Nonparent vs Parent Consent Custody Orders

Is a consent custody order void if it is entered in a case between a nonparent and a parent and the consent order does not include the conclusion that the parent has waived his or her constitutional right to exclusive, care, custody and control of the child?

I don't think so. Most existing case law indicates that such consent orders are valid. And that makes sense because constitutional rights generally can be waived voluntarily. If a parent is willing to consent to a court order without the findings and conclusions, then it simply is a waiver of that parent's constitutional protections. The subject matter jurisdiction of the court is not implicated.

However, consent orders entered in cases where the **party** requesting custody did not have ***standing*** at the time of filing are *void ab initio*.

Consent Custody Generally

The court of appeals has held that consent custody orders generally are not required to contain any findings of fact and conclusions of law. Buckingham v. Buckingham, 134 NC App 82 (1999)(but stating the trial court should review a consent custody order to "ensure that it does not contradict statutory, judicial, or public policy.").

Third Party v. Parent Cases

In *Petersen v. Rogers,* 337 NC 397 (1994) and *Price v. Howard*, 346 NC 68 (1997), the North Carolina Supreme Court reminded us all that parents have a fundamental liberty interest in the exclusive care, custody and control of their children. The state cannot interfere with this fundamental Due Process right by allowing a judge to apply the Best Interest of the Child test to determine custody in a case where a non-parent is seeking custody from a parent. It is only when the parent has lost his/her constitutional protection that the court can step in and determine whether a non-parent should have custody rights.

But when a parent wants to consent to custody rights for a non-parent in a consent order, must the consent order contain the conclusion of law that the parent has lost constitutional protection in order to be valid? In other words, is the conclusion necessary to give the trial court subject matter jurisdiction to enter the consent order? *See e.g.* Kenton v. Kenton, 218 NC App 603 (2012)(conclusion that defendant committed an act of domestic violence was required to give the trial court subject matter jurisdiction to enter a consent DVPO – result in *Kenton* reversed by statutory amendment).

While there is one appellate opinion, Wellons v. White, 748 SE2d 709 (NC App 2013), that repeatedly refers to this conclusion and the findings of fact to support it as matters of **'standing'** – and standing clearly is required to give the court subject matter jurisdiction to enter an order (see

more below) – there are three reported opinions involving trial court orders entered in third party custody matters without any conclusion of law regarding the parent's waiver of constitutional protections. In each of these cases, the court of appeals held that the order awarding custody to the nonparent third party could not be modified unless the parent showed there had been a substantial change in circumstances since the time the custody order was entered and then established that modification of custody was in the best interest of the child. There is no indication in any of these opinions that the waiver of parental rights is a matter of subject matter jurisdiction. Rather, it appears that all protections are waived if the parent does not raise the constitutional issue it at the time of the initial custody proceeding.

The three cases are: *Bivens v. Cottle*, 120 NC App 467 (1995)(trial court entered order giving custody to grandmother without concluding mother had waived her constitutional rights and instead finding that mom was 'fit and proper' to care for child. Mother was not entitled to modification without showing of changed circumstances and best interest.); *Speaks v. Fanek*, 122 NC App 389 (1996)(same result where initial order was a consent order. Court of appeals held that constitutional presumptions in favor of parents apply only when initial custody order is entered and not at modification hearing, apparently even if constitutional issues were not raised at initial hearing); Sloan v. Sloan, 164 NC App 190 (2004)(trial court gave visitation to grandmother in original custody order without reaching any conclusion that mother had waived constitutional rights but mom did not appeal. Mom could not later object to grandmother's request for increased visitation on the basis of mom's constitutional protections).

But *Standing* is Subject Matter Jurisdiction

The court of appeals has held on several occasions that third party custody complaints must be filed by a person who has standing. Standing refers to the **relationship between the person seeking custody and the child.** *See* Ellison v. Ramos, 130 NC App 389 (1998). *But see* Wellons. The court in Ellison held that the standing requirement comes from the statement by the North Carolina Supreme Court in *Petersen v. Rogers*, 337 NC 397 (1994), that "strangers" have no right to seek custody or visitation with a child. Therefore, to have standing, the person seeking custody must show a relationship sufficient to keep that person from being a stranger. Ellison held that standing must be determined on a case by case basis. To date, the court of appeals has found standing for persons who have a "relationship in the nature of parent and child" with the child, *see e.g.* Ellison and Seyboth v. Seyboth, 147 NC App 63 (2001)(step-father had parent-like relationship sufficient to grant standing), and for persons who are "relatives" of the child. Rodriquez v. Rodriquez, 211 NC App 267 (2011)(grandparents have standing); and Yurek v. Baker, 198 NC App 67 (2009)(sister and brother-in-law of child's father had standing as relatives).

According to the court of appeals, because standing is a matter of subject matter jurisdiction, it cannot be waived by the consent of the parties. Therefore, consent orders will be void if the action was initiated by a person who lacked a sufficient relationship with the child at the time of filing. *See* Myers v. Baldwin and Baker, 205 NC App 696(2010)(appellate court can raise standing issue even

if not argued by either party; unrelated couple who cared for child for two months before filing custody action did not have relationship with child sufficient to give them standing, so judgment giving them custody was void *ab initio*); and *Tilley v. Diamond, unpublished opinion, 184 NC App 758 (2007)*(same result where plaintiffs knew child only for a couple of days before filing; consent order declared void several years after it was entered).

Thoughts?