

“Incarceration is neither a sword nor
a shield.”



Incarceration is neither a sword nor a shield, except when it's one or the other or both.



Once more into the breach...

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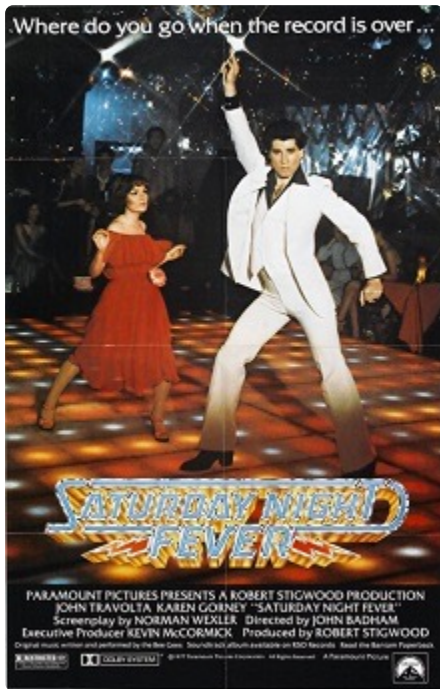
*The Office of the Parent Defender provides
and promotes high quality legal
representation for parents affected by the
child welfare system (DSS).*



TPR Grounds

7B-1111(a)(1)-(9) – various kinds of willfulness required

1. Neglect/abuse
2. Failure to make progress
3. Failure to pay cost of care
4. Failure to pay cost of care in private custody
5. Failure to legitimate
6. Dependency
7. Abandonment
8. Murder/manslaughter/injurious felony of child in home
9. Prior TPR



First, let's go back to 1978

In re Maynor, 38 NC App 724 (1978)

- ▶ RF in prison because convicted of “crime against nature” on daughter
- ▶ RF has son that is unbeknownst to him taken into DSS custody
- ▶ RF tried to contact DSS to locate son but no response
- ▶ RF couldn't earn money in prison
- ▶ Petitioners allege abandonment
- ▶ TC concludes RF abandoned child
- ▶ Appeal

In re Maynor, 38 NC App 724 (1978)

- ▶ “Petitioners contend that the fact that respondent committed the felony of crime against nature, was found guilty and was incarcerated, evinces a willful intent to forego any responsibility to the child. We cannot agree... The legislature recognized this by requiring that the abandonment must be willful. The fact that a parent commits a crime which might result in incarceration is insufficient, standing alone, to show a ‘settled purpose to forego all parental duties.’”

Rinse and repeat

- ▶ In re Williamson, 91 NC App 668 (1988)
- ▶ In re McLemore, 139 NC App 426 (2000)
- ▶ In re Yocum, 158 NC App 198 (2003) (Tyson, J., dissenting) (“Incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision”)
- ▶ In re PLP, 173 NC App 1 (2005) (quoting Yocum dissent), aff’d per curiam, 360 NC 360 (2006).



Must it be addressed in order?

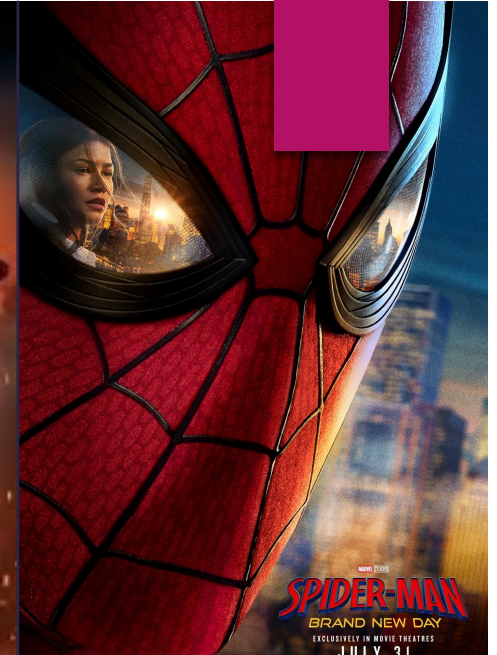
- ▶ In re Shermer, 156 NC App 281 (2003) ("Because respondent was incarcerated, there was little involvement he could have beyond what he did--write letters to Buddy and Ernest and inform DSS that he did not want his rights terminated.")
- ▶ In re CW, 182 NC App 214 (2007) (Incarceration is "circumstance" that court must consider in a2)
- ▶ In re DMO, 250 NC App (2016) ("Circumstances attendant to respondent's incarceration" are relevant to abandonment ground and should be in order)
- ▶ In re AGD, 374 N.C. 317 (2020) (Court must "recognize the limitations for showing love, affection, and parental concern under which such [incarcerated] individuals labor while simultaneously requiring them to do what they can to exhibit the required level of concern for their children.")
- ▶ In re CAB, 381 N.C. 105 (2022) ("Every ground asserted by DSS and found by the trial court required careful parsing of these facts to ensure that respondent-father's parental rights were being terminated because of his conduct, not because of his incarceration.")

It's used as a sword a lot, but shouldn't be

- ▶ In re KN, 373 N.C. 274 (2020) (7B-1111(a)(1) termination cannot be solely based on incarceration);
- ▶ In re JDAD, 253 N.C. App. 53 (2017) (7B-1111(a)(9) termination cannot be solely based on incarceration);
- ▶ In re DMO, 250 N.C. App. 570 (2016) (7B-1111(a)(7) termination cannot be solely based on incarceration);
- ▶ In re SD, 243 N.C. App. 65 (2015) (7B-1111(a)(2) termination cannot be solely based on incarceration);
- ▶ In re Clark, 151 N.C. App. 286 (2002) (prior version of 7B-1111(a)(6) termination cannot be solely based on incarceration)



Now, back
to 2026



In re ATT, 929 S.E.2d 643 (2026)

- ▶ RM 5 kids, including twins – one of twins dies from being “intentionally starved” to death, other kids malnourished, dirty housing – convicted of felony child abuse and incarcerated
- ▶ Adjudicated neglected and dependent
- ▶ RM given jail case plan, but made no progress, committed infractions, and RM only sent one drawing to each kid total
- ▶ TPR a1, a2, a6, a7
- ▶ Appeal, affirmed



In re ATT, 929 S.E.2d 643 (2026)

- ▶ “Although a parent's options for showing affection while incarcerated are greatly limited, a parent will not be excused from showing interest in the child's welfare by whatever means available”

In re LDW, 928 S.E.2d 805 (2026)

- ▶ Private TPR, PM leaves due to RF's violent outbursts
- ▶ Custody order gives RF every other weekend visits supervised by PGM, but RF violating order and PM gets DVPO that limits RF to only limited phone calls w/child
- ▶ RF stops calling in Sept. 2021, RF brief jail stints in late 2022, PM moves for full custody in Dec. 2022, notice sent to RF's same address he'd been using, RF no shows Jan. 2023 hearing, PM full custody, RF allowed no contact "directly or indirectly"
- ▶ PM files TPR petition in March 2023, RF files R60 in Sep. 2023 to get full custody order set aside due to lack of notice, TC agrees and sets aside in May 2024
- ▶ RF no contact/child support/gifts/letters in 6 months pre-petition
- ▶ TPR hearing Dec. 2024 – adjudicated a1, a7
- ▶ Appeal

In re LDW, 928 S.E.2d 805 (2026)

- ▶ July 2021 – temporary order, RF limited calls
- ▶ Sept 2021 – RF's last call to child
- ▶ Early Sept – early Nov 2022 – RF in jail
- ▶ Late Nov – mid Dec 2022 – RF in jail again
- ▶ Dec (?) 2022 – permanent custody motion, RF no notice
- ▶ Jan 2023 – custody hearing, RF not there
- ▶ March 2023 – private TPR
- ▶ Sept 2023 – RF's R60 motion to set aside permanent order
- ▶ May 2024 – R60 motion allowed
- ▶ December 2024 – TPR hearing

In re LDW, 928 S.E.2d 805 (2026)

- ▶ RF concedes lack of contact, but says DVPO, full custody order, and his incarceration prevented him from making contact
- ▶ Regardless of full custody order, COA says RF could have called during specified times prior to TPR petition – Sept. 2022 – Jan. 2023
- ▶ RF in jail for violating probation and DVPO did not nullify his need to try and contact child
- ▶ TC's lack of FOF on RF's incarceration disregarded b/c RF provided no evidence of acts he did take
- ▶ RF's lack of notice re full custody order should have resulted in him calling, but didn't
- ▶ RF still didn't call after it was set aside
- ▶ Also RF didn't ask for offer of proof of the testimony he wanted to elicit from PM
- ▶ a7 affirmed

In re LDW, 928 S.E.2d 805 (2026)

- ▶ “The trial court looks at this narrow window of time and may only consider evidence outside that time frame to evaluate the parent's credibility and intentions.”
- ▶ Vs.
- ▶ “Although the trial court must examine the relevant six-month period in determining whether respondent abandoned the juvenile, the trial court may consider respondent's conduct outside this window in evaluating respondent's credibility and intentions.”
- ▶ Also, need to try and show interest through collaterals, asking about child, sending letters/gifts, filing motions

In re LB, 928 S.E.2d 520 (2026)

- ▶ RM out of picture, RF fighting with child's half-sibling, child living w/ PGM who had drunk driving charge and failure to restrain in car child under 16
- ▶ LB alleged and adjudicated neglected and dependent
- ▶ RF convicted of drug charges, 33 years in federal prison but appealed and could be reduced to 10 years, PGM failed home study twice
- ▶ RF limited services in prison during COVID, placed on federal hold, RF took some classes, stayed in contact w/ DSS, sent child letters and birthday cards
- ▶ TPR a1, a2, a6
- ▶ Appeal

In re LB, 928 S.E.2d 520 (2026)

- ▶ No evidence RF failed to sign case plan
- ▶ No evidence as to whether RF had access to MH assessment
- ▶ Burden on DSS
- ▶ FOF that RF failed to do things “due to his incarceration”
- ▶ a1, a2 solely based on RF's incarceration
- ▶ But a6 OK b/c RF incapable of providing care and will continue for foreseeable future but vacating because no evidentiary FOF on current status of RF's alternative caregivers

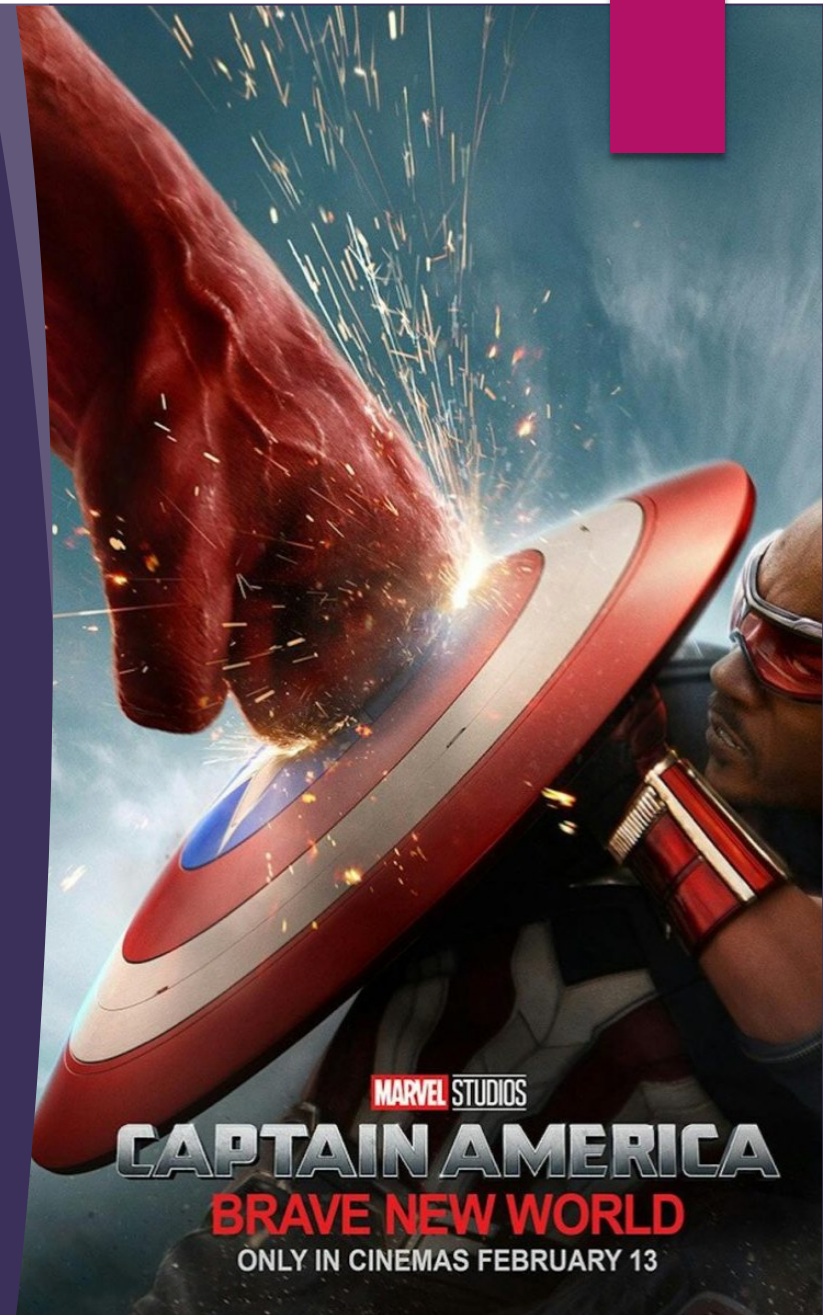
Permissible use as sword, first prong a6

- ▶ In re NTU, 234 NC App 722 (2014) (dependency TPR when parent had been incarcerated for 2 years awaiting trial and there was no evidence of an expected release date)
- ▶ In re LRS, 237 NC App 16 (2014) (dependency TPR when parent would be incarcerated for at least another 1-3 years after the hearing)
- ▶ In re ALS, 375 NC 708 (2020) (dependency TPR when mother would remain incarcerated for least another 22 months after termination hearing)
- ▶ In re KBC, 295 NC App 619 (2024) (dependency TPR when RF in jail for next 9 years)
- ▶ “The trial court considered, beyond the fact of Respondent-Father's incarceration, the substantial length of Respondent-Father's sentence [and] its effect upon the minor children...”



Shield, not sword

- ▶ 7B-1109(f) – Movant has burden of CCE
- ▶ In re DMG, No. COA18-944 (July 16, 2019) (unpublished) (a6 vacated when RF expected to be released 7 months after TPR hearing)
- ▶ In re MJG, No. COA26-564, RF convicted of indecent liberties with minor, released from prison 22 days after termination hearing, a1 and a2 TPR, pending



In re KN, 373 NC 274 (2020)

- ▶ “A parent's incarceration **may be relevant** to the determination of whether parental rights should be terminated, but our precedents are quite clear—and remain in full force—that incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision. Thus, respondent's incarceration, by itself, cannot serve as clear, cogent, and convincing evidence of neglect. Instead, the extent to which a parent's incarceration supports a finding of neglect depends upon an **analysis of the relevant facts and circumstances**, including the length of the parent's incarceration.” (emphasis added)

Takeaways

- ▶ Encourage client to show interest however possible directly or indirectly, even when case is on appeal, can still “abandon” child
- ▶ Fight back against it being used as a sword, even on a6
- ▶ Argue relevancy
- ▶ Focus on length of parent’s incarceration especially if getting released/resolved soon, ask for continuance
- ▶ Hold DSS to its burden including showing what parent could/could not access in prison
- ▶ Make them show wrong other than incarceration itself – no contact, inappropriate contact, denying culpability (if applicable), infractions/new charges/convictions, no case plan progress when could have – beware of vagaries about “effect”

Questions/Comments?

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