

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

March 2, 2010

Termination of Parental Rights

The court of appeals has ordered publication of the opinions in the following two cases filed as unpublished opinions on March 2, 2010:

Termination of parental rights: notice of appeal; best interest determination

- Notice of appeal was timely filed based on Rule 27(a) of the Rules of Appellate Procedure.
- Trial court's findings were not sufficient to support its conclusion that termination of parental rights was in child's best interest, when it did not reflect consideration of all the statutory factors.

In re E.M., ___ N.C. App. ___, ___ S.E.2d ___ (3/2/10).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091370-1.pdf>

Facts: The trial court adjudicated multiple grounds for termination of parental rights and concluded that termination was in the child's best interest. Of the factors listed in G.S. 7B-1110(a) that the court must consider in determining whether termination is in the child's best interest, the order reflected consideration of only the juvenile's age and the permanent plan of adoption. It did not indicate that the court had considered the likelihood of the child's being adopted, the bond between the child and parent, or the quality of the relationship between the child and the proposed adoptive parent, guardian, custodian, or other permanent placement.

Held: Remanded for additional findings of fact.

1. The court of appeals first denied the guardian ad litem's motion to dismiss the appeal for failure to give timely notice of appeal. The court of appeals took judicial notice that the 30th and 31st days after entry and service of the order were a Sunday and a legal holiday, respectively, and held that filing of the notice of appeal on the 32nd day was timely based on Rule 27(a) of Rules of Appellate Procedure.
2. The court of appeals stated that the use of the word "shall" in G.S. 6B-1110(a) made the trial court's consideration of the listed factors mandatory. Noting that there was evidence in the record from which the trial court could have made findings regarding the factors not reflected in the order, the court of appeals remanded for additional findings.

Termination of parental rights: ruling on motion to continue

- Trial court's denial of respondent's motion to continue the adjudicatory hearing was an abuse of discretion.

In re D.W., ___ N.C. App. ___, ___ S.E.2d ___ (3/2/10).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091349-1.pdf>

Facts: DSS filed a motion to terminate respondent's rights. On the date the case was scheduled for adjudication, respondent's attorney moved for a continuance because his client was not there, he could communicate with her only by mail, there was no confirmation that she had received notice of the hearing, she had attended all earlier hearings in the case, and there was possible confusion as to where the hearing was to be held. The judge initially did not understand the nature of the hearing,

thought there was “just information to be read into the record,” and indicated a need to be in another courtroom. The court proceeded with the hearing with understanding that there would be “limited questions” of experts (indicating that meant three or four questions). Respondent’s counsel again moved for a continuance and the motion was denied. When the hearing resumed after a recess the court acknowledged its initial confusion about the type of hearing, but denied another motion to continue. After hearing more evidence, the court adjudicated grounds for termination, heard additional disposition evidence, and concluded that termination was in the child’s best interest.

Held: Reversed

1. Making clear that it rejected a rigid rule that a parent’s absence from the hearing would always require reversal, the court of appeals held that in this case the trial court’s denial of respondent’s motion for a continuance “impaired justice” and was an abuse of discretion. The court noted that the record was “replete with indicia of the extraordinary nature of the circumstances” of the case. In addition to factors described above, the court noted the effect of the time constraints and the fact that the court was informed that the respondent suffered from a mental disability.
2. Judge Hunter concurred in a separate opinion and
 - a. did not think lack of notice of the hearing was a factor because statements in the record created a presumption that respondent received notice and there was no evidence to the contrary, and
 - b. given the absence of a notice issue or any allegation of prejudice as to evidence presented, did not think the court erred in denying the continuance.

He concurred in the result, however, because of the non-deliberative nature of the hearing, the absence of evidence directly about terminating parental rights, the critical nature of evidence the respondent could provide, the fact that the motion for a continuance was a “modest request,” and the need to “assure fundamental fairness.”

Appellate court opinions can be found at <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/case_summaries.html.



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