

On the Civil Side

A UNC School of Government Blog

<https://civil.sog.unc.edu>

N.C. Supreme Court Clarifies When and How to Preserve Parents' Constitutionally Protected Rights for an A/N/D Appeal

This entry was contributed by Timothy Heinle on January 13, 2025 at 11:05 am and is filed under Child Welfare Law, Constitutional Issues, Juvenile Law.

Five-year-old Katy* has experienced a lot in her young life. As a baby in her mother's care, Katy was exposed to substance use and domestic violence, leading to a county department of social services (DSS) petition alleging Katy was neglected. DSS and Katy's parents established a safety plan for her to live with her father. Katy was later adjudicated neglected. At initial disposition, the trial court was asked for the first time to consider removing Katy from her father, who was not the subject of allegations in the petition, based on concerns over his criminal history. The trial court agreed with DSS, granting temporary custody of Katy to paternal relatives. *In re K.C.*, __ N.C. __ (Dec. 13, 2024).

The initial disposition order included that both of Katy's parents acted inconsistent with their constitutional rights as parents. Sl.Op. at 5. The father appealed, arguing that the court erred by drawing this conclusion without receiving evidence and without discussion from any party on the issue. Applying a de novo review of this conclusion of law, a divided Court of Appeals panel agreed, vacated the disposition order, and remanded the case for further proceedings. *Id.* Our Supreme Court granted DSS' petition for discretionary review and raised the issue of whether the father had preserved the constitutional claims for appeal – which the Court held he had not. Sl.Op. 6-7. Read on to learn what it means for parents and their attorneys.

Juvenile court and the constitutional rights of parents

Parents have the right to raise children without interference by the state. They have a liberty interest in the companionship, custody, care, and control of their children under the Due Process Clause of the U.S. Constitution's Fourteenth Amendment. *Lassiter v. Dep't of Social Services*, 452 U.S. 18 (1981). This interest exists throughout the life of a juvenile abuse, neglect, or dependency (A/N/D) proceeding. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (recognizing in

a termination of parental rights proceeding that a parent's fundamental liberty interest "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state").

These rights are not absolute. While there is a presumption that parents act in their child's best interests, the state may intervene when a parent is unfit. *See, e.g., Troxel v. Granville*, 530 U.S. 57 (2000); *In re E.B.*, 375 N.C. 310 (2020). Juvenile proceedings are a form of government intervention into constitutionally protected parent-child relationships.

The remainder of this post will examine when and how a parent must preserve the issue of their constitutional rights in a juvenile proceeding. For more on the constitutional rights of parents, including a discussion of the factors a court considers and the necessary findings to determine whether a parent is unfit or has acted inconsistent with those rights, see Chapters [2.4.A](#) and [7.10.B](#) of the A/N/D Manual.

In re K.C.

Trial court. Back to Katy, a neglected juvenile due to circumstances involving her mother. Over the father's objection, the court at initial disposition removed Katy from her father's care, placing her with relatives. The issue of the father's constitutional rights as a parent was never explicitly raised, but the trial court included in its disposition order that both parents had "acted inconsistent with their constitutional rights as parents." *In re K.C.*, Sl.Op. at 5.

N.C. Court of Appeals. The father appealed, arguing that the trial court had erred in concluding he had acted inconsistent with his constitutional rights as a parent without evidence and without making necessary findings of fact. The Court of Appeals agreed, determining that (i) neither the allegations in the petition nor findings in the adjudication order pointed to the father acting inconsistent with his rights as a parent, (ii) the initial disposition hearing was the first time the possibility of removal from the father had been raised, and (iii) Katy's father properly preserved his constitutional claims when he opposed DSS' recommendations and requested that Katy remain in his care. Sl.Op. at 5-6.

A divided panel of the Court of Appeals vacated the disposition order and remanded the case for further proceedings. Sl.Op. at 1, 5. Note that the dissent focused on the order being an initial dispositional order that awarded temporary custody to a non-parent, stating the determination about the parent's constitutional rights was premature since it was not a permanent order. Sl.Op. at 6.

N.C. Supreme Court. The majority opinion starts by acknowledging long-recognized constitutional rights of parents, and notes that there are rare cases where a trial court would be authorized to remove a child from a parent under the Juvenile Code (Chapter 7B of the N.C. General Statutes), but removal would be prohibited by the U.S. Constitution. Sl.Op. at 12.

These rare situations, according to the NC Supreme Court, have created a preservation question that has “confounded the Court of Appeals for a number of years,” leading to conflicting opinions and confusion among parents. Sl.Op. at 9-10.

- One line of cases holds that because there is a presumption of parental fitness, a trial court must assess the constitutionality of removal in each case – meaning that even if the parent never raises the issue, the issue is preserved for appeal. The Supreme Court rejected this thinking in *In re J.N.*, 381 N.C. 131 (2022) (holding that a parent’s paramount interest in the custody of their child is waivable as an issue if not raised at trial). Sl.Op. at 9-10.
- A second line of cases developed separately, holding that even if the parent never expressly asserts a constitutional argument, so long as the parent opposed the removal of the child for any reason at trial, the constitutional issue is preserved. *See, e.g., In re B.R.W.*, 278 N.C. App 382 (2021) (holding that a parent has preserved the issue of their constitutionally protected rights and status by offering evidence opposing guardianship). Sl.Op. at 10.

In *K.C.*, the NC Supreme Court reminds us of its holding in *In re J.N.*, concluding that “a parent who merely argues against a child’s removal, or against the child’s placement with someone else, does not adequately preserve the constitutional issue. To preserve it, the parent must inform the trial court and the opposing parties that the parent is challenging the removal *on constitutional grounds* and articulate the basis for the constitutional claim.” Sl.Op. at 12 (emphasis in original). Doing so is critical, the Court reasoned, because opposing parties must be given notice and an opportunity to offer evidence to rebut the claim that the Juvenile Code is unconstitutional as applied to this parent – evidence which may be of a different nature than the evidence otherwise offered in the hearing. Sl.Op. at 12-13 (citation omitted).

Katy’s father conceded that he “did not argue this issue as a violation of a constitutional right.” Sl.Op. at 6. The NC Supreme Court reversed the Court of Appeals, holding that the father waived the constitutional claim when he failed to preserve it at trial, rendering it unreviewable on appeal. Sl.Op. at 13. The Court expressly overruled the Court of Appeals’ opinions in *B.R.W.* and those cases that followed it, which includes *In re T.S., III*, ___ N.C. App. ___ (Dec. 3, 2024).

When and how does a parent need to preserve these issues?

It is clear from the holding in *In re K.C.* (and two other previously published NC Supreme Court opinions, *In re J.N.*, 381 N.C. 131 (2022) and *In re J.M.*, 384 N.C. 584 (2023)) that evidence and argument from a parent or their attorney (i) opposing a plan of custody or guardianship with a non-parent, (ii) supporting continued placement, custody, or reunification with the parent, or (iii) generally opposing the recommendations of other parties for placement with a non-parent are insufficient to preserve constitutional arguments.

Instead, these constitutional issues must be specifically raised at trial. Parents or their counsel must inform the court and the parties that the parent is asserting a constitutional challenge and must articulate the constitutional basis for their argument. While reference to the specific clause may not be required, the point is to be clear that this is a constitutional challenge. Best practice is for the attorney to raise the issue during the evidentiary phase of trial and to renew the argument in closing. Remember, the “waiver principle applies even if the trial court addressed the issue on its own initiative in its order.” *In re K.C.*, Sl.Op. at 2. Attorneys should be prepared to raise constitutional claims when they can.

Practitioners should note that the appeal in Katy's case was from an *initial disposition* order which granted *temporary* custody to her relatives. The NC Supreme Court did not address the Court of Appeals dissent's concern about whether the determination of a parent's constitutional rights must be made at initial disposition when the order is temporary. However, the NC Supreme Court did not limit its holding to a particular stage of an A/N/D proceeding. Because Katy's father knew DSS was recommending custody to a non-parent, her father was on notice that his constitutional rights were implicated. As such, he was required to expressly raise and make constitutional arguments to preserve them for appeal.

**Katy is not the juvenile's real name, but rather a pseudonym used by our appellate courts.*

This entry was tagged with the following terms: abuse neglect and dependency.

Timothy Heinle

Timothy Heinle joined the School of Government in 2020. Timothy works as part of the School's Public Defense Education program, focusing primarily on juvenile abuse, neglect, and dependency, and incompetency and guardianship matters.