

TUESDAY'S TIP #12 – PRESERVING CONSTITUTIONAL ISSUES FOR APPEAL

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Situation: The case is on for guardianship or custody to a non-parent, or elimination of reunification.

The Problem: These are critical stages of the juvenile proceeding where the parent's constitutional rights should be protected. But if the parent's constitutional rights are not raised at the hearing, they cannot be raised on appeal. *In re J.N.*, 381 N.C. 131 (2022).

Law: 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 as a parent. See *Price v. Howard*, 346 N.C. 68 (1997); *Petersen v. Rogers*, 337 N.C. 397 (1994). In juvenile cases, these constitutional rights have been applied in orders involving guardianship, custody to a non-parent, or elimination of reunification. *In re D.A.*, 258 N.C. App. 247 (2018) (custody); *In re R.P.*, 252 N.C. App. 301 (2017) (guardianship); *In re Eckard*, 148 N.C. App. 541 (2002) (reunification).

However, "[A] parent's argument concerning his or her paramount interest to the custody of his or her child, although afforded constitutional protection, may be waived on review if the issue is not first raised in the trial court." *J.N.* at 133.

Action Steps:

1. Be prepared to argue for the parent's constitutional rights at every dispositional and permanency planning hearing. Just because the DSS and GAL reports recommend that DSS retain custody and reunification remain in the plan does not mean they will not change the recommendation during the hearing.
2. Parents' constitutional rights are grounded in parental fitness and exercising their opportunities to raise their children. Ensure the record has evidence of any steps the parent has taken on the case plan as evidence of current fitness. Ensure the record has evidence regarding the quantity and quality of visits. Hold DSS accountable for their efforts in helping the parent with the case plan and their efforts in making sure the parent is able to attend all visits.
3. Be sure to mention "constitutional rights" in your closing argument. Point to the steps the parent has taken on the case plan as evidence of current fitness. Point to the quantity and quality of visits as evidence of taking advantage of opportunities to parent.

Conclusion: Don't waive your client's constitutional rights at a dispositional or permanency planning hearing. Put evidence on the record to support those rights and be sure to mention them in your closing argument.

Is this something that you can implement? Feel free to email me directly with requests/suggestions for future Tuesday's Tip!