

Grandparent Custody and Visitation

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Consider.....

- Mom and dad are married and living together with two children
- Children have close and loving relationship with their paternal grandparents
- Mom and dad have disagreement with paternal grandparents; mom and dad refuse to allow grandparents to see children
- Paternal grandparents file complaint seeking visitation with the children, alleging visitation and maintenance of the close and loving relationship is in the best interest of the children.
- Mom and dad file motion to dismiss
- Do you dismiss?

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McIntyre v. McIntyre,
341 NC 629
(1995)

- Grandparents have no right to sue for custody or visitation when the family is intact, no custody proceeding is on-going, and there is no allegation that the parents are unfit or have otherwise lost their constitutional right to custody and to determine with whom their children associate

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Statutes grandparents can use to request custody/visitation

G.S. 50-13.1

- Any person seeking custody can request custody (including just visitation) pursuant to this statute
- A general statute; anyone with standing can use, including grandparents
- Custody determined by best interest analysis
- Parent v. Nonparent: no best interest unless parent has lost constitutional right to exclusive custody

G.S. 50-13.2(b1)

- Court can grant grandparent visitation as part of any custody order
- Grandparent can request only when claim pending between parents
- Court must presume that parent's decision re visitation is in best interest of child
- If presumption is rebutted, visitation cannot interfere with parent/child relationship

G.S. 50-13.5(j)

- Court can grant grandparent visitation when modifying custody order
- Grandparent can request only when claim pending between parents
- Court must presume that parent's decision re visitation is in best interest of child
- If presumption is rebutted, visitation cannot interfere with parent/child relationship

G.S. 50-13.2A

- Court can grant grandparent visitation when stepparent/relative adoption and there exists a substantial relationship between the child and the grandparent

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Consider.....

- Mom and dad are divorced; mom has primary physical custody of children and dad has visitation
- Mom dies
- Maternal grandmother takes custody of the children and files a complaint against dad seeking custody and/or visitation
- Grandmother alleges that dad has been “estranged from the children and exercised limited visitation with them”
- Dad files motion to dismiss grandmother’s complaint for failure to state a claim.
- Do you dismiss?

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Procedure?

- *Thomas v. Oxendine*, 280 NC App 526 (2021)
 - Grandparent(s) establish standing to seek custody pursuant to GS 50-13.1 by alleging in complaint or motion:
 - That they are a grandparent (no need to show ‘parent-like relationship), and
 - Facts sufficient to support the conclusion that the parent(s) have waived their constitutional right to custody
- Standing is established on the pleading alone; evidentiary hearing is not required
 - But grandparents must establish by clear, cogent and convincing evidence during the custody trial that parents have waived their constitutional right

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- Do you dismiss?

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McDuffie v. Mitchell,
155 NC App 587
(2002)

- “Where one parent is deceased, the surviving parent has a natural and legal right to custody and control of the minor children.”
- “A third party, including a grandparent, who seeks custody of a minor child as against the child’s natural parent, must allege facts sufficient to show that the natural parent has acted in a manner inconsistent with his or her constitutionally protected status.”
- “Grandparents’ right to visitation is dependent on there either being an ongoing case where custody is an issue between the parents or a finding that the parent or parents are unfit.”
- “The complaint here fails to sufficiently allege facts that would constitute “unfitness, neglect, abandonment,” or any other type of conduct so egregious as to result in defendant’s forfeiture of his constitutionally protected status as a parent.”

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Standing???

Maternal grandparents filed complaint for custody against mother of children who had been found to be dependent in an earlier juvenile proceeding

Grandparents alleged mother had acted inconsistent with her protected status as a parent

Mother filed motion to dismiss, arguing grandmother failed to allege/establish that she had a significant relationship with the children sufficient to give her standing to seek custody

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Rodriguez v. Rodriguez, 211 NC App 267 (2011)

- A non-parent seeking custody must have a relationship with the child sufficient to establish that the non-parent is not a 'stranger' to the child
 - *Ellison v. Ramos*, 130 NC App 389 (1998)
- A "parent-like" relationship is sufficient but other relationships also may establish standing
 - *Ellison*
- Relatives have a sufficient relationship to establish standing
- A grandparent has standing to seek custody when the grandparent alleges that the parent is unfit or has acted inconsistent with her constitutionally protected status

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Rodriguez

- If grandparent fails to prove by clear, cogent and convincing evidence that the parent has waived her constitutional right to custody, the trial court cannot grant custody or visitation to the grandparent

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Visitation

- Mom and dad have custody order giving them joint physical custody
- Dad files motion to modify
- Paternal grandmother files motion to intervene requesting visitation pursuant to GS 50-2(b1) and GS 50-13.5(j)(two of the grandparent visitation statutes)
- Question #1: Can you grant the motion to intervene?
- Question #2: Can you give grandmother visitation?

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Intervention

Rule 24. Intervention

- (a) Intervention of right. - Upon timely application anyone shall be permitted to intervene in an action:
 - (1) When a statute confers an unconditional right to intervene;
- (b) Permissive intervention. - Upon timely application anyone may be permitted to intervene in an action.
 - (1) When a statute confers a conditional right to intervene; ...
- (c) Procedure. - A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and **shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.**

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Alexander v. Alexander,
276 NC App 148
(2021)

- Parents settled custody by consent order
- A few years later, dad filed motion to modify
- After motion to modify filed, paternal grandparents filed request to intervene seeking visitation pursuant to GS 50-13.2(b1) and GS 50-13.5(j)
- Trial court allowed intervention
- Father died
- Trial court modified custody to give mother primary physical and legal custody and grandparents extensive visitation

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Effect of dad's death?

Generally, when one parent dies, custody action/order between the two parents abates

- Custody reverts automatically to surviving parent
- See also *Adams v. Langdon*, 264 NC App 251 (2019)

Action will survive if third person is a party to the action

- Grandparents became parties when motion to intervene was granted

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Statutory right to intervene??

- GS 50-13.2(b1) and GS 50-13.5(j) gave grandparents right to assert claim for visitation because there was an on-going dispute between the parents when grandparents were allowed to intervene.

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Alexander

- Did the award of visitation to grandparents in this case violate mother's federal Due Process right to exclusive care, custody and control of her child?

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Petersen v. Rogers, 337 NC 397 (1994)

- "Absent a finding that parents are unfit or have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care and control of their children must prevail."



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Petersen v. Rogers (1994)

- "Parents with lawful custody of a child have the prerogative of determining with whom their children associate."



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Price v. Howard, 346 NC 68 (1997)

- When parents enjoy constitutionally-protected status, "application of the 'best interest of the child standard' in a custody dispute with a non-parent would offend the Due Process Clause."

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Troxel v. Granville, 530 US 57 (2000)



- Parents have a “fundamental liberty interest” in the care, custody and control of their children.

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Troxel v. Granville



- Application of ‘best interest standard’ without – at least – a showing of “special factors” and/or “appropriate deference” to the parent, violates Due Process

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Alexander,
276 NC App 148 (2021)

Trial court can grant visitation pursuant to the grandparent visitation statutes only when:

- There is an on-going custody dispute between the parents;
- Grandparents overcome the presumption that the parents’ decision regarding visitation with the grandparents is in the best interest of the child, and
- The visitation awarded does not adversely interfere with the parent/child relationship

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Consider.....

Existing custody order granted grandparents primary physical and legal custody, granted father visitation and mother supervised visitation

Custody order does not conclude parents lost their constitutional right to exclusive custody

Dad files a motion to modify

Must trial court conclude parents have lost constitutional rights before entering a new custody order awarding custody/visitation to grandparents?

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*Fecteau v.
Spierer,*
277 NC App 1
(2021)

- **No**

- Once custody has been granted to nonparent in a case between the nonparent and parents, modification is controlled by GS 50-13.7
 - Person seeking modification must establish substantial change in circumstances affecting child
 - If substantial change affecting child, court determines whether best interest requires modification
 - Constitutional rights of parents are not implicated