

## COVID and the Due Process Rights of Incarcerated Parents

The ramifications of the COVID-19 pandemic on prisons and the court system have been wide-reaching. We are still seeing, and will likely continue to see, the tentacles of these issues stretch into cases for years to come. The North Carolina Supreme Court recently issued a decision tackling one such issue: whether a parent who was unable to attend a termination of parental rights hearing because he was incarcerated during a pandemic-related prison lockdown was entitled to a continuance so he could be present for the hearing. [In re C.A.B., 2022-NCSC-51](#), ¶ 1.

### What happened

Caleb was only a few days old when, in January 2019, Social Services received non-secure custody of him. For unrelated reasons, Caleb's father was already being held on federal charges. A little over a month later, the Respondent Father provided a visiting social worker with the names of potential relative placements with whom he wanted Caleb to live while he spent what was likely going to be three years in prison. The Respondent Father also expressed that he wanted to be in a position to regain custody when released. *In re C.A.B.*, ¶¶ 3-4.

In August 2020, DSS filed a motion for termination of parental rights pursuant to G.S. 7B-1102. The adjudication hearing on the motion was continued twice: once because counsel for the Respondent Father was unavailable and once in response to then-Chief Justice Beasley's pandemic-related Emergency Directives. *In re C.A.B.*, ¶ 10. The adjudication hearing was rescheduled for January 20, 2021. As that date approached, the attorney for the Respondent Father filed a motion to continue, stating that the father's case manager had informed him that the federal prison where the father was held was on a COVID-related lockdown until January 25. As a result, the father would be unable to be transported to his hearing, nor could he be moved within the prison so that he could participate by phone. The trial court denied the motion to continue and again denied the continuance when the attorney orally renewed the motion on the day of trial. *Id.* at ¶ 11. Finding that grounds existed to terminate the father's parental rights, the court entered an order accordingly. *Id.* at ¶ 12. The father appealed. *Id.* at ¶ 13.

### Liberty interests and fair procedures

The Supreme Court's ruling reiterates long established law: that all parents, including incarcerated parents, have a fundamental liberty interest in their constitutionally protected right to custody, care,

and control of their children. *In re C.A.B.*, ¶¶ 2, 39. Given that liberty interest, a parent must be afforded fundamentally fair procedures in a proceeding to terminate that parent's rights. *Id.* at ¶ 2.

The Court reviewed the procedures used by the trial court and found that:

Given respondent-father's inability to meet with counsel before the hearing because of the lockdown at his prison, the lack of any other testimony regarding respondent-father's conduct in prison, the centrality of factual questions regarding respondent-father's activities in prison to the court's examination of the asserted grounds for termination, and the magnitude of respondent-father's interest in avoiding an erroneous termination of his parental rights (which DSS shared), the trial court's denial of respondent-father's motion to continue was legal error. *In re C.A.B.*, ¶ 32.

A constitutional error having been committed, DSS and the GAL had the burden of showing beyond a reasonable doubt the violation of the father's due process rights was harmless. The Court held that burden had not been met and that the father was prejudiced by the ruling on the motion to continue. *In re C.A.B.*, ¶¶ 33, 37. The Court vacated the trial court's order terminating the father's rights and remanded for further proceedings. *Id.* at ¶ 39.

## Lessons

**The pandemic.** Despite frustrations that COVID-19 continues to surround so much of our daily existence, the reality is that people continue to get sick, and measures taken in response to the virus can influence judicial proceedings. As frustrating as delays in a proceeding can be to parties and judicial officials, sometimes a continuance is not only appropriate, but is necessary to protect the due process rights of the parties.

**Extraordinary circumstances.** The North Carolina Supreme Court found that in denying the father's motion for a continuance, the trial court misstated—or at least stated incompletely—the law as it relates to TPR hearings. The trial court found that TPR adjudications “are required to be heard within 90 days of filing” and that because the case was beyond that window, it denied the motion to continue. *In re C.A.B.*, ¶ 11. The Juvenile Code does require that TPR hearings be heard within 90 days of filing *unless* extraordinary circumstances exist. G.S. 7B-1109(d). On appeal, the Court found that the pandemic-related prison lockdown was an extraordinary circumstance. The Court reasoned that even assuming a trial court should consider how much time has passed since

a TPR was filed when ruling on a motion to continue beyond 90 days, “a trial court is not entitled to ignore the nature of the circumstances,” as extraordinary circumstances can occur at any time. *In re C.A.B.*, ¶¶ 18-19. Whereas the trial court found the uncertainty of how long COVID-19 would affect the prison system to be a basis for denying the continuance, the Supreme Court found that same uncertainty to be evidence of extraordinary circumstances that supported a continuance. *Id.* at ¶ 20.

**No bright line rule.** The Supreme Court’s holding recognizes the fundamental liberty interests at stake in TPR proceedings and the due process implications of a parent not being given an opportunity to participate. The Court did not, however, establish a bright line rule about an incarcerated parent’s presence at a TPR or about future situations involving complications arising from COVID. The Court’s analysis is based heavily on the entirety of the circumstances of the case, and not necessarily any one single dispositive factor. Those circumstances included the father’s consistent desire to have his son placed with family and to position himself to regain custody on his release from jail, as well as the father’s employment and participation in classes and services while incarcerated. *In re C.A.B.*, ¶¶ 4, 8. The Supreme Court also found the trial court’s attempts at mitigation—the father’s attorney was present at and participated in the TPR hearing, and the trial court considered a previously prepared report from the father—were insufficient to offset the risk posed to the father by denying the continuance. *Id.* at ¶¶ 22, 26-27. Still, no bright line rules were announced by the Court regarding those mitigation attempts.

**Constitutional arguments and issue preservation.** A parent’s constitutional due process rights may be implicated when that parent is unable to attend a TPR adjudication hearing and the court declines to continue the proceeding. *In re C.A.B.*, ¶ 15. On appeal, the denial of the motion to continue is reviewed de novo but only if the parent made the assertion at trial that the continuance was necessary to protect a constitutional right. *Id.* at ¶ 16. Here, counsel’s motion made a clear reference to the constitutional stakes, which meant the trial court’s ruling on the continuance was reviewed de novo rather than using an abuse of discretion standard—the latter being a steeper hill for the father to climb. Be careful to not inadvertently waive appellate review of this argument.

*In re C.A.B.* is also a good reminder that it is best practice for an attorney to not only make a motion on the record but to renew the motion as appropriate. Here, when the original motion to continue was denied, the father’s attorney orally renewed the motion at trial, rather than attend the hearing and say nothing more on the subject. *In re C.A.B.*, ¶ 11. Protecting a parent’s ability to raise arguments on appeal is a critical responsibility of trial counsel.

**Offer of proof.** In *In re C.A.B.*, no offer of proof as to the father’s possible testimony was made at the trial level when requesting a continuance. The Court noted that while it is best practice to support a motion to continue with an affidavit or other offering, the prison lockdown meant the father’s attorney had no way of obtaining the information to make a showing, including forecasting the expected testimony of the father or why it would be significant to the case. *In re C.A.B.*, ¶ 34. This analysis is likely specific to these facts. It is a good reminder that trial attorneys should do

whatever they can to make an offer of proof when seeking a continuance to allow a witness to be present. Remember too that parents have a right to effective counsel in termination of parental rights proceedings. See [In re B.S., 378 N.C. 1](#), ¶ 9 (2021) (discussing, in the appeal of an order terminating a parent's rights, what constitutes ineffective assistance of counsel). Depending on the circumstances, effective counsel may include requesting a continuance and supporting that motion with an offer of proof, such as a forecast of a witness' testimony.

**Documenting efforts.** attorneys representing incarcerated parents should document, and make sure the record reflects, the attorney's efforts to meet, call, and write their client and any resulting obstacles. The opinion in *In re C.A.B.* makes multiple references to the father's attorney's efforts to communicate with their client, which enabled the Court to find that the prison lockdown had interfered with the father's ability to update his attorney and to prepare for trial. *In re C.A.B.*, ¶¶ 25, 27-8, 32, 34.

### Tailoring a case plan

Although not a central issue on appeal, one other component of *In re C.A.B.* stuck out to me. When the dispositional plan was entered in the spring of 2019, the Respondent Father was incarcerated, which everyone involved in the case was aware of. Yet, the trial court's orders—and, presumably, the recommendations of DSS—did not reflect his incarceration with one exception: the father's visits were suspended due to the challenges created by his being in a detention center. *In re C.A.B.*, ¶ 5. It was not until August of 2020 that the dispositional plan was changed to reflect the reality of dad's incarceration. *Id.* at ¶ 9. So, from spring of 2019 to August of 2020, more than a year into this infant's life and more than a year into the proceeding, the Respondent Father's case plan was not tailored to his incarceration in any way other than to prevent him from seeing Caleb. The dispositional plan that accurately reflected the father's circumstances was ultimately adopted by the court; however, that order had only been in place for roughly two weeks when Social Services moved to terminate the father's rights. *Id.* at ¶ 10. A trial court's disposition plan should reflect consideration of the facts of the case and the circumstances of the parties, including the strengths and weaknesses of the family. G.S. § 7B-100(2).

### Final thought

Whenever a parent is incarcerated, there is a risk of that parent unintentionally becoming an afterthought to the process. It is important that Social Services engage incarcerated parents—particularly if reunification efforts have not been ceased—and for parent attorneys to stay vigilant in protecting the parent's rights and role in the proceeding, which trial courts are also responsible for upholding.