Juvenile Cases Related to "Best Interest" under *Petersen* and *Price*

<u>Petersen v. Rogers, 337 N.C. 397, 445 S.E.2d 901 (1994).</u>

Bost v. Van Nortwick, 117 N.C. App. 1, 449 S.E.2d 911 (1994).
The court of appeals reversed an order terminating a father's rights, in an action brought by his former wife. The court emphasized the "best interest" standard and "polar star," found that the trial court abused its discretion in making the best interest determination, but then held that no grounds had been established. The court quoted from *Petersen*: "[P]arents' paramount right to custody would yield only to a finding that they were unfit custodians because of bad character or other, special circumstances…"

<u>Price v. Howard, 346 N.C. 68, 484 S.E.2d 528 (1997).</u>

In re Huff, 140 N.C. App. 288, 536 S.E.2d 838 (2000).
In a termination of parental rights case, the court cited *Petersen*, but only with respect to the proper consideration of religious practices.

In re Byrd, 354 N.C. 188, 552 S.E.2d 142 (2001).
The supreme court affirmed a holding that a putative father's consent to his child's adoption was not required because he had not provided reasonable, tangible support before the petition was filed. The father had filed a petition for a prebirth determination of his right to consent to adoption, and he filed a response to the adoption petition stating that his consent was required. Two justices dissented in part, expressing concern that the holding conflicted with the court's earlier holdings in *Petersen* and *Price*. The dissenting justices noted that the constitutional argument was not raised at trial or on appeal, but stated, "There are no facts to indicate that respondent has acted inconsistently with his protected parental interests."

In re Nesbitt, 147 N.C. App. 349, 555 S.E.2d 659 (2001).
The court of appeals reversed an order terminating a mother's rights, holding that the ground had not been established by clear, cogent, and convincing evidence. It appeared that the trial court had blended its consideration of grounds and best interest. The court cited *Petersen* to emphasize that best interest is a proper consideration only after a finding of unfitness and quoted from it as follows: "'[E]ven if it were shown, …that a particular couple desirous of adopting a child would best provide for the child's welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child *adequately*.'" The court stated that an independent determination of the parent's fitness must be made, and only if the parent is found to be unfit is application of the best interest standard proper.

In re Pittman, 149 N.C. App. 756, 561 S.E.2d 560 (2002).
Affirming an adjudication of abuse and neglect, the court of appeals held that the mother could not invoke *Miranda* to suppress a statement she had made to a law enforcement officer. The court acknowledged the mother's argument that a constitutionally protected interest was at stake, but said, "[T]he common thread running throughout the Juvenile Code is that the court's primary concern must be the child's best interest." Citing *Price*, the court said that a parent's constitutional "interest in the custody and care of the child is balanced against the state's well-established interest in protecting the welfare of children."

In re Stratton, 153 N.C. App. 428, 571 S.E.2d 234 (2002).
Respondents' ten children were adjudicated neglected and dependent based on evidence that they lived in squalid conditions; had inadequate food, clothing, and housing; and were not attending school or being instructed at home. They were placed in DSS custody. DSS proposed to have the children immunized, but the parents expressed religious objections. The court of appeals upheld DSS's authority to have the children immunized. Citing and quoting from both *Petersen* and *Price*, the court stated that once the trial court found unfitness, neglect or other action inconsistent with the parent's constitutionally protected interest, the court should make a basic determination of what is in the child's best interests. In this case, the court said, immunization was in the children's best interest.

The court of appeals did not discuss

- whether an adjudication of neglect, by itself, is always sufficient to overcome the parents' constitutionally protected status;
- whether specific findings must be made with respect to each parent, since an adjudication is a judgment about the child's status, not the actions of the parents;
- G.S. 7B-903(a)(2)c., which addresses consent to medical care for children in DSS custody.

Rosero v. Blake, 357 N.C. 193, 581 S.E.2d 41 (2003).
Although not a juvenile case, the supreme court's decision in *Rosero* is relevant to cases involving termination of a putative father's rights or the issue of whether a putative father's consent to an adoption is required. In this custody case, the court affirmed an award of custody to the child's biological father, reiterating that the rights of a biological father are not lesser than those of a child's mother. The court cited *Petersen* and *Price* as well as a number of U.S. Supreme Court cases that "acknowledge that, absent a showing that the biological or adoptive parents are unfit, that they have otherwise neglected their children's welfare, or that some other compelling reason exists, the paramount rights of both parents to the companionship, custody, care, and control of their minor children must prevail."

Owenby v. Young, 357 N.C. 142, 579 S.E.2d 264 (2003).
Dicta from this custody case has been cited and relied on in termination of parental rights cases involving putative fathers. In *Owenby,* where the mother of the child's deceased mother brought an action for custody against child's father, the court held that the grandmother had failed to establish by clear and convincing evidence that the father was unfit or had acted inconsistently with his constitutionally protected parental status – citing and quoting both *Petersen* and *Price*. The dicta that shows up later in some juvenile cases reads as follows:

> There are at least two methods a court may use to find that a natural parent has forfeited his or her constitutionally protected status. First, N.C.G.S. § 7B-1111 sets forth nine different grounds upon which a court may terminate parental rights. … The finding of any one of the grounds is sufficient to order termination. … This statutory procedure is not the subject of the present case. Second, when a court finds parental conduct inconsistent with the protected status, the parent's paramount right to custody may be lost.

In re Adoption of Shuler, 162 N.C. App. 328, 590 S.E.2d 458 (2004).
Citing *Byrd*, supra, the court of appeals affirmed a holding that the biological father's consent to adoption was not required. The court said, "Under the mandate of the statute, a putative father's failure to satisfy any of these requirements before the filing of the adoption petition would render his consent to the adoption unnecessary." The court did not make reference to *Rosero*, supra. In allowing the father's interlocutory appeal to proceed, however, the court did cite *Owenby*, supra, in acknowledging the putative father's "fundamental right" in relation to his child. The opinion mentions neither *Petersen* nor *Price*.

In re Rholetter, 162 N.C. App. 653, 592 S.E.2d 237 (2004).
The trial court adjudicated the children to be abused and neglected while in the care of the father and step-mother and placed them in DSS custody pending disposition. Two home studies of the mother's home in South Carolina were done. The trial court found that concerns raised by a second home study were not sufficient to rebut the constitutional presumption that the mother was a fit and proper person to have custody of the children, under *Petersen*, and awarded custody to the mother. On appeal, the father argued that the trial court improperly used the *Petersen* presumption to award custody to the mother. Rather than address the applicability of the *Petersen* presumption at disposition in a juvenile case, the court of appeals said that since the trial court had applied the best interest standard when it awarded custody to the mother, "any misapplication of the *Petersen* presumption [was] without consequence."

In re JAG, 172 N.C. App. 708, 617 S.E.2d 325 (2005).
The court of appeals in this case appears to have applied the *Petersen* presumption to the disposition phase of a juvenile case, although it does not cite *Petersen*, *Price*, or any other case in that part of the opinion. The court of appeals affirmed the part of the trial court's order that adjudicated the child to be abused based on a non-accidental head injury that occurred when the child was in the sole care of the father. However, the court held that conclusions that the child was neglected and dependent were based on findings that were not supported by the evidence. The findings that were proper, the court said, indicated no basis for continuing the child in the custody of DSS, when there were no findings to support a conclusion that the mother could not care for the child or that the child would not be safe in her care. The court reversed the disposition part of the order, stating since there were no grounds to prolong the removal of custody from the mother, "the trial court abused its discretion in finding and concluding it was in the juvenile's best interest that his custody remain with DSS."

In re D.D.H., 168 N.C. App. 239, 607 S.E.2d 55 (2005) (unpublished).
In an appeal from an order terminating her parental rights, respondent cited *Owenby*, supra, for the proposition that alcohol abuse alone was not sufficient to terminate her parental rights. In a footnote, the court of appeals noted that *Owenby* involved a custody dispute between a father and grandmother, and that the supreme court, after briefly discussing G.S. 7B-1111, had said "This statutory procedure is not the subject of the present case." Therefore, the court of appeals concluded that *Owenby* was inapplicable to the TPR case.

In re T.K., 171 N.C. App. 35, 613 S.E.2d 739, *aff'd per curiam*, 360 N.C. 163, 622 S.E.2d 494 (2005).
The majority affirmed the trial court's permanency planning order ceasing reunification efforts, changing the permanent plan for three children from reunification with the mother to guardianship of a relative, and denying the mother visitation rights. On appeal, the mother argued that the trial court had not adequately considered the progress she had made. In affirming the trial court's order, the court of appeals said the following:

> After careful consideration, the court had no assurances respondent-mother had made sufficient progress for the children to be returned to her care. … Here the court properly made findings of fact as to the respondent-mother's progress (or lack thereof) and as to the best interest of the children. However, as we stated above, at this stage the best interests of the children, not the rights of the parents, are paramount.

One judge dissented because the trial court's order did not find by clear and convincing evidence that respondent's conduct was inconsistent with her constitutionally protected status or that she was unfit – citing and quoting *Moore v. Moore*, 160 N.C. App. 569, 587 S.E.2d 74 (2003) and its quotes from *Petersen*.

In re Adoption of Anderson, 360 N.C. 271, 624 S.E.2d 626 (2006).
The trial court found that the biological father's consent to adoption was not required, because he had not taken any of the steps necessary to prevent a ground for termination of parental rights. The court of appeals reversed and remanded for additional findings. Relying heavily on *Byrd*, supra, the supreme court reversed. In the court of appeals [*In re Adoption of Anderson*, 165 N.C. App. 413, 598 S.E.2d 638 (2004)] the father raised, but the court did not address, the argument that the trial court's construction of the statute and case law violated his rights to due process and equal protection. (It is not clear whether that argument was made in the trial court.) In allowing the father's interlocutory appeal, the court of appeals did cite *Shuler*, supra, in acknowledging the putative father's "fundamental right" in relation to his child. Neither the court of appeals nor the supreme court referred to *Petersen*, *Price*, or *Rosero*, supra, and the supreme court's opinion did not mention the constitutional argument.

A Child's Hope, LLC v. Doe, 178 N.C. App. 96, 630 S.E.2d 673 (2006).
The court of appeals reversed the trial court's order finding that grounds to terminate the putative father's rights had not been proved by clear and convincing evidence. The court held that uncontroverted evidence showed that he had not met the requirements of G.S. 7B-1111(a)(5), relying on the "bright line rules" regarding the rights of putative fathers established by the state supreme court in *Byrd* and *Anderson*, supra. The court of appeals did not refer to *Petersen*, *Price*, or *Rosero*, supra, and there is no indication that a constitutional argument was made.

In re B.G., 191 N.C. App. 399, 663 S.E.2d 12 (2008) (unpublished).
The child was removed from her mother's home and placed in DSS custody. Later she was placed temporarily with relatives, but the plan became reunification with her father. At a permanency planning hearing the court noted a positive home study of the father's home and ordered specific visitation as part of a transition to the father's home. At a later permanency planning hearing, however, the court placed the child in the joint custody of her father and an aunt and uncle, gave the aunt and uncle physical custody, and ordered visitation for the father. On appeal, the father argued that the order violated his constitutionally protected interest in the care and custody of his daughter, citing *Price*. The court of appeals refused to consider the argument, because the record did not indicate that it had been made at trial, but reversed because the order did not include the findings required by G.S. 7B-907, including whether it was possible for the child to return home within six months.

In re B.G. (2) 197 N.C. App. 570, 677 S.E.2d 549 (2009).
On remand, the father did make the constitutional argument. The trial court acknowledged his constitutional rights and that he was a "non-offending" parent, but concluded that in balancing his rights with those of a third party and the child's best interest, the court should resolve the matter according to the child's best interest. In a new permanency planning order the court ordered the same custody arrangement – joint custody to the father and relatives and primary physical custody to the relatives. The court of appeals reversed again, citing *Price* and *Adams v. Tessener,* 354 N.C. 57, 550 S.E.2d 499 (2001) (holding in custody case that trial court's findings supported a determination that father's conduct was inconsistent with his protected interest). The court held that the trial court had not properly applied the best interest test because it had not found that respondent was unfit or had acted inconsistently with his protected status. The court noted that there was evidence in the record from which the trial court *could* have made such a finding, but remanded the case, noting the "gravity of the constitutional right involved."

A.C.V., ___ N.C. App. ___, 692 S.E.2d 158 (2010).
The mother relinquished the child to an adoption agency, the child was placed in an adoptive home the day after he was born, and the agency filed a termination petition against the biological father. The trial court terminated his rights based on his failure to take any of the actions specified in G.S. 7B-1111(a)(5). The court of appeals affirmed, rejecting the father's argument that his due process rights were violated because the court terminated his rights without finding that he was unfit or had neglected the child. The court of appeals referred to the state supreme court's statement in *Owenby*, supra, noting "that a finding under any of the provisions in section 7B-1111 will result in a parent 'forfeit[ing] his or her constitutionally protected status.'" The court seemed somewhat uncomfortable with its own decision, acknowledging that cases such as *A.C.V.* and *A Child's Hope*, supra*,* indicate tension between the constitutional rights of putative fathers and G.S. 7B-1111(a)(5) as the courts have interpreted it. The court went on to state that it was "difficult, under the circumstances of this case, to conclude that [respondent's] constitutional rights were assured," especially given protections parents are afforded in abuse, neglect, and dependency cases. Nevertheless, the court held that *Owenby* and *A Child's Hope*, supra, controlled and that adjudication of a ground under G.S. 7B-1111(a)(5) removed respondent's constitutionally protected status as the child's parent and justified application of the best interest standard.

Rodriguez v. Rodriguez, __ N.C. App. __, __ S.E.2d __ (2011).
After the children's father died, the children were adjudicated dependent and placed in DSS custody. Grandparents filed a Chapter 50 custody action. About three months after the adjudication, the children were returned to the mother's physical custody. She filed an answer and motion to dismiss in the custody action. The court denied the motion to dismiss, found that the mother had acted inconsistently with her parental rights, awarded primary custody to her, and awarded secondary custody in the form of visitation to the grandparents. The court of appeals reversed the part of the order that gave the grandparents visitation. The court held that the trial court properly considered the dependency adjudication, but that it alone was not sufficient to show that the mother had acted inconsistently with her parental status, and that the findings were not sufficient to show that the mother engaged in conduct that resulted in forfeiture of her protected parental status – citing *Petersen* and *Price*.

In re D.M., __ N.C. App. __, __ S.E.2d __ (2011).
The child was adjudicated dependent and placed in DSS custody, and DSS placed her with the maternal grandmother. After a home study of respondent father's home was reported to be favorable, the court indicted that the father's alcohol use required further assessment. DSS placed the child with the father but retained custody and placement authority. Eight months later DSS moved the child back to the grandmother's home. At a subsequent permanency planning hearing the court awarded permanent custody to the grandmother and visitation for respondent father. Citing *In re B.G. (2),* supra, the court of appeals reversed, holding that because the trial court found that neither parent was unfit and made no findings or conclusions as to whether the father had acted inconsistently with his constitutionally protected parental rights, the trial court erred in awarding custody to the grandmother.

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