Child Custody: Denying Visitation to a Parent in a Case Between Parents

In this previous post, Child Custody: Denying or Significantly Limiting a Parent's Visitation (March 18, 2016), I wrote about a trial court's authority to deny 'reasonable' visitation to a parent in a child custody proceeding between two parents. I mentioned in that post the conflict between two opinions from the NC Court of Appeals regarding whether a trial court must consider the constitutional rights of a parent before denying that parent reasonable visitation in such cases. Those two conflicting opinions are *Moore v. Moore*, 160 NC App 569 (2003)(because a complete denial of visitation is 'tantamount to a termination of parental rights', the trial court must apply the constitutional analysis set forth in *Petersen* and *Price* before reaching a decision about a child's best interest) and *Respess v. Respess*, 232 NC App 611 (2014)(the constitutional analysis set forth in *Petersen* and subsequently clarified by *Price v. Howard*, 346 NC 68 (1997), applies in cases between a parent and a non-parent and has no application in custody cases between two parents).

In *Routten v. Routten* filed on June 5, 2020, the NC Supreme Court resolved this conflict and held that custody cases between parents do not implicate the parents' constitutional right to exclusive care, custody and control of their children that the trial court must consider in cases between a parent and a non-parent.

Routten v. Routten

The trial court awarded sole physical custody of the children to Mr. Routten after mother repeatedly failed to provide the neuropsychological evaluation ordered by the court. The trial court concluded that sole physical custody to father was in the best interests of the children and allowed mother only two phone calls each week with the children.

The court of appeals agreed with mother's contention that the trial court order violated her constitutionally protected interest as a parent by awarding full physical custody to father without first finding she was unfit or that she had acted inconsistently with her protected status as a parent. *Routten*, 262 NC App 458. A dissenting opinion argued that the constitutional rights of parents relied upon by the majority are not applicable in cases between two parents.

GS 50-13.5(i) **controls; *Petersen v. Rogers* does not apply**

The supreme court agreed with the dissent in the court of appeals and affirmed the trial court order. According to the supreme court:

"The resolution of the issue regarding the trial court's decision to deny visitation by defendant with the children without a determination that she was unfit to have visitation with them is governed by

North Carolina General Statutes Section 50-13.5(i). As between two parents seeking custody and visitation of their children, the cited statutory provision states, in pertinent part, that

"the trial judge, *prior to denying a parent the right of reasonable visitation*, shall make a written finding of fact that the parent being denied visitation rights is an unfit person to visit the child *or* that such visitation rights are not in the best interest of the child.

N.C.G.S. § 50-13.5(i) (2019) (emphasis added)."

The court rejected mother's argument that the statute requires that the trial court find her unfit before denying her any physical custody of her child, explaining:

"A plain reading of this subsection reveals two points critical to the resolution of the issues in the matter here. First, this provision contemplates the authorized prospect of the denial to a parent of a right to visitation. Second, that such a denial is permitted upon a trial court's written finding of fact that the parent being denied visitation is deemed unfit to visit the child *or* that visitation would not be in the child's best interests. The unequivocal and clear meaning of the statute identifies two different circumstances in which a parent can be denied visitation, and the disjunctive term "or" in N.C.G.S. § 50-13.5(i) establishes that either of the circumstances is sufficient to justify the trial judge's decision to deny visitation. [citations omitted] Thus, contrary to the majority view and consistent with the dissenting view in the lower appellate court, in a dispute between two parents if the trial court determines that visitation with one parent is not in a child's best interests, then the trial court is authorized to deny visitation to said parent without a requirement to find the existence of the alternative circumstance that the parent in question is unfit."

The court further rejected the holding by the court of appeals that if a trial court does not find a parent to be unfit, the trial court must conclude the parent has waived his or her constitutionally protected status before denying that parent physical contact with his or her children. The supreme court disavowed the holding in *Moore v. Moore*, stating:

"The majority decision of the Court of Appeals in this matter went astray due

to its reliance upon *Moore*. The *Moore* case, as accurately recounted by the dissenting

judge, "held that in a custody dispute between a child's natural or adoptive parents

'absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their

children, the constitutionally protected paramount right of parents to custody, care,

and control of their children must prevail.' " *Routten*, 262 N.C. App. at 458, 822 S.E.2d

at 451 (citation omitted). The dissent notes that the Court of Appeals in *Moore* excerpted this language from our opinion in *Petersen v. Rogers*, 337 N.C. 397, 403–04, 445 S.E.2d 901, 905 (1994), "which established a constitutionally based presumption favoring a parent in a custody dispute with a non-parent," as controlling authority for the outcome in *Moore*. *Routten*, 262 N.C. App. at 459, 822 S.E.2d at 451.

However, the *Moore* court misapplied our decision in *Petersen*. The *Petersen* case established a presumption favoring a parent in a custody dispute *with a non-parent*; *Moore* wrongly employed this presumption in a custody dispute between two parents. This presumption is not implicated in disputes between parents because in such cases, a trial court must determine custody between two parties who each have, by virtue of their identical statuses as parents, the same "constitutionally-protected paramount right to custody, care, and control of their children." *Petersen*, 337 N.C. at 400, 445 S.E.2d at 903. Therefore, no constitutionally based presumption favors custody for one parent or the other nor bars the award of full custody to one parent without visitation to the other."

The supreme court also noted that this is not the first time it has held that the *Petersen* analysis has no application in cases between parents. The court stated that in *Owenby v. Young*, 357 NC 142 (2003):

"we acknowledged the *Petersen* presumption and reaffirmed that "unless a natural parent's conduct has been inconsistent with his or her constitutionally protected status, application of the 'best interest of the child' standard in a custody dispute with a nonparent offends the Due Process Clause of the United States Constitution." *Id.* at 145, 579 S.E.2d at 266–67 (citations omitted). This

Court went on to observe, however, that this "protected right *is irrelevant in a custody proceeding between two natural parents*, whether biological or adoptive, or between two parties who are not natural parents. In such instances, the trial court must determine custody using the 'best interest of the child' test." *Id.* at 145, 579 S.E.2d at 267 (citation omitted).

See also Adams v. Tessener, 354 N.C. 57, 61, 550 S.E.2d 499, 502 (2001)("In a custody proceeding between two natural parents (including biological or adoptive parents), or between two parties who are not natural parents, the trial court must determine custody based on the 'best interest of the child' test.").

What constitutes a denial of reasonable visitation?

Completely denying a parent physical custody time with a child clearly is a denial of reasonable visitation within the meaning of GS 50-13.5(i). The court of appeals also has consistently held that limiting a parent to supervised visitation is a denial of 'reasonable visitation' that requires the findings set out in GS 50-13.5(i). *Maxwell v. Maxwell*, 212 NC App 614 (2011), *Hinkle v. Hinkle*, 131 NC App 833 (1998), and *Cox v. Cox*, 133 NC App 221 (1999). *See also In re T.R.T.,* 225 NC App 567 (2013)(limiting mother to visitation only by Skype was a denial of visitation).

However, the court of appeals has held that GS 50-135(i) did not apply in other cases where a parent's access to a child was significantly limited. Recently, in the case of *Paynich v. Vestal*, 837 S.E.2d 433 (2020), the court of appeals held that a trial court order allowing mother unsupervised visitation when the child was in her custody for short periods of time but requiring supervision when mother has the child for 5 or more consecutive days was not such 'severe restrictions' as to require the court to make those findings of fact required for orders of supervised visitation only. And in *O'Connor v. Zalinske*, 193 NC App 683 (2008), 193 NC App 683 (2008), the court of appeals held that an order limiting father to alternating weekends from Thursday through Sunday and requiring that the visitation always occur within a one hundred mile radius of the custodial mother's home was not unreasonable visitation under the circumstances of the case.

What findings of fact are required to support a denial of reasonable visitation?

While the trial court is not required to conclude that a parent has lost his or her constitutional rights due to conduct inconsistent with the parent's protected status, the findings of fact supporting no visitation or supervised visitation must be sufficient to establish why such a significant limitation is in the best interest of the child. Conclusory statements of best interests are not sufficient. The court of appeals explained in *In re Custody of Stancil*, 10 NC App 545 (1971):

"The right of visitation is an important, natural and legal right, although it is not an absolute right, but is one which must yield to the good of the child. A parent's right of access to his or her child will ordinarily be decreed unless the parent has forfeited the privilege by his conduct or unless the exercise of the privilege would injuriously affect the welfare of the child, for it is only in exceptional

cases that this right should be denied. But when it is clearly shown to be best for the welfare of the child, either parent may be denied the right of access to his or her own child."

See also Hinson v. Hinson, 836 SE2d 309 (2019)(trial court must identify the nexus between the facts found and the welfare of the child), and *Paynich v. Vestal*, 837 SE2d 433 (2020)(order denying a parent access to child's school and medical records must directly link that restriction to the welfare of the child).