

**Juvenile Case Decided by the  
North Carolina Court of Appeals**

February 2, 2010

*Permanency Planning Hearing; Other Cases of Interest*

**Permanency planning order; delays in conducting hearings**

- Trial court's conclusions of law were contradictory and were not supported by the findings of fact.
- Proper remedy for delay in conducting hearings and entering orders was a petition for writ of mandamus, not seeking relief on appeal.

**In re E.K.**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2/2/10).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091057-1.pdf>

**Facts:** Children came into DSS custody and were placed in foster care in May 2005. In October 2005 they were adjudicated neglected or abused and neglected. After a kinship care assessment, DSS recommended against placement with the maternal grandmother. In February 2006 the court allowed the grandmother's motion to intervene. The permanent plan remained reunification with the mother. In August, 2006, the children were placed with the grandmother, and in December 2006, the court allowed the foster parents' motion to intervene. After many continuances, a permanency planning order was entered in March, 2008, continuing custody with DSS, approving placement with the foster parents, ceasing reunification efforts with the mother, ordering that a permanent plan be established within 30 days, and scheduling a hearing for April 9, 2008. The hearing was not held until May, 2009, due to numerous continuances. In the resulting permanency planning order the court incorporated its findings from the March, 2008, order and made additional findings, many of which related to DSS's concerns about the grandmother as a placement resource. The court's conclusions included that (1) no relatives were willing and able to provide proper care and supervision in a safe home, and (2) primary custody to the foster parents and secondary custody with the grandmother was in the child's best interest. The court awarded joint custody to the foster parents and grandmother, designating the grandmother as a secondary placement and specifying numerous conditions on both. DSS appealed.

**Held:** Affirmed in part; reversed in part.

1. The court of appeals reversed the part of the order that awarded secondary custody to the grandmother. The trial court's conclusions of law were contradictory – concluding both that no suitable relative was available and that secondary custody with the grandmother was in the child's best interest.
2. The findings of fact did not support the conclusions of law, given that numerous findings related to reasons DSS did not recommend placement with the grandmother and to the children's stronger relationship with the foster parents.
3. The court of appeals strongly disapproved the long delay in entry of the permanency planning order, the failure to conduct hearings according to statutory timelines, and the more than 25 continuances that did not appear to be required by extraordinary circumstances. Citing *In re T.H.T.*, 362 N.C. 446 (2008), however, the court held that the proper remedy for delay in holding hearings was to file a petition for a writ of mandamus during the delay.

## Other Cases of Interest

### School Gang Policy

- Allegations that school gang policy was unconstitutionally vague on its face were sufficient to withstand a motion to dismiss.

**Copper ex rel. Copper v. Denlinger, 193 N.C. App. 249, 667 S.E.2d 470 (2008), *aff'd in part, reversed in part*, \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (1/29/10).**

Court of Appeals: <http://www.aoc.state.nc.us/www/public/coa/opinions/2008/pdf/070205-1.pdf>

Supreme Court: <http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/526-08-1.pdf>

In a case involving alleged violations of plaintiffs' federal and state due process rights by a school's application of its gang policy, the Supreme Court reversed the Court of Appeals and affirmed the trial court's dismissal of the claims pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of Civil Procedure.

The Court of Appeals had reversed the trial court's dismissal of plaintiffs' declaratory judgment claim that the school's gang policy was unconstitutionally vague on its face, and remanded to the trial court for further proceedings. The court's opinion reviewed cases from other jurisdictions addressing similar policies. In its opinion on January 29, 2010, the Supreme Court concluded that discretionary review was improvidently allowed as to the declaratory judgment issue and remanded for further proceedings. So that issue will be returned to the trial court.

### Jurisdiction in Delinquency Case

- Lack of jurisdiction in juvenile court requires dismissal by superior court if the case is transferred.

**State v. Smith, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (1/19/10).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090467-1.pdf>

Court counselor received complaints on February 26 and approved the filing of petitions two days later. The petitions were not filed, though, until April 4, more than 30 days after the complaints were received. The case was transferred to superior court where the juvenile was convicted of first-degree kidnapping, second-degree sexual offense, and robbery with a dangerous weapon.

The court of appeals reversed the convictions because the district court did not have jurisdiction, due to the late filing of the petitions, and could not transfer the case to superior court.

### Recording of Juvenile Proceeding

- Best evidence rule did not preclude use of transcript of defendant's earlier testimony in a juvenile proceeding.

**State v. Haas, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2/2/10).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/090647-1.pdf>

Parents testified in a juvenile proceeding in which their child was alleged to be an abused juvenile, and the testimony was recorded and transcribed. At a subsequent criminal trial of one parent, the

court denied defendant's motion to exclude the transcript, but ordered that either party could elect to have the jury hear the actual recording. The transcript of defendant's testimony was distributed to the jury, and neither party asked that the recording be played. The court of appeals upheld defendant's conviction of felony child abuse, holding that the best evidence rule did not preclude use of the transcript when there was no dispute about its accuracy, defendant could have offered the tape itself as evidence, and the tape was not included in the record on appeal..

The courts' opinions can be accessed from <http://www.aoc.state.nc.us/www/public/html/opinions.htm>. Earlier case summaries can be found at <http://www.sog.unc.edu/programs/dss/pubs.htm>.



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