

CONSTITUTIONAL DEFENSES IN DSS CASES

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The task of raising and preserving constitutional defenses is as important an endeavor in DSS cases as it is in criminal cases. This is true for several reasons: (1) It places DSS in the posture of having to defend and show why the allegations of each particular case warrants the court’s action in setting aside fundamental right to parent; (2) It provides the parent a potential avenue of appellate review if the constitutional arguments are properly framed and preserved; and (3) It reminds the courts that they are dealing with fundamental rights and matters of serious constitutional implications.

The 14th Amendment

The starting point for raising constitutional defenses in DSS cases must necessarily begin with the 14th Amendment to the United States Constitution:

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

No constitutional challenge is complete without reference to the North Carolina Constitution:

Art. I § 19. Law of the land; equal protection of the laws.

No person, shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

Substantive Due Process

The US Supreme Court has held that Due Process Clause of the Fourteenth Amendment provides more than just “fair process.” *Washington v. Glucksberg*, 521 U.S. 702, 138 L.Ed.2d 772, 117 S.Ct. 2258 (1997). “The Clause also includes a substantive component that ‘provides heightened protection against government interference with certain fundamental rights and liberty interests.’” *Troxel v. Granville*,

530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), see also *Reno v. Flores*, 507 U.S. 292, 123 L.Ed.2d 1, 113 S.Ct. 1439 (1993).

In DSS cases, the liberty interest that is jeopardized is the interest of parents in the care, custody, and control of their children. This liberty interest has been cited as perhaps the oldest of the fundamental liberties recognized by the Courts.

80 years ago, the United States Supreme Court held that the one of the liberty interests protected by the Due Process Clause was the right of parents to “establish a home and bring up children” and “to control the education of their own.” *Meyer v. Nebraska*, 262 U.S. 390, 67 L.Ed. 1042, 43 S.Ct. 625 (1923).

Then, in *Pierce v. Society of Sisters*, 268 U.S. 510, 69 L.Ed.2d 1070, 45 S.Ct. 571 (1925), the Court went further and held that the “child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

This concept was again affirmed in *Prince v. Massachusetts*, 321 U.S. 158, 88 L.Ed.2d 645, 64 S.Ct. 438 (1944), when the Court stated that there are constitutional ramifications to the right of parents to direct the upbringing of their children. “It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.

This liberty interest was expounded upon in several other cases where the United States Supreme Court held that parents have a fundamental right to make decisions concerning the care, custody, and control of their children.

It is plain that the interest of a parent in the companionship, care, custody and management of his or her children comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements. *Stanley v. Illinois*, 405 U.S. 645, 31 L.Ed.2d 551, 92 S.Ct. 1208 (1972).

The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. *Wisconsin v. Yoder*, 406 U.S. 205, 32 L.Ed.2d 15, 92 S.Ct. 1526 (1972).

We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected. *Quilloin v. Walcott*, 434 U.S. 246, 54 L.Ed.2d 511, 98 S.Ct. 549 (1978).

Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children.

Our cases have consistently followed that course. *Parham v. J.R.*, 442 U.S. 584, 61 L.Ed.2d 101, 99 S.Ct. 2493 (1979).

Much of the jurisprudence in this area came to a head in 2000 with *Troxel v. Granville*, supra, when the Court stated “In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”

The North Carolina Supreme Court affirmed the protected liberty interest in parenthood in *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994), when it held that “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.”

“The government may take a child away from his or her natural parent only upon a showing that the parent is unfit to have custody, or where the parent’s conduct is inconsistent with his or her constitutionally protected status. *Adams v. Tessener*, 354 N.C. 57, 550 S.E.2d 499 (2001).

The NC Supreme Court has also stated that even if “a particular couple desirous of adopting a child would best provide for the child’s welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child adequately.” *In re Nesbitt*, 147 N.C.App. 349, 555 S.Ed.2d 659 (2001).

One of the most recent decisions concerning the fundamental right to parent is *Owenby v. Young*, 357 N.C. 142, 579 S.E.2d 264 (2003). However, Owenby not only recognized the fundamental right of parents to the custody and control of their children under the Due Process Clause, but also stated that the right is contained within the Equal Protection Clause of the Fourteenth Amendment: “Indeed, the protection of the family unit is guaranteed not only by the Due Process Clause, but also by the Equal Protection Clause of the Fourteenth Amendment and possibly by the Ninth Amendment. Citing *Stanley v. Illinois*, 405 U.S. 645, 31 L.Ed.2d 551, 92 S.Ct. 1208 (1972).

Procedural Due Process

Parents are also entitled to Procedural Due Process, which includes proper service of process and notice of the proceedings. § 7B-1106.1 of the NC Juvenile Code provides the rules by which notice of abuse/neglect/dependency proceedings are to be given to parents and other interested parties:

- (a) Upon the filing of a motion pursuant to 7B-1102, the movant shall prepare a notice directed to each of the following person or agency, not otherwise a movant:

- (1) The parents of the juvenile.
- (2) Any person who has been judicially appointed as a guardian of the person of the juvenile.
- (3) The custodian of the juvenile appointed by a court of competent jurisdiction.
- (4) Any county department of social services or licensed child-placing agency to whom a juvenile has been released by one parent pursuant to Part 7 of Article 3 of Chapter 48 of the General Statutes or any county department of social services to whom placement responsibility for the juvenile has been given to a court of competent jurisdiction.
- (5) The juvenile's guardian ad litem if one has been appointed pursuant to G.S. 7B-601 and has not been relieved of responsibility.
- (6) The juvenile, if the juvenile is 12 years of age or older at the time the motion is filed.

§ 7B-1106.1 further provides for the content of the notice:

- (b) The notice required by this subsection (a) of this section shall include all of the following:
 - (1) The name of the minor juvenile.
 - (2) Notice that a written response to the motion must be filed with the clerk within 30 days after service of the motion and notice, or the parent's rights may be terminated.
 - (3) Notice that any attorney appointed previously to represent the parent in the abuse, neglect, or dependency proceeding will continue to represent the parents unless otherwise ordered by the court.
 - (4) Notice that if the parent is indigent, the parent is entitled to appointed counsel and if the parent is not already represented by appointed counsel the parent may contact the clerk immediately to request counsel.
 - (5) Notice that the date, time, and place of the hearing will be mailed by the moving party upon filing of the response or 30 days from the date of service if no response is filed.
 - (6) Notice of the purpose of the hearing and notice that the parents may attend the termination hearing.

For parents to receive procedural due process, the statutes regarding notice are the beginning points for DSS and the courts to comply with constitutional mandates for procedural due process.

“The notice requirements at issue are part of a statutory framework intended to safeguard a parent's fundamental rights “to make decisions concerning the care, custody,

and control of their children.” *In Re Alexander*, 158 N.C.App 522, 581 S.E.2d. 466 (2003).

“The fundamental premise of procedural due process is notice and the opportunity to be heard.” *In Re Padgett*, 156 N.C.App. 644, 577 S.E.2d 337 (2003), quoting *Peace v. Employment Security Commission*, 349 N.C. 315, 507 S.E.2d 272 (1998).

The 4th Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

While the 4th Amendment to the United States Constitution has been regarded as an Amendment drafted exclusively for the province of the criminal courts, that notion has begun to change, at least inasmuch as the conduct of child welfare investigators is concerned. The case that has begun the change in the constitutional landscape in North Carolina is *In Re Stumbo*, 357 N.C. 279, 582 S.E.2d 255 (2003).

On September 9, 2001, a social worker with the Cleveland County Department of Social Services received a report that a two year old child had been seen naked and unsupervised in the driveway of a house in Kings Mountain, NC. The social worker went to the home to investigate and was met by the mother of the child. The social worker and the mother spoke and the social worker told the mother why she had come to the home. The social worker then told the mother that she (social worker) would need to speak with all of the Stumbo children in private as part of her “investigation.”

Mrs. Stumbo then proceeded to call her husband at work to inform him of the transpiring events. Mr. Stumbo then proceeded to speak over the telephone with the social worker and attempted to explain why the two year old child had been in the yard naked. Mr. Stumbo telephoned an attorney on the drive home and when he spoke with the social worker, he told her that he felt he had a privacy right to refuse to allow her to speak with the children. The social worker observed the children, but did not speak to them, and in her observations she noticed nothing that would lead her to believe the children were abused or neglected.

After the discourse with the father, the social worker left the residence. One week later, the Cleveland County Department of Social Services filed a petition to “prohibit interference with or obstruction of child protective services investigation.” The Stumbos filed a response to the petition based, in part, on the protections of the 4th Amendment to the US Constitution.

The trial court concluded that because the investigation did not involve a search or a seizure, the 4th Amendment did not apply and no showing of probable cause was necessary. The trial court further concluded that the Stumbos had obstructed and

interfered with the investigation by Cleveland County DSS by refusing to allow the social worker to observe and interview the minor children. The trial court then ordered the parents to allow DSS to conduct an investigation.

The North Carolina Court of Appeals affirmed the decision of the lower court in a divided opinion and held that the case did not involve the 4th Amendment. *In Re Stumbo*, 143 N.C.App. 375, 547 S.E.2d 451 (2001). Judge Edward K. Greene dissented finding that the investigation involved a search within the meaning of the Fourth Amendment.

The North Carolina Supreme Court reversed the decision of the Court of Appeals, but not based upon Fourth Amendment grounds. The NC Supreme Court stated, “As we have often noted, ‘the courts of this State will avoid constitutional questions, even if properly presented where a case may be resolved on other grounds.’” *In Re Stumbo*, 357 N.C. 279, 582 S.E.2d 255 (2003), citing *Anderson v. Assimios*, 356 N.C. 415, 572 S.E.2d 101 (2002).

The “other grounds” utilized by the NC Supreme Court to reverse the Court of Appeals were premised upon the statutory grounds for the initiation of a DSS investigation:

...before any investigation is initiated or interference with any such investigation ensues, the proper inquiry that must be made by DSS is whether an investigation is mandated based upon the first report or multiple reports that show a pattern of neglect. Having commenced a N.C.G.S. § 7B-303 hearing, however, it is incumbent on the trial court to first ascertain whether a report of abuse, neglect, or dependency triggering the statutory mandates has been made.

The NC Supreme Court went on to state:

Thus, under the specific facts of this case, we conclude as a matter of law that the anonymous report was insufficient to invoke the extensive power and authority permitted by the General Assembly to the county departments of social services.

The unique fact about this case for purposes of defending parents in abuse/neglect cases, is that the dissent in the North Carolina Court of Appeals opinion and the concurring opinion in the North Carolina Supreme Court opinion both indicate that the statutory scheme, under which DSS must operate in investigating suspected child abuse/neglect, implicates the Fourth Amendment to the United States Constitution.

Entry into the home of a person suspected of child abuse/neglect by the Director for the purpose of ascertaining if the child has been abused/neglected is a search by a government actor and thus implicates the Fourth Amendment. An interview of a reported victim child by the

Director, without the consent of the child's parents, constitutes a seizure of the child within the meaning of the Fourth Amendment. This Fourth Amendment right can be asserted by the child's parents on behalf of the child. (*In Re Stumbo*, 143 N.C.App. 375, 547 S.E.2d 451 (2001), *dissenting opinion*, citations omitted).

The noninterference order envisioned by section 7B-303 is enforceable by civil or criminal contempt. N.C.G.S. § 7B-303(f). Thus, once such an order has been issued, a caregiver is faced with two options: (1) she can consent to the requests of the director, or (2) she can assert her constitutional right to freedom from impermissible searches and seizures as a 'lawful excuse' for noncompliance and risk contempt of court. Such a statutory scheme necessarily implicates the *Fourth Amendment to the United States Constitution* and the parallel guarantees for Article I, Section 20 of the North Carolina Constitution. (*In Re Stumbo*, 357 N.C. 279, 582 S.E.2d 255 (2003), *concurring opinion*).

North Carolina is not the only jurisdiction that has found Fourth Amendment implications connected to the investigation of child abuse/neglect cases. The Seventh Circuit Court of Appeals held that it was unconstitutional when Child Welfare employees interviewed a minor child at a private school "without a warrant or court order, probable cause, consent or exigent circumstances." *Doe v. Heck*, 327 F.3d 492 (7th Cir. 2003).

In fact, the concurring opinion in the NC Supreme Court's *Stumbo* opinion noted that a number of federal and state courts that have "concluded, either explicitly or implicitly, that constitutional implications apply to government officials who investigate child abuse."

For parent attorneys, the ramifications of this could be staggering. While abuse/neglect cases are civil in nature, and governed by the rules of civil procedure, the fact remains that social workers and the Department of Social Services are, in and of themselves, government actors. "Judicial recognition that DSS and its employees are government actors is simply an acknowledgement that "the Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures." *In Re Stumbo*, 357 N.C. 279, 582 S.E.2d 255 (2003), quoting *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 87 L.Ed. 1628, 63 S.Ct. 1178 (1943).

Since social workers and the Department are state actors, and the Fourth Amendment is implicated by their status and the nature of their work, it would stand to reason that motions to suppress and the use of the exclusionary rule should be used in DSS court when social workers and investigators violate the rules of searches and seizures in carrying out their duties.

This in turn means that parent attorneys should have a working familiarity with the rules of search and seizure and the exclusionary rule.

