

Nonparent custody claims: Court of Appeals confirms that an evidentiary hearing is not required to determine standing

Consider the situation where a grandparent or other nonparent files a custody action against a parent. The complaint includes allegations regarding the relationship between the nonparent and the child and includes allegations that the parent has waived their constitutional right to exclusive care, custody and control of the child. In response, the parent files an answer and a motion to dismiss the complaint pursuant to Rule 12(b), arguing that the nonparent does not have standing to seek custody of the child. To determine whether the complaint should be dismissed for plaintiff's lack of standing, does the court need to conduct an evidentiary hearing to determine whether the parent has waived their constitutional right to custody or is the standing determination made on a review of the complaint alone?

In a recent case, the Court of Appeals clarified that the standing determination is made on the court's review of the complaint alone.

[Thomas v. Oxendine, N.C. Ct. App. \(Dec. 7, 2021\)](#)

Plaintiffs are the paternal grandparents of the minor child whose custody is at issue in this case. The grandparent complaint alleged that plaintiffs are the child's paternal grandparents and that they have a close, substantial relationship with the child. In addition, the complaint alleged that the child's mother acted inconsistent with her protected status as a parent, thereby waiving her constitutional right to custody, by repeatedly and willfully failing to protect the child from danger and harm caused by the actions of mother's husband, the child's stepfather. The trial court entered an emergency ex parte order awarding custody of the child to plaintiffs and, following a hearing, entered a temporary custody order continuing custody with plaintiffs until the permanent custody trial.

Mother then filed a motion to dismiss, alleging grandparents had failed to state a claim in that the allegations regarding mother's conduct were insufficient to support a conclusion that she had acted inconsistent with her protected status as a parent and alleging that grandparents did not have standing to bring the custody action because they did not "allege an in loco parentis relationship with the child." The trial court denied the motion to dismiss and, following a trial on permanent custody, awarded primary custody of the child to plaintiffs.

Standing

On appeal, mother argued, among other things, that the trial court erred by determining that grandparents had standing without taking evidence. She argued that because a nonparent must prove by clear and convincing evidence that a parent has waived their constitutional right to custody before a trial court can award custody to the nonparent, the trial court must base a

determination of standing on actual evidence rather than on the sufficiency of the allegations in the complaint.

The Court of Appeals rejected mother's argument, stating:

"Standing is required to confer subject matter jurisdiction. *Wellons v. White*, 229 N.C. App. 164, 176, 748 S.E.2d 709, 718 (2013). "A [trial] court's subject matter jurisdiction over a particular matter is invoked by the pleading." *Boseman v. Jarrell*, 364 N.C. 537, 546, 704 S.E.2d 494, 501 (2010). At the motion to dismiss stage, all factual allegations in the pleadings are viewed in the light most favorable to the plaintiff, granting the plaintiff every reasonable inference. *Grindstaff v. Byers*, 152 N.C. App. 288, 293, 567 S.E.2d 429, 432 (2002)."

"To survive a motion to dismiss for lack of standing, grandparents must allege both that they are the grandparents of the minor child and facts sufficient to demonstrate that the minor child's parent is unfit or has engaged in conduct inconsistent with their parental status. See, e.g., *Rodriguez v. Rodriguez*, 211 N.C. App. 267, 276, 710 S.E.2d 235, 241-42 (2011) ("[The] plaintiffs had standing to proceed in an action for custody pursuant to N.C. Gen. Stat. § 50-13.1(a) as they alleged they are the grandparents of the children and that [the] defendant had acted inconsistently with her parental status and was unfit because she had neglected the children.") (citation omitted); *Grindstaff*, 152 N.C. App. at 292, 567 S.E.2d at 432 ("[G]randparents alleging unfitness of their grandchildren's parents have a right to bring an initial suit for custody[.]").

"[In arguing that evidence is required to determine standing], [m]other confuses two distinct but related stages in a custody dispute between a parent and non-parent, namely: (1) the standing and pleading requirements of the complaint at the motion to dismiss stage, and (2) the burden of producing evidence at the custody hearing sufficient to prove that a parent has waived the constitutional protections guaranteed to them. *Gray v. Holliday*, 2021-NCCOA-178, (unpublished). Where, as here, the pleading alleges sufficient facts to show that plaintiffs are the grandparents of the minor child and that the parent is unfit or has engaged in conduct inconsistent with their parental status, Grandparents had standing, and the trial court had subject matter jurisdiction to hear the case."

Conduct Inconsistent with Protected Status

In reviewing the permanent custody order entered by the trial court, the court of appeals explained that even when nonparent plaintiffs have standing, the plaintiffs still have the burden of proving by clear and convincing evidence during the permanent custody hearing that the parent has waived their constitutional right to exclusive custody of the child. The appellate court affirmed the permanent order in this case, concluding that plaintiffs' evidence was sufficient to show that mother failed to protect the child from the stepfather's abusive behavior and inappropriate discipline and that she also had "relinquished otherwise exclusive parental authority to" the grandparents when she left the child in grandparents care with no "definitive timeframe, oversight

or instruction” and otherwise regularly relied on “grandparents in a parental capacity for the minor child and intended for grandparents to shoulder parental responsibility.”

Conclusory or vague statements in the complaint regarding conduct inconsistent with a parent’s protected status are not sufficient to establish standing. To survive a motion to dismiss, the allegations in the complaint must be such that, if proven by clear and convincing evidence during the custody trial, will support a conclusion that the parent has waived their constitutional right to custody. See *Perdue v. Fuqua*, 195 N.C. App. 583 (2009) (allegations by grandmother that father had lost his job, began working third shift, left very young girlfriend alone to care for child, and left child in her custody for four months were insufficient to state a claim for custody against father); and *McDuffie v. Mitchell*, 155 N.C. App. 587 (2002) (trial court properly dismissed grandparent complaint for custody against father where complaint alleged only that the father “had been estranged from the children for some time and currently enjoys limited visitation with the children”; allegations were insufficient as a matter of law to support a finding that father had waived his right to custody). Cf. *Ellison v. Ramos*, 130 N.C. App. 389 (1998) (pleading sufficient to withstand dismissal where caretaker alleged she had cared for child since birth and that father had placed child in care of others who were unable to care for child’s medical conditions resulting in child’s hospitalization); *Grindstaff v. Byers*, 152 N.C. App. 288 (2002) (complaint was sufficient where grandmother alleged that parents had left children in her care and had visited the children infrequently and inconsistently and had not shown they were capable of caring for and supervising the children);

Intervention

I wrote about intervention procedure in custody and child support cases in this blog post:

<https://civil.sog.unc.edu/intervention-in-custody-and-child-support-cases/>

The *Thomas* decision offers further support for the cases cited in that post indicating that an evidentiary hearing is not required to determine whether a nonparent has a right to intervene in a custody proceeding pending between other parties. The trial court makes the determination by reviewing the sufficiency of the allegations in the pleading filed by the intervenors. The full evidentiary hearing on the issue of the parent’s constitutional right to custody will occur during the permanent custody trial.