THIRD PARTY INTERVENTION IN CUSTODY ACTIONS

James A. Davis
Davis and Davis, Attorneys at Law, PC
215 North Main Street
Salisbury, NC 28144
(704) 639-1900

This paper is largely in **outline** form and cites relevant **statutes, rules, and cases**. Interspersed are practice pointers and **tips**.

I. Who May Bring a Custody Action?

A. Any "parent, relative, or other person, agency, organization, or institution claiming the right to custody of a minor child." N.C. Gen. Stat. §50-13.1. The **answer: anyone**.

II. Who Has "Standing" to Bring a Custody Action?

A. "Standing" is the threshold issue: Does the party bringing the action have a "**parent-like**" or "**non-stranger**" **relationship** to the child? *Tilley v. Diamond,* 2007 N.C. App. LEXIS 1591; *Ellison v. Ramos,* 130 N.C. App. 389 (1998) (statute not intended to confer upon "strangers" the right to bring custody or visitation actions; a party had standing because he visited the child since birth and the child had his last name); *Neuse River Found, Inc. v. Smithfield Foods, Inc,*. 155 N.C. App. 110 (2002) (standing is "whether a party has a sufficient stake in a…justiciable controversy so as to properly seek adjudication of the matter"); and *Estate of Apple v. Commercial Courier Express, Inc.,* 168 N.C. App. 175 (2005) (if a party has no standing to bring an action, then a court has no subject matter jurisdiction to hear a claim). Cases do not require much factually. Length of the relationship may be material. *See Tilley* and *Ellison, supra*. Simply put, standing is the ability to come into court and make a claim.

B. Standing is sufficient if the allegations state a claim. *Sharp v. Sharp,* 124 N.C. App. 357 (1996). The screening tool is N.C. R. Civ. P. 12(b)(6).

C. Standing is determined at the time the action is commenced. *Quesinberry v. Quesinberry,* 674 S.E. 2d 775 (2009).

TIP: **Do not let opposing counsel reserve the right to hear your intervention motion**. The motion and pleading are either sufficient or insufficient to confer standing. **Query**: How can persons be ordered to mediation if not a party to the action?

III. **Action Between "Parent" and "Nonparent"**:

A. **Parents** (biological or adoptive) have a "preferred…[and] paramount right to custody," a "constitutionally protected status as a natural parent," or a "**constitutionally protected paramount right…to custody, care, and control of their children.**" *Peterson v. Rogers*, 337 N.C. 397 (1994) (a biological parent has a fourteenth amendment right to care for and nurture his child).

B. Initially, courts held that absent a finding that parents are (1) **unfit** or (2) have **neglected** the welfare of their children, the constitutionally-protected paramount right of natural parents to custody of their children must prevail. *Peterson v. Rogers*, 337 N.C. 397 (1994).

C. Later, case law held that c**onduct inconsistent with parental duties** or **failing to shoulder the responsibilities attendant to rearing a child** either dissolve or result in a "waiver" of the parent's constitutionally-protected status. *Price v. Howard*, 346 N.C. 68 (1997).

D. Courts later held the due process clause insures the government may take a child from a natural parent only upon a showing the parent is **unfit** or the parent's **conduct is inconsistent** with his protected status. *Adams v. Tessener*, 354 N.C. 57 (2001).

E. **The current law**: The parent must prevail unless the judge finds that the parent is **unfit**; has **neglected, abused, or abandoned** the child; **or has engaged in conduct inconsistent with the parental status**. *Davis N. v. Jason N.*, 359 N.C. 303 (2005); *In re: R.T.W.*, 359 N.C. 539 (2005); *Wake Cares, Inc. v. Wake County Bd. of Educ.*, 363 N.C. 165 (2009) (dissenting opinion stating the current law).

TIP: **A parent may be found fit but still lose his constitutionally-protected status based on his conduct towards the child**. *Davis N. v. Jason N.*, 359 N.C. 303 (2005). The issue is whether you can prove one of the grounds by clear and convincing evidence.

F. Conduct inconsistent with parental status:

1. Relevant facts:

a. whether the nonparent custody was **voluntary or involuntary**;

b. whether the parent clarified the **arrangement** as **temporary**;

c. how much **personal contact** and **financial support** the parent maintained during the period;

d. **how long** the nonparent custody lasted;

e. whether the **parent seized the opportunity to become involved** as a parent. *Adams v. Tessener*, 354 N.C. 57 (2001) (father visited child several months after birth and paternity testing; father visited child seven times by first birthday; father's *conduct found inconsistent with protected status*; court applied best interest test for custody determination).

2. The conduct inconsistent with the parent's protected status **must have some impact on the child**.

3. Several factors may support a conclusion of conduct inconsistent with a parent's protected status. *Speagle v. Seitz*, 354 N.C. 525 (2001).

G. The intervenor must prove the grounds alleged by **clear and convincing evidence**. *Owenby v. Young*, 357 N.C. 142 (2003).

H. Courts are looking for facts sufficient to find a parent has "**waived**" his constitutionally-protected status. *Price v. Howard*, 346 N.C. 68 (1997).

TIP: In **emergency custody orders**, cite facts which prove the grounds allowing intervention, reference the clear and convincing evidence standard in the conclusions of law, and make a finding the parent has waived his constitutionally-protected status in the order.

IV. **Grandparent Claims for Access**:

A. Grandparents may assert a claim for custody under the law that applies generally to **third-party claims for "custody**." N.C. Gen. Stat. §50-13.1; *Owenby v. Young*, 357 N.C. 142 (2003); *Davis N. v. Jason N.*, 359 N.C. 303 (2005); *In re: R.T.W.*, 359 N.C. 539 (2005); *Wake Cares, Inc. v. Wake County Bd. of Educ.*, 363 N.C. 165 (2009) (dissenting opinion stating the current law).

1. One case specifically **approved "grandparent standing" if** there are **allegations of unfitness or neglect** without an ongoing custody case. *Sharp v. Sharp*, 124 N.C. App. 357 (1996).

B. There are **four statutes** that **appear to give grandparents the right to seek "visitation"** in North Carolina: **(1)** N.C. Gen. Stat. §50-13.1 (the *general grant of standing* to "any…person…claiming the right to custody

[or visitation]…."; **(2)** N.C. Gen. Stat. §50-13.2(b1) (grandparent visitation can be ordered as part of "any custody order"); **(3)** N.C. Gen. Stat. §50-13.5(j) (existing custody determination may be modified to include grandparent visitation); and **(4)** N.C. Gen. Stat. §50-13.2A (visitation may be ordered following a relative or step-parent adoption). No appellate courts have addressed the constitutionality of these statutes in light of the parental preference in *Petersen* and *Price*. Rather, the **courts have limited** application of **the grandparent visitation statutes to cases where parents are involved in an "ongoing" custody action**. *McIntyre v. McIntyre*, 341 N.C. 629 (1995); See Cheryl Howell, *Third Party Custody and Visitation Actions: The Present State of the Law in North Carolina*, Family Law Bulletin, No. 21 November 2006. While courts often use the term "ongoing custody *dispute*," it appears the term "dispute" is synonymous with a court "action."

C. One may read the cases globally to mean that **grandparent "visitation**" **actions only apply if** (1) there is **an "ongoing" custody action and** (2) the **family is no longer "intact"**. *McIntyre v. McIntyre*, 341 N.C. 629 (1995).

1. The "**intact family analysis**" only **applies to "visitation" claims**, **not custody actions**. *Eakett v. Eakett*, 157 N.C. App. 550 (2003).

   a. An "**intact family**" apparently includes married parents living with their children, unmarried parents living with their children, and a single parent living with his child(ren) without some "existing strain on the family relationship, such as an adoption or an ongoing custody battle." *Fisher v. Fisher*, 124 N.C. App. 442 (1996); *Eakett v. Eakett*, 157 N.C. App. 550 (2003); and *Sharp v. Sharp*, 124 N.C. App. 357 (1996).

   b. The "intact family rule" protects the parental right "to determine with whom the children shall associate." *Sharp v. Sharp*, 124 N.C. App. 357 (1996). The grandparent is a third party to the parent-child relationship; thus, he cannot initiate a lawsuit for visitation unless the child's family is already undergoing some strain on the family relationship, such as an adoption or an ongoing custody battle. *Eakett, supra* at *553*.

2. A family **may be** "**intact" if** it consists of **a single parent with children**. *Eakett v. Eakett*, 157 N.C. App. 550 (2003) (because no action had been taken for over one year before the paternal grandfather filed an action to intervene, the mother and her child constituted an "intact" family); *Fisher v. Gaydon*, 124 N.C. App. 442 (1996) (if a single parent has no ongoing custody action, the grandparent has no

standing to seek visitation). A *single parent* appears to mean a *one-parent household*.

3. **If** the **parents are separated and** there is **no ongoing custody action**, grandparents have **no standing** to file for "visitation." *Montgomery v. Montgomery*, 136 N.C. App. 435 (2000).

4. **Grandparents may not intervene in a custody action** between parents **solely because one parent dies**. *Price v. Breedlove*, 138 N.C. App. 149 (2000); *McDuffie v. Mitchell*, 155 N.C. App. 587 (2002) (court dismissed grandparent's custody claim after mother dies even though father had exercised only sporadic visitation with child; at time of grandparent filing, children and father were living together as an intact family).

TIP: Remember: Grandparents may **also intervene when a "stepparent" or "relative" adoption proceeding is ongoing.** N.C. Gen. Stat. §50-13.2A; *Hill v. Newman*, 131 N.C. App. 793 (1998). This is a window of opportunity I expect is rarely considered.

D. It is the best interests of the child and not of the grandparent that is the polar star in these cases. *Hill v. Newman*, 131 N.C. App. 793 (1998).

E. The United States Supreme Court reviewed a grandparent's claim for visitation in *Troxel v. Granville*, 530 U.S. 57 (2000). The court affirmed parents have a fundamental liberty interest in the custody and control of their children protected by the due process clause of the fourteenth amendment to the federal constitution. The opinion yields very general guidance on the limited authority of state courts to apply the best interest of the child test in a grandparent visitation case.

TIP: I recommend you **confer with Professor Cheryl Howell at the Institute of Government** regarding the state of the law on the requirement of a "non-intact" family for grandparent visitation actions. The **law may be as simple as** a visitation action may go forward if there is an ongoing (1) custody action or (2) stepparent or relative adoption proceeding. In essence, if there is an ongoing custody action, the family is not an intact family.

V. **Same Sex Couples:**

A. **Where** a third party and a child have **an established relationship in the nature of a parent-child relationship**, the **third party has** "**standing**" **to seek custody**. *Ellison v. Ramos*, 130 N.C. App. 389 (1998) (father's companion of five years who lived with and cared for the child had standing to seek custody); and N.C. Gen. Stat. §50-13.1.

B. Once standing is established, the case proceeds just like any other third-party action.

VI. **The Procedural Tool for an Ongoing Custody Action**:

A. **Rule 24: Intervention**: N.C. Rules of Civil Procedure: N.C. Gen. Stat. §1-1 to 1-601.

1. Intervention of Right**:**

a. "When a statute confers an unconditional right to intervene; or

b. When the **applicant claims an interest relating to** the property or **transaction**…**and** he **is so situated that the disposition of the action may**…**impair**…**his ability to protect that interest.**"

2. Permissive Intervention:

a. "When a statute confers a conditional right to intervene; or

b. When the applicant's claim or defense and the main action have a question of law or fact in common."

TIP: Argue your client may **intervene as a matter of right** under the rule. It's persuasive and correct.

3. Rule 24 (c) requires:

a. "A person desiring to intervene shall **serve a motion to intervene upon all parties** affected thereby."

1. Service may be accomplished pursuant to Rule 5. *In re: Baby Boy Shamp,* 318 N.C. 695 (1987).

b. **Motion shall** (1) "**state the grounds** and (2) **have the pleadings attached** setting forth the intervenor's claim."

4. Granting of a motion to intervene under Rule 24 is **ordinarily interlocutory** and not appealable **unless** the ruling **affects a substantial right**. *Kahan v. Longiotti*, 45 N.C. App. 367 (1980). No cases found where the appeal of a denial of third-party intervention was overturned. *See Perdue v. Fuqua*, 673 S.E. 2d 145 (2009) (grandparents' denial of motion to intervene not deemed to affect a substantial right and was thus interlocutory).

5. Intervention under Rule 24 **must be timely**. Generally, a court considers: the status of the case; the unfairness or prejudice to the existing parties; the reason for the delay in moving for intervention; the resulting prejudice to the applicant if denied; and any unusual circumstances. *Hamilton v. Freeman*, 147 N.C. App. 195 (2001).

TIP: A third-party **claimant must**: (1) **file** a **pleading** which **states a claim for custody or visitation**; (2) **file** a **motion** therewith **to intervene**; (3) **articulate facts** which grant **standing**; and (4) **prove** the claim **by clear and convincing evidence** – **all before** one ever gets to a **best interest analysis.**

VI. **Congratulations. You are in the case. If you have gotten this far, you are well on the way to proving "best interest**."