 9), parents retain all legal custodial rights until a court order or an agreement between the parents limits those rights. Therefore, a parent retains all rights with regard to school-related information, even if the child resides with someone other than the parent, unless a court order specifies otherwise.<sup>43</sup>

42. *See Seyboth v. Seyboth*, 147 N.C. App. 63, 554 S.E.2d 378 (2001).

43. G.S. 50-13.2(b) appears to apply in this context and provides that a parent retains the right of access to school related information unless a court order specifies otherwise.

**16. When a child is in the custody of a department of social services and residing with foster parents or in a group home, do the child's parents have a right of access to school records and related information about the child?**

The answer to this question depends on the reason why the child is in the custody of the department of social services and on the terms of the placement order. There are many situations in which a social services department takes custody of a child but the parents do not lose all custody rights. Only in the most severe cases do parents lose a right to information regarding their child. The local social service department should provide the necessary information to school officials.

**Parental Decision-Making Authority**

**17. When the school requires parental permission for a child to participate in an activity, how should school personnel resolve a conflict between the child's parents regarding whether to give permission?**

When children live with both their parents, issues relating to custody and decision making seldom arise in the school setting. Generally, when parental consent or authorization is required, it is sufficient to obtain it from either parent, although on occasion documentation of both parents' consent is preferable.<sup>44</sup> When parents actively take different positions on a particular issue, they should be encouraged to resolve their differences through counseling, mediation, or other resources. Situations in which they are not able to reach agreement must be dealt with on a case-by-case basis, in consultation with the school attorney if necessary.

**18. When a child lives with only one parent, can the other parent make decisions about school-related issues regarding the minor child?**

The law does not provide a clear answer to this question. In general, parents retain full custodial rights, including decision-making authority, until those rights are limited by court order or agreement between the parents. When an order or agreement clearly awards legal custody rights to both parents, both retain the right to make such decisions. However, orders or agreements that grant one parent only visitation rights are ambiguous with regard to decision-making authority.

**19. When a child lives with someone other than a parent, do the parents have the right to make decisions about school-related issues?**

Yes, unless a court order or agreement between the parties indicates otherwise. Also, when a child is in the custody of a de-

partment of social services, the rights of the parents will vary, depending on the circumstances of the case. However, the fact that parents retain decision-making authority does not necessarily mean that a nonparent caretaker should not be allowed to provide consent for school activities or make other types of decisions concerning the child's education. Frequently, children live with nonparents without the benefit of a court order or agreement and the parents are not available to make decisions relating to the child. In such situations, a court might well find that the caretaker stands *in loco parentis* to a child and therefore has rights and responsibilities similar to those of a parent.

**Students over Eighteen or Emancipated Minors**

**20. How does a child under eighteen become emancipated?**

The age of majority in North Carolina is eighteen.<sup>45</sup> Anyone under that age is legally a minor and, unless emancipated, has legal rights and responsibilities that are different from those of adults.<sup>46</sup> Because minors are legally dependent, they ordinarily are in the care and custody of their parents or some other person. State law provides that any child under the age of eighteen—unless married, serving in the armed forces, or emancipated—is “subject to the supervision and control of his parents.”<sup>47</sup>

The legal dependency of some children continues beyond eighteen. G.S. 50-13.8 provides that “[f]or purposes of custody, the rights of a person who is mentally or physically incapable of self-support upon reaching his majority shall be the same as a minor child for so long as he remains mentally or physically incapable of self-support.” This suggests that parents have both the right and the obligation to maintain custody, supervision, and control of certain handicapped or disabled children after they reach the age of eighteen.<sup>48</sup>

In North Carolina, there are two ways for a minor to become emancipated—by being married or by a decree of emancipation entered by a district court judge.<sup>49</sup> A sixteen- or seventeen-year-old may marry in this state with the written consent of either (1) a parent having full or joint legal custody of the minor or (2) a person, agency, or institution having legal custody or serving as a guardian of the minor.<sup>50</sup> In addition, a judge may authorize a fourteen- or fifteen-

45. G.S. 48A-2.

46. The status of being a minor is considered a legal disability. Minors cannot, for example, represent themselves in court actions, bind themselves by contract, or give valid consent for most purposes.

47. G.S. 7B-4300; 7B-3402.

48. However, due to an amendment to the statute in 1979 (see 1979 N.C. Sess. 838, sec. 29), a person who is mentally or physically disabled is not entitled to parental monetary support. *Jackson v. Jackson*, 102 N.C. App. 574, 402 S.E.2d 869 (1991).

49. G.S. 7B-3509; G.S. 7B-3500 *et seq.*

50. G.S. 51-2. Consent is not required if the sixteen or seventeen-year-old has been emancipated by judicial decree.

44. Custody law does not provide guidance as to when a school must or should obtain parental consent from both parents rather than just one of them. Schools should consult with school board attorneys to develop policies that will help school personnel make that determination.

year-old to marry if the minor is pregnant or has given birth or is the putative father of a child either born or unborn, as long as the minor and the child's other parent agree to marry and the judge finds it in the minor's best interest.<sup>51</sup>

Court-ordered emancipation is available only to sixteen- and seventeen-year-olds. A district court proceeding for emancipation may be initiated only by the minor;<sup>52</sup> however, the minor's parent, guardian, or custodian is a necessary party and must be given notice and an opportunity to participate in the proceeding. The minor seeking emancipation has the burden of proving that emancipation is in his or her best interest. The judge may order an evaluation of the minor's physical or mental condition and is required to consider the following factors:

1. the parents' need for the minor's earnings;
2. the minor's ability to function as an adult;
3. the minor's need to contract or marry;
4. the minor's employment status and stability of living arrangements;
5. family discord that may threaten reconciliation of the minor with the family;
6. the minor's rejection of parental supervision and support; and
7. the quality of parental supervision and support.

#### 21. How does emancipation affect the relationship between a parent and child?

When a minor is emancipated, the parents are relieved of all legal duties and obligations and are divested of all rights in relation to the child.<sup>53</sup> An emancipated minor can make contracts or conveyances, sue or be sued, and transact business as an adult.<sup>54</sup> Thus, for the purposes of consent and decision making for which schools ordinarily look to a minor's parents, an emancipated minor has the same status as a student who is eighteen years old or older.<sup>55</sup>

51. G.S. 51-2.1.

52. The minor must have resided in the county in which the action is brought for six months immediately preceding the filing of the petition. G.S. 7B-3500. The petition must include the minor's "reasons for requesting emancipation" and "plan for meeting his own needs and expenses." G.S. 7B-3501.

53. G.S. 7B-3507. An emancipated minor retains the right to inherit from his or her parents by intestate succession (i.e., if the parents do not have wills). And, the minor is not relieved of the obligation to maintain and support the parents if they become dependent. G.S. 14-326.1.

54. G.S. 7B-3507. The statute provides that a decree of emancipation is irrevocable.

55. For a discussion of attendance policies for eighteen-year-olds, see Trudy Ennis, "Attendance Policies: Are Eighteen-Year-Olds Entitled to Different Treatment?" *School Law Bulletin* 17 (Fall 1986): 7-12.

#### Conclusion

Unfortunately, school personnel are called upon with increasing frequency to determine which adults in a child's life can legally have (1) personal contact with a child during school hours and (2) access to education-related information about the child. As illustrated by the discussion in this article, the law of custody does not provide clear guidance to school personnel about how to resolve issues between parents or other caretakers. Therefore, it is critical that school officials, in consultation with school board attorneys, formulate guidelines and policies to help school personnel deal with these conflicts in a consistent manner.

School policies should be designed to minimize custodial conflicts in the school setting and encourage parents and other caretakers to seek legal assistance, mediation, counseling, or other resources to resolve such disputes away from the school grounds. Above all, policies should seek to ensure the safety and welfare of the children and protect them as much as possible from distressing situations at school. The following guidelines are offered as examples of policies that may minimize the number and harmful effects of custodial disputes.<sup>56</sup>

When each child is enrolled, and annually thereafter, the school should

1. ask for information about the marital status of the student's parents and, if the parents are not living together, inquire about the child custody arrangements;
2. obtain identifying information about the child's parents if the child is living with someone other than the parents;
3. ask for copies of the most recent court orders, separation agreements, or other official documents affecting the child's custody or legal status;
4. inform parents or caretakers, in writing, of the school's policies relating to visiting students during school hours and removing students from school during school hours; and
5. make it clear that the information is requested and the policies are formulated to protect parents' rights and safeguard students.

Other procedures should include the following:

1. Flag the files of students whose custody is or may be an issue, or place relevant information in a separate file that is readily accessible to the person who handles requests to release students during school hours.

56. The guidelines are adapted, in part, from Janet Mason, "Child Custody and Related Issues." *School Law Bulletin* 20 (Spring 1989): 5-11, and Douglas S. Pungert, "The Nontraditional Family: Legal Problems for Schools," *School Law Bulletin* 15 (April 1984): 1-6.

2. Authorize the release of students during the school day only through the principal's office; teachers and others should not be allowed to authorize release.
3. Always require identification before releasing the child to any person. Check the child's file to be sure the person wishing to take the child is listed as the child's custodian or someone the custodian has authorized to remove the child from school. If not, do not release the child.
4. Provide clear guidance to all school employees who may handle a request for release about how to proceed if they have concerns about releasing a student. If there is doubt about whether to allow the student to leave with the adult, the school should contact the person listed in school records as the child's custodian.
5. Provide to any parent, upon request, any education-related information relating to a child that is appropri-

ate to share with a parent, unless the school file contains a court order or separation agreement prohibiting release of information to that parent.

Policies such as these or other, similar guidelines should decrease the uncertainty and confusion surrounding custody issues in the school setting. It is important for school officials to remember that it is not their responsibility to determine the legal rights and responsibilities of the various adults in a child's life. Parents and caretakers can turn to mediation, counseling or to the courts to define and clarify their legal relationship with the child. School officials should not hesitate to adopt policies that encourage parents and other caretakers to resolve their disputes in an appropriate manner outside the school setting. ■