



# Constitutional Rights that are Impacted in 7B Proceedings

Lyana Hunter

Assistant Public Defender

New Hanover County

# Overview

- ▶ Rights and Protections Afforded to Juveniles
- ▶ Rights and Protections not Afforded to Juveniles
- ▶ What are the Constitutional Rights of Parents?
- ▶ What Procedures are required to assure fairness and equity for Parents?
- ▶ Final Thoughts and questions

## N.C. Gen. Stat. § 7B-100

- ▶ This Subchapter shall be interpreted and construed so as to implement the following purposes and policies:
- ▶ (1) To provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents;

# Rights and Protections Afforded to Juveniles

- ▶ Right to Counsel
- ▶ Right Against Self Incrimination
- ▶ Right to Standard of Proof Beyond a Reasonable Doubt
- ▶ Right to be Free from Double Jeopardy
- ▶ Right to Notice of Charges against them
- ▶ Right to Confront and Cross Examine Witnesses
- ▶ Presumption of Indigency

## *In re Gault*, 387 U.S. 1 (1967)

- ▶ U.S. Supreme Court recognized that juveniles are entitled to many rights afforded adult defendants:
  - ▶ Right to counsel
  - ▶ Right to notice of charges
  - ▶ Right to confront and cross-examine witnesses
  - ▶ Right against self incrimination

# What do you do?

- ▶ Angry father comes in with his 14 year old daughter to the first appearance. The father is missing work, does not want to be there and has refused to allow the child to speak to the court appointed attorney because “she did the crime, she needs to do the time”. He has 3 other children in the home who “know how to follow rules”, and “why should he have to pay for a lawyer”.
- ▶ He wants to waive counsel on his child’s behalf and allow her to “plead guilty”.

# Right to Counsel

- ▶ *In re Gault*, 387 U.S. 1, 41 (1967) - first recognized
- ▶ § 7B-2000. **Juvenile's right to counsel**; presumption of indigence.
  - ▶ (a) A juvenile alleged to be within the jurisdiction of the court has the right to be represented by counsel in all proceedings. Counsel for the juvenile shall be appointed in accordance with rules adopted by the Office of Indigent Defense Services, unless counsel is retained for the juvenile, in any proceeding in which the juvenile is alleged to be (i) delinquent or (ii) in contempt of court when alleged or adjudicated to be undisciplined.
  - ▶ (b) All juveniles shall be conclusively presumed to be indigent, and it shall not be necessary for the court to receive from any juvenile an affidavit of indigency. (1979, c. 815, s. 1; 1998-202, s. 6; 2000-144, s. 22.)
- ▶ § 7B-2405. Conduct of the adjudicatory hearing.
  - ▶ The adjudicatory hearing shall be a judicial process designed to determine whether the juvenile is undisciplined or delinquent. In the adjudicatory hearing, the court shall protect the following rights of the juvenile and the juvenile's parent, guardian, or custodian to assure due process of law:
    - ▶ (1) The right to written notice of the facts alleged in the petition;
    - ▶ **(2) The right to counsel;**
- ▶ § 7B-2101. Interrogation procedures.
  - ▶ (a) Any juvenile in custody must be advised prior to questioning:
    - ▶ **(4) That the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation.**
- ▶ **EXPRESSED INTEREST**

# Presumption of Indigency

- ▶ § 7B-2000. Juvenile's right to counsel; presumption of indigence.
  - ▶ (a) A juvenile alleged to be within the jurisdiction of the court has the right to be represented by counsel in all proceedings. Counsel for the juvenile shall be appointed in accordance with rules adopted by the Office of Indigent Defense Services, unless counsel is retained for the juvenile, in any proceeding in which the juvenile is alleged to be (i) delinquent or (ii) in contempt of court when alleged or adjudicated to be undisciplined.
  - ▶ (b) All juveniles shall be conclusively presumed to be indigent, and it shall not be necessary for the court to receive from any juvenile an affidavit of indigency. (1979, c. 815, s. 1; 1998-202, s. 6; 2000-144, s. 22.)
- ▶ **CONSIDER WAIVING FEES**
- ▶ **SIDEBAR → PAY ATTENTION TO RESTITUTION REQUESTS - WHAT CAN JUVENILE ACTUALLY PAY?**



# Right to Notice of Charges Against them

- ▶ *In re Gault* - right to notice of charges against them
- ▶ § 7B-1802. Petition.
  - ▶ The petition shall contain the name, date of birth, and address of the juvenile and the name and last known address of the juvenile's parent, guardian, or custodian. The petition shall allege the facts that invoke jurisdiction over the juvenile. The petition shall not contain information on more than one juvenile.
  - ▶ A petition in which delinquency is alleged shall contain a plain and concise statement, without allegations of an evidentiary nature, asserting facts supporting every element of a criminal offense and the juvenile's commission thereof with sufficient precision clearly to apprise the juvenile of the conduct which is the subject of the allegation.
  - ▶ Sufficient copies of the petition shall be prepared so that copies will be available for the juvenile, for each parent if living separate and apart, for the guardian or custodian if any, for the juvenile court counselor, for the prosecutor, and for any person determined by the court to be a necessary party. (1979, c. 815, s. 1; 1981, c. 469, s. 9; 1998-202, s. 6; 2001-490, s. 2.10.)
- ▶ § 7B-2405. Conduct of the adjudicatory hearing.
  - ▶ The adjudicatory hearing shall be a judicial process designed to determine whether the juvenile is undisciplined or delinquent. In the adjudicatory hearing, the court shall protect the following rights of the juvenile and the juvenile's parent, guardian, or custodian to assure due process of law:
    - ▶ (1) The right to written notice of the facts alleged in the petition;

# What do you do?

- ▶ 10 year old female juvenile is charged with a sex offense involving an 8 year old male victim. The 10 year old juvenile denies the allegations and wants to have a contested hearing. The ADA keeps delaying the trial because he is concerned about trauma to the victim. The juvenile is ready for trial and the victim is able to testify.
- ▶ Case needs to be heard
  - ▶ ADAs can take steps to protect victim
  - ▶ Juvenile is entitled to have a trial no matter how uncomfortable or horrible the facts may be
  - ▶ Right to confront witness - should not be held against juvenile

# Right to Confront and Cross Examine Witnesses

- ▶ § 7B-2405. Conduct of the adjudicatory hearing.
  - ▶ The adjudicatory hearing shall be a judicial process designed to determine whether the juvenile is undisciplined or delinquent. In the adjudicatory hearing, the court shall protect the following rights of the juvenile and the juvenile's parent, guardian, or custodian to assure due process of law:
    - ▶ (1) The right to written notice of the facts alleged in the petition;
    - ▶ (2) The right to counsel;
    - ▶ (3) The right to confront and cross-examine witnesses;
- ▶ **Right to have a trial - dispel the “kiddie court” notion**

# Right against Self Incrimination

- ▶ **Can't be compelled to give information that could be used against him/her**
- ▶ **CANNOT be compelled to testify**
- ▶ 5<sup>TH</sup> Amendment of the U.S. Constitution
- ▶ Applicable to juvenile proceedings per *In re Gault*, 387 U.S. 1, 55 (1967)
- ▶ § 7B-2101. Interrogation procedures.
  - ▶ (a) Any juvenile in custody must be advised prior to questioning:
    - ▶ (1) That the juvenile has a right to remain silent;
    - ▶ (2) That any statement the juvenile does make can be and may be used against the juvenile;
    - ▶ (3) That the juvenile has a right to have a parent, guardian, or custodian present during questioning; and
    - ▶ (4) That the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation.
  - ▶ (b) When the juvenile is less than 16 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney. If an attorney is not present, the parent, guardian, or custodian as well as the juvenile must be advised of the juvenile's rights as set out in subsection (a) of this section; however, a parent, guardian, or custodian may not waive any right on behalf of the juvenile.
  - ▶ (c) If the juvenile indicates in any manner and at any stage of questioning pursuant to this section that the juvenile does not wish to be questioned further, the officer shall cease questioning.
  - ▶ (d) Before admitting into evidence any statement resulting from custodial interrogation, the court shall find that the juvenile knowingly, willingly, and understandingly waived the juvenile's rights. (1979, c. 815, s. 1; 1998-202, s. 6; 2015-58, s. 1.1.)

# Right Against Self Incrimination (continued)

- ▶ If the requirements of G.S. 7B-2101 (b) are satisfied, the juvenile may waive the right against self incrimination. *State v. Flowers*, 128 N.C. App. 697, 701-02 (1998)

- ▶ (b) When the juvenile is less than 16 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney. If an attorney is not present, the parent, guardian, or custodian as well as the juvenile must be advised of the juvenile's rights as set out in subsection (a) of this section; however, a parent, guardian, or custodian may not waive any right on behalf of the juvenile.

- ▶ \*\*\* The State bears the burden of proving by preponderance of the evidence that the waiver is knowing and intelligent. *State v. Flowers*, 128 N.C. App. 697, 701-02 (1998)

- ▶ Then the Court must determine (looking at specific facts and circumstances of each case, including background, experience and conduct of the juvenile) whether the waiver was knowing and intelligent. *State v. Johnson*, 136 N.C. App. 683, 693 (2000)

# Right Against Self Incrimination (continued)

## ▶ § 7B-2405. Conduct of the adjudicatory hearing.

- ▶ The adjudicatory hearing shall be a judicial process designed to determine whether the juvenile is undisciplined or delinquent. In the adjudicatory hearing, the court shall protect the following rights of the juvenile and the juvenile's parent, guardian, or custodian to assure due process of law:

- ▶ (1) The right to written notice of the facts alleged in the petition;
- ▶ (2) The right to counsel;
- ▶ (3) The right to confront and cross-examine witnesses;
- ▶ (4) **The privilege against self-incrimination;**

## ▶ § 7B-2408. Rules of evidence.

- ▶ If the juvenile denies the allegations of the petition, the court shall proceed in accordance with the rules of evidence applicable to criminal cases. In addition, **no statement made by a juvenile to the juvenile court counselor during the preliminary inquiry and evaluation process shall be admissible prior to the dispositional hearing.** (1979, c. 815, s. 1; 1981, ch. 469, s. 17; 1998-202, s. 6; 2001-490, s. 2.17.)

- ▶ ***J.D.B. vs North Carolina, 564 U.S. 261 (2011) - a juvenile's age is a relevant factor when determining whether a child was "in custody".***

# Right to Standard of Proof Beyond a Reasonable Doubt

- ▶ Due Process Clause of the 14<sup>th</sup> Amendment
- ▶ *In re Winship*, 397 U.S. 358, 368 (1970) - the U.S. Supreme Court recognized that although there were important differences between juvenile and adult proceedings, the potential for the juvenile's loss of liberty requires that the standard of proof is beyond a reasonable doubt.
- ▶ § 7B-2409. Quantum of proof in adjudicatory hearing.
  - ▶ The allegations of a petition alleging the juvenile is delinquent shall be proved beyond a reasonable doubt. The allegations in a petition alleging undisciplined behavior shall be proved by clear and convincing evidence. (1979, c. 815, s. 1; 1998-202, s. 6.)

# Right to Be Free from Double Jeopardy

- ▶ *Breed v. Jones*, 421 U.S. 519, 541 (1975) - established/recognized right for juveniles
  - ▶ Court can't adjudicate a juvenile delinquent for an offense and transfer the juvenile to adult court for the same offense. (Also, In re J.L.W., 136 N.C. App. 596, 598 (2000))
- ▶ Jeopardy attaches when the trial court begins to hear evidence. *In re Hunt and In re Dowd*, 46 N.C. App. 732, 735 (1980)
- ▶ If the court dismisses a petition based on lack of sufficient evidence, the juvenile can't be prosecuted for the same or greater offense. *In re Drakeford*, 32 N.C. App. 113, 119 (1977)



# Constitutional Rights not afforded to Juveniles

- ▶ Trial by jury - *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971)
  - ▶ The U.S. Supreme Court has not ruled on the following:
    - ▶ Right to Bail
    - ▶ Right to a Speedy trial
    - ▶ Right to Self Representation
  - ▶ The NC General Assembly has not provided these rights to juveniles either
    - ▶ § 7B-2405. Conduct of the adjudicatory hearing.
      - ▶ The adjudicatory hearing shall be a judicial process designed to determine whether the juvenile is undisciplined or delinquent. In the adjudicatory hearing, the court shall protect the following rights of the juvenile and the juvenile's parent, guardian, or custodian to assure due process of law:
        - ▶ (1) The right to written notice of the facts alleged in the petition;
        - ▶ (2) The right to counsel;
        - ▶ (3) The right to confront and cross-examine witnesses;
        - ▶ (4) The privilege against self-incrimination;
        - ▶ (5) The right of discovery; and
        - ▶ (6) All rights afforded adult offenders except the right to bail, the right of self-representation, and the right of trial by jury.
- ▶ **\*\*\* Each of these rights attaches on transfer of a juvenile case to superior court for trial as an adult**

# Constitutional Rights

## The 14<sup>th</sup> Amendment

*Meyer v. Nebraska*, 262 U.S. 390 (1923). “[w]ithout doubt“ the fourteenth amendment “denotes ... the right of the individual to ... bring up children ... according to the dictates of his own conscience.”

*Troxel v. Granville*, 530 U.S. 57, 65-66 (2000)

“The liberty interest ... of parents in the care, custody, and control of their children— is perhaps the oldest of the fundamental liberty interests recognized by this Court.”

# Constitutional Rights

## North Carolina

- ▶ The general rule in a custody dispute between a parent and a non-parent is that the parent is entitled to custody **unless there is proof that the parent is unfit, has neglected the child, or has acted inconsistently with the parent's protected status.**
- ▶ **If there is no such proof, it is error to determine custody based on the 'best interests' of the child.**

*Petersen v. Rogers*, 337 N.C. 397 (1994)

*Price v. Howard* 346 N.C. 68 (1997)

## TIP #1

- ▶ **General Rule-**There is no duty on the court to address the issue until requested to do so by a party.

# Actions Inconsistent with Protected Status as a Parent - When to Address?

- ❑ Constitutional issues not raised and addressed at trial will not be considered for the first time on appeal.  
*In re C.P.*, 258 N.C. App. 241 (2018) (refusing to consider respondent's argument that trial court erred in applying the best interest standard because respondent did not raise this objection at trial).
- ❑ Caveat 1. A parent must not be prevented from raising the issue.  
*In re R.P.*, 252 N.C. App. 301(2017) (holding that the respondent was not offered the opportunity to raise an objection on constitutional grounds when the trial court limited the issues of the hearing).
- ▶ Caveat 2. *In re S.J.T.H.*, 258 N.C. App. 277 (2018) suggests that when a non-removal parent appears and requests custody, the court should receive evidence and make findings about the parent's ability to parent before determining custody.

## TIP #2

- ▶ When the issue is raised, you must make findings and those findings must be supported by clear and convincing evidence.

# Actions Inconsistent with Protected Status as a Parent - How to Address?

- ❑ *In re D.M.*, 211 N.C. App. 382 (2011)

Where there was no finding that the father acted inconsistently with his constitutional rights as a parent, the trial court erred in awarding permanent custody of the child to a nonparent.

- ❑ *In re R.P.*, 252 N.C. App. 301 (2017)

The finding that a parent was unfit or acted inconsistently with his constitutionally protected status as a parent is required even when a juvenile has previously been adjudicated neglected and dependent.

- ❑ *In re E.M.*, 249 N.C. App. 44 (2016)

Absent an indication that the [district] court applied the clear and convincing standard, we must vacate this portion of the PPR order and remand for entry of a new finding of fact that makes clear the standard of proof applied by the district court in determining whether Respondent's actions have been inconsistent with her constitutionally-protected status as the child's parent.

# What are Actions Inconsistent with Protected Status as a Parent?

1. Actions of putative fathers
2. Non-removal parent
3. Actions of co-respondent



# Putative Fathers

- ▶ *In re Byrd*, 354 N.C. 188 (2001)
- ▶ *In re A.C.V.*, 203 N.C. App. 473 (2010)
- ▶ *In re S.D.W.*, 367 N.C. 386 (2014)
- ▶ *In re Adoption of B.J.R.*, 238 N.C. App. 308 (2014)

An putative father must grasp the opportunity to develop a relationship with his child for constitutional protections to apply.

# Non Removal Parent

- ▶ *In re B.G. (2)* 197 N.C. App. 570 (2009)
- ▶ *In re R.P.*, 252 N.C. App. 301(2017)
- ▶ *In re S.J.T.H.*, 258 N.C. App. 277 (2018)

There must be clear, cogent, and convincing evidence to demonstrate a parent is unfit or has acted inconsistently with his parental rights to support a disposition that does not grant a parent custody.

# Actions of Co-Respondent

- ▶ *In re J.A.G.*, 172 N.C. App. 708 (2005)

The court reversed the disposition part of the order, stating since there were no grounds to prolong the removal of custody from the mother, “the trial court abused its discretion in finding and concluding it was in the juvenile’s best interest that his custody remain with DSS.”

# Procedural Due Process

- ▶ No state shall make or enforce any law which shall abridge the privileges or 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.

# Procedural Due Process

- ▶ Right to Receive Notice of Proceedings
- ▶ Right to Participate in Hearings
- ▶ Right to an Appropriate Standard of Proof in Hearings

# Right to Receive Notice of Proceedings

- ▶ *In re H.D.F.*, 197 N.C. App. 480 (2009) (reversing a neglect adjudication when the pro se father did not receive notice of hearings nor copies of the earlier orders in the proceeding).

# Right to Participate in Hearings

- ▶ *In re Murphy*, 105 N.C. App. 651, aff'd, 332 N.C. 663 (1992)
- ▶ *In re Quevedo*, 106 N.C. App. 574 (1992)
- ▶ IDS Policy re Depositions

# Right to an Appropriate Standard of Proof

- ▶ *Santosky v. Kramer*, 455 U.S. 745 (1982). (TPR requires that the State support its allegations by at least clear and convincing evidence.)
- ▶ *Adams v. Tessener*, 354 N.C. 57 (2001) (A trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence.)



# Final thoughts and Questions

- ▶ Juvenile Court is a court of record - don't treat as kiddie court
  - ▶ Serious, potentially long-term consequences for kids
- ▶ Maintain high standards for attorneys in juvenile court
- ▶ Procedural due process - active, empathetic listening
- ▶ Hold DSS to their burden at all hearings
- ▶ Ensure ample and quality visitation between parents and children; never take away visitation as punishment
- ▶ Don't raise the bar; separate safety and treatment issues
- ▶ Recognize that people of color are disproportionately impacted/represented in juvenile court (both in delinquency and A/N/D court)
  
- ▶ **QUESTIONS?**

# References, Resources, etc.

- ▶ North Carolina Juvenile Defender Manual, Oct. 2017 edition, David W. Andrews and John Rubin
  - ▶ <https://defendermanuals.sog.unc.edu/defender-manual/7>
- ▶ N.C. General Statutes 7B
  - ▶ <https://www.ncleg.gov/Laws/GeneralStatuteSections/Chapter7B>
- ▶ N.C. Juvenile Defender Website
  - ▶ <https://ncjuveniledefender.com/>
- ▶ Applying the Reasonable Child Standard to Juvenile Interrogations after J.D.B. v. North Carolina, Latoya B. Powell, February 2016 Juvenile Law Bulletin
  - ▶ <https://www.sog.unc.edu/publications/bulletins/applying-reasonable-child-standard-juvenile-interrogations-after-jdb-v-north-carolina>
- ▶ National Juvenile Defender Center website
  - ▶ <https://njdc.info/>
- Presentation on Constitutional rights of parents adapted from a presentation by Wendy Sotolongo, Parent Defender