Parent vs Nonparent Custody and Visitation



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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."



Petersen v. Rogers (1994)

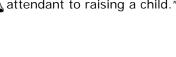
 "Parents with lawful custody of a child have the prerogative of determining with whom their children associate."



Price v. Howard (1997) o When parents enjoy constitutionallyprotected 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

 "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-bycase basis, can also rise to this level so as to be inconsistent with the protected status of natural parents."

Procedural issues

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



Procedural issues

- o "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

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

Procedural Issues

- o 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



- o Raynor v. Odom (1996)
 - Substance abuse, failure to recognize child's developmental problems, left child with grandmother
- o 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
- o Davis v. McMillian (2002)
 - Determination of unfitness in earlier proceeding

Inconsistent Conduct



- o "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

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

Inconsistent Conduct

- o Boseman v. Jarrell (NC 2010)
 - Creation of parent-like relationship; permanently ceding portion of exclusive authority to another
 - Compare
 - $\circ \textit{Mason v. Dwinnell} \text{ (mom intended to waive)}$
 - o Estroff v. Chatterjee (mom did not intend to waive)

Inconsistent Conduct

- o Adams v. Tessener
 - Dad didn't act quickly enough



- o Speagle v. Seitz
 - Mom's previous "lifestyle and romantic involvements resulted in neglect and separation from minor child"

Inconsistent Conduct



- o Owenby v. Young
 - DWI convictions not enough



- o McDuffie v. Mitchell
 - Allegations of "estrangemen:" and limited visitation not enough

Step-parents

- o *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

- But once custody is granted to nonparent, 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?
- Do all consent orders granting custody or visitation rights to a non-parent result in waiver?
 - "School custody orders"
 - See GS 115C-366

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)







Grandparent Visitation

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





Grandparent Visitation Statutes

- o 50-13.2(b1): visitation as part of any custody order
- 50-13.5(j): custody order modified to include grandparent custody or visitation
- o 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."

