

Grandparent and Third-Party Custody and Visitation¹

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I. INTRODUCTION

Grandparent and third-party custody and visitation is or will be a topic of great importance for many people. Statistically speaking, most of us will become grandparents. Given that the statistics say 50% of marriages end in divorce, grandparents should be prepared to be involved in their grandchildren's lives during a time of family instability. In today's mobile society with two working parents and a strained economy, the role of grandparents providing childcare, house sharing and financial and moral support to their children has grown dramatically.

Virginia provides a statutory basis for third-party custody and visitation.² The statute does not give a grandparent the right to visitation with a grandchild, but rather the right to have standing to pursue visitation with a grandchild. The statute really protects the "child's right to a continuing relationship with his or her own family, namely, a grandparent – usually over the objection of the child's own parent."³ In third-party custody and visitation cases, the child's rights are weighed against the parents' rights.⁴

The materials below give a summary of the law in Virginia, both statutory and case law, which address third-party custody and visitation issues.

¹ Presented to the Virginia State Bar 37th Midyear Legal Seminar, Saturday, November 6, 2010, in Buenos Aires, Argentina.

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).

⁴ See *id.*

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)

B. So, who is a “person with a legitimate interest?”

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.⁵

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” as set forth in Va. Code § 16.1-241(A), which is very similar to the definition contained in Va. Code § 20-124.1. *Thrift* draws a distinction between a “legal grandparental and sibling relationship” and the “blood relationship” that remains even though legal relationships may be terminated through 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 Virginia Court of Appeals held that the “blood relationship” continued, thus giving the grandparents standing under § 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 Virginia 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 § 20-124.1 to include non-blood relatives.]

⁵ Va. Code § 20-124.1

Although the grandparents argued in *Switzer* that they should be favored by law over the unrelated couple, the Virginia 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 PARENTS⁶**

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

“In 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).

“The rights of the [natural] parents 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...the law presumes that the child's best interests will be served when in custody of its parent.” *Judd v. Van Horn*, 195 Va. 988, 995-96, 81 S.E.2d 432, 436 (1954).

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. So when can a court award custody to a non-parent over a parent?

Non-parents who seek custodial rights must rebut the legal presumption favoring natural parents if they are to be awarded custody.

⁶ See Steven L. Raynor, *Third Party Custody in Virginia*, Fam. L. News, Winter 2009, at 13 (reviewing third-party custody case law in Virginia).

The **initial burden** is on the nonparent to introduce **clear and convincing evidence**...which constitutes an “extraordinary reason” for depriving a natural parent of custody of her or his child. Such evidence...must be **cogent and convincing**.

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** where the legal presumption favoring natural parents is rebutted. While 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” 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 v. Sours, 231 Va. 96, 100, 340 S.E.2d 824, 827 (1986) (citations omitted, emphasis added).

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

1. Parental Unfitness.

- Undoubtedly a difficult standard to meet, *Bailes* cites *Forbers v. Haney*, 204 Va. 712, 133 S.E.2d 533 (1963) as standing for the proposition that a finding of parental unfitness rebuts the parental presumption. Such 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).

- *Walker v. Fagg*, 11 Va. App. 581, 400 S.E.2d 208 (1991). Trial court properly found Father was unfit and did not have the natural parental presumption due to evidence that he was under indictment for the murder of his wife, he had a history of alcohol abuse, spousal abuse, unemployment, and family neglect. Because the grandparents were able to rebut the parental presumption, Father stood on equal ground with the grandparents.

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 that custody of the children “be assumed by the court and [that they be] temporarily placed with [the grandmother]” since the children were living with Grandmother at the time of the natural mother’s death.

The Supreme Court of Virginia subsequently 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 Father was present.”

- i. The “hearing on the merits” requirement. In finding a “divestiture,” the Supreme Court of Virginia distinguishes its ruling in *McEntire* from its previous ruling in *Wilkerson v. Wilkerson*, 214 Va. 395, 200 S.E.2d 581 (1973) by noting:

[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 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.

This requirement that a hearing on the merits be held before we have an order of “divestiture” was subsequently upheld by the Virginia Court of Appeals in *Ferris v. Underwood*, 3 Va. App. 25, 328 S.E.2d 18 (1986). In *Ferris*, the Court of Appeals found that because the mother and father agreed to the placement of custody with the paternal grandmother that the order awarding custody to the grandmother was not a “divestiture” for purposes of rebutting the parental presumption. Presumably, had the presumption not been reserved by the parents in *Ferris*, the order in question would then have constituted a voluntary relinquishment. However, the court’s opinion does not offer any guidance on this issue.

- ii. Can natural parents reserve the presumption despite agreeing to a grant of custody to a third-party? Interestingly, in *Ferris v. Underwood*, 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” the 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 parental presumption? In *Elder v. Evans*, 16 Va. App. 60, 427 S.E.2d 745 (1993), the trial court incorrectly awarded custody of a child to a third-party without requiring that third-party to rebut Father’s natural parental presumption. Even though a court awarded Mother custody of the child and Mother left the child in the third-party’s care, Father was still entitled to the natural parental presumption over nonparents in a subsequent dispute with the third-party.
3. Voluntary Relinquishment. *Shorridge v. Deel*, 224 Va. 589, 299 S.E.2d 500 (1983) involved a Mother who considered aborting her child during pregnancy. Mother was convinced by Stepmother to have the baby and then to let Stepmother raise the child for the first 17 months of the child’s life. Stepmother’s family cared for the child and raised it as if it were their own. During this time, Mother did not have visitation with the child.

After 17 Months, Mother exercised visitation with the child and refused to return the child at the end of her visitation. Stepmother filed a petition with the J&DR court and obtained custody of the child.

On appeal of the custody order, the circuit court granted custody of the child to Stepmother, finding that such an award was in the child's best interests since Mother had "voluntarily relinquished custody" of the child by virtue of the fact that Mother made no effort to regain custody of the child during the first 17 months of his life. The Supreme Court of Virginia subsequently upheld the trial court's application of the best interest standard in light of the finding that a "voluntary relinquishment" existed.

In an unpublished opinion, the Virginia Court of Appeals held that a parent's relinquishment of physical custody by entering into a consent order, while still retaining joint legal custody constitutes a "voluntary relinquishment" for purposes of rebutting the parental presumption. As the parents were no longer entitled to the natural parental presumption, they had the burden to prove a change in circumstances such that it was in the child's best interest to change custody from the grandmother to the parents. *See Long v. Holt-Tillman*, 2004 Va. App. LEXIS 239 (May 25, 2004) (unpublished).

4. Abandonment. In *Patrick v. Byerley*, 228 Va. 691, 325 S.E.2d 99 (1985), Mother left child when child was approximately four and one-half months old to pursue a relationship with another man, leaving child in the care of Father who subsequently remarried Stepmother.

Father then divorced Stepmother, but Stepmother continued to visit with child. In 1982, Father disappeared after dropping the seven year old child off at Stepmother's home. Stepmother continued to care for the child. Mother did visit sporadically. Mother subsequently filed her petition for custody of the child approximately nine years after the child's birth. The child became upset at the thought of leaving Stepmother and he felt insecure and had nightmares. The Supreme Court of Virginia upheld the award of custody to Stepmother, finding that Mother "saw [the child] infrequently for a time, but never again had his custody and made no effort to obtain it."

5. Special Circumstances. In *Bailes*, the Supreme Court of Virginia held that the close relationship and bond between Stepmother and child was a special circumstance that justified rebuttal of the parental presumption.

Mother testified that the child visited with her only eight to ten times during a nine year period and that she stopped exercising visitation with the child when he was two because visitation was causing anxiety with the child. Prior to Father's death, the last visit the child had at Mother's home was on his seventh birthday. The court noted that after Father's death, when the child was 11 years old, the child looked to

Stepmother as his only remaining parent and the prospect of leaving Stepmother to live with Mother caused severe anxiety in the child, resulting in eczema and bedwetting.

In *Brown v. Burch*, 30 Va. App. 670, 519 S.E.2d 403 (1999), Stepfather and Biological 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 seven years, Mother had exposed the child to a man that Father and Stepfather believed was abusing the child, Stepfather did not interfere with Mother's visitation and the child's relationship with Father was doing well. A psychologist also testified regarding the child's positive traits and how well-adjusted he was in Stepfather's custody. Stepfather was granted physical custody of child; Stepfather and Biological Father shared joint legal custody of child.

E. 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.

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), even though the parental presumption was rebutted because the parents had voluntarily relinquished custody, the best interests of the child must still be considered. Here, the child had severe medical problems. The court determined that the severe medical problems would constitute an extraordinary circumstance, but the parents were aware of and concerned about the child's medical problems and had met those medical needs.
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. In a third proceeding, the court awarded Father physical custody after properly applying the best interests test.

IV. THIRD-PARTY VISITATION: THE WILLIAMS STANDARD AND HARM VS. BEST INTERESTS⁷ - 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 grandparents and third-parties seeking visitation than those seeking custody. A grandparent seeking custody is on equal footing with a parent after overcoming

⁷ See Steven L. Raynor, *Third Party Visitation in Virginia*, Fam. L. News, Spring 2010, at 8 (reviewing third-party visitation case law in Virginia).

the parental presumption under the *Bailes* factors and must then demonstrate that the best interests of the child are served by an award of custody to the grandparents. However, a grandparent seeking visitation over the united objection of both parents must demonstrate that the child would suffer “actual harm” if the visits were not ordered. It does not appear in the third-party custody cases that the court applies such a heavy burden.

Query: Why should there be two standards of proof for grandparents and third-parties (*i.e.*, *Bailes* factors for custody and “actual harm” for visitation) and only the one “best interest” standard for parents regardless of custody or visitation?

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

1. The “interests of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interest recognized by this Court.” *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054 (2000). In *Troxel*, a Washington statute infringed on a parent’s constitutional right to make decisions regarding their child by allowing any person to petition for visitation rights at any time, requiring only the child’s best interest be considered.
2. “The statutory best-interests test ‘unconstitutionally infringes on that fundamental parental right’ if it authorizes a court to ‘disregard and overturn any decision by a fit custodial parent’ concerning visitation whenever a third-party affected by the decision files a visitation petition, based solely on the judge’s determination of the child’s best interests.”

Griffin v. Griffin, 41 Va. App. 77, 82, 581 S.E.2d 899, 901-02 (2003) citing *Troxel v. Granville*, 530 U.S. 57, 67, 120 S.Ct. 2054 (2000).

B. *Williams v. Williams* – In 1998, the Supreme Court of Virginia established the ‘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 harm.
 - 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) (citations omitted).

- ii. Holding that 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, 784-85, 485 S.E.2d 651, 654 (1997) (emphasis added).

2. How is "actual harm" proved?

- i. In *O'Rourke v. Vuturo*, 49 Va. App. 139, 638 S.E.2d 124 (2006), the court heard evidence from non-M.D. mental health professionals that the child would suffer actual psychological harm if he was denied visitation with Former Husband, who was not the child's biological father. Based on this expert testimony, the Virginia Court of Appeals affirmed the trial court's conclusion that the child would suffer actual harm if Former Husband was denied visitation.
- ii. In *Griffin v. Griffin*, 41 Va. App. 77, 581 S.E.2d 899 (2003), a child was born during the marriage that was not Husband's biological child. Even though Husband developed a relationship with the child, the evidence in the subsequent visitation matter only supported the inference that the child would miss the emotional attachment he had with Mother's estranged husband. The Virginia Court of Appeals reversed the visitation award to Husband, holding that this evidence, while sufficient to speak to the best interests of the child, was not enough to satisfy the clear and convincing standard of proof for the "actual harm" test.
- iii. In *Davidson v. Davidson*, 2009 Va. App. LEXIS 381 (September 1, 2009), even though Father's wife helped Father raise the child for four years, was called "mommy" by the child, and acted in all ways as the child's mother, evidence alone of Wife's close bond with the child was not enough to meet the burden of proving actual harm if visitation was denied.

3. When the parent's objection is not unified, the best interest standard applies. – 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 both parents. (You never know who is going to turn on you!)

- i. In *Dotson v. Hylton*, the court 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*.**” 29 Va. App. 635, 639, 513 S.E.2d 901, 903 (1999) (emphasis added). The court applied a basic best interest of the child test.
- ii. The trial court in *Yopp v. Hodges*, 43 Va. App. 427, 598 S.E.2d 760 (2004) followed the holding in *Dotson v. Hylton*. In *Yopp*, the grandparents cared for the child most of the time, but the relationship between Mother and the maternal grandparents deteriorated and Mother denied the grandparents request for visitation. Because Father expressly requested that the maternal grandparents be granted visitation, the best interests of the child controlled. The grandparents were able to provide evidence that visitation was in the best interest of the child and the Virginia Court of Appeals affirmed the trial court’s grant of visitation without a finding of actual harm.
 - iii. In *O’Leary v. Moore*, 2003 Va. App. LEXIS 391 (July 8, 2003), when Father, the sole surviving parent, objected to grandmother’s visitation, the Virginia Court of Appeals affirmed the trial court’s refusal to hold that an exception to *Williams* should be created and did not find because Mother was deceased, the family was “not intact.” The actual harm test was correctly applied. (So, make sure you strike while the iron is hot and file the express request for grandparent visitation while the favorable parent is still in the picture!)
 - iv. Grandparents and third-parties need to take the following steps at the first sign of marital discord:
 - a. Avoid taking sides. (“Never an unkind word.”)
 - b. The key to the children is usually through the mother. (“Kill her with kindness.”)
 - c. Remember the children’s birthdays and Christmas with gifts and cards.
 - d. Visit the children whenever possible, but make sure to call in advance. No surprise visits!
 - e. Make it hard for either parent to cut you out of the child’s life.
 - f. 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 and Father 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. Prior to her death, in 2001, Mother filed a petition in South Carolina seeking to terminate Father's parental rights.
 4. The child's maternal grandfather ("Grandfather") moved to be included in the 2001 South Carolina action.
 5. As part of the South Carolina action, the parties agreed upon an order which, upon Mother's death, granted Grandfather and Father joint custody with primary physical custody to Grandfather in Virginia. 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 2002. Father then filed another petition seeking physical custody of child in January 2002. In response, Grandfather filed a petition seeking primary physical and sole legal custody. Both petitions were ultimately resolved by a June 9, 2003 consent order that continued Grandfather's physical custody of the child. Father later appealed the June 9, 2003 order to the Fairfax County Circuit Court.
 7. The Fairfax County Circuit Court denied Father's request for sole custody of the child and continued joint custody between the Father and Grandfather. However, the circuit court granted Father's request for primary physical custody noting that the Father's relationship with the child "is at a plateau and it can't go any further unless the child lives with him."
- B. Father and Grandfather stood equally before the law. On appeal, the Virginia Court of Appeals held that the South Carolina Order granting Grandfather joint custody and the Fairfax Juvenile Court order confirming the South Carolina order accorded him the "status of custodian [and] gave him precisely the same child-rearing autonomy as that enjoyed by a parent," which afforded Grandfather, a non-parent, the same protection under the law as a parent. *Tencer*, 46 Va. App. 372 at 393, 617 S.E.2d 413 at 424. Ultimately, the Virginia Court of Appeals citing *McEntire v. Redfearn*, concluded that the trial court properly applied the best interests test since Father was no longer "clothed with the parental presumption generally accorded natural parents in a dispute with non-parents..." *Tencer*, 46 va. App. 372 at 393-94, 617 S.E.2d 413 at 424, citing *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. As such, existing case law clearly sets forth that once a material change of circumstances has been demonstrated, the court must determine whether a change of custody is in the child's best interests.
- D. Waiver. While only *dicta*, the Virginia Court of Appeals did briefly address the issue of waiver in a footnote:

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.

As noted earlier, 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 could reserve the Constitutionally protected deference granted to natural parents despite a grant of custody to a third-party that would ordinarily be considered a waiver of such rights.

However, the Virginia Court of Appeals' decision in *Tencer* suggests that any potential waiver of a natural parent or lack thereof, is irrelevant. Under the *Tencer* analysis, the issue appears to be not whether the natural parent has waived constitutional rights afforded to parents, but rather whether the third-party has been elevated to the status of a parent/custodian. (In the words of the court "clothed with that custodial right and the attendant presumption.") 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 moot as long as the third-party in question has been "clothed" with the status of a parent/custodian.

VI. CONCLUSION

As can be seen from the above law, gaining custody or visitation of a child by a third-party is usually an uphill battle absent consent of at least one of the child's parents. The burden of proof is high, requiring a showing of actual harm if visitation is denied, and this will often require an expert witness. However, if one parent consents to visitation with a grandparent, the burden is lowered and the grandparent must only demonstrate that the best interests of the child are served by an award of visitation.

Multiple 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."⁸

So 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 lives of the grandchildren starts long before any visitation dispute.⁹ "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."¹⁰

⁸ William B. Smith, *Grandparents: Don't Give Up!*, Va. Law., December 2000, at 26, 28.

⁹ *Id.* at 29.

¹⁰ *Id.*

Grandparents should try, during divorce proceedings, to negotiate specific visitation provisions for themselves. However, if visitation is not agreed to, mediation is the next step that should be considered. In cases where mediation is not agreed to, the grandparent may decide to file a petition in their own name.

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*)? Or,
 - d. Murder of a spouse (unfitness) (*Walker*)? Or,
 - e. History of alcohol or drug abuse, spousal abuse, unemployment, or family neglect (unfitness) (*Walker*)? Or,
 - 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*)? Or,
 - 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*)? Or,
 - i. Stepmother cares for child for nine years, including after Father's death and Mother visited the child eight or ten times in a nine-year period. Prospect of visiting with Mother caused child anxiety, eczema, and bed wetting (special circumstances) (*Bailes*)? Or,
 - j. Stepfather had physical custody for seven years, Mother exposed child to man who may have abused the child and step father 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 where Mother and Father both object to the visit (*Williams*)?
 - b. A mental health professional will testify that the child will suffer actual psychological harm if the visits were not granted (*O'Rourke*)?
 - c. One parent is requesting your visitation rights?
 - i. If so, the standard burden of proof would 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 applies, not best interests. (*O'Leary*).