

## **Third Party Custody: Does a parent lose constitutionally protected status by signing a consent custody order granting custody rights to a non-parent?**

It is now well established that a parent has a constitutional right to exclusive care, custody and control of his or her child. This constitutional right protects a parent against claims for custody by non-parents. A court cannot apply the best interest of the child test to determine whether a non-parent should have custody of a child unless the court first concludes that the parent has waived her constitutional right to exclusive custody. A parent waives her constitutional right by being unfit, neglecting the welfare of the child, or by conduct otherwise inconsistent with the parent's protected status. There is no precise definition of conduct inconsistent with protected status and our appellate courts have provided no comprehensive list of actions that will result in a parent's loss of constitutional rights. Instead, whether a parent's conduct has been inconsistent with protected status is an issue that must be determined on a case-by-case basis. The non-parent seeking custody has the burden of proving the parent's inconsistent conduct by clear, cogent and convincing evidence. For more detail on this law, see [Family Law Bulletin, Third Party Custody and Visitation Actions](#).

What if a parent signs a consent custody order that grants custody rights to a non-parent third party? Does the parent lose the ability to assert her constitutional right to custody in subsequent custody proceedings? For example, if a parent agrees to a court order granting custody to grandmother, does the parent have the constitutional right to regain custody from grandmother in the future? Or, if another non-parent wants custody or visitation after parent has entered into a consent custody order with grandmother, does the other non-parent still need to prove parent has waived her constitutional right to custody and, if so, can the non-parent rely on the fact that parent voluntarily gave custody to the grandmother to establish that the parent acted inconsistent with her protected status?

### **Modification of Order Granting Custody to Non-Parent**

Regarding the first scenario, the answer has been clear for some time. The court of appeals consistently has held that the constitutional rights of parents are considered only in an initial custody proceeding between a parent and a particular third party. According to the court, GS 50-13.7 sets out the exclusive process for modification of a custody order; the constitutional rights of parents play no role in that process, even if the initial order granting custody to the non-parent did not contain a conclusion that the parent had waived her constitutional right to custody. Instead, the party seeking modification, even if it is the parent seeking to regain custody, has the burden to show there has been a substantial change in circumstances. If there has been a substantial change, the court then applies the best interest of the child test to determine the new custody arrangement. See *Bivens v. Cottle*, 120 NC App 467 (1995); *Speaks v. Fanek*, 122 NC App 389

(1996); and *Warner v. Brickhouse*, 189 NC App 445 (2008).

So in the first scenario above, the parent does not have a constitutional right to regain custody from grandmother after parent has signed a consent custody order giving grandmother custody rights.

### **Another Third Party Seeks Custody**

However, the court of appeals recently held that the analysis is different when the subsequent custody proceeding is initiated by a non-parent other than the non-parent who received custody in the initial custody order. In [Weidman v. Shelton v. Wise, NC App. June 7, 2016](#), the court of appeals upheld the trial court's decision to dismiss the non-parent claim for custody after concluding that the mother of the child had not waived her constitutional right to exclusive custody when she entered into a consent order granting another non-parent sole custody of the child.

In [Weidman](#), the mother of child, Erin Shelton, signed a consent custody order giving her mother, Dawn Weideman, exclusive custody of the child. Following the entry of that consent order, Wise requested to intervene in the custody proceeding and requested custody. Wise claimed that the mother's act of signing the consent order granting exclusive custody to Weideman was conduct inconsistent with her protected status. Wise argued that because mom had signed the consent order, the trial court could apply the best interest of the child test to determine whether to grant Wise's request for custody rights to the child.

Findings of fact made by the trial court indicated that Shelton had a history of untreated mental health issues that had caused her to "self-medicate" with drugs and alcohol. As a result, she had experienced times when she was unable to care for her minor child. During those times, she had relied on both Weideman and Wise to care for the child. At one point, Shelton signed a "Guardianship Agreement" purporting to grant guardianship rights to both Weideman and Wise. That agreement specified that the parties all intended for the guardianship be temporary. Following the execution of the Guardianship Agreement, further problems arose and Wise refused to allow Shelton access to the child when the child was in Wise's care. Weideman, however, encouraged interaction between Shelton and the child. In 2012, Wiedeman filed a Chapter 50 custody proceeding and a consent order was entered between Wiedeman and Shelton granting Wiedeman sole custody of the child. Both testified that this consent custody order was intended to be a "temporary arrangement" and that Shelton believed Weideman would return custody to her when she was ready to parent her child. Shelton believed the custody order would keep the child in the care of Wiedeman who, unlike Wise, would allow Shelton to have access to her child.

According to the court of appeals, a parent who cedes all or a portion of her custody rights to a third party without intending that the arrangement be temporary has acted inconsistent with her protected status and has waived her constitutional right to custody. However, a temporary relinquishment alone is insufficient to establish that a parent has acted inconsistent with her protected status. Because the trial court found that Shelton did not intend for the custody order to

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grant permanent custody to Wiedeman and that she believed the custody order was the only way to be sure she had the opportunity “to assume her role as [the child’s] mother in the future,” the court of appeals held that it was proper for the trial court to dismiss Wise’s claim for custody.