

## Parent vs Nonparent Custody and Visitation

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### *Petersen v. Rogers* (1994)

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- 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."



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### *Petersen v. Rogers* (1994)

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- o "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)

- 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."

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Price v. Howard (1997)

- o "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

- 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."



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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."



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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."

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Procedural issues

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



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**Procedural issues**

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- “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**

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- 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**

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- 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

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



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## 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

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## 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)
- o 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. Dwinell* (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"
  - See GS 115C-366
  - 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

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



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## Grandparent Visitation Statutes

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

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## *Eakett v. Eakett*

- o "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*



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

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*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

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