

Drug Exposure in Children

Examining North Carolina Law
Related to Substance Affected Infants and Children

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Abuse vs. Neglect vs. Dependency for Substance Affected Infants

Statutory Definition of an Abused Juvenile (N.C. Gen. Stat. § 7B-101(1):
Any **juvenile** less than 18 years of age ... whose **parent**, guardian,
custodian or caretaker:

- a) Inflicts or allows to be inflicted upon the juvenile a **serious physical injury** by other than accidental means;
- a) Creates or allows to be created a **substantial risk of serious injury** to the juvenile by other than accidental means; ...

If alleging abuse for a substance affected infant:

- Get medical records
- Most likely will need expert testimony because you have to prove by clear, cogent, and convincing evidence that either:
 - 1) the juvenile has suffered a **serious physical injury**; or
 - 2) there is a **substantial risk of serious injury** to the juvenile.

DSS has to prove the causal connection between drug exposure and the **serious physical injury** to the juvenile or **substantial risk of serious injury**.

Statutory Definition of a Neglected Juvenile

(N.C. Gen. Stat. § 7B-101(15):

- Any **juvenile** less than 18 years of age ...
 - whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline;
 - who is not provided necessary medical care;
 - who lives in an injurious environment to the juvenile’s welfare.
- In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

Case Law

- 1) Trial court must find “some physical, mental, or emotional **impairment** of the juvenile, or a **substantial risk of such impairment** as a consequence of the failure to provide ‘proper care, supervision, or discipline.’” *In re Safriet*, 112 N.C. App. 747, 752 (1993) (quoting *In re Thompson*, 64 N.C. App. 95, 101 (1983)).
- 2) In order for a court to find that a child resided in an injurious environment, the evidence must show that the environment in which the child resides **has resulted in harm to the child** or a **substantial risk of harm**. *In re Helms*, 127 N.C. App. 505, 511 (1997).

IMPACT

Neglect Case Law Pertaining to Substance Affected Infants

- Note: Courts look at **other factors** to support adjudications of neglect in addition to substance abuse issues.
- *In re B.M.*, 183 N.C. App. 84 (2007) (reversed on other grounds). Court upheld an adjudication of neglect when juvenile was positive for cocaine at birth. Other factors were present including mom’s positive drug screen for cocaine, evidence of domestic violence, and mom’s refusal to sign a Safety Assessment and to stay in home of MGM.
- *In re E.P.*, 183 N.C. App. 301 (2007), *aff’d per curiam*, 362 N.C. 82 (2007). - Parent’s substance abuse issues alone will not support an adjudication of neglect. Must show correlation between substance abuse and harm or substantial risk of harm to the child.

- *In re K.J.B.*, 797 S.E.2d 516 (2016). COA reversed trial court’s adjudication of neglect because there was no evidence to show impairment or substantial risk of impairment as a result of parent’s substance abuse. Mom got drunk and passed out but child was with a babysitter. When mom retrieved her son, there was no evidence she was impaired. Sufficient evidence was not presented that mother cared for the juvenile while impaired.

- *In re L.G.I.*, 227 N.C. App. 512 (2013). Issue was consent order. However, COA upheld a neglect adjudication when the child was positive at birth for morphine and mom admitted to using illegal substances during the pregnancy.

- *In re M.J.G.*, 168 N.C. App. 638 (2005). Court upheld neglect adjudication. Juvenile was 2+ lbs. at birth and was admitted to NICU. Mom visited baby in NICU. Sibling was in DSS custody and had been adjudicated abused and neglected. Mom tested positive at birth for marijuana and admitted to using approximately 1 month prior to juvenile’s birth.

- *In re McLean*, 135 N.C. App. 387 (1999) and *In re A.B.*, 179 N.C. App. 605 (2006) both support DSS assuming custody of a newborn stating that an infant can be adjudicated neglected even if the child has never physically resided in the home of the parents. (“Decision of trial court must of necessity be predictive in nature as the trial court must assess whether there is a substantial risk of neglect.” *In re McLean*, at 396.)

Look for Other Factors to Support Neglect

- Is baby withdrawing? Symptoms, NAS scores, length of time in hospital
- Conduct of parents at hospital – appropriate care? Visiting with baby?
- Substance abuse concerns with parents?
- Mental health concerns?
- Domestic violence?
- Do parents have housing? If yes, does home meet minimal standards?
- Abuse/neglect of other children?
- History with DSS?
- Check CAD statements, criminal records, etc.

Dependency

- N.C. Gen. Stat. § 7B-101(9): A dependent juvenile is a “juvenile in need of assistance or placement because
 - (1) The juvenile has no parent, guardian or custodian responsible for the juvenile’s care or supervision, or
 - (2) The juvenile’s parent, guardian, or custodian is unable to provide for the juvenile’s care or supervision and lacks an alternative child care arrangement.”

Both prongs must be proven for #2 - parent cannot provide **AND** lack an alternative care arrangement
 See *In re P.M.*, 169 N.C. App. 423, 427 (2005) and *In re B.M.*, 183 N.C. App. 84, 90 (2007).

Dependency Case Law

- *In re D.T.N.A.*, 801 S.E.2d 642 (2016). TPR reversed on dependency ground for substance abuse when only evidence of father’s substance abuse was an admission that he smoke marijuana on New Year’s Eve, 3 weeks prior to the TPR.
- *In re B.M.*, 183 N.C. App. 84 (2007). Reversed because 2nd prong was not addressed. However, there was evidence of 1st prong due to substance abuse.
- *In re A.G.M.*, 241 N.C. App. 426, 439-440 (2015). (TPR) “[T]he burden is on the petitioner to show that the parent’s substance abuse would prevent the parent from providing for the proper care and supervision of the child.”

Ceasing Reunification Efforts at Disposition

- N.C. Gen. Stat. § 7B-901(c): Reasonable efforts shall not be required if the court makes written findings of fact pertaining to any of the following, unless the court concludes that there is compelling evidence warranting continued reunification efforts:
 - (1) A court of competent jurisdiction determines or has determined that aggravated circumstances exist because the parent has committed or encouraged the commission of, or allowed the continuation of, any of the following upon the juvenile:
 - (e) **Chronic or toxic exposure to alcohol or controlled substances that causes impairment of or addiction** in the juvenile.

Ceasing Reunification Efforts at Disposition Cont'd

- Court must make written findings
- Review medical records; may need to subpoena medical records
 - NAS scores, withdrawal symptoms, birth defects, low birth weight, etc.
- May need expert testimony regarding evidence to support that the newborn is impaired or addicted
- Must have evidence to support **chronic** or **toxic exposure**

Other States – Harm in utero

- Pennsylvania – Recent Supreme Court Decision
 - In re L.J.B., No. J-57-2018, 2018 2018 WL 6816576, (Pa. Sup. Ct. Dec. 28, 2018).
 - <https://law.justia.com/cases/pennsylvania/supreme-court/2018/10-map-2018.html>
 - Facts: Mom was positive for marijuana and Subutex at birth of her child. By 3rd day, child was experiencing NAS symptoms, mom left hospital, and did not consistently check on the child. PA Child and Youth Social Services filed a petition alleging dependency and abuse.

- At trial level, court adjudicated dependency. Held separate proceeding on abuse ground and requested briefs. Trial court declined to adjudicate abuse allegation as actions (drug exposure) of mom were committed while child was a fetus.
- “CYS” appealed to Superior Court, which reversed because mom’s actions “caused or was reasonably likely to cause injury to the child, who was **now** a child.”
- Issue of 1st impression in PA. Supreme Court looked a definition of a child under PA statutes. **Child** is “a person who is under eighteen years of age.” 23 Pa. C.S. § 6303(a).
- PA S. Ct. held that mom could not be a perpetrator of abuse because fetus was not a child at the time of the abusive act. S. Ct. reversed decision of Superior Court.

If interested....

- Amicus Brief:
- <https://clsphila.org/sites/default/files/issues/Amicus%20Curiae%20Filed%20Copy.pdf>
- Brief on behalf of the mother:
- <https://www.womenslawproject.org/wp-content/uploads/2018/02/LB-petition-for-allowance-of-appeal.pdf>

Other states

- State by state map:
- <https://projects.propublica.org/graphics/maternity-drug-policies-by-state>
- Interesting information from re: laws from each states parental drug use and abuse :
- [https://www.childwelfare.gov/pubPDFs/drugexposed.pdf#page=4&view=Full-text excerpts of State laws](https://www.childwelfare.gov/pubPDFs/drugexposed.pdf#page=4&view=Full-text%20excerpts%20of%20State%20laws)
- <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/drugexposed/>

Juvenile Defined

(N.C. Gen. Stat. § 7B-101(14))

A juvenile is “a **person** who has not reached the person’s eighteen birthday and is not married, emancipated, or a member of the Armed Forces of the United States.”

Person defined by N.C. General Statutes

Defined in numerous statutes, little variation.

- "Person means an **individual**, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity."

N.C. Gen. Stat. § 50A-102(12) (UCCJEA...)

Chapter 20: Motor Vehicles, 20-4.01; Chapter 32:Fiduciaries, 32-2; Chapter 53B: Uniform Adult Guardianship..., 35B-2; Chapter 53: Regulation of Financial Services, 53-244.030; Chapter 53C: Regulation of Banks, 53C-1-4; Chapter 55: NC Business Corporation Act, 55-1-40; Chapter 58: Insurance, 58-1-5; Chapter 62: Public Utilities, 62-3; Chapter 66: Commerce and Business, 66-232; Chapter 75: Monopolies, Trusts, Consumer Protection, 75-134; Chapter 78A: NC Securities Act, 78A-2, Chapter 78C: Investment Advisers; Chapter 8

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Individual Defined by N.C. General Statutes

3 principal definitions in the statutes:

- 1) "Human being" N.C. Gen. Stat. §§ 53C-1-4, 57D-1-03, and 105-153.3
- 2) "Natural Person" N.C. Gen. Stat. § 53-244.030
- 3) "Natural person legally competent to act..." N.C. Gen. Stat. § 55-1-40

Person defined by Black's Law Dictionary (10th ed., 2014)

- 1) Human being
- 2) The living body of a human being

Human Being

Merriam Webster's Online Dictionary: <https://www.merriam-webster.com/>

- Human Being: "Human"
- Relevant definitions of Human:
 - 1) "of, relating to, or characteristic of humans;" or
 - 2) "having human form or attributes"

Oxford English Online Dictionary: <https://en.oxforddictionaries.com/>

- Human Being: "A man, woman, or child of the species Homo sapiens, distinguished from other animals by superior mental development, power of articulate speech, and upright stance."
- Human: "Relating to or characteristic of humankind."

Natural Person Defined

Merriam Webster's Online Dictionary: <https://www.merriam-webster.com/>

- "A human being as distinguished from a person (as a corporation) created by operation of law."

Oxford English Online Dictionary: <https://en.oxforddictionaries.com/>

- "A person having legal status as an individual, as distinguished from a corporate body, representative, etc."

Black's Law Dictionary (10th ed., 2014)

"A human being."

Crimes Against Unborn Victims

- Chapter 14 – Criminal Law
 - Murder
 - Manslaughter
 - Assault
 - Battery

Unborn Victim Defined in Chapter 14

- **§ 14-23.1. Definition.**
As used in this Article only, "unborn child" means a member of the species homo sapiens, at any stage of development, who is carried in the womb.
- **§ 14-23.7. Exceptions.**
Nothing in this Article shall be construed to permit the prosecution under this Article of any of the following:
 - (1) Acts which cause the death of an unborn child if those acts were lawful, pursuant to the provisions of G.S. 14-45.1.
 - (2) Acts which are committed pursuant to usual and customary standards of medical practice during diagnostic testing or therapeutic treatment.
 - (3) Acts committed by a pregnant woman with respect to her own unborn child, including, but not limited to, acts which result in miscarriage or stillbirth by the woman.

Wrongful Death Actions

- The Supreme Court held that an unborn child possesses human life and able to seek recovery for wrongful death. *DiDonato v. Wortman*, 320 N.C. 423 (1987).

Filing Petitions Based on Substance Affected Infants

- Drug screens are important but look for other evidence to support harm or substantial risk of harm
 - Do parents have baby supplies?
 - Are parents visiting the child in the hospital? Are the parents properly caring for baby while it is in the hospital?
 - History with DSS?
 - Siblings? Evidence that the siblings are neglected?
 - Does parent(s) home meet minimal standards?
 - Are parents engaged with DSS (social worker)?
 - Check parents criminal history, pending charges, CAD statements?
 - Domestic violence?
 - Will parents engage in services?
 - Mental health concerns for parents?

Other considerations for Petitions

- Get medical records and thoroughly review them

- Consider whether expert testimony may be needed

- Evaluate with DSS staff (if there is an available safety placement and baby will be safe), do we need court involvement NOW? Should case go to case management in order to work with family and build a case for a non-compliance/slow petition if the parents do not engage in services? This *may* be something to consider if your only evidence is a positive drug screen.

Older Children

Remember:

- **Neglect:** Exposure to drugs has to be from a parent, guardian, custodian, or caretaker (N.C. Gen. Stat. § 7B-101(15))
 - Not provided proper care, supervision, or discipline
 - Juvenile **lives** in an injurious environment

- **Abuse:** Parent, guardian, or custodian inflicted or allowed to be inflicted a serious physical injury *or* Parent, guardian, custodian, or caretaker creates or allows to be created a substantial risk of serious physical injury... (N.C. Gen. Stat. § 7B-101(1))

- **Caretaker:** Any person other than a parent, guardian, or custodian who has responsibility for the health and welfare of a juvenile in a **residential setting**.

Review exposure source/theory to ensure there is a link before filing a petition

If a child has a positive drug screen for unprescribed substances:

- Consider having child medically examined for effects of drug exposure
 - Rule 803(4) – statements made for medical diagnosis or treatment
- Consider CME
- Talk to PCP/pediatrician
- Review medical records
- Are there developmental delays?
- Medical/dental problems? - GET RECORDS
- Behavioral problems?

- What evidence of **abuse** or **impact** do you have?

Other Evidence to Support Neglect

- Truancy or school related issues? – have SWs talk to school personnel
- History with DSS?
- Siblings? Evidence that the siblings are neglected/abused?
- Does the home child resides in meet minimal standards?
- Stable housing?
- Are parents, guardian, custodian engaged with DSS (social worker)?
- Check criminal records, pending charges, CAD statements?
- Domestic violence?
- Will parents engage in services, sign a family services agreement, etc.?
- Mental health concerns for parents?
- Have SWs talk to collaterals
- Statements of parents, guardians, custodians, caretakers?

Neglect Case Law Pertaining to Children

- Courts look at other factors to support adjudications of neglect.
- *In re Leftwich*, 135 N.C. App. 67 (1990). (TPR) Mother had significant problem with alcohol abuse. Family had DSS history which resulted in children being removed from the home twice. Court looked at past neglect as at the time of the 1st removal, children were not toilet trained, socially deprived, in need of speech therapy and dental care. Children has no experience with “basic toys, Play-doh, or crayons.” No toys in home and children had inappropriate clothing. Mom was found passed out in home during at time of both removals and youngest child was found outside wandering around.
 - *In re E.P.*, 183 N.C. App. 301 (2007), *aff’d per curiam*, 362 N.C. 82 (2007). - Parent’s substance abuse issues alone will not support an adjudication of neglect. Must show correlation between substance abuse and harm or substantial risk of harm to the child.

Ceasing Reunification at Disposition

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- May need expert testimony regarding evidence to support that the child is impaired or addicted
- Must have evidence to support **chronic or toxic exposure** to alcohol or controlled substances **that causes impairment of or addiction** in the juvenile.

Judicial Notice (N.C. Gen. Stat. § 8C-201)

- **Rule 201. Judicial notice of adjudicative facts.**
- (a) Scope of rule. – This rule governs only judicial notice of adjudicative facts.
- (b) Kinds of facts. – A judicially noticed fact must be one not subject to reasonable dispute in that it is either **(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.**
- (c) When discretionary. – A court may take judicial notice, whether requested or not.
- (d) When mandatory. – A court shall take judicial notice if requested by a party and supplied with the necessary information.
- (e) Opportunity to be heard. – In a trial court, a party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
- (f) Time of taking notice. – Judicial notice may be taken at any stage of the proceeding.

Subpoenas

- NC Medico-Legal Guidelines
- <http://www.ncmedsoc.org/wp-content/uploads/2014/10/Medico-Legal-Guidelines-PROOF-2.pdf>
(Resource from NC State Bar with Guidelines for working with physicians)
