APPENDIX

APPENDICES[1]

[1] Minors names have been redacted to initials.

APPENDIX A

OPINION OF THE NORTH CAROLINA SUPREME COURT (June 5, 2020)

IN THE SUPREME COURT OF NORTH CAROLINA

JOHN TYLER ROUTTEN,

v.

KELLY GEORGENE ROUTTEN,

No. 455A18

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, *Routten v. Routten*, 262 N.C. App. 436, 822 S.E.2d 436 (2018), affirming an order entered by Judge Michael J. Denning on 6 March 2017 in District Court, Wake County. Heard in the Supreme Court on 6 November 2019.

Jackson Family Law, by Jill Schnabel Jackson, for plaintiff-appellant.

Stam Law Firm, by R. Daniel Gibson, for defendant-appellee.

MORGAN, Justice.

In this appeal involving a child custody dispute between two biological parents, we hold that a trial court may grant full custody to one parent and deny visitation to the other parent, so long as the trial court has entered a written finding of fact that such a custody award is in the best interests of the children, without the need to have determined that the parent who has been denied visitation is a person deemed by the trial court to be unfit to spend time with the children. We therefore reverse the majority decision of the Court of Appeals to the extent that it vacated the trial court's order regarding custody and the lower appellate court remanded the matter for further proceedings.

Factual Background and Procedural History

Plaintiff John Tyler Routten and defendant Kelly Georgene Routten were married on 23 March 2002 and became separated on 26 July 2014. This appeal focuses on the custodial arrangement for the two children who were born to the parties during the marriage: a daughter who was born on 2 June 2004 and a son who was born on 17 July 2012.

On 4 August 2014, plaintiff-father filed a complaint against defendant-mother for child custody and equitable distribution, along with a motion for defendant to submit to psychiatric evaluation and psychological testing. The parties entered into a consent order on 13 August 2014, in which they agreed to a temporary child custody schedule. After

defendant filed her answer to plaintiff's complaint on 6 October 2014, asserting several counterclaims, the parties engaged in mediation.

On 24 September 2015, at the conclusion of the court proceeding on the parties' claims for permanent child custody support, and on defendant's counterclaims for alimony and attorney fees, the trial court directed defendant to undergo a neuropsychological evaluation prior to a decision on permanent child custody. On 21 December 2015, the trial court entered a custody and child support order which established a temporary custody schedule, ordered defendant to "take whatever steps are necessary to obtain a complete neuropsychological evaluation no later than June 15, 2016," and scheduled a review hearing on 5 April 2016 and a "subsequent hearing for review of custody and entry of final/permanent orders in July or August of 2016." On 5 April 2016, the scheduled date for the review hearing set by the 21 December 2015 order, the trial court conducted an in-chambers conference on the status of the neuropsychological evaluation in which defendant had been ordered to participate. On 27 April 2016, the trial court entered an order scheduling a hearing on 4 August 2016 to address the results of defendant's neuropsychological evaluation and other matters relating to the best interests of the children. The trial court further directed defendant to obtain the neuropsychological evaluation no later than 15 June 2016 and to submit any resulting written report to plaintiff's counsel at least ten days before the scheduled 4 August 2016 hearing. On 29 July 2016,

defendant moved for a continuance and a protective order, stating that she had complied with the orders to obtain a neuropsychological evaluation. She did not submit any written report resulting from the evaluation to plaintiff's counsel, as directed by the trial court's order of 27 April 2016.

At the final custody hearing on 4 August 2016, defendant admitted that although Duke Clinical Neuropsychology Service had performed a neuropsychological evaluation of defendant on 21 April 2016, she had not disclosed this fact to plaintiff prior to the 4 August 2016 hearing. Defendant further admitted that earlier she had informed plaintiff that Pinehurst Neuropsychology, rather than Duke, would perform the evaluation and had implied in the motions that she filed in the months of June and July of 2016 that her neuropsychological evaluation had not yet been performed. On 9 December 2016, the trial court entered a permanent child custody order awarding sole physical custody of the children to plaintiff. The trial court also entered an order for alimony and attorney fees.

Defendant subsequently filed pro se motions for a new trial and for relief from judgment pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure. She also obtained the issuance of numerous subpoenas on her own behalf. As a result of these filings, plaintiff sought and received a temporary restraining order on 13 December 2016. At the succeeding hearing on plaintiff's preliminary injunction motion on 3 January 2017, the trial court ordered defendant to calendar for hearing her Rule 59

and Rule 60 pro se motions within ten days. Defendant scheduled her motions to be heard on 1 March 2017; and on 20 February 2017, counsel filed amended Rule 59 and Rule 60 motions on her behalf. On 6 March 2017, the trial court entered an amended permanent child custody order which included additional findings of fact and conclusions of law. The amended permanent child custody order included provisions which granted sole legal custody and physical custody of the children to plaintiff, denied visitation by defendant, authorized plaintiff to "permit custodial time between the children and [d]efendant within his sole discretion," and allowed defendant to have telephone conversations with the children twice each week. On 4 April 2017, defendant filed a notice of appeal of the 6 March 2017 amended permanent child custody order "and all related interim or temporary orders and ancillary orders."

While defendant brought forward numerous arguments in her appeal to the Court of Appeals, there are two issues presented to us for resolution after the rendered decision of the lower appellate court: (1) whether the trial court erred in denying defendant's ability to have visitation with her children as the non-custodial parent without a determination that she was unfit to have visitation with them, and (2) whether the trial court erred in authorizing plaintiff, as the custodial parent, to exercise discretion in allowing visitation between defendant and the children. *See generally Routten v. Routten*, 262 N.C. App. 436, 822 S.E.2d 436 (2018).

In determining these two issues, the Court of Appeals majority agreed with defendant's contention that "the trial court violated her constitutionally protected interest as parent by awarding sole legal and physical custody of the children to Plaintiff without making a finding that she was unfit or had acted inconsistently with her constitutionally protected status as parent." *Id.* at 445, 822 S.E. 2d at 443. It also held that "[t]he trial court erred and abused its discretion by delegating its authority to determine Defendant's visitation rights." *Id.* at 444, 822 S.E. 2d at 442–443. On these issues, the dissenting Court of Appeals judge disagreed with the majority's view on the basis that the analysis was both in conflict with the precedent of this Court and was reached in reliance upon a prior Court of Appeals decision, *Moore v. Moore*, 160 N.C. App. 569, 587 S.E.2d 74 (2003), that had been expressly disavowed by an earlier panel of the Court of Appeals and therefore violated our directive in *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). *Routten*, 262 N.C. App. at 458–65, 822 S.E.2d at 451–55 (Inman, J., dissenting in part).

On 27 December 2018, defendant filed a notice of appeal in this Court on the basis of her contention that this case involved a substantial constitutional question and that this matter warranted the exercise of our discretionary review. Each of these filings was

dismissed *ex mero motu* by this Court in orders entered on 14 August 2019. On 3 January 2019, plaintiff filed a notice of appeal as a matter of right based upon the Court of Appeals dissent.

Analysis

The resolution of the issue regarding the trial court's decision to deny visitation by defendant with the children without a determination that she was unfit to have visitation with them is governed by North Carolina General Statutes Section 50-13.5(i). As between two parents seeking custody and visitation of their children, the cited statutory provision states, in pertinent part, that

> the trial judge, *prior to denying a parent the right of reasonable visitation*, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child *or* that such visitation rights are not in the best interest of the child.

N.C.G.S. § 50-13.5(i) (2019) (emphasis added). A plain reading of this subsection reveals two points critical to the resolution of the issues in the matter here. First, this provision contemplates the authorized prospect of the denial to a parent of a right to visitation. Second, that such a denial is permitted upon a trial court's written finding of fact that the parent being denied visitation is deemed unfit to visit the child *or* that visitation would not be in the child's best interests. The unequivocal and clear meaning of the statute

identifies two different circumstances in which a parent can be denied visitation, and the disjunctive term "or" in N.C.G.S. § 50-13.5(i) establishes that either of the circumstances is sufficient to justify the trial judge's decision to deny visitation. *See, e.g., Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) ("Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning.") (citation omitted). Thus, contrary to the majority view and consistent with the dissenting view in the lower appellate court, in a dispute between two parents if the trial court determines that visitation with one parent is not in a child's best interests, then the trial court is authorized to deny visitation to said parent without a requirement to find the existence of the alternative circumstance that the parent in question is unfit. *See Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 519, 597 S.E.2d 717 722 (2004) (citing *Grassy Creek Neighborhood Alliance, Inc. v. City of Winston-Salem*, 142 N.C. App. 290, 297–98, 542 S.E.2d 296, 301 (2001) for the proposition "that the natural and ordinary meaning of the disjunctive 'or' permits compliance with either condition"). In the present case, there is no dispute that the trial court found that visitation with defendant would not be in the best interests of the children. Pursuant to N.C.G.S. § 50-13.5(i), this was a proper standard to apply in resolving the custody and visitation matters before the trial court. *See, e.g., Adams v. Tessener*, 354 N.C. 57, 61, 550 S.E.2d 499, 502 (2001) ("In a custody proceeding between two natural parents (including

biological or adoptive parents), or between two parties who are not natural parents, the trial court must determine custody based on the 'best interest of the child' test.").

The majority decision of the Court of Appeals in this matter went astray due to its reliance upon *Moore*. The *Moore* case, as accurately recounted by the dissenting judge, "held that in a custody dispute between a child's natural or adoptive parents 'absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally protected paramount right of parents to custody, care, and control of their children must prevail.' " *Routten*, 262 N.C. App. at 458, 822 S.E.2d at 451 (citation omitted). The dissent notes that the Court of Appeals in *Moore* excerpted this language from our opinion in *Petersen v. Rogers*, 337 N.C. 397, 403–04, 445 S.E.2d 901, 905 (1994), "which established a constitutionally based presumption favoring a parent in a custody dispute with a non-parent," as controlling authority for the outcome in *Moore*. *Routten*, 262 N.C. App. at 459, 822 S.E.2d at 451. However, the *Moore* court misapplied our decision in *Petersen*. The *Petersen* case established a presumption favoring a parent in a custody dispute *with a non-parent*; *Moore* wrongly employed this presumption in a custody dispute between two parents. This presumption is not implicated in disputes between parents because in such cases, a trial court must determine custody between two parties who each have, by virtue of their identical statuses as parents, the same "constitutionally-

protected paramount right to custody, care, and control of their children." *Petersen*, 337 N.C. at 400, 445 S.E.2d at 903. Therefore, no constitutionally based presumption favors custody for one parent or the other nor bars the award of full custody to one parent without visitation to the other. The dissent here went on to astutely analyze the snarl that was created by the misapplication of our *Petersen* presumption by the Court of Appeals in *Moore*, and the error that this introduced into the majority decision of the lower appellate court in the present case:

> But unlike *Moore*, *Petersen* involved a custody conflict between parents and non-parents. *Moore* did not acknowledge that factual distinction or provide any analysis to support extending the *Petersen* holding to a dispute between two parents. Nor did *Moore* acknowledge controlling Supreme Court precedent expressly holding that *Petersen* does not apply to custody disputes between two parents, such as the case we decide today [of Routten v. Routten].

Routten, 262 N.C. App at 459, 822 S.E.2d at 451 (citation omitted).

Shortly before the Court of Appeals issued its decision in *Moore*, we recognized the crucial distinction regarding a custody dispute between a parent and a non-parent and a custody dispute

between two parents. In *Owenby v. Young*, the parents of two children had divorced, and primary custody had been awarded to the mother with visitation to the father. 357 N.C. 142, 142, 579 S.E.2d 264, 265 (2003). Several years later, the mother was killed in a plane crash. After this occurrence, the children resided with their father for several weeks before the children's maternal grandmother sought primary custody of them, contending that the father was not a fit and proper person to have the care, custody, and control of the children as a result of his alcohol abuse. *Id.* at 143, 579 S.E.2d at 265. In determining *Owenby*, we acknowledged the *Petersen* presumption and reaffirmed that "unless a natural parent's conduct has been inconsistent with his or her constitutionally protected status, application of the 'best interest of the child' standard in a custody dispute with a nonparent offends the Due Process Clause of the United States Constitution." *Id.* at 145, 579 S.E.2d at 266–67 (citations omitted). This Court went on to observe, however, that this "*protected right is irrelevant in a custody proceeding between two natural parents*, whether biological or adoptive, or between two parties who are not natural parents. In such instances, the trial court must determine custody using the 'best interest of the child' test." *Id.* at 145, 579 S.E.2d at 267 (citation omitted).

Although our decisions in *Petersen* and *Owenby* both preceded the decision of the Court of Appeals in *Moore*, with both *Petersen* and *Owenby* involving custodial disputes between a parent and a non-parent and being consistent with one another in the

recognition of a constitutionally based presumption favoring a parent in a custody dispute with a non-parent, nonetheless the result in *Moore* was inconsistent with this line of cases in that the Court of Appeals erroneously applied this presumption in a custody dispute between two parents. The Court of Appeals duplicates this mistake in the instant case and compounds the error by misinterpreting the disjunctive clause of N.C.G.S. § 50-13.5(i) to have required the trial court here to find that defendant was an unfit person to visit the children, when the statute authorized the alternative ground found by the trial court that such visitation was not in the best interests of the children.

We therefore utilize this opportunity to reiterate and to apply the principle which this Court enunciated in *Petersen* that where parents are each seeking custody of their children, each has a full and equal "constitutionally-protected paramount right . . . to custody, care, and control of their children" and there exists no presumption regarding custody merely on the basis of either party's parental status. *Petersen*, 337 N.C. at 403–04, 445 S.E.2d at 905. Furthermore, in light of statutory and case law, in a dispute between two parents with equal parental rights, the trial court must apply the "best interest of the child" standard to determine custody and visitation questions, *see Adams*, 354 N.C. at 61, 550 S.E.2d at 502, and if the court determines that one parent should not be awarded reasonable visitation, the court "shall make a written finding of fact that the parent being denied visitation rights is an unfit

person to visit the child *or* that such visitation rights are not in the best interest of the child." N.C.G.S. § 50-13.5(i) (emphasis added). We also expressly overrule *Moore v. Moore*, and any other Court of Appeals decisions purporting to apply the *Petersen* presumption in custody disputes between two parents.

As to the second issue which we consider upon this review, the lower appellate court's majority vacated the portion of the trial court's conclusion of law stating that "[p]laintiff may permit custodial time between the children and [d]efendant within his sole discretion, taking into account the recommendations of [the parties' daughter's] counselor as to frequency, location, duration, and any other restrictions deemed appropriate by the counselor for permitting visitation between [the parties' daughter] and [defendant]." *See Routten*, 262 N.C. App at, 443–44, 822 S.E.2d at 442. This determination by the Court of Appeals majority was based upon the holdings in two Court of Appeals decisions, each of which held that "the award of visitation rights is a judicial function which may not be delegated to the custodial parent[.]" *Brewington v. Serrato*, 77 N.C. App. 726, 733, 336 S.E.2d 444, 449 (1985). (citing *In re Stancil*, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971)).

Here we agree with the view of the dissent, that in light of the trial court's authority to deny *any* visitation to defendant pursuant to N.C.G.S. § 50-13.5(i), any delegation of discretion to plaintiff to allow *some* visitation "is mere surplusage, albeit admittedly confusing." *Routten*, 262 N.C. App. at 465, 822 S.E.2d at 455. The trial court had already

determined that it was not in the children's best interests to have visitation with defendant. Although it is curious that the trial court would afford an opportunity for defendant to have visitation with the children at the discretion of plaintiff after denying visitation rights to her, nonetheless we choose to interpret the trial court's openness to the potential prospect of defendant's ability to see her children as a humane accommodation rather than as an error of law.

Conclusion

For the reasons cited above, we reverse those portions of the Court of Appeals decision that were raised in this appeal based upon the dissenting opinion of the lower appellate court. We also reverse those portions of the Court of Appeals decision which would have vacated the custody award and remanded for further proceedings.

REVERSED.

APPENDIX B

OPINION OF THE NORTH CAROLINA COURT OF APPEALS (NOVEMBER 20, 2018)

COURT OF APPEALS OF NORTH CAROLINA

Wake County, No. 14 CVD 10295

JOHN TYLER ROUTTEN, Plaintiff,

v.

KELLY GEORGENE ROUTTEN, Defendant.

Case No. COA17-1360

Opinion filed November 20, 2018

An appeal from the Wake County District Court

Appeal by defendant from orders entered by Judge Michael Denning in Wake County District Court. Heard in the Court of Appeals 20 September 2018.

Jill Schnabel Jackson for plaintiff-appellee.

R. Daniel Gibson for defendant-appellant.

TYSON, Judge.

Kelly Georgene Routten ("Defendant") appeals from orders entered on 4 April 2017 and several other

interim and temporary orders. We affirm in part, vacate in part, and remand.

I. Background

John Tyler Routten ("Plaintiff") and Defendant were married on 23 March 2002 and separated from each other on 26 July 2014. Their union produced two children, a daughter and a son. The daughter, "H.," was born 2 June 2004. The son, "B.," was born 17 July 2012.

On 21 July 2014, Plaintiff allegedly assaulted Defendant by pushing her onto the floor of their home. Defendant was granted an *ex parte* domestic violence protective order ("DVPO") against Plaintiff and was granted temporary custody of the parties' children on 25 July 2014. On 4 August 2014, Plaintiff filed a complaint ("the Complaint") against Defendant for child custody, equitable distribution, and a motion for psychiatric evaluation and psychological testing.

On 13 August 2014, Defendant voluntarily dismissed the DVPO. That same day the parties entered into a memorandum of judgment/order, which established a temporary custody schedule for the children and a temporary child support and post-separation support arrangement. Defendant purportedly did not receive a copy of the Complaint until after she had dismissed the DVPO and signed the memorandum of judgment/order. Defendant filed her answer to the Complaint on 6 October 2014 and asserted several counterclaims, including claims for alimony, child custody, child support, and attorney's

fees. The parties participated in mediation and the trial court entered an equitable distribution order by consent of the parties on 29 April 2015.

On 21 September 2015, trial began on the parties' claims for permanent child custody, permanent child support, and Defendant's counterclaims for alimony and attorney's fees. At the conclusion of the trial on 24 September, the trial judge indicated Defendant needed to submit to a neuropsychological evaluation before he could decide permanent child custody.

On 21 December 2015, the trial court entered a custody and child support order, which established a temporary custody arrangement and ordered Defendant to "take whatever steps are necessary to obtain a complete neuropsychological evaluation no later than June 15, 2016." The 21 December 2015 order also provided that "[t]his case shall be set for a 3-hour custody review hearing on April 5, 2016" and "for a 6.5-hour subsequent hearing for review of custody and entry of final/permanent orders in July or August of 2016, once those calendars are available for scheduling trial dates." On 5 April 2016, the trial court conducted an in-chambers conference with the parties' counsel to determine the status of Defendant's neuropsychological evaluation.

On 27 April 2016, the trial court entered an order scheduling a three-hour hearing on 4 August 2018 to hear evidence relating to Defendant's neuropsychological evaluation and evidence relating

to the best interests of the children. The 27 April 2016 order also decreed:

> 2. Defendant shall take whatever steps are necessary to obtain a complete neuropsychological evaluation no later than June 15, 2016. . . .
>
> 3. Defendant shall notify Plaintiff's counsel in writing no later than May 15, 2016, of the name and address of the provider who shall perform the neuropsychological evaluation of Defendant.
>
> 4. Any written report resulting from the neuropsychological evaluation shall be produced to Plaintiff's counsel no later than ten (10) days prior to August 4th, 2016. . . .

On 29 July 2016, Defendant filed a motion for a continuance and protective order in which she alleged that she had complied with the trial court's prior orders to obtain a neuropsychological evaluation. Defendant's 29 July 2016 motion was mailed to Plaintiff's counsel five days prior to the scheduled 4 August 2016 final custody hearing. The motion did not contain the date the neuropsychological evaluation was performed or the name and address of the provider who had performed the evaluation.

The final custody hearing took place on 4 August 2016. At the outset of the hearing,

Defendant's trial counsel disclosed for the first time that Duke Clinical Neuropsychology Service had performed a neuropsychological evaluation of Defendant on 21 April 2016. During the hearing, Defendant admitted: (1) she had not disclosed to Plaintiff's counsel the 21 April 2016 evaluation by Duke prior to the 4 August 2016 hearing; (2) she had notified Plaintiff's counsel that Pinehurst Neuropsychology, not Duke, would perform the evaluation; and (3) she had filed motions in June and July 2016 suggesting that a neuropsychological evaluation had not yet been performed.

At the conclusion of the hearing, the trial court transferred sole physical custody of the children to Plaintiff pursuant to a memorandum of order/ judgment until a complete permanent custody order could be drafted and entered. The trial court entered a permanent child custody order on 9 December 2016 and an order for alimony and attorney's fees. On 9 and 13 December 2016, Defendant filed *pro se* motions for a new trial and relief from judgment pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure.

Following a series of subpoenas filed by Defendant following the trial court's final custody hearing on 4 August 2016, Plaintiff filed a motion for a temporary restraining order and preliminary injunction on 13 December 2016. Plaintiff's motion asserted, in part:

> 17. The subpoenas issued by Defendant seek the production of documents related

> to child custody issues. Child custody has been fully litigated and there are no hearings scheduled (or motions pending) that relate to child custody.
>
> 18. Defendant is representing herself pro se and appears to be using the subpoena process through the clerk's office to (improperly) attempt to continue litigating a claim that has been fully and finally litigated.

The trial court granted Plaintiff a temporary restraining order on 13 December 2016. The trial court conducted a hearing on Plaintiff's preliminary injunction motion on 3 January 2017. At the hearing, the trial court ordered Defendant to calendar her pending Rule 59 and 60 motions within ten days for the next available court dates. Defendant calendared the hearing for the Rule 59 and 60 motions for 1 March 2017. On 25 January 2017, the trial court entered an order granting Plaintiff's preliminary injunction. The trial court's order decreed, in relevant part: "Defendant is hereby restrained and prohibited from requesting issuance of a subpoena in this action by the Wake County Clerk of Superior Court or by any court personnel other than the assigned family court judge."

On 20 February 2017, Defendant filed amended Rule 59 and Rule 60 motions. The trial court concluded Defendant was entitled to the entry of a new order containing additional findings of fact and conclusions of law. On 6 March 2017, the trial court

entered an amended permanent child custody order ("the Amended Order"). The Amended Order, in part, granted Plaintiff sole legal custody and physical custody, denied Defendant visitation with the children, but allowed Plaintiff to "permit custodial time between the children and Defendant within his sole discretion" and allowed Defendant two telephone calls per week with the children.

Defendant appeals the trial court's Amended Order and several other "related interim or temporary orders and ancillary orders."

We note Defendant initially chose to prosecute her appeal *pro se*. This Court provided the opportunity for this case to be included in the North Carolina Appellate Pro Bono Program. Following this Court's inquiry, Defendant accepted representation by a *pro bono* attorney under this Program. Upon Defendant's acceptance of *pro bono* representation, this Court ordered the parties to file supplemental briefs by order dated 23 August 2018.

II. Jurisdiction

Jurisdiction lies in this Court over an appeal of a final judgment regarding child custody in a civil district court action pursuant to N.C. Gen. Stat. §§ 7A-27(b)(2) (2017) and 50-19.1 (2017).

III. Standard of Review

In a child custody case, the standard of review is "whether there was competent evidence to support the trial court's findings of fact[.]" *Barker v. Barker*,

228 N.C. App. 362, 364, 745 S.E.2d 910, 912 (2013) (quoting *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992)). "[T]he trial court's findings of fact are conclusive on appeal if supported by substantial evidence, even if there is sufficient evidence to support contrary findings. 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Peters v. Pennington*, 210 N.C. App. 1, 12-13, 707 S.E.2d 724, 733 (2011) (quoting *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980)) (citations omitted). "Whether [the trial court's] findings of fact support [its] conclusions of law is reviewable *de novo*." *Hall v. Hall*, 188 N.C. App. 527, 530, 655 S.E.2d 901, 904 (2008) (alteration in original) (citation omitted).

"Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal." *Everette v. Collins*, 176 N.C. App. 168, 171, 625 S.E.2d 796, 798 (2006). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Davis v. Kelly*, 147 N.C. App. 102, 106, 554 S.E.2d 402, 405 (2001) (citation omitted).

IV. Issues

On appeal, Defendant contends: (1) the trial court abused its discretion by ordering Defendant to submit to a neuropsychological evaluation; (2) the trial court abused its discretion by delegating its authority to determine Defendant's visitation rights

to Plaintiff; (3) the trial court infringed Defendant's constitutionally protected parental rights by awarding sole custody and visitation rights to Plaintiff; (4) the trial court violated N.C. Gen. Stat. § 50-13.2(e)(3) (2017) by only granting Defendant telephone visitation; (5) the trial court entered numerous findings not supported by competent evidence; (6) the trial court infringed Defendant's procedural due process rights; (7) the trial court abused its discretion in calculating the amount of alimony; (8) the trial court abused its discretion in denying her claim for attorney's fees; and (9) the trial court abused its discretion with respect to her originally filed Rule 59 motion and three contempt motions at a hearing on 1 March 2017.

V. Analysis

A. *Neuropsychological Evaluation*

Defendant argues the trial court exceeded its authority under Rule 35 of the North Carolina Rules of Civil Procedure by ordering her to submit to a neuropsychological evaluation by a non-physician. Rule 35 states that a court "may order [a] party to submit to a physical or mental examination by a physician" when that party's physical or mental condition is in controversy. N.C. Gen. Stat. § 1A-1, Rule 35 (2017). In Defendant's *pro se* briefs, she does not refer to a specific order she asserts was erroneously entered. In Defendant's supplemental *pro bono* brief, she specifically argues the trial court erred, or abused its discretion, by entering an order

on 3 October 2014 requiring her to submit to an examination by a neuropsychologist.

The trial court's 3 October 2014 order required both parties to submit to *psychological*, not *neuropsychological*, evaluations by Dr. Kuzyszyn-Jones. Defendant did not include the 3 October 2014 order in her notice of appeal listing the various orders of the trial court she appealed from. "Proper notice of appeal is a jurisdiction requirement that may not be waived." *Chee v. Estes*, 117 N.C. App. 450, 452, 451 S.E.2d 349, 350 (1994). "[T]he appellate court obtains jurisdiction only over the ruling specifically designated in the notice of appeal as the ones from which the appeal is being taken." *Id*. Defendant's arguments concerning the requirement of the 3 October 2014 order to obtain a psychological evaluation by Dr. Kuzyszyn-Jones are waived and dismissed. *See id.*; N.C. R. App. P. 3(d).

B. *Father's Discretion over Visitation*

Defendant also argues the trial court violated the statute and abused its discretion by granting Plaintiff the sole authority to "permit custodial time between the children and Defendant" in the Amended Order. Under N.C. Gen. Stat. S 50-13.10), "custody" includes "custody or visitation or both." N.C. Gen. Stat. § 50-13.1(a) (2017).

The trial court's Amended Order concluded "It is not in the children's best interests to have visitation with Defendant." The Amended Order then provides:

> 2. Physical Custody. The minor children shall reside with Plaintiff. *Plaintiff may permit custodial time between the children and Defendant within his sole discretion*, taking into account the recommendations of [H.'s] counselor as to frequency, location, duration, and any other restrictions deemed appropriate by the counselor for *permitting visitation between [H.] and [Defendant]*. (Emphasis supplied).

Defendant cites *In re Stancil*, 10 N.C. App. 545, 179 S.E.2d 844 (1971), in support of her argument. *Stancil* involved a custody dispute between a child's mother and the paternal grandmother. *Id*. at 546-47, 179 S.E.2d at 845-46. In the trial court's custody award to the grandmother, it granted the grandmother "the right to determine the times, places and conditions under which she could visit with [the child]." *Id*. at 550, 179 S.E.2d at 848. This Court stated:

> When the question of visitation rights of a parent arises, the court should determine from the evidence presented whether the parent by some conduct has forfeited the right or whether the exercise of the right would be detrimental to the best interest and welfare of the child. If the court finds that the parent has by conduct forfeited the right *or if the court finds that the exercise of the right would be detrimental*

> *to the best interest and welfare of the child*, the court may, in its discretion, deny a parent the right of visitation with, or access to, his or her child; *but the court may not delegate this authority to the custodian*.

Id. at 552, 179 S.E.2d at 849 (emphasis supplied). Here, although the trial court had determined, without finding Defendant had forfeited her parental visitation rights, that it was "not in the children's best interests to have visitation with Defendant." The trial court contradicted its finding and conclusion, the above rule stated in *Stancil*, and delegated its judicial authority to Plaintiff to determine Defendant's visitation. As with the trial court in *Stancil*, the trial court delegated the determination of Defendant's visitation with her children to Plaintiff, at "his sole discretion." The trial court erred and abused its discretion by delegating the determination of Defendant's visitation rights with her children to Plaintiff. *Id*. The trial court cannot delegate its judicial authority to award or deny Defendant's visitation rights to Plaintiff or a third-party. *See id.*; *Brewington v. Serrato*, 77 N.C. App. 726, 733, 336 S.E.2d 444, 449 (1985) ("[T]he award of visitation rights is a judicial function, which the trial court may not delegate to a third-party" (internal quotation marks and citation omitted)).

The decretal portion of the Amended Order is vacated and the matter remanded for the trial court to determine an appropriate custodial and visitation schedule consistent with this Court's opinion in

Stancil. *See Stancil*, 10 N.C. App. at 552, 179 S.E.2d at 849.

C. *Electronic Visitation*

Defendant also argues the trial court abused its discretion by allowing her only electronic "visitation," specifically, two telephone calls per week with the children. Defendant raises her electronic visitation arguments for the first time on appeal. Based upon our holding to vacate the custodial and visitation schedule from the Amended Order and remand for additional findings and conclusions, it is unnecessary to address the merits of Defendant's arguments concerning electronic visitation.

However, the trial court is instructed on remand that: "electronic communication with a minor child may be used to supplement visitation with the child. Electronic communication *may not* be used as a replacement or substitution for custody or visitation." N.C. Gen. Stat. § 50-13.2(e) (2017) (emphasis supplied).

"Electronic communication" is defined as "contact, other than face-to-face contact, facilitated by electronic means, such as by telephone, electronic mail, instant messaging, video teleconferencing, wired or wireless technologies by Internet, or other medium of communication." *Id*. If on remand, the trial court does not determine Defendant is unfit or engaged in conduct inconsistent with her parental rights, the trial court may only order electronic visitation as a supplement to Defendant's visitation

rights and not as a replacement for Defendant's visitation rights. *See id*.; *In re T.R.T.*, 225 N.C. App. 567, 573-74, 737 S.E.2d 823, 828 (2013).

D. *Constitutionally Protected Status as Parent*

Defendant contends the trial court violated her constitutionally protected interest as parent by awarding sole legal and physical custody of the children to Plaintiff without making a finding that she was unfit or had acted inconsistently with her constitutionally protected status as parent. We agree.

The Amended Order purported to deny Defendant all custody and visitation with her children, effectively terminating her parental rights.

The Supreme Court of North Carolina held in *Owenby v. Young*, that:

> [T]he Due Process Clause of the Fourteenth Amendment ensures that the government does not impermissibly infringe upon a natural parent's paramount right to custody solely to obtain a better result for the child. [*Adams v. Tessener*, 354 N.C. 57, 62, 550 S.E.2d 499, 503 (2001) (citing *Troxel v. Granville*, 530 U.S. 57, 72-73, 147 L. Ed. 2d 49, 61 (2000))]. Until, and unless, the movant establishes by clear and convincing evidence that a natural parent's behavior, viewed cumulatively, has been inconsistent with his or her protected status, the "best interest of the

> child" test is simply not implicated. In other words, the trial court may employ the "best interest of the child" test only when the movant first shows, by clear and convincing evidence, that the natural parent has forfeited his or her constitutionally protected status.

357 N.C. 142, 148, 579 S.E.2d 264, 268 (2003). Our Supreme Court also recognized in *Price v. Howard*, that:

> 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.

346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997) (citations omitted). Each parent's constitutional rights are equal and individually protected. *See id.*; *Quilloin v. Walcott*, 434 U.. 246, 255, 54 L. Ed. 2d 511, 519 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.").

Before denying a parent all custodial and visitation rights with his or her children, the trial court: (1) must first make a written finding that the parent was unfit or had engaged in conduct inconsistent with his protected status as a parent, before applying the best interests of the child test; and

(2) make these findings based upon clear, cogent, and convincing evidence. *Moore v. Moore*, 160 N.C. App. 569, 573-74, 587 S.E.2d 74, 76 (2003); *see Petersen v. Rogers*, 337 N.C. 397, 403-404, 445 S.E.2d 901, 905 (1994) ("[A]bsent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail.")

Based upon the trial court's failure to find Defendant is either unfit or has acted inconsistently with her constitutionally protected status as a parent, we vacate the trial court's conclusions of law and custody portions of its order. If on remand, the trial court purports to deny Defendant all custody and visitation or contact with her children, the trial court must make the constitutionally required findings based upon clear, cogent, and convincing evidence. *Owenby*, 357 N.C. at 148, 579 S.E.2d at 268; *Moore*, 160 N.C. App. at 573-74, 584 S.E.2d at 76.

The dissenting opinion claims this holding "diverges from established precedent" and "recognizes a new constitutional right" citing *Respess v. Respess*, 232 N.C. App. 611, 754 S.E.2d 691 (2014). However, the dissenting opinion either overlooks or disregards the precedents set by the Supreme Court of the United States, the Supreme Court of North Carolina, and this Court, including *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989).

E. *In re Civil Penalty*

The Supreme Court of North Carolina issued a decision in *Lanier, Comr. Of Insurance v. Vines*, 274 N.C. 486, 164 S.E.2d 161 (1968). Subsequently, this Court interpreted the holding of *Lanier in N.C. Private Protective Servs. Bd. v. Gray, Inc.*, 87 N.C. App. 143, 360 S.E.2d 135 (1987). A later decision from this Court found *Gray* had "contradict[ed] the express language, rationale and result of *Lanier*," and refused to follow that decision. *In re Civil Penalty*, 92 N.C. App. 1, 13-14, 373 S.E.2d 572, 579 (1988). Upon review, the Supreme Court concluded "that the effect of the majority's decision . . . was to overrule Gray," and rejected this Court's attempt to do so. *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *Id.*

This sequence of events in *In re Civil Penalty* is precisely what happened after this Court's unanimous decision in *Moore*. The Supreme Court issued a decision in *Owenby*, holding that "[u]ntil, and unless, the movant establishes by clear and convincing evidence that a natural parent's behavior, viewed cumulatively, has been inconsistent with his or her protected status, the 'best interest of the child' test is simply not implicated." *Owenby*, 357 N.C. at 148, 579 S.E.2d at 268. The Court's unanimous decision in *Moore*, applied that precise result, holding: "[o]nce conduct that is inconsistent with a parent's protected status is proven, the 'best interest of the

child' test is applied." 160 N.C. App. at 573, 587 S.E.2d at 76. No further appellate review of *Moore* occurred.

As occurred *In re Civil Penalty*, "[s]everal pages of the [*Respess*] opinion were devoted to a detailed rejection of the [*Moore*] panel's interpretation of [*Owenby*]." *In re Civil Penalty*, 324 N.C. at 383-84, 379 S.E.2d at 36. The panel in *Respess* violated our Supreme Court's holding of *In re Civil Penalty* when it refused to follow the unanimous binding ten-year precedent set forth in *Moore*. *See In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37; *Respess*, 232 N.C. App. at 624-25, 754 S.E.2d at 700-01.

Further, numerous other precedential cases, also decided prior to *Respess*, have cited to *Moore* for the holding at issue, contrary to the assertion in the dissenting opinion. *See, e.g., Woodring v. Woodring*, 227 N.C. App. 638, 644, 745 S.E.2d 13, 19 (2013) ("In the absence of extraordinary circumstances, a parent should not be denied the right of visitation." (quoting *Moore*, 160 N.C. App. at 573, 587 S.E.2d at 76)); *Maxwell v. Maxwell*, 212 N.C. App. 614, 622-23, 713 S.E.2d 489, 495 (2011) ("we reverse and remand this matter for further findings of fact as to Plaintiff's fitness as a parent or the best interest of the minor children" (citing *Moore*, 160 N.C. App. at 574, 587 S.E.2d at 77)); *Slawek v. Slawek*, No. COA09-1682, 2010 WL 3220668, at *6 n.4 (N.C Ct. App. Aug. 17, 2010) (unpublished) ("To declare a parent unfit for visitation, there must be 'clear, cogent, and convincing evidence.' " (quoting *Moore*, 160 N.C. App. at 573, 587 S.E.2d at 76)); *Mooney v. Mooney*, No.

COA08-998, 2009 WL 1383395, at *5 (N.C. Ct. App. May 19, 2009) (unpublished) ("A trial court may only deny visitation under the 'best interest' prong of N.C.G.S. § 50-13.5(i) '[o]nce conduct that is inconsistent with a parent's protected status is proven.' " (quoting *Moore*, 160 N.C. App. at 573, 587 S.E.2d at 76)); *In re E.T.*, No. COA05-752, 2006 WL 389731, at *3 (N.C. Ct. App. Feb. 21, 2006) (unpublished) ("The trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child." (quoting *Moore*, 160 N.C. App. at 572, 587 S.E.2d at 76)); *In re M.C.*, No. COA03-661, 2004 WL 2152188, at *4 (N.C. Ct. App. Sep. 21, 2004) (unpublished) ("The trial court is required to make a finding that a natural parent is unfit before denying custody to that parent." (citing *Moore*, 160 N.C. App. 569, 587 S.E.2d 74)); *David N. v. Jason N.*, 164 N.C. App. 687, 690, 596 S.E.2d 266, 268 (2004) ("The trial court is required to make a finding that a natural parent is unfit before denying custody to that parent." (citing *Moore*, 160 N.C. App. 569, 587 S.E.2d 74)), *rev'd on other grounds*, 359 N.C. 303, 608 S.E.2d 751 (2005).

In *Peters v. Pennington*, this Court cited *Moore*, as follows:

> In *Moore*, this Court stated that the prohibition of *all* contact with a natural parent's child was analogous to a termination of parental rights. The

> Court reasoned that, in order to sustain a 'total prohibition of visitation or contact' based on the unfitness prong of N.C. Gen. Stat. § 50-13.5(i), the trial court must find unfitness based on the clear, cogent, and convincing evidentiary standard that is applicable in termination of parental rights cases.

210 N.C. App. at 19, 707 S.E.2d at 737 (emphasis in original) (citing *Moore*, 160 N.C. App at 573-74, 587 S.E.2d at 76-77))

Our Supreme Court has not overturned any of this Court's published opinions listed above, including *Moore*, which protect the "constitutionally-protected paramount right" of each individual parent over the care, custody, and control of their children. *See Petersen*, 337 N.C. at 403-404, 445 S.E.2d at 905. The dissenting opinion does not address or distinguish any of these binding precedents upon this Court.

Were we to disregard each parent's individually protected constitutional right, the following scenario may arise: an unmarried couple conceives a child. The couple becomes estranged before the child is born, and the father never knows the mother was pregnant. Years later, after the child is born, the father learns of his child's existence and seeks to have a relationship with the child. The father files an action to seek custody or visitation with his child. Under *Respess*, the trial court could then deny the father any custody or visitation solely using the

"best interests" test, without any findings of the father's unfitness or actions inconsistent with his parental status. The application of the "best interests" test under this scenario, without findings of unfitness or actions inconsistent, would be wholly incompatible with our precedents, which have recognized: "A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child[.]" *Price*, 346 N.C. at 79, 484 S.E.2d at 534; *see Quilloin*, 434 U.S. at 255, 54 L. Ed. 2d at 519 ("the relationship between parent and child is constitutionally protected"); *Owenby*, 357 N.C. at 148, 579 S.E.2d at 268; *Moore*, 160 N.C. App. at 574, 587 S.E.2d at 77.

The dissenting opinion, and *Respess*, assert this Court's holding in *Moore* was in conflict with *Owenby*. Citing the precedents of the Supreme Court of the United States and the Supreme Court of North Carolina, this Court unanimously stated in *Moore*:

> It is presumed that fit parents act in the best interest of their children. *Troxel*, 530 U.S. at 69, 147 L. Ed. 2d at 59. A parent's right to a relationship with his child is constitutionally protected. *See Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 54 L. Ed. 2d 511, 519 (1978). Once conduct that is inconsistent with a parent's protected status is proven, the "best interest of the child" test is applied.

> *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997).

Moore, 160 N.C. App. at 573, 587 S.E.2d at 76.

This Court's application of the rule regarding each parent's constitutionally protected individual relationship of custody or visitation with her child in this case and in *Moore* is fully consistent with binding precedents and with our Supreme Court's holding in *Owenby*. "[T]he trial court may employ the 'best interest of the child' test only when the movant first shows, by clear and convincing evidence, that the natural parent has forfeited his or her constitutionally protected status." *Owenby*, 357 N.C. at 148, 579 S.E.2d at 268.

This opinion fully quotes and is consistent with the holding in *Owenby* and does not "conspicuously omit[]" any binding language therein, contraty to the dissenting opinion's assertion. *See id*.

F. *Trial Court's Findings of Fact*

Defendant argues the Amended Order contains numerous findings of fact which are not supported by competent evidence, and the findings of fact do not support the trial court's conclusions of law.

"Our trial courts are vested with broad discretion in child custody matters." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (citation omitted). Where substantial evidence in the record supports the trial court's findings of fact, those findings are conclusive on appeal, even if record

evidence might sustain findings to the contraty. *Id*. at 475, 586 S.E.2d at 254 (citation omitted).

Here, the trial court made fifty-two findings of fact in its Amended Order. Defendant challenges over twenty of the findings of fact made by the trial court concerning Defendant's behavior, Defendant's misleading statements to Plaintiff's counsel and the trial court regarding her neuropsychological evaluation, Defendant's health, Defendant's relationship with Plaintiff, Defendant's relationship with the children, and the best interests of the children.

After careful review of the whole record, we conclude the trial court's findings of fact are based upon competent evidence in the record, including the testimony of the Plaintiff; the parties' former neighbors, Jennifer and Jared Ober; Dr. Kuzyszyn-Jones; Defendant's neurologist, Dr. Mark Skeen; and Defendant's own testimony from the September 2015 hearing and the 4 August 2016 hearing. Defendant's arguments are overruled.

Defendant also argues the trial court's conclusions of law are not supported by the findings of fact. Based upon our holding to vacate the trial court's conclusions of law for the reasons stated above m sections B and D, it is unnecessary to address these arguments.

G. *Denial of Procedural Due Process Rights*

Defendant also argues the trial court infringed her constitutional rights to procedural due process by conducting a temporary custody review on 5 April 2016 to determine the status of Defendant's obligation to complete the neuropsychological evaluation. This custody review was conducted in the trial judge's chambers, and not in open court.

Both Plaintiff's counsel and Defendant's counsel were present for this temporary custody review. The trial court did not enter an order based upon this temporary custody review that altered the custody arrangement specified in the 21 December 2015 temporary custody and child support order. Following the 5 April 2016 custody review hearing, the trial court entered an order setting specific guidelines for when Defendant should complete the neuropsychological evaluation ordered by the trial court on 21 December 2015. As a result of the temporary custody review on 5 April 2016, the trial court only ordered that the permanent custody review hearing take place on 4 August 2016 and reiterated Defendant's obligation under the 5 December 2015 order to obtain a neuropsychological evaluation. Defendant's trial counsel offered no objection to the trial court holding the in-chambers custody review meeting. "A contention not raised in the trial court may not be raised for the first time on appeal." *Creasman v. Creasman*, 152 N.C. App. 119, 123, 566 S.E.2d 725, 728 (2002) (citations omitted).

Defendant also did not raise her procedural due process arguments in her amended Rule 59 and Rule 60 motions to set aside the trial court's permanent custody order. *Id*. ("We note that defendant did not raise this issue in his motion to set aside the judgment. The record does not reflect a ruling on this issue by the trial court"); N.C. R. App. P. 10(a)(1). These arguments are waived and dismissed.

H. *Domestic Violence*

Defendant also contends the trial court failed to consider evidence of domestic violence perpetrated by Plaintiff in making its custody determination in the Amended Order. N.C. Gen. Stat. § 50-13.2(a) (2017) provides, in relevant part:

> An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person . . . as will best promote the interest and welfare of the child. In making the determination, the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party.

The Amended Order indicates it did consider Defendant's allegations of domestic violence by Plaintiff. Finding of fact 24 states:

> There was significant conflict between the parties during their marriage, which

> culminated in physical altercations between the parties on more than one occasion. Defendant testified at length about these altercations during the September 2015 trial and described herself as a victim of domestic violence, but Plaintiff introduced a recording into evidence at the September 2015 trial in which Defendant can be heard laughing and attempting to goad Plaintiff into a physical altercation. There were two incidents in July of 2014 (shortly before the parties separated) during which Plaintiff attempted to retreat from Defendant during an argument by locking himself in another room but Defendant forced her way into the room. Furthermore, Defendant's medical records (as introduced into evidence by Defendant and/or made available to Plaintiff's counsel for cross-examination purposes at the September 2015 trial) are inconsistent with her testimony about the alleged altercations.

This finding of fact was supported by substantial competent evidence of Plaintiff's testimony and the audio recording referenced therein, which was admitted into evidence. Additionally, finding of fact 24 in the Amended Order is the same as finding of fact 22 in the initial permanent custody order. Defendant did not raise the issue of the trial court's purported failure to consider domestic violence in her amended Rule 59 and 60 motions. Defendant

had a full opportunity to assert the trial court failed to consider domestic violence at the 1 March 2017 hearing on her Rule 59 and 60 motions, but failed to do so. *See Creasman* 152 N.C. App. at 123, 566 S.E.2d at 728; N.C. R. App. P. 10(a)(1). Defendant may disagree with the weight and credibility the trial court gave the evidence, but the record clearly establishes the trial court considered the allegations of domestic violence in determining custody pursuant to N.C. Gen. Stat. § 50-13.2(a). Defendant's argument is overruled.

I. *Alimony and Attorney's Fees*

Defendant next argues the trial court abused its discretion with regard to the Alimony and Attorney Fee Order entered by the trial court on 9 December 2016, the same day the trial court entered its initial permanent custody order. Defendant argues the trial court erred by awarding her alimony for a duration calculated from the parties' date of separation and not from the parties' date of divorce. "Decisions concerning the amount and duration of alimony are entrusted to the trial court's discretion and will not be disturbed absent a showing that the trial court has abused such discretion." *Robinson v. Robinson*, 210 N.C. App. 319, 326, 707 S.E.2d 785, 791 (2011).

The trial court is required to consider the sixteen factors enumerated in N.C. Gen. Stat. § 50-16.3A(b) in deciding to award alimony. N.C. Gen. Stat. § 50-16.3A(c) ("[T]he court shall make a specific finding of fact on each of the factors in subsection (b)

of this section if evidence is offered on that factor."). "[T]he award of . . . attorney's fees in matters of child custody and support, as well as alimony . . . is within the discretion of the trial court." *McKinney v. McKinney*, 228 N.C. App. 300, 307, 745 S.E.2d 356, 361 (2013).

Here, the trial court made several specific and unchallenged findings of fact with reference to attorney's fees and the required statutory factors for determining alimony. Defendant does not challenge any of these findings of fact or argue that these findings are not supported by competent evidence in the record. Defendant has failed to show the trial court abused its discretion in calculating the amount of alimony awarded or by denying Defendant's claim for attorney's fees. Defendant's arguments are overruled.

J. *1 March 2017 Hearing*

Defendant attempts to argue the trial court erred with respect to actions taken by her own attorney at a hearing on 1 March 2017. This hearing was held on several motions filed by Defendant. After the trial court entered its original permanent child custody order and its order on alimony and attorney's fees on 9 December 2016, Defendant subsequently filed a *pro se* Rule 59 motion on 16 December and a *pro se* Rule 60 motion on 19 December.

Defendant obtained new counsel, who then filed amended Rule 59 and Rule 60 motions on 20 February 2017. These motions were heard by the trial

court on 1 March 2017, in addition to three *pro se* contempt motions Defendant had previously filed.

At the outset of the 1 March 2017 hearing, Defendant's counsel stated to the trial court that the contempt motions "are right now being written up in a voluntarily dismissal to be dismissed with prejudice as of today." The trial court then proceeded to hear Defendant's amended Rule 59 and Rule 60 motions. The trial court granted Defendant's Rule 59 motion and later entered the Amended Order on 6 March 2017.

Defendant appears to argue the trial court should have considered her original *pro se* Rule 59 motion instead of the amended motion filed by her attorney. Defendant asserts her contempt motions should not have been dismissed on 1 March 2017. These motions were voluntarily dismissed by Defendant's own counsel and not by the trial court. Defendant was present for the 1 March 2017 hearing and did not voice any disagreement to the trial court over her counsel's voluntary dismissal of the contempt motions. Defendant cites no authority to support these arguments. Defendant fails to establish any error on the trial court's part with respect to the Rule 59 motion and the voluntary dismissal of her contempt motions. These arguments are dismissed.

VI. Conclusion

The trial court erred and abused its discretion by delegating its authority to determine Defendant's visitation rights to Plaintiff and by effectively

terminating Defendant's parental rights without first making a finding of unfitness or acts inconsistent with her constitutionally protected status by clear, cogent, and convincing evidence, and violated the statute by limiting her access to her children to telephone calls only. *Owenby*, 357 N.C. at 148, 579 S.E.2d at 268; *Moore*, 160 N.C. App. at 573-74, 584 S.E.2d at 76; N.C. Gen. Stat. § 50-13.2(e).

Defendant has failed to show the trial court abused its discretion in calculating the amount of alimony, or in denying her claim for attorney's fees. Defendant has failed to preserve her arguments concerning the trial court's ordering of a neuropsychological evaluation and the trial court's purported violations of her procedural due process rights. Defendant's remaining arguments are overruled and dismissed for failures to object and preserve.

The Alimony Order and Attorney Fees Order are affirmed. The trial court's conclusions of law and decretal portions of its Amended Order are vacated and remanded for further proceedings as consistent with this opinion. *It is so ordered*.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judge BERGER concurs with separate opinion.

Judge INMAN concurs in part, dissents in part, with separate opinion.

BERGER, Judge, concurring.

I fully concur in the majority opinion, but write separately to address a trend in this Court's jurisprudence that has troubling implications.

In the last few years, this Court increasingly has overruled precedent on the ground that a case, although published and otherwise controlling, itself failed to follow an even earlier Court of Appeals or Supreme Court case.[1]

At first glance, this approach might seem appropriate. After all, *In re Civil Penalty* tells us that one panel cannot overrule another on the same issue. 324 N.C. 373, 384, 379 S.E.2d 30, 36-37 (1989). If it appears a second panel did precisely that by refusing to follow the precedent set by the first panel, should the third panel faced with the issue not ignore the second and follow the first? But, what if a fourth panel comes along and concludes that the second panel properly distinguished or limited the first panel? That fourth panel could refuse to follow the third

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[1] Here are a few examples: *State v. Alonzo*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, No. COA17-1186, 2018 WL 3977546, at *2 (Aug. 21, 2018), *temporary stay allowed*, ___ N.C. ___, 817 S.E.2d 733 (2018); *State v. Jones*, ___ N.C. App. ___, ___, 802 S.E.2d 518, 523 (2017); *State v. Mostafavi,* ___ N.C. App. ___, ___, 802 S.E.2d 508, 513 (2017), *rev'd*, 370 N.C. 681, 811 S.E.2d 138 (2018); *State v. Meadows*, ___ N.C. App. ___, ___, 806 S.E.2d 682, 693-94 (2017), *disc. review allowed*, ___ N.C. ___, 812 S.E.2d 847 (2018); *In re D.E.P.,* ___ N.C. App. ___, ___, 796 S.E.2d 509, 514 (2017).

panel on the ground that it improperly overruled the second.

This may sound more like a law school hypothetical than a real-world problem, but it is very real. As the case before us here demonstrates, this Court can be trapped in a chaotic loop as different panels disagree, not only on the interpretation of the law, but also on what law appropriately controls the issue.

This problem is compounded by the reality that we are an intermediate appellate court that sits in panels. Ordinarily, the doctrine of *stare decisis* will prevent appellate courts from casually tossing away precedent decided just a few years (or even months) earlier.[2] But that precedential effect is much weaker

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[2] "The judicial policy of *stare decisis* is followed by the courts of this state." *Musi v. Town of Shallotte*, 200 N.C. App. 379, 383, 684 S.E.2d 892, 896 (2009) (citation omitted). "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Janus v. Am. Fed'n of State, Cnty., & Mun. Employees, Council 31*, __ U.S. __, __, 201 L. Ed. 2d 924, 954-55 (2018) (citing *Payne v. Tennessee*, 501 U.S. 808, 827, (1991)).

"[A]ntiquity has never been a reason for this Court to overrule its own prior case law or that of the North Carolina Supreme Court; indeed, this Court does not have authority to do so." *Strickland v. City of Raleigh*, 204 N.C. App. 176, 181, 693 S.E.2d 214, 217 (2010) (citation omitted). "When this Court is presented with identical facts and issues, we are bound to reach the same conclusions as prior panels of this court." *Smith v. City of*

when a court sits in panels where the judges considering the issue were not necessarily involved in the earlier decision. As the dissent notes in footnote 4, we make mistakes.

One solution to this problem is for this Court to write opinions following our precedent, notwithstanding that panel's view of the weaknesses and errors within the current state of the law. In such an opinion, that panel could explain why the precedent is incorrect and make a direct request for the Supreme Court to use their power of discretionary review to announce the correct rule.

But many judges on this Court view this approach as unrealistic.[3] The Supreme Court hears cases on discretionary review primarily because they

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Fayetteville, 220 N.C. App. 249, 253, 725 S.E.2d 405, 409 (2012) (citation omitted).

[3] Nevertheless, it is "an established rule to abide by former precedents, *stare decisis*, where the same points come up again in litigation, as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion, as also because, the law in that case being solemnly declared and determined what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or swerve from according to his private sentiments; he being sworn to determine, not according to his private judgment, but according to the known laws and customs of the land, - not delegated to pronounce a new law, but to maintain and expound the old one - *jus dicere et non jus dare* [to declare the law, not to make the law]." *McGill v. Town of Lumberton*, 218 N.C. 586, 591, 11 S.E.2d 873, 876 (1940) (citation omitted).

involve matters of "significant public interest" or "major significance to the jurisprudence of the State." N.C. Gen. Stat. § 7A-31. Though our frequent intramural disputes over *In re Civil Penalty* seem significant to us, the underlying legal issues often are narrow, are of no public interest, and affect only minor or isolated issues within our jurisprudence. At a high court that hears only seventy or eighty cases on discretionary review each year, these simply won't make the cut.

There is another option. This Court now has the power to sit *en banc*. *See* N.C. Gen. Stat. § 7A-16. When the Supreme Court issued procedural rules for our *en banc* review, it instructed that we may sit *en banc* "to secure or maintain uniformity of the court's decisions." N.C. R. App. P. 31.1(a)(1). This suggests that our Supreme Court anticipated we would use our authority to sit *en banc* to address these minor conflicts in our case law and resolve them ourselves. And, of course, if this Court sitting *en banc* gets it wrong, an opinion explaining the conflicting cases and the detailed reasons underlying our interpretation of them would issue from this Court, producing an excellent vehicle by which the Supreme Court can grant review and announce the correct rule.

Unfortunately, we have yet to sit *en banc*. To date, there have been 61 petitions filed requesting this Court to hear cases *en banc*, and we have declined to hear every single one. Perhaps some of my fellow judges on this Court are skeptical of whether the Supreme Court wants us to resolve our own conflicts. Some may be convinced that this resolution is not

ours, but the business of our higher court. Others may have different motives. Whatever the reasons we have declined to sit *en banc* may be, legitimate or otherwise, encouragement and accountability from the appellate bar would be beneficial. Of course, if the Supreme Court believes this Court should resolve our conflicts *en banc*, it would be helpful for that Court to say so.

INMAN, Judge, concurring in part and dissenting in part.

I concur in the majority opinion affirming the Alimony Order and Attorney Fees Order. I respectfully dissent from the majority opinion vacating the trial court's conclusions of law regarding custody and its decree awarding full custody to Plaintiff. The majority's holding in this respect is precluded by established precedent of the North Carolina Supreme Court and this Court and threatens to upend the stability of decisions by our trial courts in child custody disputes between parents.

The trial court's Amended Order denying Defendant custody and visitation complied with Section 50-13.5 of the North Carolina General Statutes, which provides:

> In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child *or* that such

> visitation rights are not in the best interest of the child.

N.C. Gen. Stat. § 50-13.5(i) (2018) (emphasis added). "Where a statute contains two clauses which prescribe its applicability and clauses are connected by the disjunctive 'or', application of the statute is not limited to cases falling within both clauses but applies to cases falling within either one of them." *Grassy Creek Neighborhood All., Inc. v. City of Winston-Salem*, 142 N.C. App. 290, 297, 542 S.E.2d 296, 301 (2001) (internal quotation marks and citations omitted). Ultimately the trial court found that"[i]t is not in the children's best interests to have visitation with Defendant." Given this finding, pursuant to N.C. Gen. Stat. § 50-13.5(i), the trial court had the authority to suspend Defendant's visitation with the children without finding that Defendant was a person unfit to visit them.

The trial court's express finding that visitation with Defendant was not in the children's best interest followed several other findings by the trial court of Defendant's harmful interactions with her children, including: (1) Defendant's behavior necessitated that her daughter have a safety plan while in her custody; (2) Defendant engaged in physical and verbal altercations with her daughter; (3) Defendant was trespassed from her son's preschool as a result of her behavior there; (4) she had difficulty controlling her son's behavior; (5) she removed her son from preschool contrary to the school's recommendation and without Plaintiff's knowledge or consent; and (6) her daughter's emotional distress was caused by

spending time with Defendant. Each of these findings was supported by competent evidence.

The majority does not hold that the trial court erred in its findings of fact regarding Defendant's harmful interactions with the children. The majority does not hold that the trial court erred in finding that visitation with Defendant was not in the children's best interest. Rather, the majority holds that Defendant has a constitutional right to visitation with her children which has been violated by the trial court and remands the matter for "constitutionally required findings based upon clear, cogent, and convincing evidence." In support of today's holding, the majority relies on *Moore v. Moore*, 160 N.C. App. 569, 587 S.E.2d 74 (2003), a decision disavowed by this Court—and one directly contrary to controlling North Carolina Supreme Court precedent—which held that when resolving a custody dispute between two parents, a trial court cannot suspend one parent's visitation rights absent a finding that either the parent is unfit or engaged in conduct that is inconsistent with his or her protected status. *Id.* at 573, 587 S.E.2d at 76.

Moore held that in a custody dispute between a child's natural or adoptive parents, "absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail." *Id.* at 572, 587 S.E.2d at 76 (internal quotation marks and citation omitted). As support for this holding, *Moore* quoted *Petersen v. Rogers*, 337 N.C. 397, 403-04, 445

S.E.2d 901, 905 (1994), which established a constitutionally-based presumption favoring a parent in a custody dispute with a non-parent (the "*Petersen* presumption").[4] But unlike *Moore, Petersen* involved a custody conflict between parents and non-parents. 337 N.C. at 399, 445 S.E.2d at 902. *Moore* did not acknowledge that factual distinction or provide any analysis to support extending the *Petersen* holding to a dispute between two parents. Nor did *Moore* acknowledge controlling Supreme Court precedent expressly holding that *Petersen* does not apply to custody disputes between two parents, such as the case we decide today.

Significantly, after *Petersen* was decided and a few months prior to *Moore*, the North Carolina Supreme Court, in a child custody dispute between a father and maternal grandmother, explained the distinction between proceedings involving (1) a parent versus a non-parent, and (2) a parent versus the other parent:

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[4] *Petersen* quoted the holding in *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L.Ed.2d 551 (1972), that " '[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' " 337 N.C. at 400-01, 445 S.E.2d at 903 (emphasis omitted) (quoting *Stanley*, 405 U.S. at 651, 31 L.Ed.2d at 559). Relying on *Stanley*, the *Petersen* Court noted that a natural parent has a "constitutionally-protected paramount right to custody, care, and control of their child." *Id.* at 400, 445 S.E.2d at 903.

> We acknowledged the importance of [a parent's] liberty interest nearly a decade ago when this Court [in *Petersen*] held: absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally protected paramount right of parents to custody, care, and control of their children must prevail. The protected liberty interest complements the responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child. The justification for the paramount status is eviscerated when a parent's conduct is inconsistent with the presumption or when a parent fails to shoulder the responsibilities that are attendant to rearing a child. Therefore, unless a natural parent's conduct has been inconsistent with his or her constitutionally protected status, application of the "best interest of the child" standard in a custody dispute with a nonparent offends the Due Process Clause of the United States Constitution. *Furthermore, the protected right is irrelevant in a custody proceeding between two natural parents, whether biological or adoptive, or between two parties who are not natural parents. In such instances, the trial court must*

> *determine custody using the "best interest of the child" test.*

Owenby v. Young, 357 N.C. 142, 145, 579 S.E.2d 264, 266-67 (2003) (internal quotation marks and citations omitted) (emphasis added). *Moore* failed to cite *Owenby*, much less attempt to distinguish its holding that a parent's constitutional right is *irrelevant* in a custody dispute with the other parent. *Moore* was not pursued further on appeal, so its conflict with *Owenby* was not reviewed by the Supreme Court.[5]

The error of *Moore* was ultimately noted a decade later, in a unanimous decision written by a judge who had concurred in *Moore*. In *Respess v. Respess*, 232 N.C. App. 611, 754 S.E.2d 691 (2014), that judge, writing for a unanimous panel, concluded that "the standard articulated in *Moore* directly conflicts with prior holdings of . . . our Supreme Court and therefore does not control our decision in the

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[5] Although *Moore* was not appealed, our Supreme Court passed on the opportunity to ratify or adopt the holding of *Moore* two years later in *In re T. K., D.K., T. K., & J. K.*, 171 N.C. App. 35, 613 S.E.2d 739, *aff'd* 360 N.C. 163, 622 S.E.2d 494 (2005). That appeal followed a split decision by this Court. The dissent in *In re T.K.* asserted—as the majority holds here—that a trial court's order awarding visitation to the father was in error because, pursuant to *Moore*, the trial court did not make findings that the mother's "conduct was inconsistent with her protected status as a parent," or, by clear and convincing evidence, that the mother was "unfit as a parent." *Id.* at 44, 613 S.E.2d at 744 (Tyson, J., dissenting). On review, the Supreme Court affirmed the majority opinion *per curiam*. *In re T. K.*, 360 N.C. 163, 622 S.E.2d 494.

instant case." *Id.* at 624-25, 754 S.E.2d at 700-01. *Respess* explained that prior to *Moore*, precedent consistently held:

> (1) the standard in a custody dispute between a child's parents is the best interest of the child; (2) the applicable burden of proof is the preponderance of the evidence; (3) the principles that govern a custody dispute between a parent and a non-parent are irrelevant to a custody action between parents; and (4) a trial court complies with N.C. Gen. Stat. § 50-13.5(i) if it makes the finding set out in the statute.

Id. at 627, 754 S.E.2d at 702. *Respess* acknowledged our Supreme Court's holding in *In re Appeal of Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989), that a panel of this Court is bound by a prior decision by another panel of this Court deciding the same issue, but held that rule of decision did not apply to bind the panel to follow *Moore*, because "this Court has no authority to reverse existing Supreme Court precedent." *Respess*, 232 N.C. App. at 625, 754 S.E.2d at 701. *Respess* was never appealed and, until our Supreme Court tells us otherwise, *Respess* remains good law on both points.

Today's majority opinion quotes a portion of the opinion in *Owenby*, but conspicuously omits the Supreme Court's key holding directly controlling in this case, that a constitutional analysis "is irrelevant in a custody proceeding between two natural parents"

and that "[i]n such instances, the trial court must determine custody using the 'best interest of the child' test." *Owenby*, 357 N.C. at 145, 579 S.E.2d at 267; *see also Respess*, 232 N.C. App. at 626, 754 S.E.2d at 701-02 ("*Moore's* holding that the *Petersen* presumption applies to a trial court's decision to deny visitation rights to a non-custodial parent [in a dispute with the custodial parent] contradicts our Supreme Court's holding [in *Owenby*] that *Petersen* is 'irrelevant' to a dispute between parents and that in such instances, the trial court must determine custody using the 'best interest of the child' test." (internal quotation marks, citation, and brackets omitted)).

The majority also fails to distinguish the facts of this case from *Respess*, or to address the effect of *Owenby* on *Moore*'s precedential value. The majority's holding today deviates from years of consistent precedent and confuses an otherwise settled area of law affecting families across our state.[6]

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[6] As noted by the majority, until it was disavowed by *Respess* as violating controlling precedent, *Moore* was cited in subsequent decisions by this Court for its holding directly contrary to *Owenby*. *But see Everette v. Collins*, 176 N.C. App. 168, 173-74, 625 S.E.2d 796, 799-800 (2006) (distinguishing disputes between parents and non-parents, involving the "constitutionally protected status afforded parents," and disputes between only parents, applying the "best interest of the child" determination without constitutional analysis). But none of the decisions citing *Moore* for that holding acknowledged the conflict. Since *Respess, Moore* has been cited by this Court for its holding that a trial court's findings of fact must resolve factual issues rather than merely reciting witness testimony, but it has not been cited in a majority decision for the proposition disavowed in *Respess*. *See* State v. Robinson, ___ N.C. App. ___, ___, 805 S.E.2d 309, 317

The majority asserts that *Respess* violated the North Carolina Supreme Court's holding in *In re Appeal of Civil Penalty* that one panel of this Court is bound by a previous panel's decision on the same issue. But the majority fails to acknowledge that *Respess* explicitly held that *In re Civil Penalty* did not require this Court to repeat the holding in *Moore* that was contrary to controlling precedent by our Supreme Court. *See Respess*, 232 N.C. App. at 629, 754 S.E.2d at 703.

Earlier this year, in a unanimous opinion, this Court expressly adopted the holding in *Respess* which interpreted and distinguished *In re Civil Penalty* to disavow *Moore*. *See Martinez v. Wake Cty. Bd. of Educ.*, ___ N.C. App. ___, ___, 813 S.E.2d 659, 667 (2018) (discussing *Respess* at length and holding that "it is clear that where a prior ruling of this Court is in conflict with binding Supreme Court precedent, we must follow the decision of the Supreme Court rather than that of our own Court"). Today's decision cannot be harmonized with *Respess* or *Martinez*.

The jurisprudential history of *In re Civil Penalty*, contrasted with the history of *Moore, Respess*, and today's decision, demonstrates the majority's error in this case. *In re Civil Penalty* arose from a conflict regarding the precedent established by the North Carolina Supreme Court in *State ex rel. Lanier*

(2017); *Lueallen v. Lueallen*, ___ N.C. App. ___, ___, 790 S.E.2d 690, 698 (2016); *Kelly v. Kelly*, 228 N.C. App. 600, 610, 747 S.E.2d 268, 278 (2013).

v. Vines, 274 N.C. 486, 490, 164 S.E.2d 161, 163 (1968). *Lanier* held that a statute allowing the Commissioner of Insurance to impose a monetary penalty of up to $25,000 for violations of administrative regulations improperly delegated power vested exclusively in the judiciary by Art. IV, § 3, of the North Carolina Constitution. *Id.* at 497, 164 S.E.2d at 168. Almost twenty years later, in *North Carolina Private Protective Services Board v. Gray, Inc.*, 87 N.C. App. 143, 360 S.E.2d 135 (1987), this Court rejected a constitutional challenge to a statute authorizing the North Carolina Private Protective Services Board to impose monetary penalties of up to $2,000 for violations of agency regulations. *Id.* at 147, 360 S.E.2d at 138. *Gray* held that "[t]his case is readily distinguishable from the situation in *Lanier*." *Id.* at 147, 360 S.E.2d at 138.

One year later, in *In re Civil Penalty*, 92 N.C. App. 1, 373 S.E.2d 572 (1989), in a split decision, this Court addressed the constitutionality of a statute authorizing the Department of Natural Resources to assess an administrative penalty against individuals who violated the Sedimentation Pollution Act. *Id.* at 3, 373 S.E.2d at 573. The majority opinion concluded that this Court was bound by the decision in *Lanier*, and not by *Gray*, reasoning that the "rationale [in *Gray*] directly contradicts the rationale and result of *Lanier*." *Id.* at 16, 373 S.E.2d at 581. The dissent asserted that the majority's failure to follow *Gray*'s interpretation of *Lanier* "unjustifiably overrule[d]" *Gray*, which "was correctly decided and should have governed the court's decision in the case before us." *Id.*

at 21, 373 S.E.2d at 583 (Becton, J., dissenting). On review, the North Carolina Supreme Court agreed with the dissent and concluded that "the effect of the majority's decision here was to overrule *Gray*. This it may not do." *In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. The Supreme Court went on to explain, in a holding quoted by this Court in dozens of decisions over the past quarter century, that, "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *Id.* at 384, 379 S.E.2d at 37.

Unlike this Court's decision in *Gray*, which addressed and distinguished the North Carolina Supreme Court's decision in *Lanier*, this Court's decision in *Moore* utterly failed to acknowledge the Supreme Court's decision in *Owenby*.[7] A citation to *Owenby* is nowhere to be found in *Moore*. The

[7] I do not suggest that the panel in *Moore* deliberately ignored *Owenby*. The Supreme Court issued its decision in *Owenby* in May 2003; *Moore* was heard in this Court just three months later, in August 2003. Given the typical lapse of months between the submission of briefs and hearing before this Court in most cases, it is likely that *Owenby* was decided by the Supreme Court after briefing in *Moore* was completed, and that neither counsel nor the panel deciding *Moore* realized that binding precedent intervened. Such an error reflects not defiance or judicial recklessness but merely the very human occurrence of overlooking a new precedent when deciding one among a tremendous volume of cases heard by panels of this Court. By contrast, today's majority violates precedent specifically called to its attention.

assertion by the majority today that *Moore* applied the holding of *Owenby* misrepresents the reported decision.

Unlike *Moore, Respess* cited *Owenby*, discussed it at length, and characterized the Supreme Court's statement that the *Petersen* presumption is "irrelevant in a custody proceeding between two natural parents" as a "holding" in *Owenby*. *Respess*, 232 N.C. App. at 625-26, 754 S.E.2d at 701-02. As *Respess* has not been overturned by a higher court, we are thus bound by its interpretation of *Owenby*, and must conclude that the language ignored by the majority in today's decision is a holding by our Supreme Court. *See In re Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. And it is directly controlling here. This Court's holding in *Moore* must yield to the Supreme Court's holding in *Owenby*. We do not have the "authority to overrule decisions of the Supreme Court of North Carolina and [have a] responsibility to follow those decisions, until otherwise ordered by the Supreme Court." *Cannon v. Miller*, 313 N.C. 324, 324, 327 S.E.2d 888, 888 (1985).

The rule of decision established by *In re Civil Penalty* applies when two panels of this Court issue conflicting decisions on the same issue without distinguishing the facts or applicable law, passing each other like ships in the night. But *In re Civil Penalty* does not bind a panel of this Court to a decision by a prior panel that conflicts with Supreme Court precedent. The conflict between a decision by this Court and one by our Supreme Court is more akin

to a row boat passing an ocean liner. It is resolved not by *In re Civil Penalty* but by *stare decisis*.

"A primary goal of adjudicatory proceedings is the uniform application of law. In furtherance of this objective, courts generally consider themselves bound by prior precedent, *i.e.*, the doctrine of *stare decisis*." *Bacon v. Lee*, 353 N.C. 696, 712, 549 S.E.2d 840, 851-52 (2001). The doctrine of *stare decisis* "is a maxim to be held forever sacred." *Commonwealth v. Coxe*, 4 U.S. 170, 1 L. Ed. 786, 4 Dall. 170, 192 (Pa. 1800). Because it is so fundamental to our jurisprudence, the doctrine is generally applied without comment and is described at length only in dissenting opinions. "Adhering to this fixed standard ensures that we remain true to the rule of law, the consistent interpretation and application of the law." *State ex. rel. McCrory v. Berger*, 368 N.C. 633, 651, 781 S.E.2d 248, 260 (2016) (Newby, J., concurring in part and dissenting in part). "[T]here must be some uniformity in judicial decisions . . . or else the law itself, the very chart by which we are sailing, will become as unstable and uncertain as the shifting sands of the sea[.]" *State v. Bell*, 184 N.C. 701, 720, 115 S.E. 190, 199 (1922) (Stacy, J., dissenting).

This Court in *Respess* correctly held that it was not bound by *In re Civil Penalty* to follow *Moore*'s holding—which plainly diverged from Supreme Court precedent. And, as *Respess* distinguished *In re Civil Penalty* and explained why it did not apply—*i.e.*, that it did not bind the panel to *Moore*—we are bound by that interpretation, ironically pursuant to *In re Civil Penalty*. Stated differently, the majority charts the

same wayward course that previously led this Court to run aground even though our Supreme Court has built us a lighthouse in *In re Civil Penalty*; just as *Gray* constituted a binding interpretation of *Lanier, Respess* provided binding interpretations of *Owenby*[8] and *In re Civil Penalty*. We are bound by *Respess* unless and until it is disavowed by our Supreme Court.

The majority opinion today vacates the conclusions of law and custody portions of the Amended Order based on the trial court's failure to include findings only deemed necessary in *Moore*. Today's decision, like the decision in *Moore*, conflicts with binding precedent and the plain language of N.C. Gen. Stat. § 50-13.5(i), the governing statute. Because the dispute is exclusively between the children's parents, the trial court properly applied the "best interest of the child" test. *See Adams v. Tessener*, 354 N.C. 57, 61, 550 S.E.2d 499, 502 (2001) ("In a custody proceeding between two natural parents (including biological or adoptive parents), or between two parties who are not natural parents, the trial court must determine custody based on the 'best interest of the child' test.").

The majority today also asserts—again citing *Moore*—that the "Amended Order purported to deny Defendant all custody and visitation with her children, effectively terminating her parental rights."

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[8] As recounted *supra*, there is nothing in *Moore* to indicate it was interpreting or applying *Owenby*, let alone that it was cognizant of the decision. Thus, *Respess* was not bound by any interpretation of *Owenby* in *Moore*, as none appears therein.

A loss of visitation or custody in a Chapter 50 proceeding between two parents is fundamentally different from the termination of parental rights, which can only be accomplished in a proceeding pursuant to Chapter 7B. "Our jurisprudence has long recognized significant differences between a child custody order, which is subject to modification upon a showing of changed circumstances, and orders for adoption or for termination of parental rights, which are permanent." *Respess*, 232 N.C. App. at 626, 754 S.E.2d at 702 (citations omitted). Among other things, the standard of proof prescribed by Chapter 50 for custody disputes between parents is a preponderance of the evidence; by contrast, the standard of proof prescribed by Chapter 7B for termination of parental rights is clear and convincing evidence. N.C. Gen. Stat. § 7B-1110(b) (2018); *Speagle v. Seitz*, 354 N.C. 525, 533, 557 S.E.2d 83, 88 (2001).

For the foregoing reasons, I respectfully dissent from the majority opinion regarding the award of child custody and would affirm the Amended Order's conclusions of law and decree regarding custody.

Because I dissent from the majority opinion vacating the trial court's decree suspending Defendant's right to visitation with her children, I disagree with the majority's holding that the trial court erred by delegating to Plaintiff the sole discretion to allow, or deny, telephone contact between Defendant and their children. That is, if Defendant has no right to visitation, the trial court's delegation of discretion to Plaintiff is mere surplusage, albeit admittedly confusing. Assuming *arguendo* that

the trial court erred in this portion of its decree, it was surplusage that does not require appellate review.

In sum, I concur in the majority opinion affirming the Alimony Order and Attorney Fees Order. I respectfully dissent from the majority opinion vacating the trial court's conclusions of law and its decree awarding full custody to Plaintiff.

APPENDIX C

MEMORANDUM OF JUDGMENT/ORDER OF THE WAKE COUNTY DISTRICT COURT
(August 4, 2016)

STATE OF NORTH CAROLINA
WAKE COUNTY

14 CVD 10295

JOHN TYLER ROUTTEN,
Plaintiff,

v.

KELLY GEORGENE ROUTTEN,
Defendant.

[Original Handwritten]

Pending further orders of the Court, the minor children shall remain in the physical custody of Plaintiff. The legal custody & phone/skype provisions of the December 2015 custody order shall remain in effect pending further orders of the Court.

The Court Orders:

(a) With the signing of this Memorandum by the presiding judge, this Memorandum shall become a judgment/order of the court and shall be deemed entered pursuant to Rule 58 of the North Carolina Rules of Civil Procedure on the date filed with the Clerk;

(b) the provisions of this Memorandum are fair and reasonable and each party has had ample opportunity to obtain legal advice concerning the legal effect and terms of this Memorandum;

(c) this Memorandum is enforceable by the contempt powers of the court should any party not comply with its terms;

(d) the format judgment or order may be signed by the presiding judge out of term, session, county and district;

Prior to accepting the stipulated agreement of the parties, the undersigned judge read the terms of the above stipulations and agreements to the parties, and made careful inquiry of them with regards to the voluntary nature of their agreement and their understanding thereof. The court explained to the parties the legal effect of their stipulations and agreements and determined that the parties understood the legal effect and terms of the agreement and stipulations. The parties acknowledged their

voluntary execution of the agreements and stipulations, stated that the terms accurately recorded their agreement, and agreed of their own free wills to abide by them.

Date 8/4/16 /s/_____

APPENDIX D

CHILD CUSTODY ORDER OF THE WAKE COUNTY DISTRICT COURT (December 9, 2016)

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
14 CVD 10295
Assigned Judge: DENNING

NORTH CAROLINA
WAKE COUNTY

JOHN TYLER ROUTTEN,
Plaintiff,

v.

KELLY GEORGENE ROUTTEN,
Defendant.

THIS CAUSE came on for hearing on the parties' claims for permanent child custody before the undersigned District Court Judge presiding over the SEPTEMBER 21, 2015 Civil Domestic Session of District Court, Wake County, North Carolina; and

IT APPEARING TO THE COURT that Plaintiff was present and represented in this matter by Jill Jackson of Tharrington Smith, LLP, in Raleigh, North Carolina and Defendant was present and represented in this matter by Laura Brennan, of Raleigh, North Carolina; and

THE COURT, after consideration of the evidence and testimony presented during the four (4) days of trial, determined that it was appropriate under the circumstances for this Court to enter a temporary custody order that determined the custodial arrangements for the children pending completion of a neuropsychological evaluation by Defendant; and

THE COURT conducted a custody review in chambers with counsel for the parties on April 5, 2016, to determine the status of Defendant's completion of the neuropsychological evaluation; and

THE COURT entered an Order on April 27, 2016, that established more specific requirements for Defendant's completion of the neuropsychological evaluation prior to a final hearing scheduled for August 4, 2016; and

THE COURT conducted the final hearing on the parties' claims for permanent child custody on August 4, 2016, at which time Plaintiff was present and represented by Jill Jackson of Tharrington Smith, LLP, and Defendant was present and represented by Norman York, both parties testified before the Court; and

THE COURT upon review of the pleadings and other documents of record and after considering the documents of record, evidence, testimony of witnesses, and arguments of the parties, hereby makes and enters the following:

FINDINGS OF FACT

1. Both parties are residents of Wake County, North Carolina, and have been for more than six (6) months preceding the filing of this action.

2. Plaintiff and Defendant were married to each other on March 23, 2002.

3. Plaintiff and Defendant separated from each other on July 26, 2014. The parties are now divorced.

4. The parties are the parents of two children, namely: H.B.R., born June 2, 2004 (age 12); and B.C.R., born July 17, 2012 (age 4).

5. The minor children have resided with the parties in Wake County, North Carolina at all times from their birth until the parties' separation. From the date of the parties' through September 2015, the children resided primarily with Defendant and secondarily with Plaintiff in Wake County, North Carolina. Since September 2015, the children have resided primarily with Plaintiff and secondarily in Wake County, North Carolina.

6. During the four (4) day trial in September 2015, the Court heard testimony from Plaintiff, Defendant, Jennifer Ober, Jared Ober, Jerry Baker, George Hurst, Connie Hurst, Grant Decker, Natalie Panko, Carrie Brown, Stephanie Normand, Dr. Mark Skeen, Dr. Katrina Kuzyszyn-Jones, and Dr. Joanne deSupinski.

7. During the August 4, 2016 hearing, the Court heard testimony from Plaintiff and Defendant.

8. Dr. Skeen and Dr. Kuzyszyn-Jones were qualified by the Court to testify as expert witnesses.

9. Defendant has Multiple Sclerosis and is experiencing impairment of her episodic memory, working memory, and processing speed.

10. During the September 2015 proceeding, Dr. Kuzyszyn-Jones recommended that Defendant undergo a neuropsychological evaluation.

11. This Court entered an Order: Custody and Child Support ("Temporary Order") on December 21, 2015 that determined the custodial arrangements for the children pending the completion by Defendant of a neuropsychological evaluation.

12. This Court conducted an in-chambers custody review with counsel for the parties on April 5, 2016, to determine the status of Defendant's completion of the neuropsychological evaluation. On April 27, 2016, the Court entered an Order that established more specific requirements for Defendant's completion of the neuropsychological evaluation prior to a final hearing scheduled for August 4, 2016.

13. Defendant filed a Notice of Appeal on May 24, 2016. Defendant appealed only from the Order entered by the Court on April 27, 2016 (but not from the Temporary Order entered on December 21, 2015).

14. Defendant's appeal was dismissed by this Court on August 2, 2016.

15. During the pendency of the appeal, various motions were filed by Defendant with the Court and with the North Carolina Court of Appeals in which Defendant made representations regarding the status of her neuropsychological examination. Defendant's representations, considered as a whole, caused the Court and Plaintiff's attorney to understand that Defendant had not completed the neuropsychological evaluation and did not intend to do so, either because she could not afford to do so or because she objected to doing so on privacy grounds.

16. At the August 4, 2016 hearing, Defendant's counsel revealed that Defendant had, in fact, submitted to a neuropsychological evaluation in April 2016 but Defendant would not authorize her attorney to release the report to Plaintiff's counsel. Defendant wished to submit the report directly to the Court without any opportunity for review by Plaintiff's counsel.

17. Defendant did not produce the neuropsychological evaluation report to Plaintiff's counsel as required by the April 27, 216 Order.

18. The April 27, 2016 Order required Defendant to disclose the name and address of the provider who would be doing the evaluation to Plaintiff's counsel no later than May 15, 2016. Although Defendant did disclose the name and address of a provider to Plaintiff's counsel by May 16,

2016, the name and address disclosed to Plaintiff's counsel was not the provider who evaluated Defendant and wrote the report that Defendant sought to disclose to the Court at the August 4, 2016 hearing.

19. When Defendant disclosed the name and address of an evaluator to Plaintiff's counsel on May 16, 2016, Defendant did not disclose that a neuropsychological evaluation already had been performed by another evaluator in April 2016.

20. The Court and Plaintiff's counsel were unaware that a neuropsychological evaluation had been done until the August 4, 2016 hearing.

21. The Court believes that Defendant was misleading to the Court and to Plaintiff's counsel from April 2016 through August 4, 2016 regarding the status of the evaluation and, consequently, the evidence available for and the issues to be decided at the August 4, 2016 hearing.

22. There was significant conflict between the parties during their marriage, which culminated in physical altercations between the parties on more than one occasion. Defendant testified at length about these altercations during the September 2015 trial and described herself as a victim of domestic violence, but Plaintiff introduced a recording into evidence at the September 2015 in which Defendant can be heard laughing and attempting to goad Plaintiff into a physical altercation. Furthermore, Defendant's medical records (as introduced into evidence by

Defendant and/or made available to Plaintiff's counsel for cross-examination purposes at the September 2015 trial) are inconsistent with her testimony about the alleged altercations.

23. During the parties' marriage, Plaintiff established strong relationships with several of the parties' neighbors. Plaintiff continues to be friends with his former neighbors, who provide a support network for Plaintiff and the children. After the parties' separation, while the children resided primarily with Defendant, H. had a safety plan to go to the neighbors if she needed any help.

24. Defendant did not have a good relationship with the parties' neighbors and she did not maintain friendships with others. The parties' neighbors have experienced bizarre conversations with Plaintiff, during which Plaintiff would claim, for example, that someone had fired a gun into the parties' house from outside or someone was moving things around in their backyard at night or that Plaintiff had given a valuable family heirloom to a neighbor. There was not evidence, other than Defendant's statements, that these things had occurred.

25. Defendant was obsessed with security during the parties' marriage. Plaintiff was not permitted to touch the home security pad or to disable the security system.

26. Towards the end of the parties' marriage, Plaintiff found small cassette recorders that were

hidden throughout the house. The cassettes contained hours of recordings of Defendant talking to herself.

27. From the date of separation through September 2015, while the children resided primarily with Defendant, there would be times when Defendant was unable to get herself and/or the children to appointments on time. Defendant mixed up her appointments with Dr. Kuzyszyn-Jones, for example, and the parties' daughter missed a chorus performance because Defendant got lost and did not arrive on time for the child to participate.

28. From the date of separation through September 2015, while the children resided primarily with Defendant, there was a least one physical altercation between H. and Defendant. Defendant admitted during her testimony that H. is physically aggressive toward her and that Defendant sometimes uses corporal punishment for H.

29. On more than one occasion since the parties' separation, there have been struggles between Defendant and H. as Defendant attempted to gain access to H.'s bedroom and H. attempted to prevent her mother from getting in, resulting in damage to the door.

30. From the date of separation through September 2015, while the children resided primarily with Defendant, Defendant would sometimes bring strangers with her to visitation exchanges with Plaintiff. These people were not known to Plaintiff or the children, and at least one of these people behaved

aggressively toward Plaintiff during an exchange. During the exchange, Defendant would remain in the vehicle while the stranger conducted the custodial exchange.

31. From September 2015 through August 4, 2016 hearing, while the children resided primarily with Plaintiff, Defendant's parents regularly would travel from Georgia to be present during Defendant's custodial times with the children.

32. In February of 2016, Defendant was trespassed from B.'s preschool due to her confrontational behavior with staff at the school. Plaintiff adjusted his work schedule so that he could pick up B. and conduct the custodial exchange once Defendant was unable to pick up B. from school.

33. In the summer of 2016, the children lived primarily with Defendant as set out in the Temporary Order. During that period of time, H. became increasingly emotional and upset. H. texted her father frequently and often was distraught during phone calls with her father. On at least one occasion, H. called her father, extremely distraught, very late at night when she should have been asleep. Plaintiff worked with H.'s counselor to support H. during this time and arranged for H. to have text communication with her counselor as needed.

34. In the summer of 2016, Defendant moved H. out of her bedroom into a more central location in the house with limited privacy; and Defendant turned

off the power to H.'s bedroom at least once. These actions were very upsetting to H.

35. Defendant testified at trial that H. calls Defendant names like "psycho" and stays in her room and is sad during her custodial time with Defendant. Defendant acknowledges that H. argued with her about staying primarily with Defendant for the summer.

36. According to Defendant's testimony, in the summer of 2016, H. claimed that Defendant's mother handled her roughly when H. did not do what her grandmother asked. Defendant heard but did not see this altercation.

37. At the September 2015 trial, Defendant testified that she was asked to stop bringing B. to a toddler class because of his behavior during the class; and Dr. Kzuzyszyn-Jones noted in Defendant's psychological evaluation report that Defendant had difficulty managing B.'s behavior at her office. Defendant admitted during her testimony at the August 2016 hearing that B. is becoming more difficult for her to handle.

38. Defendant admitted that, at times, she calls her father to assist her by telephone with disciplining the children.

39. Defendant attributes her difficulty in parenting and disciplining the children to poor parenting by Plaintiff.

40. In the summer of 2016, Defendant removed B. from preschool, contrary to the school's recommendation for B.'s kindergarten readiness, and refused to allow him to attend preschool during her custodial time.

41. Plaintiff continues to seek appropriate ongoing treatment with a licensed mental health provider for stress and anxiety, in compliance with the Temporary Order.

42. Plaintiff has remained steadily employed at all times since the parties' separation.

43. Plaintiff maintains a loving, stable home for the minor children and ensures that they get to school and to their appointments, including regular counseling appointments for H.

44. Plaintiff has continued to share information about the children with Defendant (such as appointments and illnesses) while they have been in his primary care.

45. At the conclusion of the August 4, 2016. hearing, the Court entered a Memorandum of Judgment that provided for the children to remain in Plaintiff's sole physical custody pending further orders of the Court.

46. The children's best interests would be served by implementing the custody provisions set forth in the decretal paragraphs below.

Based upon the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW

1. This Court has personal and subject matter jurisdiction to enter this Order.

2. The children's best interests would be served by implementing the legal and physical custody provisions set forth in the decretal paragraphs below.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. Legal Custody, Plaintiff shall have sole legal custody of the minor children.

Plaintiff shall keep Defendant informed of any serious accident, illness, or injury affecting the children (with "serious" defined as an incident requiring medical care and/or prescription medication and not day-to-day incidents that may require basic first aid and/or OTC medication) and of any major issues pertaining to the children's health, welfare, education and upbringing. Each party shall have equal access to records and information concerning the children, including but not limited to, medical, dental, health, mental health, school and educational records, and each party shall be entitled to communicate directly with any health care or educational professional rendering services to the children. Plaintiff shall inform Defendant of any diagnosis, prognosis, and any other information

received from medical and/or mental health provider(s) regarding the minor children. The children's health, medical, and other appointments shall be posted on Our Family Wizard at least 48 hours in advance (or as soon as possible once the appointment is scheduled, if not 48 hours in advance). Defendant is not authorized to attend appointments at which the children will be physically present except as consented to in writing in advance by Plaintiff.

2. Physical Custody, The minor children shall reside with Plaintiff. Plaintiff may permit custodial time between the children and Defendant within his sole discretion, taking into account the recommendations of H.'s counselor as to frequency, location, duration, and any other restrictions deemed appropriate by the counselor for permitting visitation between H. and Plaintiff.

3. Defendant is entitled to speak with the children by telephone for a reasonable duration, taking into account the ages and wishes of the children, twice per week (but not before school/work on school/work days, except in the event of an emergency). The children will have open telephone access to both parties at all times. Both parents shall be available to the other party in case of emergency and shall promptly answer any calls or texts in case of emergency.

4. Each party shall communicate with the other party in a courteous and cordial manner. Except in the event of an emergency, all communications

between the parties shall be conducted in writing via Our Family Wizard and shall be limited to conveying necessary information to the other party relating to the minor children.

5. Each party shall at all times encourage and foster in the children sincere respect and affection for both parents. Each party shall support and encourage the minor children's relationship with the other party. Neither party shall speak negatively or make disparaging remarks about the other party or the other party's family in the presence or hearing of the minor children.

6. Each party shall keep the other party informed at all times of his or her home address (mailing address and physical address), home land line telephone number, mobile telephone number, primary work address, work telephone number, and email address.

7. Each party shall participate in regular, ongoing therapy/counseling with a licensed mental health provider of his/her choosing. Each party shall comply with all recommendations of his/her mental health provider, including the use of prescribed medications if deemed appropriate by that party's mental health provider. Each party shall sign whatever release or other paperwork is necessary to authorize his/her mental health provider to communicate freely with the mental health provider for the parties' daughter.

8. The parties' daughter, H., shall continue in regular ongoing counseling with Dr. Dittmer. Neither party may terminate H.'s counseling with Dr. Dittmer except as recommended by Dr. Dittmer or pursuant to subsequent order of this Court. The parties shall comply with all recommendations from H.'s provider. Except as required by law or as deemed appropriate by the provider (within his/her sole discretion), H.'s provider is not obligated to release information to either party regarding services to H. or any disclosures made by H. during the course of treatment. Neither party shall delay, disrupt, interfere with, or otherwise take any steps to negatively impact the counseling process and/or the therapeutic relationship between H. and her provider.

9. Any and all law enforcement agencies shall enforce the terms of this Order.

10. Defendant shall not remove either child from the State of North Carolina at any time without express written consent in advance from Plaintiff.

This the 29th day of OCTOBER, 2016.

/s/_____
District Court Judge Presiding

APPENDIX E

AMENDED CHILD CUSTODY ORDER OF THE WAKE COUNTY DISTRICT COURT
(March 6, 2017)

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
14 CVD 10295
Assigned Judge: DENNING

NORTH CAROLINA
WAKE COUNTY

JOHN TYLER ROUTTEN,
Plaintiff,

v.

KELLY GEORGENE ROUTTEN,
Defendant.

THIS CAUSE came on for hearing on the parties' claims for permanent child custody before the undersigned District Court Judge presiding over the SEPTEMBER 21, 2015 Civil Domestic Session of District Court, Wake County, North Carolina; and

IT APPEARING TO THE COURT that Plaintiff was present and represented in this matter by Jill Jackson of Tharrington Smith, LLP, in Raleigh, North Carolina and Defendant was present and represented

in this matter by Laura Brennan, of Raleigh, North Carolina; and

THE COURT, after consideration of the evidence and testimony presented during the four (4) days of trial, determined that it was appropriate under the circumstances for this Court to enter a temporary custody order that determined the custodial arrangements for the children pending completion of a neuropsychological evaluation by Defendant; and

THE COURT conducted a custody review in chambers with counsel for the parties on April 5, 2016, to determine the status of Defendant's completion of the neuropsychological evaluation; and

THE COURT entered an Order on April 27, 2016, that established more specific requirements for Defendant's completion of the neuropsychological evaluation prior to a final hearing scheduled for August 4, 2016; and

THE COURT conducted the final hearing on the parties' claims for permanent child custody on August 4, 2016, at which time Plaintiff was present and represented by Jill Jackson of Tharrington Smith, LLP, and Defendant was present and represented by Norman York, both parties testified before the Court; and

THE COURT upon review of the pleadings and other documents of record and after considering the documents of record, evidence, testimony of witnesses,

and arguments of the parties, hereby makes and entered a Permanent Child Custody Order on December 9, 2016; and

Defendant thereafter filed a Motion for a New Trial (filed 12/16/2016), a motion for Relief from Orders/Judgments (filed 12/19/2016), an Amended Motion for New Trial (filed 2/20/2017) (referred to collectively as "Defendant's Motions"); and

THE COURT conducted a hearing on Defendant's Motions on March 1, 2017, at which time Plaintiff was represented by Jill Jackson of Tharrington Smith, LLP, and Defendant was present and represented by Jeff Marshall of Marshall & Taylor; and

THE COURT upon review of the pleadings and other documents of record and after considering the documents of record, evidence, testimony of witnesses and arguments of the parties, hereby determines that Defendant is entitled to entry of a new Order that includes additional findings of fact and conclusions of law; and

THE COURT hereby makes and enters the following:

FINDINGS OF FACT

1. Both parties are residents of Wake County, North Carolina, and have been for more than six (6) months preceding the filing of this action.

2. Plaintiff and Defendant were married to each other on March 23, 2002.

3. Plaintiff and Defendant separated from each other on July 26, 2014. The parties are now divorced.

4. The parties are the parents of two children, namely: H.B.R., born June 2, 2004 (age 12); and B.C.R., born July 17, 2012 (age 4).

5. The minor children have resided with the parties in Wake County, North Carolina at all times from their birth until the parties' separation. From the date of the parties' through September 2015, the children resided primarily with Defendant and secondarily with Plaintiff in Wake County, North Carolina. Since September 2015, the children have resided primarily with Plaintiff and secondarily in Wake County, North Carolina.

6. During the four (4) day trial in September 2015, the Court heard testimony from Plaintiff, Defendant, Jennifer Ober, Jared Ober, Jerry Baker, George Hurst, Connie Hurst, Grant Decker, Natalie Panko, Carrie Brown, Stephanie Normand, Dr. Mark Skeen, Dr. Katrina Kuzyszyn-Jones, and Dr. Joanne deSupinski.

7. During the August 4, 2016 hearing, the Court heard testimony from Plaintiff and Defendant.

8. Dr. Skeen and Dr. Kuzyszyn-Jones were qualified by the Court to testify as expert witnesses.

9. Defendant has Multiple Sclerosis and is experiencing impairment of her episodic memory, working memory, and processing speed.

10. During the September 2015 proceeding, Dr. Kuzyszyn-Jones recommended that Defendant undergo a neuropsychological evaluation.

11. This Court entered an Order: Custody and Child Support ("Temporary Order") on December 21, 2015 that determined the custodial arrangements for the children pending the completion by Defendant of a neuropsychological evaluation.

12. This Court conducted an in-chambers custody review with counsel for the parties on April 5, 2016, to determine the status of Defendant's completion of the neuropsychological evaluation. On April 27, 2016, the Court entered an Order that established more specific requirements for Defendant's completion of the neuropsychological evaluation prior to a final hearing scheduled for August 4, 2016.

13. Defendant filed a Notice of Appeal on May 24, 2016. Defendant appealed only from the Order entered by the Court on April 27, 2016 (but not from the Temporary Order entered on December 21, 2015).

14. Defendant's appeal was dismissed by this Court on August 2, 2016.

15. During the pendency of the appeal, various motions were filed by Defendant with the

Court and with the North Carolina Court of Appeals in which Defendant made representations regarding the status of her neuropsychological examination. Defendant's representations, considered as a whole, caused the Court and Plaintiff's attorney to understand that Defendant had not completed the neuropsychological evaluation and did not intend to do so, either because she could not afford to do so or because she objected to doing so on privacy grounds.

16. At the August 4, 2016 hearing, Defendant's counsel revealed that Defendant had, in fact, submitted to a neuropsychological evaluation in April 2016 but Defendant would not authorize her attorney to release the report to Plaintiff's counsel. Defendant wished to submit the report directly to the Court without any opportunity for review by Plaintiff's counsel.

17. Defendant did not produce the neuropsychological evaluation report to Plaintiff's counsel as required by the April 27, 2016 Order.

18. The April 27, 2016 Order required Defendant to disclose the name and address of the provider who would be doing the evaluation to Plaintiff's counsel no later than May 15, 2016. Although Defendant did disclose the name and address of a provider to Plaintiff's counsel by May 16, 2016, the name and address disclosed to Plaintiff's counsel was not the provider who evaluated Defendant and wrote the report that Defendant

sought to disclose to the Court at the August 4, 2016 hearing.

19. When Defendant disclosed the name and address of an evaluator to Plaintiff's counsel on May 16, 2016, Defendant did not disclose that a neuropsychological evaluation already had been performed by another evaluator in April 2016.

20. The Court and Plaintiff's counsel were unaware that a neuropsychological evaluation had been done until the August 4, 2016 hearing.

21. The Court believes that Defendant was misleading to the Court and to Plaintiff's counsel from April 2016 through August 4, 2016 regarding the status of the evaluation and, consequently, the evidence available for and the issues to be decided at the August 4, 2016 hearing.

22. After the August 4, 2016 hearing but prior to entry of the original Permanent Custody Order on December 9, 2016, the Court received a document by mail that purported to be the Evaluation Report resulting from the April 2016 neuropsychological evaluation. This "Report" lists more than ten (10) tests or inventories that purportedly were performed on Defendant but no results or analysis of Defendant's performance on these tests/inventories were included in the document.

23. The Court provided a hard copy of the Evaluation Report to Jill Jackson, Plaintiff's attorney, via hand delivery. The Court instructed Ms. Jackson

to maintain the confidentiality of the Evaluation Report and prohibited Ms. Jackson from disclosing the Evaluation Report (or its contents) to Plaintiff or any third party. Ms. Jackson has complied with these instructions.

24. There was significant conflict between the parties during their marriage, which culminated in physical altercations between the parties on more than one occasion. Defendant testified at length about these altercations during the September 2015 trial and described herself as a victim of domestic violence, but Plaintiff introduced a recoding into evidence at the September 2015 in which Defendant can be heard laughing and attempting to goad Plaintiff into a physical altercation. There were two incidents in July of 2014 (shortly before the parties separated) during which Plaintiff attempted to retreat from Defendant during an argument by locking himself in another room but Defendant forced her way into the room. Furthermore, Defendant's medical records (as introduced into evidence by Defendant and/or made available to Plaintiff's counsel for cross-examination purposes at the September 2015 trial) are inconsistent with her testimony about the alleged altercations.

25. During the parties' marriage, Plaintiff established strong relationships with several of the parties' neighbors. Plaintiff continues to be friends with his former neighbors, who provide a support network for Plaintiff and the children. After the parties' separation, while the children resided

primarily with Defendant, H. had a safety plan to go to the neighbors if she needed any help.

26. Defendant did not have a good relationship with the parties' neighbors and she did not maintain friendships with others. The parties' neighbors have experienced bizarre conversations with Plaintiff, during which Plaintiff would claim, for example, that someone had fired a gun into the parties' house from outside or someone was moving things around in their backyard at night or that Plaintiff had given a valuable family heirloom to a neighbor. There was not evidence, other thana Defendant's statements, that these things had occurred.

27. The psychological evaluation of Defendant also supported the testimony of the neighbors, the Defendant makes statements at times that are outright bizarre and/or not grounded in reality.

a. For example, Defendant told Dr. Kuzszyn-Jones during her psychological evaluation that Plaintiff threw Defendant in September 2012 after a hockey game and then Defendant later woke up to find cotton candy all over the bed. There is no evidence that this incident ever occurred.

b. As further example, Defendant told Dr. Kuzszyn-Jones during her psychological evaluation that she believes Plaintiff was having an affair with a neighbor and that she had CPI security video of two

> people having intercourse in the yard at the marital residence (implying that it was Plaintiff and the neighbor), but no such evidence was introduced during any hearing in this matter. There is no evidence that Plaintiff conducted an affair with the neighbor (or anyone).

28. Defendant was obsessed with security during the parties' marriage. Plaintiff was not permitted to touch the home security pad or disable the security system.

29. Towards the end of the parties' marriage, Plaintiff found small cassette recorders that were hidden throughout the house. The cassettes contained hours of recordings of Defendant talking to herself.

30. From the date of separation through September 2015, while the children resided primarily with Defendant, there would be times when Defendant was unable to get herself and/or the children to appointments on time. For example, Defendant struggled to complete the psychological evaluation process with Dr. Kuzyszyn-Jones because she would forget appointment dates or times, she lost her keys while at the office, and she lsot her cellphone while at the office. As another example, the parties' daughter missed a chorus performance because Defendant got lost and did not arrive on time for the child to participate.

31. From the date of separation through September 2015, while the children resided primarily

with Defendant, there was a least one physical altercation between H. and Defendant. Defendant admitted during her testimony that H. is physically aggressive toward her and that Defendant sometimes uses corporal punishment for H.

32. On more than one occasion since the parties' separation, there have been struggles between Defendant and H. as Defendant attempted to gain access to H.'s bedroom and H. attempted to prevent her mother from getting in, resulting in damage to the door.

33. From the date of separation through September 2015, while the children resided primarily with Defendant, Defendant would sometimes bring strangers with her to visitation exchanges with Plaintiff. These people were not known to Plaintiff or the children, and at least one of these people behaved aggressively toward Plaintiff during an exchange. During the exchange, Defendant would remain in the vehicle while the stranger conducted the custodial exchange.

34. From September 2015 through August 4, 2016 hearing, while the children resided primarily with Plaintiff, Defendant's parents regularly would travel from Georgia to be present during Defendant's custodial times with the children.

35. In February of 2016, Defendant was trespassed from B.'s preschool due to her confrontational behavior with staff at the school. Plaintiff adjusted his work schedule so that he could

pick up B. and conduct the custodial exchange once Defendant was unable to pick up B. from school.

36. In the summer of 2016, the children lived primarily with Defendant as set out in the Temporary Order. During that period of time, H. became increasingly emotional and upset. H. texted her father frequently and often was distraught during phone calls with her father. On at least one occasion, H. called her father, extremely distraught, very late at night when she should have been asleep. Plaintiff worked with H.'s counselor to support H. during this time and arranged for H. to have text communication with her counselor as needed.

37. In the summer of 2016, Defendant moved H. out of her bedroom into a more central location in the house with limited privacy; and Defendant turned off the power to H.'s bedroom at least once. These actions were very upsetting to H.

38. Defendant testified at trial that H. calls Defendant names like "psycho" and stays in her room and is sad during her custodial time with Defendant. Defendant acknowledges that H. argued with her about staying primarily with Defendant for the summer.

39. According to Defendant's testimony, in the summer of 2016, H. claimed that Defendant's mother handled her roughly when H. did not do what her grandmother asked. Defendant heard but did not see this altercation.

40. At the September 2015 trial, Defendant testified that she was asked to stop bringing B. to a toddler class because of his behavior during the class; and Dr. Kzuzyszyn-Jones noted in Defendant's psychological evaluation report that Defendant had trouble managing B.'s behavior at her office. Defendant admitted during her testimony at the August 2016 hearing that B. is becoming more difficult for her to handle.

41. Defendant admitted that, at times, she calls her father to assist her by telephone with disciplining the children.

42. Defendant attributes her difficulty in parenting and disciplining the children to poor parenting by Plaintiff.

43. In the summer of 2016, Defendant removed B. from preschool, contrary to the school's recommendation for B.'s kindergarten readiness, and refused to allow him to attend preschool during her custodial time.

44. Defendant lacks any insight into her own behavior and the consequences of that behavior for the children. Defendant accepts no responsibility for, among other things, being trespassed from B.'s preschool, her inability to control B.'s behavior, physical altercations with H., her inappropriate attempts to impose "discipline" on H., allowing her mother (H.'s maternal grandmother) to engage in physical altercations with H., and H.'s obvious emotional distress during visitations with Defendant.

45. Defendant accepts no responsibility for her conduct in misleading this Court and Plaintiff's attorney regarding the status of the neuropsychological evaluation, as evidenced by her conduct at the August 2016 hearing.

46. Since entry of the Permanent Child Custody Order on December 9, 2016, this Court has issued a Preliminary Injunction (Gatekeeper Order) that prohibits Defendant from issuing subpoenas without prior approval by the Court.

47. Plaintiff continues to seek appropriate ongoing treatment with a licensed mental health provider for stress and anxiety, in compliance with the Temporary Order.

48. Plaintiff has remained steadily employed at all times since the parties' separation.

49. Plaintiff maintains a loving, stable home for the minor children and ensures that they get to school and to their appointments, including regular counseling appointments for H.

50. Plaintiff has continued to share information about the children with Defendant (such as appointments and illnesses) while they have been in his primary care.

51. At the conclusion of the August 4, 2016. hearing, the Court entered a Memorandum of Judgment that provided for the children to remain in Plaintiff's sole physical custody pending further orders of the Court.

52. It is not in the children's best interests to have visitation with Defendant. The children's best interests would be served by implementing the custody provisions set forth in the decretal paragraphs below.

Based upon the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW

1. This Court has personal and subject matter jurisdiction to enter this Order.

2. Pursuant to Rule 59, Defendant is entitled to entry of a new Order with additional findings of fact and conclusions of law as set out herein.

3. It is not in the children's best interests to have visitation with Defendant.

4. The children's best interests would be served by implementing the legal and physical custody provisions set forth in the decretal paragraphs below.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. Legal Custody, Plaintiff shall have sole legal custody of the minor children. In exercising sole legal custody, Plaintiff shall:

a. keep Defendant informed of any serious accident, illness, or injury affecting the children (with "serious" defined as an incident

requiring medical care and/or prescription medication and not day-to-day incidents that may require basic first aid and/or OTC medication) and of any major issues pertaining to the children's health, welfare, education and upbringing. Each party shall have equal access to records and information concerning the children, including but not limited to, medical, dental, health, mental health, school and educational records, and each party shall be entitled to communicate directly with any health care or educational professional rendering services to the children.

b. Plaintiff shall inform Defendant of any diagnosis, prognosis, and any other information received from medical and/or mental health provider(s) regarding the minor children. The children's health, medical, and other appointments shall be posted on Our Family Wizard at least 48 hours in advance (or as soon as possible once the appointment is scheduled, if not 48 hours in advance). Defendant is not authorized to attend appointments at which the children will be physically present except as consented to in writing in advance by Plaintiff.

2. Physical Custody, The minor children shall reside with Plaintiff. Plaintiff may permit custodial time between the children and Defendant within his sole discretion, taking into account the recommendations of H.'s counselor as to frequency,

location, duration, and any other restrictions deemed appropriate by the counselor for permitting visitation between H. and Plaintiff.

3. Defendant is entitled to speak with the children by telephone for a reasonable duration, taking into account the ages and wishes of the children, twice per week (but not before school/work on school/work days, except in the event of an emergency). The children will have open telephone access to both parties at all times. Both parents shall be available to the other party in case of emergency and shall promptly answer any calls or texts in case of emergency.

4. Each party shall communicate with the other party in a courteous and cordial manner. Except in the event of an emergency, all communications between the parties shall be conducted in writing via Our Family Wizard and shall be limited to conveying necessary information to the other party relating to the minor children.

5. Each party shall at all times encourage and foster in the children sincere respect and affection for both parents. Each party shall support and encourage the minor children's relationship with the other party. Neither party shall speak negatively or make disparaging remarks about the other party or the other party's family in the presence or hearing of the minor children.

6. Each party shall keep the other party informed at all times of his or her home address

(mailing address and physical address), home land line telephone number, mobile telephone number, primary work address, work telephone number, and email address.

7. Each party shall participate in regular, ongoing therapy/counseling with a licensed mental health provider of his/her choosing. Each party shall comply with all recommendations of his/her mental health provider, including the use of prescribed medications if deemed appropriate by that party's mental health provider. Each party shall sign whatever release or other paperwork is necessary to authorize his/her mental health provider to communicate freely with the mental health provider for the parties' daughter.

8. The parties' daughter, H., shall continue in regular ongoing counseling with Dr. Dittmer. Neither party may terminate H.'s counseling with Dr. Dittmer except as recommended by Dr. Dittmer or pursuant to subsequent order of this Court. The parties shall comply with all recommendations from H.'s provider. Except as required by law or as deemed appropriate by the provider (within his/her sole discretion), H.'s provider is not obligated to release information to either party regarding service to H. or any disclosures made by H. during the course of treatment. Neither party shall delay, disrupt, interfere with, or otherwise take any steps to negatively impact the counseling process and/or the therapeutic relationship between H. and her provider.

9. Any and all law enforcement agencies shall enforce the terms of this Order.

10. Defendant shall not remove either child from the State of North Carolina at any time without express written consent in advance from Plaintiff.

This the 3rd day of MARCH, 2017.

/s/_____
The Honorable Michael J. Denning
District Court Judge Presiding

APPENDIX F

N.C. Gen. Stat. § 50-13.5

§ 50-13.5. Procedure in actions for custody or support of minor children.

(a) Procedure. - The procedure in actions for custody and support of minor children shall be as in civil actions, except as provided in this section and in G.S. 50-19. In this G.S. 50-13.5 the words "custody and support" shall be deemed to include custody or support, or both.

(b) Type of Action. - An action brought under the provisions of this section may be maintained as follows:

(1) As a civil action.

(2) Repealed by Session Laws 1979, c. 110, s. 12.

(3) Joined with an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(4) As a cross action in an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(5) By motion in the cause in an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(6) Upon the court's own motion in an action for annulment, or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(7) In any of the foregoing the judge may issue an order requiring that the body of the minor child be brought before him.

(c) Jurisdiction in Actions or Proceedings for Child Support and Child Custody. -

(1) The jurisdiction of the courts of this State to enter orders providing for the support of a minor child shall be as in actions or proceedings for the payment of money or the transfer of property.

(2) The courts of this State shall have jurisdiction to enter orders providing for the custody of a minor child under the provisions of G.S. 50A-201, 50A-202, and 50A-204.

(3) to (6) Repealed by Session Laws 1979, c. 110, s. 12.

(d) Service of Process; Notice; Interlocutory Orders. -

(1) Service of process in civil actions for the custody of minor children shall be as in other civil actions. Motions for support of a minor child in a pending action may be made on 10 days notice to the other parties and compliance with G.S. 50-13.5(e). Motions for custody of a minor child in a pending action may be made on 10 days notice to the other parties and after compliance with G.S. 50A-205.

(2) If the circumstances of the case render it appropriate, upon gaining jurisdiction of the minor child the court may enter orders for the temporary custody and support of the child, pending the service of process or notice as herein provided.

(3) A temporary order for custody which changes the living arrangements of a child or changes custody shall not be entered ex parte and prior to service of

process or notice, unless the court finds that the child is exposed to a substantial risk of bodily injury or sexual abuse or that there is a substantial risk that the child may be abducted or removed from the State of North Carolina for the purpose of evading the jurisdiction of North Carolina courts. A temporary custody order that requires a law enforcement officer to take physical custody of a minor child shall be accompanied by a warrant to take physical custody of a minor child as set forth in G.S. 50A-311.

(e) Notice to Additional Persons in Support Actions and Proceedings; Intervention. -

(1) The parents of the minor child whose addresses are reasonably ascertainable; any person, agency, organization or institution having actual care, control, or custody of a minor child; and any person, agency, organization or institution required by court order to provide for the support of a minor child, either in whole or in part, not named as parties and served with process in an action or proceeding for the support of such child, shall be given notice by the party raising the issue of support.

(2) The notice herein required shall be in the manner provided by the Rules of Civil Procedure for the service of notices in actions. Such notice shall advise the person to be notified of the name of the child, the names of the parties to the action or proceeding, the court in which the action or proceeding was instituted, and the date thereof.

(3) In the discretion of the court, failure of such service of notice shall not affect the validity of any order or judgment entered in such action or proceeding.

(4) Any person required to be given notice as herein provided may intervene in an action or proceeding for support of a minor child by filing in apt time notice of appearance or other appropriate pleadings.

(f) Venue. - An action or proceeding in the courts of this State for custody and support of a minor child may be maintained in the county where the child resides or is physically present or in a county where a parent resides, except as hereinafter provided. If an action for annulment, for divorce, either absolute or from bed and board, or for alimony without divorce has been previously instituted in this State, until there has been a final judgment in such case, any action or proceeding for custody and support of the minor children of the marriage shall be joined with such action or be by motion in the cause in such action. If an action or proceeding for the custody and support of a minor child has been instituted and an action for annulment or for divorce, either absolute or from bed and board, or for alimony without divorce is subsequently instituted in the same or another county, the court having jurisdiction of the prior action or proceeding may, in its discretion direct that the action or proceeding for custody and support of a minor child be consolidated with such subsequent action, and in the event consolidation is ordered, shall determine in which court such consolidated action or proceeding shall be heard.

(g) Custody and Support Irrespective of Parents' Rights Inter Partes. - Orders for custody and support of minor children may be entered when the matter is before the court as provided by this section,

irrespective of the rights of the wife and the husband as between themselves in an action for annulment or an action for divorce, either absolute or from bed and board, or an action for alimony without divorce.

(h) Court Having Jurisdiction. - When a district court having jurisdiction of the matter shall have been established, actions or proceedings for custody and support of minor children shall be heard without a jury by the judge of such district court, and may be heard at any time.

(i) District Court; Denial of Parental Visitation Right; Written Finding of Fact. - In any case in which an award of child custody is made in a district court, the trial judge, prior to denying a parent the right of reasonable visitation, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child or that such visitation rights are not in the best interest of the child.

(j) Custody and Visitation Rights of Grandparents. - In any action in which the custody of a minor child has been determined, upon a motion in the cause and a showing of changed circumstances pursuant to G.S. 50-13.7, the grandparents of the child are entitled to such custody or visitation rights as the court, in its discretion, deems appropriate. As used in this subsection, "grandparent" includes a biological grandparent of a child adopted by a stepparent or a relative of the child where a substantial relationship exists between the grandparent and the child. Under no circumstances shall a biological grandparent of a child adopted by adoptive parents, neither of whom is related to the

child and where parental rights of both biological parents have been terminated, be entitled to visitation rights.

APPENDIX G

Listing of States Applying the Judicial Best Interests Rule

1. Alaska

   "In summary, the record shows that the superior court weighed the extensive testimony of many witnesses and ultimately found, based on all the evidence, that the children's best interests would be served by awarding Bahma-Ebertz sole custody of Alicia and Mitchell and shared custody of Zackery." *Ebertz v. Ebertz*, 113 P.3d 643, 651 (Alaska 2005)

2. Connecticut

   "[T]he legal rights of no one, even a parent, may militate against the court's determination of the best interests of the child." Sullivan v. Bonafonte, 172 Conn. 612, 614 (1977).

3. Delaware

   "The interests in the child of the father and mother are never of paramount importance in the decision with respect to custody or visitation." *In Re One Minor Child*, 295 A. 2d 727, 728 (Del, 1972).

4. Iowa

   "[W]e hold that the acknowledged father of an illegitimate child has a right to visit the child upon his showing that it would be in the best interests of the child." *Gay*

*v. Cairn*s, 298 NW2d 313, 315 (Iowa 1980).

5. Maine

> "[A]bsent a showing that the justice gave undue weight to the lack of a marriage relationship between the mother and father of the children in his balancing assessment of the children's best interests, the fact that the justice gave it some consideration does not constitute legal error." *Dustin v. Belanger*, 429 A. 2d 212, 213 (Me. 1981).

6. Massachusetts

> "The plaintiff has a right to visitation with the children if he is their father and if visitation is in their best interests." *Normand v. Barkei*, 385 Mass. 851, 852, 434 N.E.2d 631, 632 (1982).

7. Michigan

> "[W]hen determining visitation rights, as with child custody matters, the best interests of the child involved are of paramount importance." *Cooper v. Cooper*, 93 Mich. App. 220, 228, 285 N.W.2d 819, 822 (1979).

8. Nebraska

> "[V]irtually all states which have considered the issue have granted the father a right to reasonable visitation if it is in the best interests of the child." *Cox v. Hendricks*, 208 Neb. 23, 28, 302 N.W.2d 35, 38 (1981).

9. North Carolina

> "[T]he protected right is irrelevant in a custody proceeding between two natural parents." *Routten v. Routten*, 372 N.C. 571, 577, 843 S.E.2d 154, 159 (2020).

10. South Carolina

> "The privilege of visitation must yield to the good of the child and may be denied or limited where the best interests of the child will be served thereby." *Porter v. Porter*, 246 S.C. 332, 340, 143 S.E.2d 619, 624 (1965).

11. Virginia

> "In any child custody decision, the lodestar for the court is the best interest of the child, and the due process rights of the parents must be tempered by this guiding principle." *Haase v. Haase*, 20 Va. App. 671, 681, 460 S.E.2d 585, 589 (1995) (citations omitted).

12. Washington

> "Although the privilege of visitation enjoyed by a parent is an important one, it is not of itself an absolute right, nor is it the paramount consideration; it must always yield to what is best for the welfare of the child." *Borenback v. Borenback*, 34 Wash.2d 172, 178, 208 P.2d 635, 638 (1949).

APPENDIX H

Listing of States Applying the Actual Harm Rule

1. Alabama

   "[A] father has a legal right to reasonable access to his bastard child, where he contributes to its support, and there is no showing that such right would be detrimental to the child's best interests." *Bagwell v. Powell*, 99 So. 2d 195, 197 (Ala. 1957).

2. Arkansas

   "[B]efore a trial court restricts the non-custodial parent's visitation, it must make specific factual findings [of harm] based on sound evidence in the record." *Taylor v. Taylor*, 353 Ark. 69, 83, 110 S.W.3d 731, 739 (2003).

3. Illinois

   "[T]he General Assembly has established a presumption that it is in the best interests of the child to have reasonable visitation with a noncustodial parent, and the burden is on the custodial parent to prove that visitation would seriously endanger the child." *Parentage of J.W. v. Will*s, 2013 IL 114817 ¶ 43, 990 N.E.2d 698, 707-708.

4. Kentucky

   "[U[nder KRS 403.320(3), a court can modify timesharing if it is in the best

interests of the child, but it can only order a 'less than reasonable' timesharing arrangement if the child's health is seriously endangered." *Layman v. Bohanon*, 599 S.W.3d 423, 429 (Ky. 2020).

5. Maryland
    a. "Visitation rights, however, are not to be denied even to an errant parent unless the best interests of the child would be endangered by such contact." *Boswell v. Boswell*, 352 Md. 204, 226, 721 A.2d 662, 670 (1998) (quoting *Roberts v. Roberts*, 35 Md.App. 497, 507, 371 A.2d 689, 694 (1977)).
6. Minnesota

    "[V]isitation is to be regarded as a parental right essential to the continuance and maintenance of a child-to-parent relationship between the child and noncustodial parent, and that a denial of this right shall be based on persuasive evidence that visitation will not serve the best interests of the child." *Griffin v. Van Griffin*, 267 N.W.2d 733, 735 (Minn. 1978).
7. Mississippi

    "Absent any evidence that visitation with Michael and his lover would be harmful to the children, the chancellor erred and abused his discretion in placing such a restriction on Michael's

visitation." *Dunn v. Dunn*, 609 So. 2d 1277, 1286 (Miss. 1992).

8. Missouri

"[T]he court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger the child's physical health or impair his emotional development" *Turley v. Turley*, 5 S.W.3d 162, 164 (Mo. 1999) (quoting Mo. Rev. Stat. § 452.400.2 (2019)).

9. Montana

"[T]he court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger seriously the child's physical, mental, moral, or emotional health." *In re Marriage of Robbins*, 219 Mont. 130, 135, 711 P. 2d 1347, 1350 (1985) (quoting Mont. Code § 40-4-217(3) (1984).

10. Nevada

"[T]he decree or order must tie the child's best interest, as informed by specific, relevant findings respecting the NRS 125.480(4) and any other relevant factors, to the custody determination made." *Davis v. Ewalefo*, 131 Nev. 445, 451, 352 P.3d 1139, 1143 (2015).

11. New Mexico

"[O]nly when visitation by the noncustodial parent "interferes with the child's emotional well-being or significantly disrupts the child's day to day environment, should it be limited."

Lopez v. Lopez, 1981-NMSC-138, ¶ 9, 97 N.M. 332, 335, 639 P.2d 1186, 1189.

12. North Dakota

    a. "[V]isitation between a non-custodial parent and a child is presumed to be in the child's best interests and that it is not merely a privilege of the non-custodial parent, but a right of the child… Thus, a court should only withhold visitation when it is likely to endanger the child's physical or emotional health." *Hendrickson v. Hendrickson*, 2000 N.D. 1, ¶ 21, 603 NW 2d 896, 903 (2000).

13. Oregon

    "[O]rdinarily, a parent's privilege of reasonable access may be regarded as a right, and will not be forfeited unless the welfare of the child will be seriously affected by its exercise." *Kellog v. Kellog*, 187 Or. 617, 622, 213 P.2d 172, 175 (1949).

14. Rhode Island

    "Visitation rights are to be strongly favored and will be denied only in an extreme situation in which the children's physical, mental, or moral health would be endangered by contact with the parent in question." *Africano v. Castelli*, 837 A. 2d 721, 728 (R.I. 2003).

15. South Dakota

    "[W]here the evidence establishes that exercise of visitation will be harmful to the welfare of the children; in this event,

the right of the noncustodial parent to visit with his children can be limited, or, under extreme circumstances, prohibited altogether." *Pieper v. Pieper*, 2013 S.D. 98, ¶ 15, 841 N.W.2d 781, 786 (quoting *Roberts v. Roberts*, 22 Ohio App.3d 127, 489 N.E.2d 1067, 1069 (1985)).

16. Tennessee

"[T]he right of visitation ... may be limited, or eliminated, if there is definite evidence that to permit ... the right would jeopardize the child, in either a physical or moral sense." *Suttles v. Suttles*, 748 S.W.2d 427, 429 (Tenn. 1988).

17. Vermont

"Absent a showing by clear and convincing evidence that any visitation would be detrimental to daughter's best interests [] the court erred by halting all contact between father and daughter." *DeSantis v. Pegues*, 2011 VT 114, ¶ 35, 190 Vt. 457, 469, 35 A.3d 152, 162 (2011).

APPENDIX I

Listing of States Applying the Unfitness Rule

1. The District of Columbia

   "When custody of children has been awarded to one parent, the parent deprived of their custody has the right of visitation with the children and ought not to be denied that right unless by his conduct he has forfeited his right, or unless the exercise of the right would injuriously affect the welfare of the children." *Jackson v. Jackson*, 461 A.2d 459, 460 (D.C. 1983) (quoting *Surrey v. Surrey,* 144 A.2d 421, 423 (D.C.Mun. App. 1958)).

2. Georgia

   "The parent having the right of custody and control of a minor child has the right to make these determinations, and a court has no authority to interfere unless it first appears that the parent has forfeited his rights in a manner recognized by law." *Davis v. Davis*, 212 Ga. 217, 221, 91 S.E.2d 487, 490 (1956).

3. Idaho

   "It is only under extraordinary circumstances that a parent should be denied the right of visitations, even though the parent is guilty of marital misconduct." *Wilson v. Wilson,* 73 Idaho 326, 328, 252 P.2d 197, 198 (1953).

4. Indiana

> "Indiana has long recognized that the right of parents to visit their children is a precious privilege that should be enjoyed by noncustodial parents, and thus a noncustodial parent is "generally entitled to reasonable visitation rights." *Perkinson v. Perkinson*, 989 N.E.2d 758, 762 (Ind. 2013) (citing *Duncan v. Duncan,* 843 N.E.2d 966, 969 (Ind.Ct. App.2006) and Ind.Code § 31-17-4-1 (2012)).

5. Kansas

> "[A] fit and proper parent is entitled to have access to and at reasonable times visit and be visited by a child who is in the custody of the other parent." *State ex rel. Wingard v. Sill*, 223 Kan. 661, 665, 576 P.2d 620, 624 (1978).

6. Louisiana

> "The presumption in favor of visitation can only be overcome by conclusive evidence that the parent has forfeited his right of access by his conduct or that exercise of the right would injuriously affect the child's welfare." *Maxwell v. LeBlanc,* 434 So. 2d 375, 379 (La. 1983).

7. New Hampshire

> "To deny all visitation rights to the child and the plaintiff, as the mother requests, is fair to neither the child nor the father, unless there are unusual circumstances, the existence of which is a matter for

> determination by the trial court. Absent such circumstances, the right of the child and the father to a continuing relationship should not depend upon legislative enactment. It is a right that has its foundation among those 'natural, essential, and inherent rights' that are recognized in N.H. Const., pt. I, art. 2." *Locke v. Ladd*, 119 N.H. 136, 140, 399 A.2d 962, 965 (1979).

8. New York

> "[T]he rebuttable presumption in favor of visitation applies when the parent seeking visitation is incarcerated. A parent who is in prison does not forfeit his or her visitation rights by being incarcerated." *In re Granger v. Misercola*, 21 N.Y.3d 86, 91, 990 N.E.2d 110 (2013).

9. Oklahoma

> "A parent possesses certain natural rights with respect to his child whose custody is given to the other parent. The right to visit the child is one. This natural right should not be denied him unless the evidence conclusively shows that his conduct is of such nature that he has forfeited the right of access to the child." *In Re McMenamin*, 310 P 2d 381, 383 (Okla. 1957).

10. Utah

> "The general policy of the law is that a parent will be denied visitation rights only under extraordinary circumstances.

> This Court is reluctant to deny all visitation rights, unless the child's welfare is jeopardized thereby." *Slade v. Dennis*, 594 P.2d 898, 901 (Utah 1979).

11. West Virginia

> "The right of a parent to have the custody of his or her child is founded on natural law and, while not absolute, such right will not be taken away unless the parent has committed an act or is guilty of an omission which proves his or her unfitness." *Hammack v. Wise*, 158 W. Va. 343, 348, 211 S.E.2d 118, 121 (1975).