**Modern Families: Do Grandma, Grandpa, or Auntie Ann have Custody or Visitation Rights?**[1]

by
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## I. INTRODUCTION

The nuclear family, commonly defined as a household consisting exclusively of a mother, father, and their children, has become less of "the norm." Our society's modern families are defined by complex family relations involving not just mom and dad, but also grandparents, aunts, uncles, and stepparents. This shifting definition of "the norm" comes as no surprise given that statistics say that 50% of marriages end in divorce. Moreover, increased mobility, incidence of employment of both parents, and economic strain all lead to greater involvement of third parties in providing financial and moral support to today's children. Such support is often supplied with everyone under one roof. Virginia family law accounts for these third party relationships by providing a means for Grandma, Grandpa, and Auntie Ann to establish custody or visitation rights to the children in their family. This seminar focuses on the law giving these third parties standing to pursue custody or visitation of a child, with examples of recent cases to illustrate how it has been applied by our courts to various factual scenarios.[2] As family lawyers, our practice must evolve with the changing family dynamic, based on an understanding of our statutory and case law which protects the "child's right to a continuing relationship with his or her own family . . . usually over the objection of the child's own parent."[3] Let's examine this complex contest between the best interests of a child and the rights of his or her parent.

## II. STANDING TO ASSERT CUSTODIAL RIGHTS

### A. Who can seek custody and visitation rights?

Va. Code § 20-124.2(B) establishes that "[t]he court shall give due regard to the primacy of the parent-child relationship but may upon a showing by **clear and convincing evidence** that the best interest of the child would be served thereby award custody or visitation to any other **person with a legitimate interest**." (Emphasis added.)

[1] Presented to the Virginia Trial Lawyers Association Continuing Legal Education Seminar, October 9, 11, 16, and 18, 2012.
[2] Va. Code § 20-124.2(B)
[3] Daniel R. Victor & Keri L. Middleditch, *Grandparent Visitation: A Survey of History, Jurisprudence, and Legislative Trends Across the United States in the Past Decade*; 22 J. Am. Acad. Matrimonial Law. 391, 391 (2009).

B. Who is a "person with a legitimate interest?"

1. As defined in Va. Code § 20-124.1, a "person with a legitimate interest" includes, but is not limited to, grandparents, stepparents, former stepparents, blood relatives and family members provided any such party has intervened in the suit or is otherwise properly before the court. "The term shall be broadly construed to accommodate the best interest of the child."

2. Exploring the boundaries of "person with a legitimate interest."

- *Thrift v. Baldwin*, 23 Va. App. 18, 473 S.E.2d 715 (1996). This case addresses the definition of a "party with a legitimate interest" contained in Va. Code § 16.1-241(A)(6): "A party with a legitimate interest shall be broadly construed and shall include, but not be limited to, grandparents, stepparents, former stepparents, blood relatives and family members." *Thrift* draws a distinction between a "legal grandparental and sibling relationship" and the "blood relationship" that remains even though legal relationships may be terminated by adoption or termination of parental rights. Thus, even though the grandparents' legal status as grandparents was terminated after the natural parents consented to adoption of their children, the Court of Appeals held that the "blood relationship" continued, thus giving the grandparents standing under Code § 16.1-241(A).

- *Switzer v. Smith*, 2001 Va. App. LEXIS 454 (July 31, 2001) (unpublished). *Switzer* applies the *Thrift* analysis to Va. Code § 20-124.1. In *Switzer*, the Court of Appeals held that a couple who was unrelated to the child by blood, but who cared for the child for two years as a result of the natural parents' inability to do so, had standing to assert custodial rights as a result of the couple's "cognizable and reasonable interest" in maintaining a close relationship with the child. [The court clearly interpreted the "includes, but is not limited to" clause of Code § 20-124.1 to extend the definition to non-blood relatives.] Although the grandparents argued in *Switzer* that they should be favored by law over the unrelated couple, the Court of Appeals held that all non-parents, whether relatives or not, come before the court equally in custody cases.

- *Nicklaus v. Strong*, 1995 Va. App. LEXIS 787 (October 31, 1995) (unpublished). The Virginia Court of Appeals' unpublished holding that a non-biological father who had been listed on child's birth certificate had standing under Va. Code § 20-124.2 and the trial court's award of custody to the non-biological father was proper.

## III. THIRD-PARTY CUSTODY: THE "PRIMACY OF THE PARENT-CHILD RELATIONSHIP" AND THE PRESUMPTION FAVORING NATURAL PARENTS[4]

A. Virginia has long recognized a presumption in favor of natural parents in custody disputes:

"[I]n a custody dispute between a parent and a non-parent, 'the law presumes that the child's best interest will be served when in the custody of its parent.'" *Bailes v. Sours*, 231 Va. 96, 100, 340 S.E.2d 824, 827 (1986) (quoting *Judd v. Van Horn*, 195 Va. 988, 996, 81 S.E.2d 432, 436 (1954)).

"[T]he rights of the [natural] parent may not be lightly severed but are to be respected if at all consonant with the best interest of the child." *Wilkerson v. Wilkerson*, 214 Va. 395, 397, 200 S.E.2d 581, 583 (1973).

"[A] fit parent with a suitable home has a right to the custody of his child superior to the rights of others . . . . [T]he law presumes that the child's best interests will be served when in custody of its parent." *Judd*, 195 Va. at 995-96, 81 S.E.2d at 436.

In 1994, the General Assembly amended Va. Code § 20-124.2 to require "due regard to the primacy of the parent-child relationship," thus making the parental presumption a statutory requirement.

B. When can a court award custody to a non-parent over a parent?

For non-parents seeking custodial rights to be awarded custody, they must rebut the legal presumption favoring natural parents.

> The **initial burden** is on the nonparent to introduce **clear and convincing evidence** . . . which constitute[s] an "extraordinary reason" for depriving a natural parent of custody of her or his child. Such evidence . . . must be **cogent and convincing**.

[4] *See* Steven L. Raynor, *Third Party Custody in Virginia*, Fam. L. News, Winter 2009, at 13 (reviewing third-party custody case law in Virginia).

> Once the presumption favoring parental custody has been **rebutted**, the parental and non-parental parties stand equally before the court, with no presumption in favor of either, and the question is the determination of the **best interests** of the child according to the **preponderance of the evidence**.

*Brown v. Burch*, 30 Va. App. 670, 685-86, 519 S.E.2d 403, 410-11 (1999) (citations omitted, emphasis added).

C. Overcoming the parental presumption.

In *Bailes v. Sours*, 231 Va. 96, 340 S.E.2d 824 (1986), the Supreme Court of Virginia sets forth the **five circumstances** under which the legal presumption favoring natural parents may be rebutted. Although the *Bailes* case was decided before the codification of the parental presumption by virtue of the addition of the "due regard to the primacy of the parent-child relationship" language to Va. Code § 20-124.2 in 1994, it has subsequently been upheld in numerous cases.

> Although the presumption favoring a parent over a non-parent is a strong one, it is rebutted when certain factors are established by **clear and convincing evidence**. We have held that such factors include: (1) parental unfitness; (2) a previous order of divestiture; (3) voluntary relinquishment; and (4) abandonment.
>
> Finally, we have recognized a **fifth factor** that rebuts this presumption: a finding of "special facts and circumstances . . . constituting an extraordinary reason for taking a child from its parent, or parents."

*Bailes*, 231 Va. at 100, 340 S.E.2d at 827 (citations omitted, emphasis added).

D. A closer look at the five circumstances under which the parental presumption may be rebutted.

1. **Parental Unfitness.**

Parental unfitness is undoubtedly a difficult standard to meet. In *Bailes*, the Supreme Court cites *Forbes v. Haney*, 204 Va. 712, 133 S.E.2d 533 (1963) as support for the holding that a finding of parental unfitness rebuts the parental presumption. The trial court in Forbes found that the father's "immoral" conduct "disqualified him as the

custodian of the child." *Id.* at 715, 133 S.E.2d at 535. A finding of unfitness would presumably be based upon "anti-social, immoral, and illegal conduct" on the part of the offending parent. *See Commonwealth v. Hayes*, 215 Va. 49, 53, 205 S.E.2d 644, 648 (1974).

In *Walker v. Fagg*, 11 Va. App. 581, 400 S.E.2d 208 (1991), the Court of Appeals determined that the trial court properly found by clear and convincing evidence that Father was unfit and therefore lost the natural parental presumption. The evidence showed that he was under indictment for the murder of his wife and had "a history of alcohol abuse, spousal abuse, unemployment and general family neglect." *Id.* at 583, 400 S.E.2d at 210. Because the grandparents were able to rebut the parental presumption by clear and convincing evidence, Father stood on equal ground with the grandparents, and the question became the determination of the best interest of the child according to the preponderance of the evidence.

2. **Order of Divestiture.**

In *McEntire v. Redfearn*, 217 Va. 313, 227 S.E.2d 741 (1976), the maternal grandmother sought custody of her daughter's minor children after the natural mother died. Father opposed Grandmother's petition and sought custody for himself. The Juvenile and Domestic Relations District Court (J&DR) ordered in 1971 that custody of the children "be assumed by the court and [that they be] temporarily placed with [the grandmother]," and Father did not appeal this order. Father did not seek custody of the children until after he became married in 1974.

The Supreme Court held that the J&DR temporary order constituted a "divestiture" sufficient to rebut the parental presumption. In doing so, the *McEntire* court noted that the J&DR order was entered "after a hearing on the merits at which the father was present."

i. The "hearing on the merits" requirement.

In finding a "divestiture," the Supreme Court of Virginia distinguished its ruling in *McEntire* from its previous ruling in *Wilkerson v. Wilkerson*, 214 Va. 395, 200 S.E.2d 581 (1973), in which there had been no merits determination of custody:

> [I]n *Wilkerson*, . . . a temporary custody order in favor of the non-parents had been entered by agreement upon petition of the father to protect the child from the unfit

> mother and to maintain the status quo during pendency of the parents' divorce proceeding. We pointed out in *Wilkerson* that the agreed temporary custody order had "neither the dignity nor the effect of a final order of custody upon the merits."

*McEntire*, 217 Va. at 316, 227 S.E.2d at 744 (quoting *Wilkerson*, 214 Va. at 397, 200 S.E.2d at 583).

The requirement that a hearing on the merits be held before there can be an order of "divestiture" was subsequently upheld by the Court of Appeals in *Ferris v. Underwood*, 3 Va. App. 25, 328 S.E.2d 18 (1986). *Ferris* involved a custody dispute between the natural mother and paternal grandmother. The Court of Appeals determined that, because Mother and Father agreed to the placement of custody with the paternal grandmother and the J&DR order awarding custody to Grandmother stated "the express understanding that neither parent has waived, abandoned or in any other manner relinquished the relationship of the natural child to its natural parent," it was not a "divestiture" for purposes of rebutting the parental presumption. Had the presumption not been expressly reserved by the mother in *Ferris*, it is possible that the order in question would have constituted a voluntary relinquishment.

ii. Can natural parents reserve the presumption despite agreeing to a grant of custody to a third-party?

Possibly. In *Ferris*, 3 Va. App. at 27, 328 S.E.2d at 19, the agreed order granting the paternal grandmother custody contained language reflecting the parties' "express understanding that neither parent has waived, abandoned, or in any other manner relinquished the relationship of the natural child to its natural parent." While the court ultimately decided *Ferris* on the basis of the lack of a "hearing on the merits," this case does raise the question of whether natural parents can enter into an arrangement that would ordinarily rebut the parental presumption, yet reserve the presumption with express language to that effect.

iii. Does an award of custody to one parent over another parent eliminate the natural parent presumption?

*Elder v. Evans*, 16 Va. App. 60, 427 S.E.2d 745 (1993), involved a custody dispute between a child's natural father and a non-parent with whom the natural mother had entrusted the child. The trial court incorrectly awarded custody of the child to the third-party based on a best interest standard without requiring the third-

party to rebut Father's natural parent presumption by clear and convincing evidence. The record was devoid of proof of an unappealed order in favor of a non-parent divesting Father of custody. Therefore, Father was entitled to the natural parent presumption in the contest between him and the non-parent.

3. **Voluntary Relinquishment.**

In *Shortridge v. Deel*, 224 Va. 589, 299 S.E.2d 500 (1983), the natural mother appealed the trial court's order granting custody of the child to third-parties. The trial court had determined that (1) Mother voluntarily relinquished the child to the third-parties shortly after the child's birth, (2) Father relinquished any custodial and parental rights he may have had, and (3) awarding custody to the third-parties was in the child's best interests. *Id.* at 591, 299 S.E.2d at 501-02.

The facts showed that Mother had considered having an abortion and told the third-party wife that she would do so if the third-party did not want the baby. The third-party wife reassured Mother that she wanted the child and Mother took the child directly from the hospital after birth and delivered him into the care of third-party wife and husband, where he remained for 17 months. There was no evidence that Father contributed to the child's support and he conceded that he did not call the third parties even once during the first 17 months of the child's life to inquire about the child.

After 17 months had passed, Mother took the child for a visit and refused to return him to the third parties at the end of her visitation. The third parties filed a petition with the J&DR court and were granted custody of the child. The trial court upheld the order granting the third-parties custody of the child, and the Supreme Court affirmed, as the evidence amply supported the trial court's findings.

In an unpublished opinion, *Long v. Holt-Tillman*, 2004 Va. App. LEXIS 239 (May 25, 2004), the Court of Appeals upheld the circuit court's finding that a child's natural parents voluntarily relinquished their right to custody because (1) Mother signed a J&DR consent order granting the maternal grandmother sole physical custody, (2) Father willingly played a limited role in the child's early upbringing and voluntarily acquiesced to the child's placement in Grandmother's custody, and (3) neither parent provided any appreciable financial support to the child. This clear and convincing evidence showed that the parents' "voluntary relinquishment" rebutted the parental presumption, regardless of Mother's having retained joint legal custody of the child.

The Court of Appeals noted that the J&DR custody order granting Grandmother sole physical custody, though a consent order, was an adjudication on the merits by the court in a proceeding where both parties were contesting custody, and the court's decision was based on evidence presented at a custody hearing and went beyond maintaining the *status quo*. As the parents were no longer entitled to the parental presumption, they had the burden to that it was in the child's best interest to return custody of the child to them. They failed to meet this burden.

4. **Abandonment.**

In *Patrick v. Byerley*, 228 Va. 691, 325 S.E.2d 99 (1985), the custody dispute was between the child's mother and former stepmother. The trial court awarded Stepmother custody after determining by clear, cogent, and convincing evidence that Mother had voluntarily abandoned the child and awarding custody to Stepmother was in the child's best interest.

When the child was approximately 4 ½ months old, Mother left him with Father and began living with a married man. Upon Father and Mother's divorce, Father was awarded custody of the child. The child developed a loving relationship with Stepmother and her parents, who the child regarded as his grandparents. Father and Stepmother later divorced, but Stepmother continued to maintain constant contact with the child. Following one of Stepmother's visits, Father failed to return for the child and his whereabouts remained unknown.

Stepmother continued to care for the child as if he were her own, while Mother "became a total stranger to her son." *Id.* at 695, 325 S.E.2d at 101. When Mother filed her petition for custody, the child became upset at the thought of leaving Stepmother and he felt insecure and had nightmares. The Supreme Court upheld the award of custody to Stepmother, determining that "[c]learly, to divest [Stepmother] of custody after caring for [the child] for nearly five years would be highly disruptive to [the child] and not in his best interest." *Id.*

5. **Special Circumstances.**

In *Bailes*, 231 Va. 96, 340 S.E.2d 824 (1986), the Supreme Court held that the close relationship and bond between Stepmother and child was a special circumstance that justified rebuttal of the parental presumption. The custody dispute was between Mother and Stepmother, as Father was deceased. Following Father's death, the child remained living with Stepmother. "Through the years, [Stepmother] assumed the role of [the child's] mother, and, indeed, he refers to her as his 'mother.'" *Id.* at 98, 340

S.E.2d at 826. A psychologist found that the child was very upset over the prospect of leaving Stepmother and living with Mother, and that his bed wetting and eczema were directly related to this anxiety. The child told the psychologist that he would run away if forced to live with Mother. The Supreme Court held that Mother's contact with the child was so limited that she was virtually a stranger to her son, and "the likelihood of inflicting serious harm to [the child] is so clearly established by the evidence that the presumption favoring the mother is repugnant to the child's best interest. Clearly, [Stepmother] has met the burden of rebutting the presumption with clear and convincing evidence of extraordinary circumstances." *Id.* at 101, 340 S.E.2d at 827-28. Therefore, the Supreme Court affirmed that trial court's award of custody to Stepmother.

In *Brown v. Burch*, 30 Va. App. 670, 519 S.E.2d 403 (1999), the Court of Appeals affirmed the trial court's award of joint custody of the child to Father and Stepfather, and physical custody to Stepfather over Mother's objection, holding that Stepfather and Father established by clear and convincing evidence special and unique circumstances that justified Mother being denied custody. Stepfather showed the child had been in his custody for six years at the time of the custody hearing (and more than seven years when the appeal was heard), Stepfather did not interfere with Mother's visitation or her relationship with the child, and the child's relationship with Father flourished while the child was in Stepfather's custody. A psychologist also testified about how well-adjusted the child was and regarding the child's positive traits, but that the child's wellbeing would be adversely affected if his custody was transferred to Mother. The trial court found that the child "has not just done well, he's done off the charts" in Stepfather's care. *Id.* at 684, 519 S.E.2d 410.

In a recent case, *Gibson v. Kappel*, 2011 Va. App. LEXIS 352 (November 15, 2011), the Court of Appeals upheld the trial court's award of sole legal and physical custody to the child's paternal grandparents with supervised visitation to Mother and Father, based on its finding of special facts and circumstances by clear and convincing evidence.

Mother and Father divorced when the child was four years old, and entered into a PSA in providing them joint legal custody and primary physical custody to Father. Prior to the parties' separation, Grandparents saw the child weekly. Following the separation, when the child was enrolled in daycare, Grandparents picked the child up at noon and cared for her until 9:00 p.m. every night. The child also stayed with Grandparents overnight, and they provided for all of her needs: feeding, clothing, taking her to doctors' visits, enrolling her in extracurricular activities and transporting her to these activities, and potty training her. They also had the primary responsibility

for managing her high cholesterol and eating problems. Mother visited the child one or one-and-a-half days each weekend. When the child began school, Grandmother suggested that Mother care for the child, but Mother declined this responsibility because she "liked her life the way it was."

Father married Stepmother, whose three sons moved in with Father. Mother told Grandmother that the child reported inappropriate sexual contact by one of Stepmother's sons while the child was at Father's house. DSS filed a CHINS petition, and an investigation was conducted, which revealed that in addition to the inappropriate sexual conduct, Stepmother had been using crack cocaine and Father was aware of her drug use. Grandparents filed a petition seeking custody, and Mother filed a motion to modify the custody and visitation provisions of the divorce decree to remove custody from Father. The J&DR Court awarded temporary custody to Grandparents, to which Mother did not object. Mother continued to visit with the child on a weekly basis.

Mother and Father appealed the JDR Court's ruling. The child's therapist testified that the child suffered from adjustment disorder with depression, had a strong relationship with Grandparents, but did not have a strong relationship with Mother. The therapist opined that the parents had harmed the child and she would suffer further harm if either parent was awarded custody. The trial court held that although neither parent was unfit, "each ha[d] demonstrated significant lapses in judgment in their interaction with [child]," "neither ha[d] demonstrated consistent ability to address her physical and emotional needs over the years," and "each ha[d] clearly abdicated responsibility for the day-to-day care of the child, while grandparents ha[d] met those responsibilities." The trial court found special facts and circumstances sufficient to rebut the parental presumption, and that granting Grandparents sole legal and physical custody was in the child's best interests. The Court of Appeals affirmed.

E. <u>After the parental presumption is rebutted, and a third-party is on equal footing with the parents, the best interests of the child must still be considered</u>.

1. Virginia Code § 20-124.3 outlines the ten factors the court must consider in determining the best interests of a child.

2. In *Smith v. Pond*, 5 Va. App. 161, 360 S.E.2d 885 (1987), the Court of Appeals reversed the trial court's award of custody to a third party (Mother's aunt) over the child's natural parents' objection. The trial court had determined that special facts and circumstances justified removal of the child from the custody of her natural parents; specifically, the child's medical problems. It also found that the parents voluntarily

relinquished the child's custody to Aunt when they signed a notarized document granting Aunt "permanent custody" of the child. The Court of Appeals assumed, without deciding, that the parents had voluntarily relinquished the child's custody to Aunt and therefore Aunt rebutted the parental presumption; however, the Court determined that the child's medical situation was an insufficient reason to take the child from the parents' custody and therefore special facts and circumstances were not proven by clear and convincing evidence. The Court then considered the child's best interests and held that the record was devoid of facts justifying a finding that the child's best interest would be served by separating her from her siblings and granting custody to Aunt. The natural parents regained custody of the child.

3. In *Denise v. Tencer*, 46 Va. App. 372, 617 S.E.2d 413 (2005), Father had twice consented to Grandfather sharing joint legal custody and having primary physical custody of the child. Mother was deceased prior to Father's second agreement to this custodial arrangement. In a third proceeding, the trial court awarded Father physical custody, and maintained joint legal custody with Grandfather, after applying the best interests test. "Where father is no longer 'clothed with the parental presumption generally accorded natural parents in a dispute with non-parents, . . . it follows that the best interests test is appropriately applied in resolving the custody dispute between father and grandparent.'" *Id.* at 393-94, 617 S.E.2d at 424 (quoting *McEntire*, 217 Va. at 316, 227 S.E.2d at 743). The Court of Appeals affirmed.

## IV. THIRD-PARTY <u>VISITATION</u>: THE *WILLIAMS* STANDARD AND HARM VS. BEST INTERESTS[5] - Balancing Best Interests of the Child and Constitutional Rights of the Parents.

The United States and Virginia Supreme Courts have arguably established a higher burden of proof for third-parties seeking visitation than those seeking custody. A grandparent seeking custody is on equal footing with a parent after overcoming the parental presumption by clear and convincing evidence under the *Bailes* factors and must then demonstrate that the best interests of the child are served by awarding custody to the grandparent. However, a grandparent seeking visitation over the objection of a parent must demonstrate that the child would suffer "actual harm" if the visits were not ordered. Courts do not seem to apply such a heavy burden in the third-party custody cases in Virginia.

[5] *See* Steven L. Raynor, *Third Party Visitation in Virginia*, Fam. L. News, Spring 2010, at 8 (reviewing third-party visitation case law in Virginia).

*Query*: What is the rationale for having two standards of proof for third-parties depending on whether they are seeking custody or visitation (*i.e.*, clear and convincing evidence of *Bailes* factors for custody and clear and convincing evidence of "actual harm" for visitation) and only the one best interests standard for parent v. parent regardless of whether custody or visitation is being determined?

A. Deference to parental decision-making under *Troxel v. Granville*.

1. The "interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054 (2000). In *Troxel*, a Washington statute infringed on parents' constitutional rights to make decisions regarding their child by allowing any person to petition for visitation rights at any time, requiring only consideration of the child's best interest.

2. In practical effect, the statute permitted a court to disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third-party affected by the decision filed a visitation petition, based solely on the judge's determination of best interests. The U.S. Supreme Court therefore held that Washington statute unconstitutionally infringed on the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

3. "Nothing in *Troxel* implies that the legal superiority of a fit parent's rights over those of a non-parent turns on whether the parent is married, separated, divorced, or widowed." *Griffin v. Griffin*, 41 Va. App. 77, 84, 581 S.E.2d 899, 902 (2003).

B. *Williams v. Williams* – In 1998, the Supreme Court of Virginia established the "actual harm' standard as a means of affording deference to parents' Constitutional rights.

1. Because of parents' liberty interest, a third-party may only be awarded visitation over the parents' united objection if there is a finding of actual harm by clear and convincing evidence.

"Clear and convincing evidence involves that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established." *Griffin v. Griffin*, 41 Va. App. 77, 85, 581 S.E.2d 899, 903 (2003) (citation omitted).

i. "For the constitutional requirement to be satisfied, before visitation can be ordered over the objection of the child's parents, a court must find an actual harm to the

child's health or welfare without such visitation. A court reaches consideration of the 'best interests' standard in determining visitation only after it finds harm if visitation is not ordered."

*Williams v. Williams*, 256 Va. 19, 22, 502 S.E.2d 417, 418 (1998) (quoting *Williams v. Williams*, 24 Va. App. 778, 784-85, 485 S.E.2d 651, 654 (1997)) (internal citation omitted).

ii. "Without a finding of harm to the child, a court may not impose its subjective notions of 'best interests of the child' over the united objection of the child's parents without violating the constitutional rights of those parents. . . . Code § 20-124.2(B) requires a finding that harm or detriment to a child's health or welfare would result without visitation, before visitation can be ordered over the united objection of the child's parents . . . ."

*Williams v. Williams*, 24 Va. App. 778, 785, 485 S.E.2d 651, 654 (1997).

Note: *Williams* involved a visitation dispute between the parents of a child in an intact family unit and the child's paternal grandparents.

2. How is "actual harm" proved?

i. In *O'Rourke v. Vuturo*, 49 Va. App. 139, 638 S.E.2d 124 (2006), the Former Husband of Mother sought visitation with the child over the joint objection of Mother and Father. The child was born to Mother during her marriage to Former Husband and he raised the child as his own until Mother left him for Father. The trial court heard evidence from five experts, and testimony from the parties and other lay witnesses, regarding the parties' relationships with the child and the effect that denying Former Husband visitation would have on the child. Mental health professionals testified that the child would suffer actual psychological harm if he was denied visitation with Former Husband. The trial court granted Former Husband visitation with the child. The Court of Appeals affirmed, and held that the trial court did not err in admitting the testimony of expert witnesses even though they were not medical doctors.

ii. In *Griffin v. Griffin*, 41 Va. App. 77, 581 S.E.2d 899 (2003), the child born during the parties' marriage was not Husband's biological child. The child's biological father testified at the visitation hearing that he paid child support, but did not want a relationship with the child. A psychologist testified that there was significant hostility between the parties, and Husband engaged in chronic disparagement of Wife in the child's presence. Husband's expert testified that it "could be" emotionally hurtful for the child if visitation was discontinued. The trial court awarded visitation to Husband, finding that it was in the child's best interests and that not doing so would be "detrimental" to the child. The Court of Appeals reiterated its holding in *Williams* that the actual harm test cannot be satisfied by a showing that 'it would be 'better,' 'desirable,' or 'beneficial' for a child" to have visitation with a non-parent. *Id.* at 84, 581 S.E.2d at 902 (quoting *Williams*, 24 Va. App. at 784, 501 S.E.2d at 654). The Court reversed the visitation award to Husband, holding that the evidence did not satisfy the clear and convincing standard of proof for the "actual harm" test.

> To justify a finding of actual harm under the clear and convincing burden of proof, the evidence must establish more than the obvious observation that the child would benefit from the continuing emotional attachment with the non-parent. No doubt losing such a relationship would cause some measure of sadness and a sense of loss which, in theory, "could be" emotionally harmful. But that is not what we meant by actual harm to the child's health or welfare. If it were, any non-parent who has developed an emotionally enduring relationship with another's child would satisfy the actual-harm requirement. The constitutional rights of parents cannot be so easily undermined.

*Griffin*, 41 Va. App. at 85-86, 581 S.E.2d at 903 (internal citation omitted).

iii. In *Davidson v. Davidson*, 2009 Va. App. LEXIS 381 (September 1, 2009), Father's estranged Wife sought visitation of the child over Father's and Mother's objection. Mother was incarcerated throughout the pendency of the case. Even though Wife helped Father raise the child for four years, the child called her "mommy", and she acted as the child's mother in all ways, evidence alone of Wife's close bond with the child was not enough to meet her burden of proving actual harm to the child if visitation was denied.

3. <u>When a parent's objection is not unified, the best interest standard applies</u>. This is a very important distinction carved out under Virginia case law. Grandparents need to be mindful of the exception and make certain to cultivate a positive relationship with <u>both</u> parents. (You never know who is going to turn on you!)

i. In *Dotson v. Hylton*, 29 Va. App. 635, 513 S.E.2d 901 (1999), the Court of Appeals held that "[w]hen **only one parent objects** to a grandparent's visitation and the other parent requests it, the trial court is **not required to follow the standard enumerated in *Williams***." *Id.* at 639, 513 S.E.2d at 903 (emphasis added). The factual predicate in *Williams* was a unified family. The grandparents in *Dotson* therefore were not required to show actual harm, but only clear and convincing evidence that the best interests of the child would be served by granting them visitation.

ii. The trial court in *Yopp v. Hodges*, 43 Va. App. 427, 598 S.E.2d 760 (2004), applied the standard set forth in *Dotson v. Hylton*. In *Yopp*, the maternal grandparents essentially raised the child until he was 5 or 6 years old, but the relationship between Mother and the maternal grandparents deteriorated and Mother denied the grandparents request for visitation. Because Father, who was not unfit, joined in and expressly supported the maternal grandparents' request for visitation, the best interests of the child controlled. The guardian *ad litem* also joined in the recommendation that the maternal grandparents be granted visitation. The trial court determined that granting the grandparents visitation was in the child's best interests, and the Court of Appeals affirmed.

iii. In *O'Leary v. Moore*, 2003 Va. App. LEXIS 391 (July 8, 2003), Father, the child's sole surviving parent, who was a fit and loving parent, objected to the maternal grandmother's petition for visitation. The Court of Appeals affirmed the trial court's application of the *Williams* "actual harm" standard. The trial court appropriately rejected the grandmother's argument that because Mother was deceased, the family was not intact and therefore fell under an exception to *Williams*. (This case highlights the importance of filing the express request for grandparent visitation while the favorable parent is still in the picture!)

iv. At the first sign of marital discord among natural parents, grandparents and third-parties would be wise to take the following steps:

a. Avoid taking sides. ("Never an unkind word.")
b. Maintain a good relationship with the children's mother, as she usually holds the key to the children.
c. Acknowledge and celebrate the children's birthdays, holidays, and other special occasions with cards, gifts, and through personal involvement.
d. Visit the children whenever possible, but make sure to call in advance and respect the parents' authority. No surprise visits!
e. Make it hard, in a non-forceful manner, for either parent to cut you out of the children's life.
f. At all times, make nice!

## V. When Third-Parties rise to the level of Parents, and other issues raised by *Denise v. Tencer*.

A. Background – *Denise v. Tencer*, 46 Va. App. 372, 617 S.E.2d 413 (2005).

1. Mother (Mary Denise) and Father (Philip Tencer) never married. Mother gave birth to the parties' child on August 29, 1997.

2. Mother had primary physical custody of the child until her death on September 6, 2001.

3. In 2001, prior to her death, Mother filed a petition in South Carolina seeking to terminate Father's parental rights.

4. The child's maternal grandfather moved to be included in the 2001 South Carolina action. The parties and guardian *ad litem* agreed to his inclusion as a party.

5. As part of the South Carolina action, the parties entered into an agreement, that was incorporated into an order, which, upon Mother's death, granted Grandfather and Father joint custody, granted Grandfather primary physical custody in Virginia, and provided Father "liberal contact" with the child. Pursuant to the parties' agreement, the goal of the parties was to ultimately "unite the child and [Father]."

6. In 2001, after Mother died, Father filed a petition with Fairfax J&DR seeking visitation at his home in California in December 2001 and vacation in Utah in February 2002. The J&DR Court denied Father's request for visitation in December 2001, but granted his request for visitation in February 2002.
7. In January 2002, Father filed another petition in the J&DR Court seeking physical custody of the child. In response, Grandfather filed a petition seeking primary physical and sole legal custody. Both petitions were resolved by a June 9, 2003 consent order that granted Father and Grandfather joint legal custody of the child, with primary physical custody to Grandfather and visitation to Father.

8. Father later appealed the June 9, 2003 order to the Fairfax County Circuit Court. Following a hearing, the circuit court found a material change of circumstances since 2001. Nevertheless, the circuit court rejected Father's argument that the changed circumstances warranted a change in legal custody and continued joint legal custody between Father and Grandfather. The circuit court did, however, award Father primary physical custody, noting that Father's relationship with the child "is at a plateau and it can't go any further unless the child lives with him."

9. Father appealed the circuit court's order denying his sole legal custody. Grandfather appealed the award of primary physical custody to Father.

B. Father and Grandfather stood equally before the law. *Troxel*, *Williams*, and *Griffin* are inapplicable.

The Court of Appeals opined that "rights analogous to the constitutional rights enjoyed by a parent" may "be established by other means, the most salient of which are court-adjudicated findings that a non-parent actor, such as a grandparent, is acting and will continue to act in accordance with the best interests of the child and that the non-parental party is a proper custodian." *Tencer*, 46 Va. App. at 388, 617 S.E.2d at 421. *Troxel*, *Williams*, and *Griffin* were held to be inapplicable, because those cases "involved situations in which a non-parent with no custodial rights requested visitation against the wishes of parents whose constitutional right to child-rearing autonomy had not been in the least altered." *Id.*

The Court held that the agreed upon South Carolina order and Fairfax J&DR Court order granting Grandfather joint legal custody and primary physical custody of the child accorded him "custodial status" with "precisely the same child-rearing autonomy as that enjoyed by a parent." *Id.* at 393, 617 S.E.2d 413 at 424. Therefore, because Grandfather had the same protection under the law as a parent, and father was "no longer 'clothed with the parental presumption generally accorded natural parents in a dispute with non-parents,'" the trial court properly applied the best interests test to determine the child's custody. *Id.* (quoting *McEntire*, 217 Va. at 316, 227 S.E.2d at 743).

C. Father's petition did not involve an initial custody determination.

While only touching on the point briefly, the Court did note that Father's petition involved modification of an existing custody order, not an initial custody and visitation determination. Therefore, Father bore the burden of proving that a material change of circumstances had occurred since the entry of the consent order and that a change in visitation would be in the child's best interests.

D. Waiver. While only *dicta*, the Court of Appeals briefly addressed the issue of waiver of parental constitutional rights in the footnotes:

> In its opinion letter, the trial court carefully circumscribed the breadth of father's "waiver," when it held that "a change from joint

> legal custody to sole custody" in grandfather "would be an additional restriction of [father's] constitutional right," and something to which father did not agree, unlike his "relinquishment of his protected constitutional right [which] occurred when he consented to joint legal custody." Thus, father only agreed to and, according to the trial court, waived joint legal custody and primary physical custody.
>
> Father argues, *inter alia*, that any waiver he consented to was limited, citing to the agreement language which he alleges envisioned a resumption of custody in father. Even assuming we accept his characterization of the nature of the waiver, the result remains unchanged. Once custody is posited in grandfather, together with the presumption that grandfather will act in the child's best interests, grandfather remains clothed with that custodial right and attendant presumption until he himself waives it by voluntarily relinquishing custody, or alternatively, a court of law divests grandfather of that right by finding that it no longer is in the best interests of the child to remain within his custody.

*Tencer*, 46 Va. App. 372 at 394, 617 S.E.2d 413 at 424, n.16 & 17.

The issue of waiver was also present in *Ferris v. Underwood*, 3 Va. App. 25, 348 S.E.2d 18 (1986). There, the agreed order granting the paternal grandmother custody contained language reflecting the parties' "express understanding that neither parent has waived, abandoned, or in any other manner relinquished the relationship of the natural child to its natural parent," thus suggesting that natural parents can reserve the constitutionally protected deference granted to them despite a grant of custody to a third-party that would ordinarily be considered a waiver of such right.

However, the Court of Appeals' decision in *Tencer* suggests that any potential waiver of a natural parent or lack thereof, is irrelevant when a third-party, such as the grandfather, has gained "custodial status." The issue is whether the third-party has been elevated to such status of a parent/custodian. This analysis suggests that any attempt by a natural parent to limit the extent to which he or she "waives" any fundamental liberty interests is of no consequence as long as the third-party in question has been "clothed" with custodial status.

## VI. CONCLUSION

As the law cited above illustrates, a third-party who attempts to obtain custody or visitation of a child typically faces an uphill battle absent consent of at least one of the child's parents. The burden of proof is high. For custody, a third-party must show by clear and convincing evidence one of the five enumerated circumstances: (1) parental unfitness, (2) a previous order of divestiture, (3) voluntary relinquishment, (4) abandonment, or special facts and circumstances. For visitation, the third-party must prove by clear and convincing evidence that there would be actual harm to the child if visitation is denied, which will often require expert witness testimony. If the third-party seeking custody or visitation overcomes this initial hurdle, the court must still consider whether granting him or her custody or visitation is in the child's best interests. However, if one parent consents to visitation with a grandparent or other third-party, the burden is lowered and the grandparent must only demonstrate that the best interests of the child are served by an award of visitation.

Factors of great importance in these cases are: "the relationship between the grandparents and the child while the parents were still together; the time spent by the grandparents with the child after the separation or loss of one parent; the facilities available to the grandparent for visitation; the extent of the child's relationship with his or her extended family; the lack of any evidence of abuse by the grandparent; and the mental, physical and moral fitness and ability of the grandparent to care for the child during visitation and any evidence that the grandchild benefited from being with the grandparents."[6]

What can a grandparent do to ensure that the relationship with a grandchild continues notwithstanding any breakdown in the parents' relationship? Establish a strong bond with the parents even before the grandchildren are born, and establish a relationship with the grandchildren so that any participation in the grandchildren's lives begins long before any visitation dispute arises.[7] "The goal should be to build a bond with the grandchildren and both of their parents, so that the relationship will survive anything that puts the grandchildren's family at risk, including the disruption of the family unit by illness, death of a parent, or divorce."[8]

During divorce proceedings, grandparents should become involved and try to negotiate specific visitation provisions for themselves. If visitation is not agreed to, then mediation is the should be considered as a next step. In cases where mediation is not agreed to, the grandparent may decide to file a petition in their own name as persons with a legitimate interests.

[6] William B. Smith, *Grandparents: Don't Give Up!*, Va. Law., December 2000, at 26, 28.
[7] *Id*. at 29.
[8] *Id*.

Helpful Checklist Before Embarking
On a Grandparent or Third-Party Custody or Visitation Case

1. Do you have a CUSTODY case with:

    a. Standing as a person with a legitimate interest (Va. Code § 20-124.1)?

    b. Clear, cogent, and convincing evidence to overcome the parental presumption (*Brown*)?

    c. Anti-social, illegal, or immoral conduct (unfitness) (*Commonwealth v. Hayes*)?

    d. Murder of a spouse (unfitness) (*Walker*)?

    e. History of alcohol or drug abuse, spousal abuse, unemployment, or family neglect (unfitness) (*Walker*)?

    f. Parent's death and children living with a grandparent at the time of the death and hearing on the merits (order of divestiture) (*McEntire*)?

    g. Parent allows third-party to raise child for a period of time without visitation by the parent (voluntary relinquishment) (*Ferris*)?

    h. Parent leaves child in the care of a third-party for a period of years and child becomes upset at the thought of leaving the third-party (abandonment) (*Patrick*)?

    i. Stepmother cares for child for years, including after Father's death, Mother infrequently visited the child during those years, and the prospect of visiting with Mother causes the child anxiety or other medical conditions (special circumstances) (*Bailes*)?

    j. Stepfather had physical custody for years, Mother exposed child to man who may have abused the child, Stepfather did not interfere with Mother's relationship with the child, and the child was doing well (special circumstances) (*Brown*)?

2. Do you have a VISITATION case with clear and convincing evidence that:

    a. Actual harm or detriment to the child's health or welfare would result without visitation with the third-party, and Mother and Father both object to the visitation (*Williams*)?

    b. A mental health professional will testify that the child will suffer actual psychological harm if visitation is not granted (*O'Rourke*)?

    c. One parent will join in your request for visitation rights?

        i. If so, the burden of proof will be the best interests of the child (*Yopp*).

        ii. If one parent has died and the surviving parent objects to grandparent or third-party visitation, then the actual harm standard will apply. (*O'Leary*).