

Parent vs Nonparent Custody and Visitation



July 2025

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Custody statutes

○ GS 50-13.1

- “Any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child, as hereinafter provided.”

○ GS 50-13.2

- “An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child.”

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Petersen v. Rogers (1994)

- "Absent a finding that parents are unfit or have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care and control of their children must prevail."



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Petersen v. Rogers (1994)

- "Parents with lawful custody of a child have the prerogative of determining with whom their children associate."



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Price v. Howard (1997)

- When parents enjoy constitutionally-protected status, “application of the ‘best interest of the child standard’ in a custody dispute with a non-parent would offend the Due Process Clause.”

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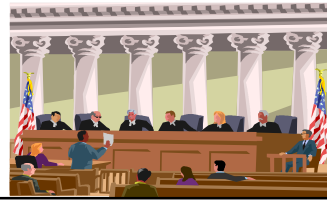
Price v. Howard (1997)

- “A parent’s due process interest in the companionship, custody, care and control of a child is not absolute.”

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Price v. Howard

- Parent's protected interest "is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child."



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Price v. Howard

- "Therefore, the parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to raising a child."



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Price v. Howard

- “Unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status a parent may enjoy. Other types of conduct, which must be viewed on a case-by-case basis, can also rise to this level so as to be inconsistent with the protected status of natural parents.”

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What does this mean?

- In a dispute between a parent and a nonparent, you cannot consider a child’s best interest unless you conclude the parent has lost their constitutional right to custody

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Procedural issues

- “Standing” required – *Ellison v. Ramos*
 - Sufficiency of relationship decided on case-by-case basis
 - Standing cannot be waived
 - Order void if plaintiff did not have standing at time of filing

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Procedural Issues

- Rule 12(b)(6) issue
 - Pleading must allege sufficient facts
 - *McDuffie v. Mitchell*; *Ellison v. Ramos*
- Waiver doesn't mean parent loses
 - *Price v. Howard*; *Deborah N. v. Carla B.*

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Procedural Issues

- Emergency and temporary orders?
 - GS 50-13.5 – entered when circumstances ‘render it appropriate’
 - *Smith v. Barbour*, 154 NC App 402 (2002)
(no conclusions necessary in temporary orders regarding waiver of constitutional rights by parents)
 - Intervention allowed ex parte?
 - Rule 24

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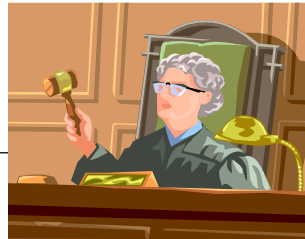
Procedure

- Waiver conclusion needs clear and convincing evidence
 - *Adams v. Tessener*, 354 NC 57(2001)



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Unfitness



- *Raynor v. Odom* (1996)
 - Substance abuse, failure to recognize child's developmental problems, left child with grandmother
- *Sharp v. Sharp* (1996)
 - Risk of harm to child when in mother's care, physical and emotional instability of mother, no financial support of child
- *Davis v. McMillian* (2002)
 - Determination of unfitness in earlier proceeding

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Inconsistent Conduct



- "any past circumstance or conduct which could impact either the present or the future of the child is relevant."
 - *Speagle v. Seitz*, 354 NC 525(2001)
- Conclusion must be supported by clear and convincing evidence
 - *Adams v. Tessener*, 354 NC 57 (2001)

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Inconsistent Conduct

- *Price v. Howard*
 - Voluntary, non-temporary relinquishment of physical custody
 - Compare
 - *Penland v. Harris* (no waiver)
 - *Ellison v. Ramos* (enough in pleading)
 - *Grindstaff v. Byers* (enough in pleading)
 - *Perdue v. Fuqua* (not enough in pleading)

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Inconsistent Conduct

- *Boseman v. Jarrell* (NC 2010)
 - Creation of parent-like relationship; permanently ceding portion of exclusive authority to another
 - Compare
 - *Mason v. Dwinnell* (mom intended to waive)
 - *Estroff v. Chatterjee* (mom did not intend to waive)

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Inconsistent Conduct

- *Adams v. Tessener*
 - Dad didn't act quickly enough
- *Speagle v. Seitz*
 - Mom's previous "lifestyle and romantic involvements resulted in neglect and separation from minor child"



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Inconsistent Conduct

- *Owenby v. Young*
 - DWI convictions not enough
- *McDuffie v. Mitchell*
 - Allegations of "estrangement" and limited visitation not enough



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Step-parents

- *Seyboth v. Seyboth*, 147 NC App 63 (2001)
 - Step-parent has standing due to relationship with child
 - No best interest until determine parent waived constitutional rights
 - Intent to permanently cede portion or exclusive parental authority ????

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Modification

- Parent does not lose protected status as a result of custody litigation with other parent
 - *Brewer v. Brewer*, 139 NC App 222 (2000)

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Modification

- But once custody is granted to non-parent, parent must show changed circumstances and best interest to modify.
 - *Bivens v. Cottle*, 120 NC App 467 (1995)
 - *Speaks v. Fanek*, 122 NC App 389 (1996)
 - *Warner v. Brickhouse*, NC App (4/1/08)
 - *Cf. Weideman v. Shelton*, 787 SE2d 412 (NC App 2016)(parent did not lose protected status by entering consent custody order with another non-parent intended to be 'temporary')

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Consent Orders

- Can custody orders be entered by consent without waiver findings?
- Do all consent orders granting custody or visitation rights to a non-parent result in waiver?
 - "School custody orders"
 - Mediated parenting agreements
 - See also *Weideman*



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Grandparents

- Treated same as everybody else for custody
 - *Owenby v. Young*, 357 NC 142 (2003)
 - *Speagle v. Seitz*, 354 NC 525 (2001)
 - *McDuffie v. Mitchell*, 155 NC App 587 (2002)



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Grandparent Visitation

- 50-13.1(a): general custody/visitation
 - *Not* a grandparent visitation statute
 - *McIntyre v. McIntyre*



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Grandparent Visitation Statutes

- 50-13.2(b1): visitation as part of any custody order
- 50-13.5(j): custody order modified to include grandparent custody or visitation
- 50-13.2A: visitation following relative/step-parent adoption

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Eakett v. Eakett

- "A grandparent cannot initiate a lawsuit for visitation rights unless the child's family is experiencing some strain on the family relationship, such as an adoption or an on-going custody [visitation] battle."

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Troxel v. Granville



- Parents have a “fundamental liberty interest” in the care, custody and control of their children.

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Troxel v. Granville



- Application of ‘best interest standard’ without – at least – a showing of “special factors” and/or “appropriate deference” to the parent, violates Due Process

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Alexander v. Alexander

- Court of appeals held grandparent visitation statute unconstitutional as applied
 - See blog post:
<https://civil.sog.unc.edu/?s=grandparent>