IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-403

Filed: 6 March 2018

Watauga County, No. 16-CVD-209

JAMES H. MCCALL, IV and SHANNON MCCALL, Plaintiffs,

v.

RONALD LEE MILLION, JR. and MARISSA HAYLER MILLION, Defendants.

Appeal by Defendants from order entered 30 December 2016 by Judge F. Warren Hughes in District Court, Watauga County. Heard in the Court of Appeals 23 October 2017.

Rivenbark Attorneys at Law, PC, by Nancy M. Rivenbark and Andrew C. Brooks, for Plaintiffs-Appellees.

Miller & Johnson, PLLC, by Nathan A. Miller, for Defendants-Appellants.

McGEE, Chief Judge.

Ronald Lee Million, Jr. ("Mr. Million") married Kelsie Million ("Kelsie"), the daughter of Shannon McCall ("Plaintiff") on 10 September 2010. Their son ("the child") was born on 26 March 2011. At that time, Mr. Million was stationed in Virginia as a member of the United States Navy. Shortly before Mr. Million was discharged from the Navy in August or September 2012, Kelsie and the child moved

to Banner Elk, North Carolina, where they lived with Plaintiff and Plaintiff's husband[1] for about a month. When Mr. Million joined Kelsie and the child in Banner Elk, they moved into an apartment attached to Plaintiff's home. According to Plaintiff, "[t]hey were having problems with their marriage[,]" and a few months later, Mr. Million moved into a townhome in Banner Elk with his brother. Kelsie and the child moved back into Plaintiff's home. Early in 2013, Kelsie and the child moved into the townhome where Mr. Million was living. Kelsie died on 15 February 2013.

Mr. Million and the child lived in Plaintiff's home in Banner Elk from approximately March 2013 through November 2013, when Plaintiff and her husband purchased a home in Lenoir. Mr. Million and the child moved with Plaintiff, Plaintiff's husband, and their young son to Lenoir and lived with them until late spring 2014. Plaintiff testified that, during the fifteen months Mr. Million and the child lived in her home after Kelsie died, they "all got along" and had a "wonderful" relationship. She testified:

> We helped each other. . . . [Mr. Million] owned his own landscaping company. If he was working late, I would do whatever I needed to do to help with [the child]. I would bathe [the child], feed him, take him to daycare, pick him up . . . from daycare, read him bedtime stories. That was something that was shared. [Mr. Million is] a wonderful father to [the child], but it was something that [we] shared.

[1] Plaintiff's husband, James H. McCall, IV, was dismissed as a party to this action by the trial court for lack of standing.

Plaintiff said she and Mr. Million shared a number of parental responsibilities, including taking the child to medical appointments, cooking meals, buying clothes for the child, and potty-training. According to Plaintiff, the child and Plaintiff's biological son, who is approximately ten months younger than the child, were "like brothers."

In spring 2014, Mr. Million accepted a job in Georgia. Mr. Million moved to Georgia and the child remained in Plaintiff's care "for a few weeks, and then [Plaintiff and Plaintiff's husband] took [the child] to Georgia . . . when [Mr. Million] had everything settled." Mr. Million and the child lived in Georgia for a few months before moving to Boone, North Carolina, to live with Mr. Million's parents. Plaintiff testified her relationship with Mr. Million "was still okay . . . until about October [2014] when [Mr. Million] [] told [Plaintiff] that he didn't want to talk to [her] anymore, . . . [and] cut off pretty much all communication with [Plaintiff]." According to Plaintiff, Mr. Million "just would never return any of [her] messages." Mr. Million began primarily communicating with Plaintiff's husband, and the child continued visiting Plaintiff's home about once a month.

Mr. Million testified he increasingly felt Plaintiff and her husband were "undermining [his] parental [choices]" during the child's visits to Plaintiff's home. Mr. Million began limiting Plaintiff's visitation with the child, and testified he eventually asked Plaintiff to "give [him some] space . . . to be able to process

everything to where we continued to heal, to where we could maybe mend the relationship, and [Plaintiff] did not respect that request." Plaintiff last saw the child in March 2015, shortly before the child's fourth birthday. Plaintiff subsequently sent the child cards, letters, and other packages, but they were refused and returned to Plaintiff.

Mr. Million married Marissa Hayler Million ("Marissa") (collectively, "Defendants") in January 2016, and Marissa legally adopted the child on 21 March 2016. Defendants moved to Georgia with the child in May 2016. Plaintiff filed a complaint on 21 April 2016 seeking visitation rights, as the child's biological grandparent, pursuant to N.C. Gen. Stat. § 50-13.2A. Defendants filed a motion to dismiss Plaintiff's complaint on 27 June 2016. The motion to dismiss was denied by order entered 25 August 2016.

The trial court held a hearing on 30 November 2016 at which Plaintiff and Defendants testified. Defendants moved for "a directed verdict at the close of [the] evidence in regards to the failure of [] [P]laintiff to meet [her] burden [of proof]." Defendants' counsel indicated Defendants were "not asking [the trial court] to invalidate the entire [relevant grandparent visitation] statute, [N.C.G.S. § 50-13.2A][,] but [were contending that] as applied in this case, [Plaintiff] [] failed to meet [her] constitutional burden[.]" Defendants argued Plaintiff was required, but failed, to demonstrate that Defendants were unfit parents or had otherwise acted in a

manner inconsistent with their constitutionally protected status as parents. Defendants' counsel stated the following during closing arguments:

> Your Honor, I would like to incorporate my earlier argument and just state the case now before us . . . is between a natural parent and a third party who is not a natural parent. . . . [T]he Supreme Court of North Carolina [has] held that natural parents have a constitutionally protected interest in the companionship, custody, [and] control of their children. [Our Supreme Court has] stated that this interest must prevail in a custody dispute with a non-parent, absent a showing of unfitness or neglect. That is North Carolina law. . . . If Your Honor chooses that that is not the [applicable] standard and decides . . . that it is the standard of [the] best interest of the child, [Defendants contend] it is in the best interest of this child at this point [] to have [Defendants'] wishes followed and not have a relationship at this [time] with [Plaintiff]. . . . [Defendants] should have a constitutional right and should be given deference to what they believe [is in] the best interests [of the child] when they are fit and proper [parents]. Again, no evidence has been set forth that . . . [Defendants are] unfit parents. . . . We understand this is a temporary hearing, and a full-blown hearing will go forth, but I think it would be remiss of this [c]ourt to grant temporary visitation when this [case] has constitutional implications."

In response, Plaintiff's counsel noted Plaintiff was seeking visitation, not custody, and further contended:

> There's no question that there existed a familial relationship amongst all parties[.] . . . Mr. Million has the right to carry on with his life. . . . But that should not extract this grandchild from his grandparents. . . . The unique part about this case is we've got two little boys that have a very close relationship. We've got a grandmother who assisted Mr. Million in rearing [the child] because . . . they needed to be there to carry on with their lives. It's not

> . . . in [the child's] best interest to sever[] his tie with his uncle, who is younger than he. It is not right that [the child] not be allowed to have contact with his grandma. . . . [Plaintiff] needs to be a part of [the] child's life. He needs her to be in his life. And we need these two little boys together. It's that simple, Judge. There's got to be some reconciliation in this family and there's got to be some visitation. . . . To refuse all of [Plaintiff's] cards and letters, Judge, is wrong. It's just wrong. This relationship needs to be mended. . . . This should be . . . an unnecessary thing, but we're here because [Defendants] have chosen to just cut this tie. And [Plaintiff is] here imploring the [c]ourt to help [her] get it going again.

The trial court indicated it would "take the matter under advisement and [] make a ruling [] in the next couple of weeks."

In an order filed on 30 December 2016 ("the order"), the trial court awarded Plaintiff visitation with the child, based on its findings that

> Plaintiff . . . is a biological grandparent [of the child] as defined by N.C.G.S. § 50-13.2A and had a substantial relationship with the [] child prior to [] [Mr. Million] ceasing all contact with the [] child[.] [] Plaintiff clearly assisted [] [Mr. Million] in raising the [] child and [Mr. Million's] actions in denying [] Plaintiff[] . . . visitation have been not only mean-spirited but clearly were not in the best interest of the [] child. [Mr. Million's] decision to cease all communication and contact with [] Plaintiff considering the prior history of [] Plaintiff and the [] child is not in the best interest of the [] child and N.C.G.S. § 50-13.2A requires this [c]ourt to enter an [o]rder granting [] Plaintiff visitation with the [] child.

The decretal portion of the order provided that it was "temporary and non-prejudicial to any party but [] nonetheless enforceable with the contempt powers of the [trial c]ourt." Defendants appeal.[2]

II. Appealability of Trial Court Order

We first consider whether the trial court's order was appealable. "An interlocutory order is generally not appealable." *Taylor v. Brinkman*, 108 N.C. App. 767, 769, 425 S.E.2d 429, 431 (1993) (citation omitted). "An order is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the rights of all the parties involved in the controversy." *Flitt v. Flitt*, 149 N.C. App. 475, 477, 561 S.E.2d 511, 513 (2002). "This Court has addressed the question [of] whether a custody order is temporary or permanent when determining if an appeal from the order is interlocutory. Generally, a party is not entitled to appeal from a temporary custody order." *Smith v. Barbour*, 195 N.C. App. 244, 249-50, 671 S.E.2d 578, 583 (2009) (citation omitted); *see also Simmons v. Arriola*, 160 N.C. App. 671, 674, 586 S.E.2d 809, 811 (2003) ("The same standards that apply to changes in custody

[2] Defendants filed notice of appeal to this Court on 11 January 2017. The same day, they filed a motion to stay the trial court's order pending disposition of their appeal. Following a hearing, the trial court entered an order on 19 January 2017 concluding it lacked jurisdiction to enter a stay and denying Defendants' motion. Defendants petitioned this Court for writ of *supersedeas* on 10 February 2017 to stay execution of the trial court's order. This Court denied Defendants' petition by ordered entered 2 March 2017.

determinations are also applied to changes in visitation determinations." (citations omitted)).

The order at issue in the present case was explicitly captioned "TEMPORARY ORDER (Non-Prejudicial)." However, "the trial court's designation of an order as 'temporary' or 'permanent' is not binding on an appellate court. Instead, whether an order is temporary or permanent in nature is a question of law, reviewed on appeal *de novo*." *Smith*, 195 N.C. App. at 249, 671 S.E.2d at 582 (citations omitted) (emphasis added).

This Court has held that

> [a] permanent custody order establishes a party's present right to custody of a child and that party's right to retain custody indefinitely[.] In contrast, temporary custody orders establish a party's right to custody of a child pending the resolution of a claim for permanent custody – that is, pending the issuance of a permanent custody order.

File v. File, 195 N.C. App. 562, 567-68, 673 S.E.2d 405, 409 (2009). Moreover, "[a]n order is temporary if either (1) it is entered without prejudice to either party[;] (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues." *Peters v. Pennington*, 210 N.C. App. 1, 13-14, 707 S.E.2d 724, 734 (2011) (citation and quotation marks omitted) (first alteration added).

In the present case, although the trial court stated its order was temporary and non-prejudicial to any party, the order "failed to set forth a specific date on which

to reconvene and review" the award of visitation to Plaintiff. *See Maxwell v. Maxwell*, 212 N.C. App. 614, 618, 713 S.E.2d 489, 492-93 (2011); *see also Cox v. Cox*, 133 N.C. App. 221, 233, 515 S.E.2d 61, 69 (1999) ("A clear and specific reconvening time must be set out in the order and the time interval between the two hearings must be reasonably brief." (citation omitted)). Consequently, this Court would ordinarily "view the trial court's order as a permanent one and appropriate for immediate appellate review." *Maxwell*, 212 N.C. App. at 618, 713 S.E.2d at 493; *see also Brewer v. Brewer*, 139 N.C. App. 222, 228, 533 S.E.2d 541, 546 (2000) (holding that "an appeal from a temporary custody order is premature *only if* the trial court: (1) stated a clear and specific reconvening time in the order; and (2) the time interval between the two hearings was reasonably brief." (citation omitted) (emphasis added)). During oral arguments before this Court, however, Defendants "[did] not contest the interlocutory nature of their appeal." *See McIntyre v. McIntyre*, 175 N.C. App. 558, 562, 623 S.E.2d 828, 831 (2006).

> An interlocutory order may be immediately appealed in only two circumstances: (1) when the trial court, pursuant to N.C.R. Civ. P. 54(b), enters a final judgment as to one or more but fewer than all of the claims or parties and certifies that there is no just reason to delay the appeal; or (2) when the order deprives the appellant of a substantial right that would be lost absent appellate review prior to a final determination on the merits.

High Rock Lake Partners, LLC v. N.C. Dep't of Transp., 204 N.C. App. 55, 61, 693 S.E.2d 361, 366 (2010) (citation omitted). In the present case, Defendants assert that,

even assuming the trial court's order was interlocutory, it was still appealable because it affected a substantial right of Defendants. *See* N.C. Gen. Stat. § 1-277(a) (2015) (providing in part that "[a]n appeal may be taken from every judicial order . . . which affects a substantial right claimed in any action or proceeding[.]"). According to Defendants, the order in this case violated their "fundamental liberty interest in the care, custody, and control of the [] child[,] . . . a right afforded to parents by the United States Constitution under the due process clause of the [Fourteenth] Amendment." Plaintiff acknowledges "the fundamental nature of the rights afforded to parents," but submits that, in North Carolina, such rights are only sufficiently "substantial" to support an interlocutory appeal "when the physical well-being of the child is at stake." We find Plaintiff's argument unpersuasive and conclude the trial court's award of visitation to Plaintiff affected a substantial right of Defendants.

"Whether a substantial right is affected is determined on a case-by-case basis." *McCallum v. N.C. Coop. Extension Serv.*, 142 N.C. App. 48, 50, 542 S.E.2d 227, 231 (2001) (citation omitted). Plaintiff cites *McConnell v. McConnell*, 151 N.C. App. 622, 566 S.E.2d 801 (2002), as holding that, in general, a custody order will only be found to affect a substantial right where "the physical well[-]being of the child is at issue[.]" *See id.* at 625, 566 S.E.2d at 804. Plaintiff's reading of *McConnell* is overbroad. This Court did not hold in *McConnell* that a custody order affects a substantial right *only*

if the well-being of the child is threatened. On the contrary, *McConnell* illustrates the fact-driven nature of the inquiry. This Court stated in *McConnell*:

> Our Courts have not addressed whether a permanent custody order affects a substantial right. However, *the order in this case* involve[d] the removal of the child from a home where the [trial] court specifically concluded "that there [was] a direct threat that the child [would be] subject to sexual molestation if left in the mother's home." Where[,] *as here*, the physical well[-]being of the child is at issue, we conclude that a substantial right is affected that would be lost or prejudiced unless immediate appeal is allowed.

Id. (emphases added).

Plaintiff also cites *Hausle v. Hausle*, 226 N.C. App. 241, 739 S.E.2d 203 (2013), in which this Court distinguished *McConnell* and concluded a child custody order did not affect a substantial right. In *Hausle*, after observing that "[a] review of North Carolina case law reveal[ed] that this Court ha[d] never held that a child custody order affects a substantial right except for when the physical well-being of a child is at stake[,]" *id.* at 244, 739 S.E.2d at 206, and noting the specific threat of harm identified in *McConnell*, this Court held:

> In the present case, plaintiff alleges the well-being of the children is at stake because of a lack of educational opportunities available to them and dental issues that they have suffered. Plaintiff further asserts that these issues are urgent because the [children] are already in high school and there is limited time to remedy the error. Upon review of the record, we find that the circumstances alleged by plaintiff to warrant immediate appellate review fall well short of the level of physical well-being at stake

> contemplated in *McConnell*. Therefore, we hold plaintiff has failed to show that a substantial right has been affected.

Id. at 245, 739 S.E.2d at 206. As with *McConnell*, nothing in *Hausle* suggests that the *only way* to demonstrate a custody order affects a substantial right is to show that a certain level of risk to a child's physical well-being exists. In *Hausle*, the threat of harm to the physical well-being of the parties' children was *the specific basis alleged* in support of the plaintiff's argument that the order at issue affected a substantial right. Thus, this Court's application of *McConnell* to the facts presented in *Hausle* was both logical and straightforward. Perhaps most importantly, and unlike the present case, neither *Hausle* nor *McConnell* involved nonparent, third-party visitation. We disagree with Plaintiff that *McConnell* and *Hausle* "explicitly settled the issue of how to determine whether [the fundamental] right [asserted by Defendants] is sufficient to allow an interlocutory appeal."

Defendants, as the appellants, bear the burden of establishing that a substantial right will be affected unless they are allowed an immediate appeal from the trial court's order, *see McConnell*, 151 N.C. App. at 625, 566 S.E.2d at 804, and further, "that deprivation of that right, if not corrected before appeal from final judgment, will potentially injure [them]." *See File*, 195 N.C. App. at 568, 673 S.E.2d at 410 (citation omitted); *see also Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000) ("A substantial right is one which will clearly be lost or

irremediably adversely affected if the order is not reviewable before final judgment." (citation and internal quotation marks omitted)). Defendants "must present more than a bare assertion that the order affects a substantial right; they must demonstrate *why* the order affects a substantial right[.]" *Hanesbrands Inc. v. Fowler*, 369 N.C. 216, 219, 794 S.E.2d 497, 499 (2016) (citation and quotation marks omitted) (emphasis in original). Our Supreme Court held in *Hanesbrands*:

> We have determined that a substantial right is a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which [one] is entitled to have preserved and protected by law: a material right. Recognizing that the substantial right test for appealability of interlocutory orders is more easily stated than applied, we have determined that it is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.

Id. at 219, 794 S.E.2d at 499-500 (citations and internal quotation marks omitted) (alteration in original).

Defendants, citing *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997), and *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994), assert that the trial court's order awarding visitation rights to Plaintiff implicated Defendants' constitutionally protected interest in the custody, care, and control of the child. We agree. In *Petersen*, our Supreme Court explicitly recognized "the strength of the right of natural parents as against others[.]" 337 N.C. at 403, 445 S.E.2d at 904. *Petersen* also adopted

precedent of this Court holding that "parents' paramount right to custody *includes the right to control their children's associations*[.]" *Id.* at 403, 445 S.E.2d at 904-05 (emphasis added) (quoting *Acker v. Barnes*, 33 N.C. App. 750, 752, 236 S.E.2d 715, 716 (1977) ("So long as parents retain lawful custody of their minor children, they retain the prerogative to determine with whom their children shall associate.")). Our Supreme Court reiterated these principles in *Owenby v. Young*, 357 N.C. 142, 579 S.E.2d 264 (2003), in which it

> note[d] that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children. This parental liberty interest is perhaps the oldest of the fundamental liberty interests the United States Supreme Court has recognized. This interest includes the right of parents to establish a home and to direct the upbringing and education of their children. Indeed, the protection of the family unit is guaranteed not only by the Due Process Clause, but also by the Equal Protection Clause of the Fourteenth Amendment and possibly by the Ninth Amendment. . . . The protected liberty interest . . . is based on a presumption that [parents] will act in the best interest of the child.

Id. at 144-45, 579 S.E.2d at 266 (citations and internal quotation marks omitted); *see also Troxel v. Granville*, 530 U.S. 57, 147 L. Ed. 2d 49 (2000).

In *In re Adoption of Shuler*, 162 N.C. App. 328, 590 S.E.2d 458 (2004), the biological father of a minor child moved to dismiss a third-party petition to adopt the child, and the trial court denied his motion on the basis that the father had failed to acknowledge paternity before the petition was filed. This Court held that, although

the father's appeal was interlocutory, the trial court's order affected a substantial right because it "eliminate[d] the [father's] fundamental right . . . , as a parent, to make decisions concerning the care, custody, and control of [the child][.]" *Id.* at 330, 590 S.E.2d at 460 (citation and internal quotation marks omitted). In the present case, we similarly conclude that the trial court's order directing Defendants to allow Plaintiff access to and visitation with the child affected Defendants' fundamental right to make decisions concerning the care, custody, and control of the child, including the child's association with third parties. Notwithstanding statutory provisions that permit grandparents to seek visitation rights in limited circumstances, this Court has explicitly held that "[a] grandparent is a third party to the parent-child relationship. Accordingly, the grandparent's rights to the care, custody[,] and control of the child are not constitutionally protected while the parent's rights are protected." *Eakett v. Eakett*, 157 N.C. App. 550, 554, 579 S.E.2d 486, 489 (2003). Defendants, who had lawful custody of the child, both testified that they opposed any visitation between Plaintiff and the child. **(T pp. 62, 66)** The trial court's order granting visitation to Plaintiff therefore affected a substantial right, and Defendants' appeal is properly before us.

III. Defendants' Appeal

Defendants argue on appeal that N.C.G.S. § 50-13.2A, the statute that permits a biological grandparent to sue for visitation with a child adopted by a stepparent or

other relative, violates substantive due process rights secured by the United States and North Carolina constitutions. *See Amward Homes, Inc. v. Town of Cary*, 206 N.C. App. 38, 63, 698 S.E.2d 404, 422 (2010) ("In general, substantive due process protects the public from government action that [1] unreasonably deprives them of [2] a liberty or property interest." (citation and quotation marks omitted)); *State v. Fowler*, 197 N.C. App. 1, 21, 676 S.E.2d 523, 541 (2009) ("In order to determine whether a law violates substantive due process, we must first determine whether the right infringed upon is a fundamental right. If the right is constitutionally fundamental, then the court must apply a strict scrutiny analysis wherein the party seeking to apply the law must demonstrate that it serves a compelling state interest." (citation and quotation marks omitted)). Defendants assert that, because N.C.G.S. § 50-13.2A infringes a fundamental right, it is subject to strict scrutiny analysis. Defendants further contend the statute cannot withstand strict scrutiny because it is not narrowly tailored to advance a compelling government interest. Citing *Troxel*, Defendants submit that "the already well-established test for [parental] unfitness or other showing that a parent has acted inconsistent with their [constitutional] rights need[s] to be shown prior to any third party, including grandparents, being afforded visitation. Then and only then will [N.C.G.S. § 50-13.2A] . . . [be] sufficiently narrowly tailored."

We note Defendants did not specifically argue before the trial court that N.C.G.S. § 50-13.2A (1) is subject to strict scrutiny analysis, or (2) fails the strict scrutiny test. Upon moving for a directed verdict, Defendants' counsel told the court Defendants were "not asking [it] to invalidate the entire statute, but [to find that] as applied in this case, [Plaintiff] [] failed to meet [her] constitutional burden[.]" *See State v. Brower*, 186 N.C. App. 397, 402, 651 S.E.2d 390, 394 (2007) (holding defendant was "not permitted to make one constitutional argument before the trial court, and a different one on appeal." (citation omitted)). The trial court therefore did not determine whether N.C.G.S. § 50-13.2A is narrowly tailored to advance a compelling government interest. Consequently, this argument is not properly before us. *See City of Durham v. Manson*, 285 N.C. 741, 743, 208 S.E.2d 662, 664 (1974) ("Appellate courts will not ordinarily pass upon a constitutional question unless it affirmatively appears that such question was raised and passed upon in the trial court. . . . Since the constitutionality of the statute in question was not passed upon in the trial court, it was not properly before the Court of Appeals[.]" (citations and internal quotation marks omitted)).

Defendants also argue that, in light of the constitutionally-protected rights of parents to the custody, care, and control of their children recognized in *Petersen*, the trial court was required to apply "[s]omething more than . . . [the statutorily-prescribed] best interest [of the child] standard[;]" – namely, Defendants contend,

"the standard to be applied in [] a proceeding [pursuant to N.C.G.S. § 50-13.2A] . . . [is whether] the parent has been unfit and/or acted in a manner inconsistent with their rights as a parent." Defendants ask this Court to hold, as we have in the context of *custody* disputes between parents and third parties, that this constitutional standard of proof applies to *visitation* disputes between a parent and a biological grandparent of a child adopted by a stepparent or relative. *See*, *e.g.*, *Estroff v. Chatterjee*, 190 N.C. App. 61, 63-64, 660 S.E.2d 73, 75 (2008) ("Our General Assembly acted on [the] concern [regarding the consequences of custody rulings for the children involved] by mandating that disputes over custody be resolved solely by application of the 'best interest of the child' standard. Nevertheless, our federal and state constitutions, as construed by the United States and North Carolina Supreme Courts, do not allow this standard to be used as between a legal parent and a third party unless the evidence establishes that the legal parent acted in a manner inconsistent with his or her constitutionally-protected status as a parent." (citations omitted)). Defendants submit the trial court improperly applied the statutorily-mandated "best interest of the child" test without first finding that Mr. Million was an unfit parent; or, at minimum, finding that the child was not living in an intact family when Plaintiff filed her action for visitation.

As an initial matter, we observe that our appellate courts have repeatedly distinguished "custody" and "visitation" in the context of this State's grandparent

visitation statutes. *See McIntyre v. McIntyre*, 341 N.C. 629, 634-35, 461 S.E.2d 745, 749 (1995) ("Reading N.C.G.S. § 50-13.1(a) in conjunction with N.C.G.S. §§ 50-13.2(b1), -13.5(j), and -13.2A strongly suggests that the [L]egislature did not intend 'custody' and 'visitation' to be interpreted as synonymous in the context of grandparents' rights."); *Rodriguez v. Rodriguez*, 211 N.C. App. 267, 273, 710 S.E.2d 235, 240 (2011) ("Although it is axiomatic in custody disputes *between parents* that [v]isitation privileges are but a lesser degree of custody[,] when a grandparent is seeking visitation with grandchildren, a claim for visitation may be distinct from a claim for custody and standing requirements differ for each claim." (citations and internal quotation marks omitted) (emphasis and alterations in original)). As a result, in cases involving grandparent visitation, this Court has not imposed the same constitutional requirements as in custody disputes between parents and non-parents. *See Price*, 346 N.C. at 79, 484 S.E.2d at 534-35 (holding that, in custody dispute between parent and non-parent, statutory "best interest of the child" test violates parental due process rights unless evidence shows conduct "inconsistent with the protected status of natural parents."); *Perdue v. Fuqua*, 195 N.C. App. 583, 586, 673 S.E.2d 145, 148 (2009) ("[O]ur Courts have distinguished grandparents' standing to seek visitation from grandparents' standing to seek custody. In order for a grandparent to initiate a proceeding for *visitation*, there must be an ongoing custody proceeding and the child's family must not be an intact family. . . . *In contrast*, a

grandparent initiating a proceeding for *custody* must allege unfitness of a parent due to neglect or abandonment." (citations omitted) (emphases added)). Accordingly, we disagree with Defendants' contention that a grandparent seeking visitation pursuant to N.C.G.S. § 50-13.2A must allege and demonstrate parental unfitness or conduct inconsistent with a natural parent's constitutional rights.

Nevertheless, this Court's precedent also makes clear that parents' constitutional rights *are* implicated when grandparents seek visitation rights, and must be adequately protected. In *McIntyre*, our Supreme Court concluded that a grandparent cannot sue for visitation "against parents whose family is intact and where no custody proceeding is ongoing." 341 N.C. at 635, 461 S.E.2d at 750. "This public policy has been designated the 'intact family' rule." *Eakett*, 157 N.C. App. at 553, 579 S.E.2d at 488 (citations omitted).

> Under the 'intact family' rule, [] grandparent[s] cannot initiate a lawsuit for visitation rights unless the child's family is already undergoing some strain on the family relationship, such as an adoption or an ongoing custody battle. The 'intact family' rule is intended to protect parents' constitutional right to determine with whom their child shall associate.

Wellons v. White, 229 N.C. App. 164, 175, 748 S.E.2d 709, 718 (2013) (citations and internal quotation marks omitted).

In *Eakett*, this Court held the intact family rule applied to actions for grandparent visitation pursuant to N.C. Gen. Stat. § 50-13.5(j), which provides in

part that "[i]n 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 . . . the grandparents of the child are entitled to such custody or visitation rights as the court, in its discretion, deems appropriate." N.C. Gen. Stat. § 50-13.5(j) (2015) (emphasis added). The *Eakett* grandparent-intervenor alleged N.C.G.S. § 50-13.5(j) permitted him to request visitation even though his grandchild was living in an intact family and there was no active custody controversy. This Court rejected that argument, concluding:

> Intervenor's interpretation of [N.C.G.S. § 50-13.5(j)] would authorize interference with [] constitutionally protected parental rights. Under [the] intervenor's proposed reading of [N.C.]G.S. § 50-13.5(j), any custody order entered by a trial court could be re-opened upon a grandparent's motion asserting that he or she was not authorized enough visitation with his or her grandchildren. *Although [the] intervenor's interpretation might produce a stronger grandparent-grandchild relationship, it would provide a mechanism by which a grandparent could disrupt a stable family where no disruption previously existed*.

Eakett, 157 N.C. App. at 554, 579 S.E.2d at 489 (emphasis added). The *Eakett* intervenor's "failure to allege the absence of an 'intact family' in his complaint meant that [the] intervenor lacked standing to intervene." *Id.*

By contrast, this Court has held that a grandparent need not demonstrate lack of an intact family in actions for grandparent visitation under N.C. Gen. Stat. § 50-13.2(b1), which provides in part that "*[a]n order for custody* of a minor child may

provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate." N.C. Gen. Stat. § 50-13.2(b1) (2015) (emphasis added). N.C.G.S. § 50-13.2(b1) applies "only when the custody of a child is 'in issue' or 'being litigated'[.]" *See Fisher v. Gaydon*, 124 N.C. App. 442, 446, 477 S.E.2d 251, 253 (1996); *see also Smith*, 195 N.C. App. at 251-52, 671 S.E.2d at 584.

As demonstrated by the above cases, although a grandparent seeking visitation rights need not prove parental unfitness, the intact family rule may nevertheless apply. *Eakett* indicates that if the intact family rule applies to a particular action for grandparent visitation, it is a pleading requirement, without which a grandparent cannot establish standing to proceed with a claim for visitation. *See Eakett*, 157 N.C. App. at 554, 579 S.E.2d at 489 (holding grandparent-intervenor's complaint for visitation "failed to state a claim upon which relief could be granted" because it "did not allege that [the intervenor's] grandchild was not part of an 'intact family.'"). A central question implicated in the present appeal is whether the standing requirements set forth in N.C.G.S. § 50-13.2A – (1) a biological grandparent, (2) a substantial grandparent-grandchild relationship, and (3) an adoption by a stepparent or other relative – themselves adequately protect parents' constitutional rights or whether, as Defendants contend, additional constitutional safeguards are necessary.

In *Hill v. Newman*, 131 N.C. App. 793, 509 S.E.2d 226 (1998), this Court concluded a grandmother had standing to seek greater visitation rights with her

biological grandchildren, who had been adopted by other relatives, pursuant to N.C.G.S. § 50-13.2A:

> Under the explicit language of [N.C.G.S. § 50-13.2A], a grandparent seeking greater visitation rights with his/her minor grandchildren would have standing to bring such an action under this statute so long as "a substantial relationship exists between the grandparent and the child." In this case, there [was] competent evidence in the record to support a finding that a substantial relationship existed between [the] plaintiff and her two minor grandchildren, in that at all relevant times, [the] plaintiff lived in close proximity to her grandchildren, and in fact had helped raise the grandchildren [since their] birth. Further, prior to the adoption taking place . . . , the grandchildren had resided at [the] plaintiff's home for approximately eight months. Therefore, since there [was] competent evidence in the record that a substantial relationship existed, the trial court properly exercised jurisdiction under [N.C.G.S.] § 50-13.2A to decide the case on its merits.

Id. at 797-98, 509 S.E.2d at 229-30. There was no discussion in *Hill* of the intact family rule; the statutory standing requirements were considered sufficient.[3] We

[3] In the present case, Defendants filed an answer and motion to dismiss Plaintiff's complaint, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6), on 27 June 2016. Defendants' motion to dismiss, citing *McIntyre* and *Eakett*, alleged Plaintiff "ha[d] fail[ed] to state a claim upon which relief [could] be granted in that [] Plaintiff[] ha[d] failed to allege that there [was] an[y] ongoing custody litigation in regards to the minor child and that the minor child's family [was] not intact[.]" The trial court denied Defendants' motion to dismiss in an order filed 25 August 2016. The order explicitly provided it was "[b]ased upon the [c]ourt[']s reading of *Hill v. Newman*[.]" On appeal, Plaintiff argues that because Defendants did not appeal the denial of their motion to dismiss, the order denying the motion to dismiss "became the law of the case, granting [] Plaintiff[] standing[,]" and observes that "Defendant[s] do[] not challenge Plaintiff['s] standing on appeal." However, "[s]tanding is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction. Therefore, issues pertaining to standing may be raised for the first time on appeal, including *sua sponte* by [this] Court." *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878-79 (2002) (citations omitted); *see also Reece v. Forga*, 138 N.C. App. 703, 704, 531 S.E.2d 881, 882 (2000) ("A party may not waive jurisdiction, and a court

note, however, unlike the present case, *Hill* involved the trial court's *denial* of a grandparent's request for visitation with her biological grandchildren. In affirming the trial court's decision, this Court explicitly recognized that "a fundamental part of [parents'] paramount right to custody includes the right to control their children's associations[.]" *Id.* at 799, 509 S.E.2d at 230 (citation and internal quotation marks omitted). This Court also observed that "a final order of adoption results in establishing the relationship of parent and child between the adoptive parents and the child, such that the adopted child becomes legally the child of the adoptive parents[.]" *Id.* (citation and internal quotation marks omitted); *see also* N.C. Gen. Stat. § 48-1-106 (2017). Accordingly, we concluded in *Hill*, while "[c]ourts are not insensitive to the yearning of grandparents . . . for the company of children in their families . . . [,] such cannot be translated into a legal right without a showing that it is dictated by the needs and welfare of the child. In the absence of such a showing, custodial control goes along with custodial responsibility." *Id.* (citation and quotation marks omitted).

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has inherent power to inquire into, and determine, whether it has jurisdiction and to dismiss an action *ex mero motu* when subject matter jurisdiction is lacking." (citations omitted)). As discussed in this opinion, if the intact family rule applies in an action for grandparent visitation, it is a pleading requirement, necessary to establish standing, and a complaint that fails to allege lack of an intact family is subject to dismissal. Thus, while we do not reach the issue in the present case, we observe that if the intact family rule in fact applied here, Plaintiff's complaint was subject to dismissal, because it did not allege lack of an intact family. *See Street v. Smart Corp.*, 157 N.C. App. 303, 305, 578 S.E.2d 695, 698 (2003) ("A lack of standing may be challenged by motion to dismiss for failure to state a claim upon which relief may be granted." (citation and quotation marks omitted)).

Hill also preceded the discussions in *Wellons* and *Eakett* of the intact family rule in the context of our grandparent visitation statutes. Although neither *Wellons* nor *Eakett* directly involved an action for grandparent visitation pursuant to N.C.G.S. § 50-13.2A, there is dicta in both implying that an adoption by a stepparent or relative constitutes a "strain on the family relationship" akin to an ongoing custody dispute, in which case the intact family rule presumably does not apply. *See Wellons*, 229 N.C. App. at 175, 748 S.E.2d at 718 ("Under the 'intact family' rule, [a] grandparent cannot initiate a lawsuit for visitation rights *unless the child's family is already undergoing some strain on the family relationship, such as an adoption or an ongoing custody battle*." (citation and internal quotation marks omitted) (emphasis added) (alteration in original)); *Eakett*, 157 N.C. App. at 553, 579 S.E.2d at 488 ("*In a case that does not involve adoption by a stepparent or other relative*, a grandparent must prove that the child's family is not intact before the grandparent can intervene to request visitation with his grandchild." (citation omitted) (emphasis added)). At the same time, we find resonance in the present case with the reasoning articulated in *Eakett* for imposing the intact family rule where there has been a prior determination of custody and no ongoing custody dispute exists. In this case, the child's adoption was finalized a month before Plaintiff filed her action for visitation. *Cf. Hedrick v. Hedrick*, 90 N.C. App. 151, 156, 368 S.E.2d 14, 18 (1988) (holding adoptive stepfather was not a necessary party to action for visitation under N.C.G.S. § 50-13.2A, where

adoption was not yet finalized when grandparents filed motion to intervene and "[w]hatever rights [the stepfather] was to gain in becoming an adoptive parent had not vested at the time of the hearing[.]"). Mr. Million, Marissa, and the child were living as a family unit, and the child had not seen Plaintiff in approximately one year. *See*, *e.g.*, *Penland v. Harris*, 135 N.C. App. 359, 361, 520 S.E.2d 105, 107 (1999) (holding that "the term 'intact family' should certainly include a married natural parent, step-parent and child living in a single residence."). Arguably, under the specific facts of this case, N.C.G.S. § 50-13.2A "provide[d] a mechanism by which [Plaintiff] could disrupt a stable family where no disruption previously existed." *Eakett*, 157 N.C. App. at 554, 579 S.E.2d at 489.

To the extent our appellate courts have not explicitly settled the applicability of the intact family rule to grandparent visitation actions pursuant to N.C.G.S. § 50-13.2A, we decline to determine the precise constitutional parameters. We instead adhere to the long-standing rule that "the courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds." *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002); *see also Brooks v. Taylor Tobacco Enterprises., Inc.*, 298 N.C. 759, 761, 260 S.E.2d 419, 421 (1979) ("It is an established principle of appellate review that this [C]ourt will refrain from deciding constitutional questions when there is an alternative ground available upon which the case may properly be decided."). Our Supreme Court has

cautioned that "[i]f the factual record necessary for a constitutional inquiry is lacking, an appellate court should be especially mindful of the dangers inherent in the premature exercise of its jurisdiction." *Anderson*, 356 N.C. at 416-17, 572 S.E.2d at 102 (citation and internal quotation marks omitted). Applying these principles of judicial restraint, and as further discussed below, we conclude the trial court's order violates the plain language of N.C.G.S. § 50-13.2A. *See James v. Bartlett*, 359 N.C. 260, 266, 607 S.E.2d 638, 642 (2005).

IV. Trial Court Order

A. *Standard of Review*

"In a child custody case, the 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. . . . Unchallenged findings of fact are binding on appeal." *Peters*, 210 N.C. App. at 12-13, 707 S.E.2d at 733 (citations omitted). In the present case, Defendants have not challenged any of the trial court's findings of fact, and those findings are therefore binding on this Court. *See Sloan v. Sloan*, 164 N.C. App. 190, 196, 595 S.E.2d 228, 232 (2004). "In addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, [the reviewing c]ourt must determine if the trial court's factual findings support its conclusions of law." *Shipman v. Shipman*, 357 N.C. 471, 475, 586 S.E.2d 250, 254 (2003). "The determination of . . . 'what is in the best interest of the child[]' is a conclusion of law,

and this conclusion must be supported by findings of fact as to the characteristics of the parties competing for custody." *Hunt v. Hunt*, 112 N.C. App. 722, 728, 436 S.E.2d 856, 860 (1993) (internal citation omitted). "Absent an abuse of discretion, the trial court's decision in matters of child custody should not be upset on appeal. The trial court's conclusions of law . . . will not be reversed if supported by the findings of fact." *Everette v. Collins*, 176 N.C. App. 168, 171, 625 S.E.2d 796, 798 (2006) (citations omitted); *see also In re W.V.*, 204 N.C. App. 290, 294, 693 S.E.2d 383, 387 (2010) ("This Court reviews the trial court's decision whether it is in the best interests of [a child] to award visitation to a [particular party] for an abuse of discretion.").

A trial court order awarding custody or visitation rights "must include findings of fact which support the determination of what is in the best interests of the child." *Jones v. Patience*, 121 N.C. App. 434, 441, 466 S.E.2d 720, 724 (1996) (citation and quotation marks omitted). "[T]he judgment of the trial court should [also] contain findings of fact which sustain the conclusion of law that the party [awarded visitation rights] is a fit person to visit the child[.]" *Montgomery v. Montgomery*, 32 N.C. App. 154, 157, 231 S.E.2d 26, 29 (1977) (citations omitted). "When a trial court is required to make findings of fact, it must make the findings of facts specially.'" *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003) (citations omitted). "[A] custody order is fatally defective where it fails to make detailed findings of fact from which an appellate court can determine that the order is in the best interest of the child[.]"

Dixon v. Dixon, 67 N.C. App. 73, 76-77, 312 S.E.2d 669, 672 (1984) (citation omitted); *see also Kerns v. Southern*, 100 N.C. App. 664, 667, 397 S.E.2d 651, 653 (1990) (noting that "conclusory statements are inadequate findings to support [an] award of visitation rights to [] grandparents.").

B. *Analysis*

N.C.G.S. § 50-13.2A provides in part: "A [trial] court *may* award [grandparents] visitation rights *if* it determines that visitation is in the best interest of the child." (emphases added). By its plain language, N.C.G.S. § 50-13.2A does not compel the trial court to award visitation, even if standing is properly established. *See Brock & Scott Holdings, Inc. v. Stone*, 203 N.C. App. 135, 137, 691 S.E.2d 37, 38 (2010) ("The use of the word 'may' generally connotes permissive or discretionary action and does not mandate or compel a particular act." (citation, quotation marks, and alterations omitted)). In addition to demonstrating standing, a grandparent seeking visitation rights must persuade the trial court that an award of visitation is in the best interest of the grandchild. *See*, *e.g.*, *Kerns*, 100 N.C. App. at 667, 397 S.E.2d at 652 (holding it was error for trial court to reverse burden by requiring mother "to prove that the [grandparent] visitation was bad for the children.").

If the trial court determines a grandparent has met this burden, it "may" award grandparent visitation, subject to the statutory requirement that "[its] order [awarding visitation] . . . *shall* contain findings of fact which support the

determination by the judge of the best interest of the child." (emphasis added). *See Morningstar Marinas/Eaton Ferry, LLC v. Warren Cty.*, 368 N.C. 360, 365, 777 S.E.2d 733, 737 (2015) ("It is well[-]established that the word 'shall' is generally imperative or mandatory when used in our statutes." (citation and internal quotation marks omitted)). This Court has held that, when a statute requires the trial court to determine custody or visitation by applying the "best interest of the child" test, "[t]his determination must be based on clear, cogent, and convincing evidence." *See Estroff*, 190 N.C. App. at 68, 660 S.E.2d at 77. Findings that support a best interest determination "may concern physical, mental, or financial fitness [of the competing parties] or any other factors brought out by the evidence and relevant to the issue of the welfare of the child." *Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E.2d 466, 468 (1978).

In the present case, contrary to statutory mandate, the trial court made *no* findings of fact sufficient to support its determination that visitation with Plaintiff was in the child's best interest. The court made two findings in which it referred to the child's "best interest." In finding of fact twenty, it stated: "Plaintiff clearly assisted [Mr. Million] in raising the [] child and [Mr. Million's] actions in denying [] Plaintiff[] visitation have been not only mean-spirited but clearly were not in the best interest of the [] child." The mere fact that Plaintiff' assisted in raising the child in the past does not indicate why visitation with Plaintiff was *presently* in the child's

best interest. *See*, *e.g.*, *Clark v. Clark*, 294 N.C. 554, 576, 243 S.E.2d 129, 142 (1978) (holding that, on remand, trial court should "determine [what visitation arrangement would] be in [the children's] best interest *under the conditions then prevailing*." (emphasis added)). The court's finding that Mr. Million's past actions toward Plaintiff were "mean-spirited" similarly does not explain why the trial court believed a visitation award was in the child's current best interest. *See*, *e.g.*, *Hill*, 131 N.C. App. at 799, 509 S.E.2d at 231 (denying grandparent's request for visitation, and noting that "it is the best interests of the *child*, and not the best interests of the *grandparent*, that is the polar star[.]" (emphases in original)). The trial court's conclusory statement that Mr. Million's decision to deny visitation was "clearly [] not in the best interest of the [] child" was also inadequate to support an award of visitation to Plaintiff. *See Dixon*, 67 N.C. App. at 77, 312 S.E.2d at 672 (observing that "custody orders are routinely vacated where the 'findings of fact' consist of mere conclusory statements that . . . it will be in the best interest of the child to award custody to [a particular party].").

In finding of fact twenty-one, in addition to its erroneous statement that N.C.G.S. § 50-13.2A "require[d]" the trial court to award visitation to Plaintiff, the court stated: "[Mr. Million's] decision to cease all communication and contact with [] Plaintiff considering the prior history of [] Plaintiff and the [] child is not in the best interest of the [] child[.]" Again, the court's vague reference to "the prior history of []

Plaintiff and the [] child" does not explain why visitation with Plaintiff would *currently* serve the child's best interest, and its statement that Mr. Million's decision to deny contact was "not in the best interest of the [] child" was a conclusion rather than a finding of fact. *See Hunt*, 112 N.C. App. at 728, 436 S.E.2d at 860.

The trial court's other findings "do not shed any light upon the rationale for [its] ultimate conclusion of what [was] in [the child's] best interest[,]" *see Carpenter v. Carpenter*, 225 N.C. App. 269, 278, 737 S.E.2d 783, 789 (2013), other than its belief that Mr. Million's past actions toward Plaintiff were "mean-spirited" and that Plaintiff had a close relationship with the child prior to March 2015. The court's findings that, when Mr. Million and the child resided with Plaintiff for a number of months in 2013 and early 2014, "the parties shared a close familial bond" and Plaintiff "generally shared childcare responsibilities with [Mr. Million], treating the [] child as if he were her own[,]" may show that Plaintiff had a substantial relationship with the child in the past, but they do not indicate why, at present, visitation with Plaintiff would be in the child's best interest. *See*, *e.g.*, *Hill*, 131 N.C. App. at 797-98, 509 S.E.2d at 229-30 (finding evidence supported *existence of substantial relationship* between grandparent and grandchildren, "in that at all relevant times, plaintiff lived in close proximity to her grandchildren, and in fact had helped raise the grandchildren [since their] birth. Further, prior to [their] adoption . . . [,] the grandchildren had resided at plaintiff's home for approximately eight months."). At

the time of the hearing, the child had not seen Plaintiff for more than a year. The trial court made no findings about the potential impact on the child of suddenly resuming unsupervised visitation with Plaintiff. The court also made no findings about the child's current developmental needs or emotional well-being, despite ordering that the visits with Plaintiff should occur in "a location that will . . . cause as little anxiety or disruption in the life of the [] child as possible[,]" and that Defendants should be present during the first visit "in order to comfort the [] child if . . . necessary." *See, e.g.*, *Williams v. Chaney*, ___ N.C. App. ___, ___, 802 S.E.2d 756, 764 (2017) (holding trial court's conclusions of law were not supported by its findings of fact, where trial court concluded it should require additional counseling and reunification efforts despite finding that "additional reunification counseling would 're-traumatize' [the child]."); *cf. Hill*, 131 N.C. App. at 801, 509 S.E.2d at 231 (finding no abuse of discretion in trial court's best interest determination, where trial court made detailed findings, including that awarding visitation to grandparent "[would] be very disruptive to the children."). Additionally, despite awarding Plaintiff unsupervised visitation, including overnight visitation, the trial court made no findings regarding whether Plaintiff was a fit and proper person to have visitation with the child.

Defendants both testified they opposed any contact between Plaintiff and the child. The trial court's findings do not explain why it believed, notwithstanding

Defendants' express wishes to the contrary, visitation with Plaintiff was in the child's best interest. *See*, *e.g.*, *Lamond v. Mahoney*, 159 N.C. App. 400, 407, 583 S.E.2d 656, 661 (2003) (reversing visitation order, where trial court's findings of fact did not explain "why the trial court believed much more substantial visitation [with father]" was in child's best interest at that time despite father's testimony that he did not believe child was ready to spend summer vacation with him). This failure to comply with an explicit statutory mandate was an abuse of discretion. *See*, *e.g.*, *In re Eades*, 143 N.C. App. 712, 713, 547 S.E.2d 146, 147 (2001) ("This Court has held that use of the language 'shall' is a mandate to trial judges, and that failure to comply with the statutory mandate is reversible error." (citations omitted)).

"It is not sufficient that there may be evidence in the record sufficient to support findings that *could have been made*." *Greer v. Greer*, 101 N.C. App. 351, 355, 399 S.E.2d 399, 402 (1991) (citations omitted) (emphasis added). "When the trial court fails to find facts so that the [reviewing] court can determine that [an] order is adequately supported by competent evidence and the welfare of the child subserved, then the order entered thereon must be vacated and the case remanded for detailed findings of fact." *In re Moore*, 8 N.C. App. 251, 254, 174 S.E.2d 135, 137 (1970) (citation omitted).

V. Conclusion

Even assuming *arguendo* that the trial court properly reached the statutory best interest determination, the court failed to make findings of fact required under N.C.G.S. § 50-13.2A to support its conclusion that an award of visitation to Plaintiff was in the child's best interest. Accordingly, we vacate the trial court's order and remand for additional findings consistent with this opinion.

VACATED AND REMANDED.

Judges INMAN and ZACHARY concur.

Report per Rule 30(e).