

# Parent vs Nonparent Custody and Visitation



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# *Petersen v. Rogers* (1994)

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





## *Price v. Howard (1997)*

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- 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.”
- “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*

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- “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-by-case basis, can also rise to this level so as to be inconsistent with the protected status of natural parents.”





# Procedural issues

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- Applies in all parent vs. non-parent custody and visitation cases
  - Except grandparent visitation?????
- “Standing” required – *Ellison v. Ramos*
  - Sufficiency of relationship decided on case-by-case basis
  - Standing cannot be waived
    - *Tilley v. Diamond*, 646 SE2d 865 (2007)(unpublished)



# Procedural Issues

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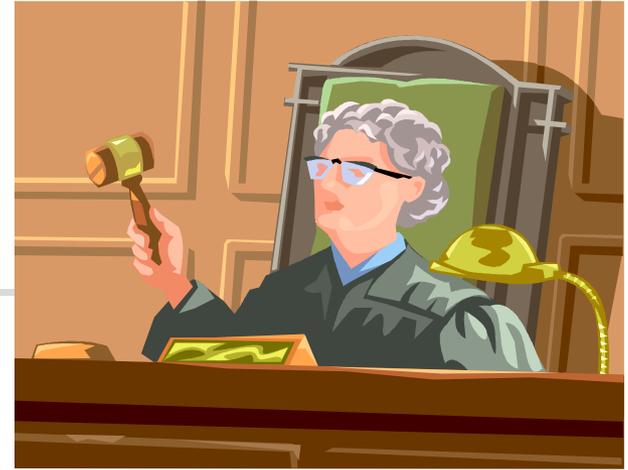
- Rule 12(b)(6) issue
  - Pleading must allege sufficient facts
  - *McDuffie v. Mitchell; Ellison v. Ramos*
- Waiver doesn't mean parent loses
  - *Price v. Howard; Deborah N. v. Carla B.*

# Procedure

- Waiver conclusion needs clear and convincing evidence
  - *Adams v. Tessener*, 354 NC 57(2001)
- “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)
- It’s all about the facts
  - *Owenby v. Young*, 357 NC 142(2003)



# Unfitness



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



# Inconsistent Conduct

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- Failure to “shoulder responsibilities”
- Need not rise to level of TPR
- Some parents may never obtain protected status
- Voluntary relinquishment of custody
- Creation of parent-like relationship???



## *Mason and Estroff (and Price)*

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- May waive protection if voluntarily chose to create a family unit and permanently cede to third party a significant amount of parental responsibility and decision-making authority to create parent-like relationship between third party and child



## *Mason and Estroff*

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- Focus is not on whether conduct consisted of “good acts” or “bad acts”; rather volitional acts of the parent that relinquish otherwise exclusive authority to third party
- Need to consider both conduct and intent of parent



# Compare

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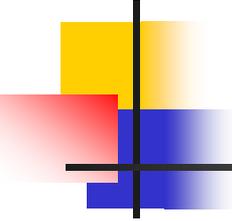
- *Mason v. Dwinnell*, NC App (5/6/08)
  - Joint decision to conceive and raise a child
  - Parent “intended – during creation of family unit – that relationship would be permanent”
  - Parent invited third party into her “zone of privacy” with no expectation that parental relationship would be terminated



# Compare

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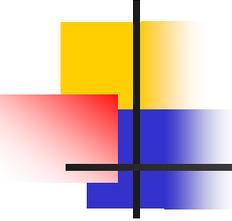
- *Estroff v. Chaterjee*, NC App (5/6/08)
  - No clear, cogent and convincing evidence that parent intended to cede a portion of her parental rights to third party on a permanent basis
  - Issue is not whether there is a bond between third party and child, nor whether third party has provided care and financial support



# Step-parents

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- *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

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- Parent does not lose protected status as a result of custody litigation with other parent
  - *Brewer v. Brewer*, 139 NC App 222 (2000)



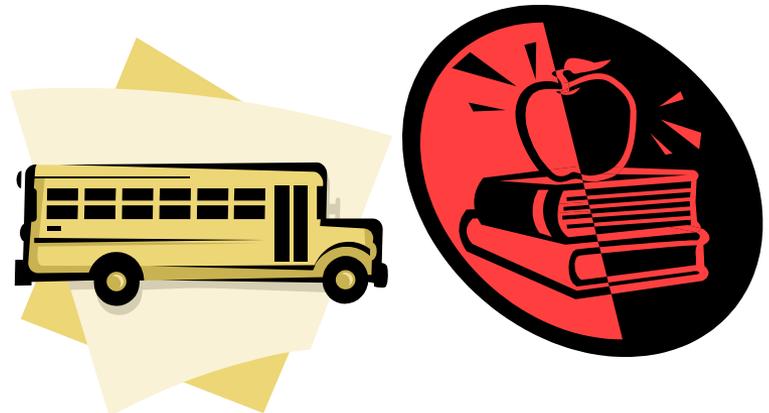
# Modification

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- 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)

# 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



# 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)

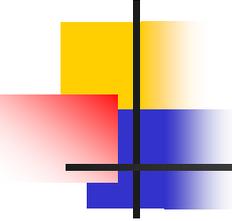


# Grandparent Visitation



- 50-13.1(a): general custody/visitation
- 50-13.2(b1): grandparent visitation can be part of any custody order
- 50-13.5(j): any custody order can be modified to include grandparent custody or visitation
- 50-13.2A: grandparent can seek visitation following relative/step-parent adoption

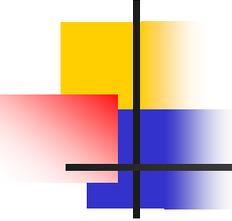




# Grandparent Visitation

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- “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.”
  - *Eakett v. Eakett*, 157 NC App 550 (2003)
  - *Smith v. Smith, unpublished* , NC App (9/06)

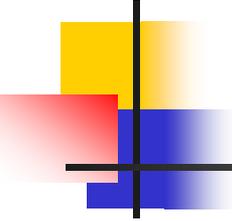


# *Troxel v. Granville*

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- Parents have a “fundamental liberty interest” in the care, custody and control of their children.
- Application of ‘best interest standard’ without – at least – a showing of “special factors” and/or “appropriate deference” to the parent, violates Due Process



# Family Law Bulletin #21

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- “Third-party Custody and Visitation Actions”
  - [www.sog.unc.edu](http://www.sog.unc.edu)
  - Free Download in Publications/bulletins
- Missing *Mason* and *Estroff* decided by COA May 6, 2008