

A “Non-Offending” Parent’s Constitutional Right to Custody in DSS Cases

- 1) Who is a “non-offending” parent?
- 2) When is the parent’s constitutional right considered by the Court?
 - At Adjudication?
 - At Disposition?
 - At TPR?
- 3) What should Courts include in Findings of Fact?

What do we mean by “Non-Offending” Parent?

- A parent with whom the child was not living at the time of the Neglect/Abuse/Dependency that led to the Petition? (Note: It is a question, not an answer)
 - Does it matter whether this parent knew of the child’s living environment / abilities of the other parent?
 - Does it matter whether this parent knew the child existed?
- Is a parent who knows his/her child is living in an injurious environment with the other parent but who does nothing to change the circumstances really “non-offending”?
- Any other examples?

Adjudication: Does a Parent’s Culpability Matter?

- At the adjudication of the allegations in the petition, it is the status of the child, not the culpability of either parent that matters.
See In re Poole, 151 N.C. App. 472, 476-77, 568 S.E.2d 200, 203 (2002) (Timmons-Goodson, J., dissenting), *adopted per curiam*, 357 N.C. 151, 579 S.E.2d 248 (2003). See also, In re J.S., 182 N.C. App. 79, 86, 641 S.E.2d 395, 399 (2007).
- Though findings of parental culpability not required for adjudication, are they required to rebut the presumption of a parent’s constitutional right to custody for dispositional purposes?
- BEWARE of Consent Adjudications if no consent to the dispositional alternative!

Disposition: DSS vs. the “Non-Offending” Parent

- Custody to DSS over “non-offending” parent—what findings of fact are required?
 - If culpability findings in Adjudication Order?
 - If no culpability findings in Adjudication Order?
 - A finding that the “non-offending” parent has acted inconsistently with his/her constitutionally protected status?
 - Evidentiary findings regarding the acts inconsistent?

TPR: Pete and Re-Pete were sitting on a wall. Pete fell off, so who was left?

REPEAT!!

- Owenby v. Young, 357 N.C. 142, 579 S.E.2d 264 (2003)—Two methods to find that a natural parent has forfeited his or her constitutionally protected status:
 1. A finding of any one of the grounds in N.C.G.S. § 7B-1111.
 2. A finding that a parent’s conduct is inconsistent with the constitutionally protected status.
- What about *Res Judicata*?
 - Prior findings *at Adjudication* of conduct inconsistent or culpability may rebut parent’s paramount right to custody, but NOT sufficient to TPR—findings must be independent.
