

Parent vs Nonparent Custody and Visitation

Cheryl Howell
School of Government



Petersen v. Rogers (1994)

- o "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."



Petersen v. Rogers (1994)

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



Price v. Howard (1997)

- o 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."

Price v. Howard (1997)

- o "A parent's due process interest in the companionship, custody, care and control of a child is not absolute."

Price v. Howard

- o 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."



Price v. Howard

- o "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."



Price v. Howard

- o "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."

Procedural issues

- o Applies in all parent vs. non-parent custody and visitation cases
 - Except grandparent visitation?????



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

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.*

Procedural Issues

- Emergency and temporary orders?
 - GS 50-13.5 – entered when circumstances ‘render it appropriate’
 - Intervention allowed ex parte?
 - Rule 24

Procedure

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



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

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)

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)

Inconsistent Conduct

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

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"



Inconsistent Conduct



- *Owenby v. Young*
 - DWI convictions not enough

- *McDuffie v. Mitchell*
 - Allegations of "estrangement:" and limited visitation not enough



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 ????

Modification

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

Modification

- o 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)

Consent Orders

- o Can custody orders be entered by consent without waiver findings?
- o Do all consent orders granting custody or visitation rights to a non-parent result in waiver?
 - "School custody orders"
 - See GS 115C-366



Grandparents

- o 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)



Grandparent Visitation

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



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

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."

Troxel v. Granville



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

Troxel v. Granville



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