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Rest In Peace:
The Untragic and Overdue End of
G.S. § 7B-1111(a)(3) As We Know It




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○ Outline

(1) Pre-trial: A constitutional argument against G.S. 7B-1111(a)(3)

(2) At trial: Challenging unsound precedent regarding ability to pay and willfulness




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○ (1) Constitutional Argument

“It is a fundamental obligation of the courts of this state to protect the people from unconstitutional laws”

M.E. v. T.J., 854 S.E.2d 74, 93 (N.C. Ct. App. 2020)



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○ (1) Constitutional Argument

Improving on 40-year-old arguments

In re Clark, 303 N.C. 592 (1981) – rejected constitutional challenge to the (identical*) predecessor to G.S. 7B-1111(a)(3)

- Three different arguments:
 - Lack of counsel
 - Lack of jury
 - Unconstitutionally vague (i.e., how much is a "reasonable amount?") and overbroad

Importantly, though, *Clark* draws no comparisons with (the identical predecessor to) G.S. 7B-1111(a)(4).

*Of note: G.S. 7A-289.30 was the old 7B-1111(a), which also allowed TPR simply if the parent "without cause failed to establish or maintain concern or responsibility as to the child's welfare." The "reasonable progress" ground spanned two years rather than twelve months. 1977 N.C. Sess. Laws 879.



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○ (1) Constitutional Argument

G.S. 7B-1111(a)(3)

- Child in gov't custody
- Existence of CSUP order/agreement irrelevant
- Willful failure to pay "reasonable portion of the cost of care for the juvenile although physically and financially able to do so"
- Six months of nonpayment

G.S. 7B-1111(a)(4)

- Child in other parent's custody
- Must have CSUP order/agreement
- Willful failure to pay, per the order/agreement, "without justification"
- Twelve months of nonpayment



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○ (1) Constitutional Argument

The standards of (a)(3) are more burdensome than those of (a)(4). Ergo, it is easier to terminate under (a)(3) than (a)(4):

- Length of nonpayment
 - 6 months versus 12 months
- Amount of nonpayment
 - "take a guess" versus an actual number
- Notice of obligation to pay*
 - optional versus required

(*see slide 19)



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○ (1) Constitutional Argument

"The Equal Protection Clause of Article I, Section 19 of the North Carolina Constitution and the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution forbid North Carolina from denying any person the equal protection of the laws. N.C. Const. art. I, § 19 ("No person shall be denied the equal protection of the laws."); U.S. Const. amend. XIV, § 1 ("No State shall ... deny to any person within its jurisdiction the equal protection of the laws.")

Dep't of Transp. v. Rowe, 353 N.C. 671, 675 (2001)



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○ (1) Constitutional Argument

"To determine if a regulation violates either of these clauses, North Carolina courts apply the same test. The court must first determine which of several tiers of scrutiny should be utilized. Then it must determine whether the regulation meets the relevant standard of review. Strict scrutiny applies . . . when it infringes on the ability of some persons to exercise a fundamental right."

Dep't of Transp. v. Rowe, 353 N.C. 671, 675 (2001) (quotes omitted)



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○ (1) Constitutional Argument

Parental Rights = Fundamental Rights

"[N]atural parents have a constitutionally protected interest in the companionship, custody, care, and control of their children."

Price v. Howard, 346 N.C. 68, 72 (1997)

"The right to parent one's children is a fundamental right . . ."

In re A.K., 360 N.C. 449, 457 (2006)



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(1) Constitutional Argument

Strict Scrutiny = Shift of Burden

"If a regulation receives strict scrutiny, then the state must prove that the classification is necessary to advance a compelling government interest; otherwise, the statute is invalid."

Dep't of Transp. v. Rowe, 353 N.C. 671, 675 (2001)



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(2) Challenging Unsound Precedent

BAD:

- *In re J.M.*, 373 N.C. 352 (2020)
- *In re S.E.*, 373 N.C. 360 (2020)

GOOD:

- *Durham County ex rel. Wilson v. Burnette*, 262 N.C. App. 17, *aff'd*, 372 N.C. 64 (2019)



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(2) Challenging Unsound Precedent: *In re J.M.* & Ability to Pay

HELD: If parent was subject to a CSUP order during the relevant six-month window, then the mere existence of that order is enough to establish ability to pay under (a)(3).

J.M., 373 N.C. at 359 (citing *In re S.T.B.*, 235 N.C. App. 290, 296 (2014) (“[Because a] proper decree for child support will be based on the supporting parent’s ability to pay as well as the child’s needs, there is no requirement that petitioner independently prove or that the termination order find as fact respondent’s ability to pay support during the relevant statutory time period.” (quoting *In re Roberson*, 97 N.C. App. 277 (1990))).

****Roberson* concerned the predecessor to (a)(4), not (a)(3).

HOWEVER, *J.M.* conflicts with *Durham County ex rel. Wilson*...



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(2) Challenging Unsound Precedent: *In re J.M.* & Ability to Pay

J.M. conflicts with Durham County ex rel. Wilson

- For civil contempt, regardless of existence of CSUP order, the court's gotta do some work:
 - Court must take a "financial inventory [which] must consider both sides of the equation: the defendant's income, assets, or ability to take reasonable means to obtain funds to pay support *minus* the defendant's legitimate reasonable needs and expenses." *Durham County ex rel. Wilson*, 262 N.C. App. at 36.
- But, for TPR, the court can take a very easy shortcut under *J.M.*:
 - "This CSUP order that was entered three (or five, or ten) years ago automatically and necessarily proves you had the ability to pay during the last six months. So, we don't have to bother ourselves with pesky details like whether you've been unemployed for the last year."
- Ergo, it is easier to TPR than enter civil contempt—FOR THE SAME ACT OF NONPAYMENT!
And that is just...



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(2) Challenging Unsound Precedent: *In re J.M.* & Ability to Pay

J.M. conflicts with Durham County ex rel. Wilson

- "When interpreting a statute, the Court must first look to legislative intent." *In re M.L.W.*, 365 N.C. 374, 378 (2012).
- "When multiple statutes address a single matter or subject, they must be construed together, *in pari materia*, to determine the legislature's intent." *DTH Media Corp. v. Folt*, 374 N.C. 292, 300 (2020).
- G.S. 7B-1111(a)(3) & G.S. 5A-21 both "address a single matter or subject": What happens when a parent has the ability to pay CSUP, but willfully fails to do so?
- Ergo, G.S. 7B-1111(a)(3) & G.S. 5A-21 should be construed *in pari materia*.



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(2) Challenging Unsound Precedent: *In re J.M.* & Ability to Pay

J.M. conflicts with Durham County ex rel. Wilson

- Applying the reasoning of *Durham County ex rel. Wilson* to G.S. 7B-1111(a)(3) (i.e., acknowledging *J.M.* is wrong) breaks no new ground:
 - Forty years ago, NCSC acknowledged that determinations under (a)(3) involve "a difficult standard which requires great flexibility in its application." *In re Clark*, 303 N.C. 592, 604 (1981).
 - In other words, there needn't be any easy shortcuts, as *J.M.* creates.
 - So, too, for contempt: "The trial court has broad discretion to determine which expenses are reasonable and necessary . . ." *Durham County ex rel. Wilson*, 262 N.C. App. at 37.



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(2) Challenging Unsound Precedent: *In re S.E.* & "The Cloak of Ignorance"

HELD: "The absence of a court order, notice, or knowledge of a requirement to pay support is not a defense to a parent's obligation to pay reasonable costs, because parents have an inherent duty to support their children. Given her inherent duty to support her children, respondent cannot hide behind a cloak of ignorance to assert her failure to pay a reasonable portion of the cost of care for her children was not willful."

S.E., 373 N.C. at 366 (quotes and cites omitted)



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(2) Challenging Unsound Precedent: *In re S.E.* & "The Cloak of Ignorance"

Three problems with S.E.

- i. It wrongly interprets G.S. 7B-1111(a)(3) as a strict liability statute.
- ii. It exacerbates the constitutional problem.
- iii. It ignores reality: DSS can't accept CSUP without a CSUP order.



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(2) Challenging Unsound Precedent: *In re S.E.* & "The Cloak of Ignorance"

(i) S.E. makes G.S. 7B-1111(a)(3) a strict liability statute

Willfulness matters

- [ability to pay] + [failure to pay] ≠ TPR
- *State v. Moore*, 240 N.C. App. 465, 477-78, writ & review denied, 368 N.C. 353 (2015) (explaining that by amending statute to insert *mens rea* element of "willfulness," the General Assembly "intended to consider violations under these provisions not as strict liability offenses, but as offenses requiring a showing of the requisite intent of willfulness")
- For G.S. 7B-1111(a)(3), "willful" imports knowledge and a stubborn resistance." *In re J.K.C.*, 218 N.C. App. 22, 31-32 (2012).
- By saying every parent already knows (or should just intuitively know) of duty to pay, S.E. reads "willfulness" right out of the statute.



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(2) Challenging Unsound Precedent: *In re S.E.* & “The Cloak of Ignorance”

(ii) *S.E.* exacerbates the unconstitutional disparate treatment of parents

An untenable dichotomy results under *S.E.*

- Under G.S. 7B-1111(a)(4), parents in private disputes must have CSUP order.
- But, under *S.E.*'s interpretation of G.S. 7B-1111(a)(3), parents in A/N/D cases need not be given any notice of obligation to pay.
- In other words:
 - Parents in private custody cases: “You are guaranteed formal notice of your obligation to pay.”
 - Parents in A/N/D cases: “You should just know better.”
- The “canon of constitutional avoidance in statutory interpretation ... is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.” *Clark v. Martinez*, 543 U.S. 371, 381 (2005).



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(2) Challenging Unsound Precedent: *In re S.E.* & “The Cloak of Ignorance”

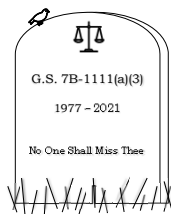
(iii) *S.E.* ignores reality: DSS can't accept CSUP without a CSUP order

- “Most of the time when a child is placed in a licensed Foster Care arrangement, a monthly board payment from either IV-E [i.e., Title IV-E of the federal Social Security Act] or SFHS [i.e., State Foster Home Fund] funds pays the cost of the child's care.”
[N.C. Child Support Services Policy Manual, Chapter: Public Assistance Cases, pp 17-21, available at: https://policies.ncdhhs.gov/divisional/social-services/child-support/policy-manual.](https://policies.ncdhhs.gov/divisional/social-services/child-support/policy-manual)
- G.S. 110-139(f): All CSUP payments are made through the centralized State Child Support Collection and Disbursement Unit, which are then routed to the proper recipient or government account—including the different accounts for foster care reimbursements.



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