

## What happens to a custody case when a party dies?

When mom and dad are litigating custody, or when mom and dad have a custody order determining their custody rights with regard to each other, and one of them dies, it is not uncommon for another member of the deceased parent's family to file a request to intervene in the custody case. Frequently, the motion to intervene is filed by a grandparent who wants to step into the place of the deceased parent and share custody or visitation with the surviving parent.

Before we even reach the question of whether the court can award custody or visitation to a non-parent against the wishes of the surviving parent, we need to consider the procedural posture of the existing custody case. What is the impact of the death of a party on the pending case? What is the effect of the death on an existing custody order?

The court of appeals addressed this issue in the three cases discussed below and all three opinions cite the supreme court in [McIntyre v. McIntyre, 341 NC 629](#) (1995), for the general rule that the trial court's jurisdiction in a child custody case terminates completely upon the death of a party. According to the court of appeals, this general rule means there is no case within which a grandparent can intervene following the death of a parent and any existing custody order between the parents is no longer controlling with regard to the custody rights of the surviving parent. However, the court of appeals also has held that this general rule will not apply in cases involving more than two parties at the time one party dies.

**\*\*\*UPDATE Posted 2/22/19: On February 2, 2019, the court of appeals issued the opinion in *Rivera v. Matthews*, <https://appellate.nccourts.org/opinions/?c=2&pdf=37389>, holding that when mother died while custody case was pending between mother and the maternal grandparents, the custody action did not abate. The court noted that the custody action can proceed against the estate of mother. The court of appeals in *Rivera* agrees with the holding in *Price* and *McDuffie* discussed below that a custody action between two parents only will abate upon the death of one parent, but *Rivera* concludes that when the custody case is between a parent and a non-parent, the case does not abate upon the death of the parent.**

### ***Price v. Breedlove***

The court of appeals first addressed this issue in [Price v. Breedlove, 138 NC App 149](#) (2000). In 1995, Mr. Breedlove was awarded primary physical custody of his minor children and their mother was awarded visitation. In 1997, mother was killed in an automobile accident and in 1998, maternal grandmother filed an action seeking visitation with the children. One of grandmother's arguments was that [GS 50-13.5\(j\)](#) gave her standing to seek visitation. That statute provides that the court may award visitation to a grandparent "in any action in which custody has been determined, upon a motion in the cause and a showing of changed circumstances." The trial court dismissed grandmother's claim, concluding that grandparents cannot seek visitation pursuant to [GS 50-13.5\(j\)](#) unless there is a pending custody dispute between the parents.

Grandmother appealed but the court of appeals affirmed the trial court, stating broadly that “the trial court’s jurisdiction over the issues of visitation and custody regarding the children herein terminated upon the death of plaintiff’s daughter.” The court of appeals pointed to [McIntyre](#), wherein the supreme court held that although [GS 50-13.5\(j\)](#) permits a grandparent to seek visitation under limited circumstances following an initial custody determination between parents, “the trial court retains jurisdiction of the issue of custody only *until the death of one of the parties* or the emancipation of the youngest child.”

### ***McDuffie v. Mitchell***

Two years later, the court of appeals again addressed the issue in [McDuffie v. Mitchell, 155 NC App 587 \(2002\)](#). In *McDuffie*, mother had been awarded primary physical custody by a New Jersey court in a case between her and the child’s father, Mr. Mitchell. After mother and the children moved to North Carolina, father initiated an action seeking modification of custody. Before an order was entered by the North Carolina court on the motion to modify, mother died. After the death of their mother, the children resided with grandmother and within days of mother’s death, grandmother filed a motion to intervene in the custody case that had been pending between the parents and requested custody of the children. The trial court denied her motion to intervene on the basis that jurisdiction in the custody case terminated immediately upon the death of the mother.

Grandmother then filed a separate proceeding, seeking in part visitation pursuant to [GS 50-13.5\(j\)](#), the same statute at issue in *Breedlove*. The trial court entered an order giving father immediate custody of the children and dismissed grandmother’s complaint for failure to state a claim.

The court of appeals affirmed the trial court, stating first that “where one parent is deceased, the surviving parent has a natural and legal right to custody and control of the minor children.” While acknowledging that a parent can lose the right to custody under certain circumstances, the trial court rejected grandmother’s argument that this “natural right” does not exist when the surviving parent was not the custodial parent before the death of the other parent.

The court of appeals also held that [GS 50-13.5\(j\)](#) allows a grandparent to seek visitation only when there is an “on-going case where custody is at issue between the parents” and stated:

“Upon the death of the mother in the instant case, the on-going case between the mother and the father ended. [McIntyre v. McIntyre](#). Consequently, there was no on-going custody action when plaintiff filed her motion to intervene.”

### ***Sloan v. Sloan***

[Breedlove](#) and [McDuffie](#) therefore tell us that when a custody case is pending between two parties, the case will terminate upon the death of either party and the court will lose jurisdiction to enter any additional custody orders in that case. *McDuffie* also tells that when there is an existing custody

order entered in a case between mom and dad, the court loses jurisdiction to modify the custody order following the death of one parent. In addition, *McDuffie* holds that a surviving parent has a right to custody of the child, regardless of the terms of the custody order in effect at the time of the parent's death.

In [Sloan v. Sloan, 164 NC App 190 \(2004\)](#), however, the court of appeals held that the result of the death of a party is different when there are more than two parties in the pending action at the time one party dies.

In 2001, a temporary custody order was entered in a case where father Mr. Sloan was the only named plaintiff and mother Ms. Sloan was the only named defendant. The temporary custody order provided that “plaintiff *and the paternal family* of the minor child have temporary custody of the minor child [during specified time periods]” and “defendant and *the maternal family* of the minor child shall have temporary custody of the minor child [during specified time periods].” The final custody order granted defendant mother primary custody of the child and provided that “the plaintiff and/or his parents” were entitled to telephone contact with the child two times each week.

Following entry of the final custody order, plaintiff father was killed and defendant mother ceased all telephone contact between the children and father's parents. The grandparents filed a motion to intervene in the custody case and a motion requesting that defendant mother be held in contempt for failing to comply with the provisions of the custody order.

Mother filed a motion to dismiss but the trial court denied her motion after concluding that the case survived husband's death because the grandparents had been made “de facto parties” to the custody case when the trial court granted them temporary custody and later granted them telephonic visitation in the permanent order. When mother appealed the trial court's decision and contempt order, the court of appeals agreed with the trial court. [Sloan v. Sloan, 164 NC App 190 \(2004\)](#).

The court of appeals held that the grandparent's motion to intervene should have been denied “if the issue of grandparent visitation and/or custody had been raised for the first time when the motion to intervene was filed [following the death of the father].” However, because the grandparents had been awarded visitation in the initial order, the case did not terminate upon the death of the father. According to the court of appeals, the motion to intervene filed by the grandparents was simply a request by the grandparents “to be formally recognized as parties to a child custody action where they had already been awarded custody rights.”

*Sloan* tells us that the death of a party will not affect the trial court's jurisdiction in a custody case if there is more than one surviving party who has been granted custody rights in the case. It also tells us that custody orders entered before the death of the party granting visitation rights to grandparents will remain in effect and enforceable following the death of a parent, at least to the extent that rights were awarded in that order to the third party.

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*Sloan* does not tell us if a case will remain pending if one parent dies before the court awards custody or visitation to grandparents who are parties in the case at the time of death. At that point, will the surviving parent be entitled to custody, as stated in [McDuffie](#)? Or, does the grandparents' claim for visitation 'vest' when they formally become parties to the case such that the claim would be unaffected by the death of a parent? See *Quesinberry v. Quesinberry*, 196 NC App 118 (2009)(the standing of a party to make a claim is determined at the time the claim is filed).