

LESSONS LEARNED

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Due Process In Child Welfare

Parents have a fundamental and constitutionally-protected interest in the care, custody, and control of their children.

- *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923): The liberty interest protected by the Due Process Clause includes the right of parents to “establish a home and bring up children” and “to control the education of their own.”
- *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944): There is a constitutional dimension 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 preparations for obligations the state can neither supply nor hinder.”
- *Troxel v. Granville*, 530 U.S. 57, 66 (2000): “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.”

Due Process protections for parental rights to the care, custody and control of their children do not cease to exist when the State (or a County) becomes involved in the family unit as the result of a report of abuse, neglect, or dependency.

In re Stumbo, 357 N.C. 279, 286 (2003): “While acknowledging the extraordinary importance of protecting children from abuse, neglect or dependency by prompt and thorough investigations, we likewise acknowledge the limits within which governmental agencies may interfere with or intervene in the parent-child relationship.”

A decision to place a child outside of the home impacts a parent's rights to the care, custody and control of his or her children

In re R.R.N., 368 N.C. 167, 171 (2015): “We recognize that DSS has an important role in protecting children; however, because parents have a fundamental right to their children, we must ‘acknowledge the limits within which governmental agencies may interfere with or intervene in the parent-child relationship.’ Therefore, before subjecting families to ongoing DSS supervision and an array of possible adverse collateral consequences that can flow from an adjudication of abuse or neglect...trial courts should consider the purpose of the Juvenile Code when determining whether intervention is necessary to protect the welfare of the child. If not, DSS should not intervene. Ultimately, the best interest of the child is the lodestar, but if parents act appropriately to protect their child, their constitutional right to rear that child is paramount.” (internal citations omitted)

A County Department of Social Services is required to follow law, rule, and policy when placing a child with someone other than the parents

1. Voluntary Action of the Parent
 - a. *Temporary Parental Safety Agreement (formerly known as Safety Resources)*
2. Emergency Situations
 - a. *Temporary Custody—Limited to 12-24 Hours*
 - b. *Safe Surrender of Infant*
3. Court Order
 - a. *Nonsecure and Secure Custody*
 - b. *Dispositional Hearings*
 - c. *Termination of Parental Rights*

The duty to follow, law, rule, and policy should not be replaced by a social worker's belief of what is best for the child if that determination is made outside of law, rule, and policy.

Troxel v. Granville, 530 U.S. 57, 72-73 (2000): “[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a judge believes a ‘better’ decision could be made.”

**A parent does not lose his or her parental
rights until a court
MODIFIES or TERMINATES
those rights!**

The Intersection of Child Welfare and Private Agreements

Role of the DSS Director:

The Director can facilitate the signing of various agreements with parents, such as:

- *Safety Plans*
- *Temporary Parental Safety Agreements*
- *Family Services Agreements*
- *Voluntary Placement Agreements*
 - 10A N.C.A.C. 70B.0102(a)(3)
 - N.C. Gen. Stat. 7B-910
- *Visitation & Contact Agreements (requires court oversight)*

Authority of the DSS Director:

The DSS Director is bound by his/her statutory authority to act under 108A-14, and in the Child welfare context, is governed by the following:

- *Chapter 48 (Supervision of adoptive placements, home studies, etc)*
- *Chapter 7B (Abuse/Neglect/Dependency & Delinquent children)*
- *Chapter 35A (children in need of a guardian)*
- *There is no authority to act under Chapter 50*

The “Custody and Visitation Agreement”

What is a CVA?

An Agreement between parties that purports to determine the legal and physical care, custody, and control of a child or children.

Who signs these agreements?

- Scenario 1: One Parent signing over custody to the other Parent.
- Scenario 2: One or Both Parents signing over custody to a Third Party.
- Scenario 3: Court-Ordered Custodian signing over custody to a Third Party.

Concerns with “Custody and Visitation Agreements”

1. The involvement of the Department of Social Services
2. The “Findings” of the Agreement
3. The Terms of the Agreement
4. Enforceability

**Unenforceable or Void/Voidable
Contracts, Unlawful Transfers of
Custody and Permanence for
Children**

Unenforceable Contracts

Contracts regarding child custody are not generally unlawful, but are unenforceable

- Agreements can be used as evidence in custody proceedings but are not binding in and of themselves
- There is no remedy for breach, nor can a third party be liable for honoring one (doctors, schools, etc)

Contracts that are potentially void as against public policy

UNENFORCEABILITY ON GROUNDS OF PUBLIC POLICY; IMPAIRMENT OF FAMILY RELATIONS:

- “The custody of minor children is, like marriage, an important subject of public concern. A promise by one entitled to the custody of a minor child to transfer the custody to another is unenforceable unless it is consistent with the child’s best interest. Such promises are typically found in separation agreements between parents, and the fact that the person to whom custody is transferred is a parent is an important, although not controlling, factor in showing that the transfer is in the interest of the child. Even where enforcement of a promise disposing of custody is not precluded on grounds of public policy the disposition is still subject to the plenary supervision of the court.”

Restatement (Second) of Contracts § 191 (1981) (emphasis added)

Voidable Contracts

Contracts are voidable if they purport to limit a parent's rights without court oversight or the voluntary consent of the parent (a common feature of the CVA)

Unlawful Transfer of Custody

- Children transferred into the custody of a non-relative/non-parent must have a substantial relationship with that person otherwise there is a potential unlawful transfer of custody
- Unlawful Transfer of Custody is governed by N.C. Gen. Stat. §14-321.2
 - *Defined under subsection (b)(4)*
 - *Unlawful transfer is a Class A1 Misdemeanor*
 - *If the child is injured, the crime becomes a Class G Felony*

Legal Permanence Problems

- Children Subject to these Custody and Visitation Agreements are left without legal permanence without court oversight
- Failing to close a case on a child without obtaining legal permanence is a violation of DSS policy

Unauthorized Practice of Law

What is it?

Unauthorized practice of law is defined in N.C. Gen. Stat. § 84-2.1 as “the preparation and filing of petitions for use in any court, including administrative tribunals and other judicial or quasi-judicial bodies, or assisting by advice, counsel, or otherwise in any legal work; **and to advise or give opinion upon the legal rights of any person, firm or corporation...**”
(emphasis added)

Limitations on Lawyers

N.C. Rules of Professional Conduct

- Rule 5.5(f)- A lawyer shall not assist another person in the unauthorized practice of law
- Rule 5.5, Comment 14: “Lawyers may provide professional advice and instruction to non-lawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies.”

Non-lawyers

N.C. Gen Stat. § 84-4 states that persons other than members of the State Bar are prohibited from practicing law

- *In 1995 new language was added to prevent practice by non-lawyers “except as otherwise permitted by law”*

Penalties for the Unauthorized Practice of Law

- **Criminal: Punishment for violation of Unauthorized Practice of Law statutes is a Class 1 Misdemeanor under §84-8(a)]**
- **Civil: Private cause of action under §84-10.1**
- **In addition, the State Bar may investigate and enjoin unauthorized activities under §84-37.**

Relevance to Social Workers

- A social worker is an authorized representative of the DSS Director
- The N.C. General Statutes have been interpreted to carve-out an exception for Directors of County Departments of Social Services and their authorized representatives for the drafting and filing of juvenile petitions
- § 7B-403 pertains to reports and the filing of petitions and states that “the petition shall be drawn by the director, verified before an official authorized to administer oaths, and filed by the clerk...”
- The Statutory carve-outs apply ONLY to petitions—dispensing legal advice or other tasks included in the “practice of law” are still prohibited as unauthorized practice
- Assisting a client with a Power of Attorney Document MAY be unauthorized practice according to a Letter of Caution issued by the State Bar Authorized Practice Committee in October of 2017

Other Topics

- DSS Funding Private Attorneys
- Conflicts of Interest

DSS Funding for Private Attorneys to facilitate agreements

- Who is the client? Is it the parent? A Third party?
- How are the parents' wishes being documented?
- How does it look for the attorney?
- Is there a conflict of interest? (see next slide)
- How does it look for the agency?
- Is the agency protected from liability later on?

Conflicts of Interest

27 NCAC 02 RULE 1.08 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is not interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;
and

(3) information relating to representation of a client is protected as required by Rule 1.6.