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)

 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)

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

Price v. Howard

 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."



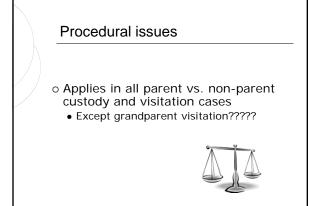
Price v. Howard

 "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

 "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

- "Standing" required *Ellison v. Ramos*Sufficiency of relationship decided on
 - case-by-case basisStanding 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
- o Waiver doesn't mean parent loses
 - Price v. Howard; Deborah N. v. Carla B.

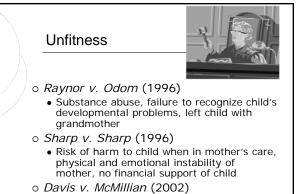
Procedural Issues

- o Emergency and temporary orders?
 - GS 50-13.5 entered when circumstances 'render it appropriate'
 - Intervention allowed ex parte? • Rule 24

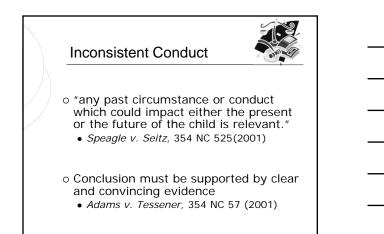
Procedure

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





Determination of unfitness in earlier proceeding



Inconsistent Conduct

o Price v. Howard

• Voluntary, non-temporary relinquishment of physical custody

• Compare

- Penland v. Harris (no waiver)
- \circ Ellison v. Ramos (enough in pleading)
- *Grindstaff v. Byers* (enough in pleading) *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

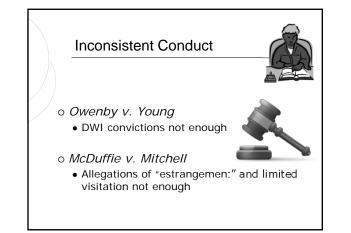
Mason v. Dwinnell (mom intended to waive)
 Estroff v. Chatterjee (mom did not intend to waive)

Inconsistent Conduct

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"



Step-parents

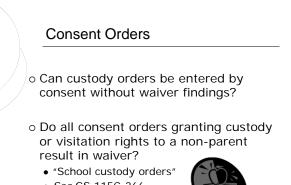
- Seyboth v. Seyboth, 147 NC App 63 (2001)
 - Step-parent has standing due to relationship with child
 - No best interest until determine parent waived constitutional rights
 - Intent to permanently cede portion or exclusive parental authority ????

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

- 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)



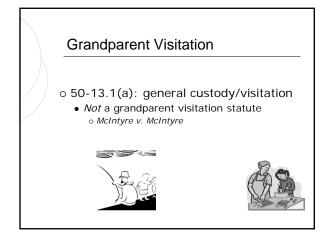
• See GS 115C-366



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 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



 Parents have a "fundamental liberty interest" in the care, custody and control of their children.

Troxel v. Granville



 Application of 'best interest standard' without – at least – a showing of "special factors" and/or "appropriate deference" to the parent, violates Due Process