Parents and Drugs: Takeaways from S.L. 2021-100 and 132, and a Recent U.S. Dept. of Justice Investigation

On October 1, 2021, two laws went into effect that pertain to parents who test positive for controlled substances while involved in juvenile abuse, neglect, or dependency (A/N/D) proceedings. Together, the laws

- dictate what happens to a parent's court ordered visits following a positive test,
- clarify that participation in Medication-Assisted Treatment is not a violation of an order prohibiting substance use, and
- implicitly acknowledge that parents who may use drugs still have roles to play.

Positive Drug Screens and Court-Ordered Visits

The law. For all A/N/D proceedings pending as of October 1, 2021, and for new petitions filed on or after that date, S.L. 2021-132 (S 693) created G.S. 7B-905.1(b1)—a provision that addresses the bearing drug screens have on parent-child visits. A positive drug screen can no longer, on its own, prevent a parent from having court-ordered visits with a juvenile who DSS has placement authority or custody of. The provision applies regardless of whether the court-ordered visits are supervised or unsupervised.

Key takeaways for parent attorneys about G.S. 7B-905.1(b1).

A parent cannot be denied court-ordered *supervised* visits solely because of a positive screen. To suspend or modify a parent's supervised visits because of a positive screen, DSS or another party will need to file a motion or wait until the next scheduled hearing to seek a court order. *See* G.S. 7B-905.1(b). In the event a parent is wrongfully denied visits in a way that violates this provision, the parent attorney should consider filing a motion and requesting that it be heard as soon as possible.

DSS cannot unilaterally deny a parent court-ordered *unsupervised* visits solely because of a positive screen; however, DSS can impose supervision requirements, so long as the agency follows specific procedures. If a parent receiving unsupervised visits tests positive, DSS must "expeditiously" file a motion so the court can review the visitation plan. The agency must also request a hearing take place within 30 days. If either of these requirements is not complied with, the parent attorney should consider filing a motion to have the matter heard as soon as possible.

While DSS' motion is pending, the agency can "temporarily" impose supervision requirements on

all or part of the visitation plan. (Note that the provision does not give DSS the authority to change visits to supervised before filing a motion; the motion must be pending.) G.S. 7B-905.1(b1) also requires that DSS "promptly communicate the limited and temporary change" to the parent whose visits are being altered. If this requirement is not complied with, that lack of communication should be raised with the court at the next hearing. The statute does not address the form of communication. (For guidance, look to G.S. 7B-905.1(b), which addresses DSS communication of a change in visits due to illness, scheduling conflicts, or extraordinary circumstances, and requires the communication be in writing.)

There is no specific requirement in the statute that DSS must notify the parent's attorney of a change in supervision. A parent attorney who is routinely not being informed of changes to visits because of a positive screen may consider asking the court—particularly in cases that involve substance use concerns—to order that the attorney be informed of any such changes. A requirement that attorneys be promptly alerted of changes to visits under this statute may also be worth proposing as an amendment to the local rules.

Child safety can still be ensured during visits. Although a positive screen alone cannot be the basis for denying visits, G.S. 7B-905.1(b1) explicitly allows for the cancellation of a visit when at the time of the visit, the parent (1) appears to be activity impaired or (2) is under the influence of substances and behaves in a way that may create an unsafe environment. This provision ensures the visit is safe for the child. Note the cancellation is limited to that particular visit. If a parent's visit is cancelled under this provision, the parent's attorney should request the social worker's notes and any other agency documentation relating to the cancelled visit be shared with the attorney, pursuant to G.S. 7B-700(a). If the request for information sharing is denied, the attorney should consider filing a motion for discovery, pursuant to G.S. 7B-700(c). As always, the attorney should also speak with the client to learn what the client has to say.

Positive screens remain relevant in many A/N/D proceedings. This newly enacted provision does not prevent a court from considering a parent's positive screen, or from changing or suspending visits. Instead, the provision primarily limits what parties can do in response to a positive screen without court oversight.

The legislation appears to limit courts in one respect. The statute does not explicitly address the court's ability to condition visits solely on negative drug screens. The statute, however, prohibits a parent from being denied court-ordered visits solely because of positive drug screens, and makes no exception for courts.

Additional circumstances surrounding the positive screen could mean the provision does not apply. "A parent's positive result from a drug screen *alone* is insufficient to deny the parent court-ordered visitation." G.S. 7B-905.1(b1) (emphasis added). If a parent tests positive and there is some additional fact or allegation, the prohibition on suspending visits may not apply. Examples may be a parent who receives unsupervised visits but is charged with Driving While Impaired stemming from

a car accident with the juvenile present, and who subsequently tests positive after being taken to the hospital, or a parent who repeatedly appears for a supervised visit while impaired.

Removing the Stigma from Medication-Assisted Treatment

The law. Effective for all pending or new A/N/D proceedings on or after October 1, 2021, S.L. 2021-100 (H 132) enacted a change to the court's authority over parents after adjudication. As a result, if a parent is ordered to comply with treatment for substance use disorder, that parent's participation with medication-assisted treatment (MAT) cannot be considered a violation of the court's order. G.S. 7B-904(c1). MAT is "the use of pharmacological medications" prescribed in a Substance Abuse and Mental Health Services Administration accredited and certified opioid treatment program or by a licensed physician "in combination with counseling and behavioral therapies, to provide a whole patient approach to the treatment of substance use disorders." *Id*. Note that in the medical field, some providers now refer to MAT as Medications for Opioid Use Disorder (MOUD).

Key takeaways for parent attorneys about G.S. 7B-904(c1).

This provision is an acknowledgement of the legitimacy of MAT, including programs that involve prescriptions for narcotics like Suboxone to treat opioid addiction. As a result, parent attorneys should not sit silently while a client is criticized or punished for engaging in MAT. The dismissive notion that a parent has simply substituted one drug for another—a notion I have heard repeatedly in A/N/D proceedings—is inappropriate in light of the statute. Parent attorneys should object on the record to insinuations that MAT participation will hurt the client's chances at reunification or visits, or otherwise be held against the client.

Likewise, findings of fact should not be made that a parent who is ordered to comply with substance use treatment and is participating in MAT is in violation of that portion of the order. Parent attorneys should object to any such finding and ask that it not be included in the order. (In fact, parent attorneys should consider requesting the court make positive findings of fact that the client is complying with treatment and the order.) A parent attorney should not advise a client to consent to an order that contains a finding in violation of G.S. 7B-904(c1).

Participation with MAT and any positive screens that are a direct result of MAT cannot be the basis of a unilateral change in visits under G.S. 7B-905.1(b1). Consider a parent who is ordered to comply with substance use treatment and who is prescribed Suboxone through a MAT program as defined in G.S. 7B-904(c1). If that parent tests positive for Suboxone, the positive screen cannot serve as part of the basis for DSS unilaterally imposing supervision requirements on the parent's court-ordered unsupervised visits. If instead the court has ordered supervised visits, the positive screen cannot serve as the reason for DSS to suspend visits for the parent. Attorneys who

represent MAT participants should remain vigilant in ensuring that their client is not considered to be in violation of an order for complying with treatment.

MAT and the Americans with Disabilities Act (ADA)

The U.S. Department of Justice (DOJ) recently published the results of its investigation into complaints surrounding the policies of various Pennsylvania courts regarding Opioid Use Disorder (OUD) medications and treatment. U.S. Dept. of Justice, Civil Rights Div., The United States' Findings and Conclusions Based on Its Investigation of the Unified Judicial System of Pennsylvania under Title II of the Americans with Disabilities Act, DJ # 204-64-170 (February 2, 2022). Although the investigation focused on the policies of mental health, drug treatment, and criminal/probation courts, the DOJ repeatedly refers to OUD as it relates to parents. *See, e.g.*, *Id*. at 7 (finding that court policies requiring individuals to stop using prescribed medication were not necessary to achieve stability or avoid relapse; instead, the individuals' "treatment needs and experiences align with medical research showing that long-term use of OUD medication…lets individuals better manage other aspects of their lives, including parenting.") Among other conclusions, the DOJ determined that

- by requiring individuals to wean off of their prescribed OUD medication, the courts discriminated against individuals "on the basis of disability and denied them an equal opportunity to benefit from services," in violation of the ADA,
- individuals were wrongly denied "an equal opportunity to benefit from [a] probation program because of their disability by requiring, under threat of incarceration," that they stop taking their medication,
- the OUD policies of some courts denied programming available to other participants and otherwise penalized individuals based off their disability, substantially delaying their progress in a manner that "directly conflicted with prevailing medical guidance on OUD medication",
- court policies that tended to prevent OUD patients from "fully and equally enjoying the courts' programs" were in violation of the ADA, and
- the courts violated Title II of the ADA by wrongly discriminating against individuals who receive OUD treatment.

Reach out to me anytime at Heinle@sog.unc.edu if you would like to discuss the issues in this post.