

***What is “third party” custody?***

A “third party” is anyone other than a parent (natural or adoptive). If you want to file a lawsuit for child custody and are a third party, you need to first meet a difficult “threshold” standard: a constitutional presumption in favor of a parent’s right to choose with whom a child associates and how that child is cared for. The assumption of our courts is that a parent will make good choices for his or her children.

Therefore, if a grandparent (or any other “third party”) seeks custody, he or she must demonstrate that the parents have been acting in a way that is inconsistent with the presumption. That does not mean that a grandparent must show that the parents’ rights have been terminated by a court, nor does it mean that abuse, neglect or abandonment have been found by DSS. But there must, at a minimum, be compelling evidence of parents consistently making decisions that are adverse to the child.

If that hurdle (called “standing”) is met, the grandparent and the parent(s) will both be considered as possible primary caregivers for the child. The court uses a “best interests” of the child test in its analysis. It is in then in the judge’s discretion where the child should live.



***If one parent dies, can the grandparent(s) get a custody order on that basis?***

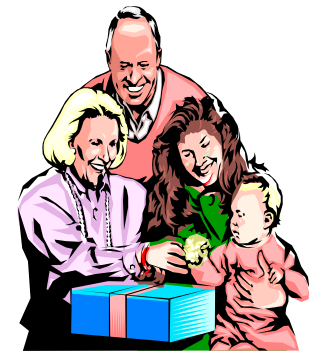
Not just on that basis. When there is no ongoing custody dispute between the parents, the family is considered intact. If there is not a prior visitation order in favor of the grandparent, the surviving parent can make whatever decisions he or she wants to make about visitation or access to the child. Even if the surviving parent was not the primary caregiver, the legal presumption is that that parent is now the caregiver and that he/she has complete parental authority, including where to live, how to care for the child(ren) and whether or not the child(ren) spends time with the grandparent. Again, only where conduct that is inconsistent with a parent’s rights exists may a grandparent initiate custody.

***No “Permanent” Orders***

Just because a court determines custody in one order does not deprive the court of future decisionmaking power over the issue. Later on, if the circumstances of the parties as they affect the child change, a modification may be sought by either party. The change must be “substantial” (very significant) and must affect the child before the court will revisit its order, however. A party files a Motion in the Cause (or “Motion to Modify”) for such a reconsideration.



# **Child Custody Issues & Grandparents’ Legal Rights**





### ***The High Court's Protections for Parents ...And what it means for grandparents***

The United States Constitution and the North Carolina constitution protect against interference with "fundamental rights and liberty interests." Among these important rights is the right to make decisions as a parent.

The courts have consistently limited the right of non-parents to interfere with a parent's decisions. For example, the U.S. Supreme Court, in Troxel v. Granville, held that a state law that allowed anyone (including a grandparent) to get visitation with a child if he or she could show that it was in the best interest of that child violated a parent's constitutional rights. However, in that decision, the Supreme Court acknowledged that grandparents are increasingly playing "an important role" in raising children in our country.



### ***What if the child was left with me?***

Even if a grandparent has been responsible for the care of a child, it doesn't mean that the parent has lost his or her constitutional presumption. Several cases have held that asking another relative or friend to care for a child because of work, poor health or other difficulties does not deprive a parent of his or her constitutional presumptions. If the person caring for the child knows that the parent is leaving the child with him or her temporarily, there is no "abandonment." However, a grandparent or other caregiver may override the protections for the parent where it can be shown that the parent did not attempt to remain involved with the child and/or failed to support the child after placing the child with that caregiver.

### ***How can I use the law to establish custody?***

A custody determination results when someone files a legal proceeding (an "action") in the civil court system. This differs from a juvenile proceeding, in which the state has stepped in to determine the status of a child. It is also not guardianship, which is a special proceedings matter. There are four, separate custody statutes in North Carolina that allow a grandparent to pursue visitation/custody through the court system. They are as follows:



1. Where there is an ongoing custody dispute in the court system, a grandparent may intervene and ask for visitation under N. C. Gen. Stat. 50-13.2(b1).
2. If custody has been previously decided, but a change has occurred that requires review, the grandparent may seek custody or visitation under N.C. Gen. Stat. 50-13.5(j).
3. Where a child is being adopted by a stepparent or a relative, and a biological grandparent already has a relationship with that child, he or she may petition the court under N.C. Gen. Stat. 50-13.2A for continuing visitation.
4. Where the natural parents act inconsistently with their constitutionally protected status as parents, a grandparent may approach the court as a "third party" seeking custody under N.C. Gen. Stat. 50-13.1(a).

**If you need help with child custody, contact your local Legal Aid of NC office.**

