

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

March 16, April 20, and May 4, 2010

Neglect and Dependency; TPR; Adoption; Delinquency

The court of appeals has ordered publication of the opinion in the following case, which was filed as an unpublished opinion on March 16, 2010:

Disposition in Neglect Case

- Evidence did not support finding that further reunification efforts would be futile and inconsistent with child's health and welfare.
- Award of custody to DSS was error when the order did not include findings as to the father's fitness to parent the children.
- Court failed to make sufficient specific findings to establish that placement with an available relative was not appropriate.

In re A.S., ___ N.C. App. ___, ___ S.E.2d ___ (3/16/10).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091386-1.pdf>

Facts: In an earlier appeal in the same case, the court of appeals affirmed the adjudication that the child was neglected and remanded for additional findings of fact with respect to disposition. After a hearing the trial court entered a new disposition order continuing custody with DSS and changing the permanent plan from reunification to guardianship. The court took judicial notice of and relied heavily on findings it had made in the case of the child's siblings, including findings that placement with the paternal grandmother was not appropriate. The order in the siblings' case was reversed, in part because the findings about the grandmother, which the court made again in this case, were not supported by the evidence and also because the award of guardianship was improper where there were no findings that the father was unfit or had neglected his constitutional responsibilities. Respondents appealed the new disposition order.

Held: Reversed and remanded for new hearing.

1. Awarding custody to DSS was improper in the absence of findings that the parents were unfit or had neglected their constitutional responsibilities.
2. The trial court did not make sufficient findings to rule out the grandmother as an appropriate placement.
3. No evidence supported the trial court's findings that further reunification efforts would be futile and inconsistent with the child's health and safety, and the evidence did not establish that DSS had made reasonable efforts to reunify the child with the parents.

Opinions in the following cases were filed April 20, 2010:

Dependency and Neglect

- Trial court that adjudicated children to be dependent erred by not deciding the neglect allegation and by attempting to hold it in abeyance.
- When children are removed from the home, the disposition order must address terms of the parent's visitation with the children.

In re T.B., ___ N.C. App. ___, ___ S.E.2d ___ (4/20/10).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091401-1.pdf>

Facts: Trial court adjudicated three children to be dependent based on respondent's failure to meet the children's special needs and the conduct resulting from her mental health problems and failure to take her medications. The petition also alleged neglect, and the court stated that this allegation should "remain pending." The children were placed in DSS custody.

Held: Affirmed with regard to adjudication that children were dependent; reversed and remanded for further findings and conclusions on the neglect allegation, based on the existing record, and to further address visitation.

1. Medical reports provided sufficient evidence to support the trial court's inference that respondent's mental difficulties impaired her parenting ability.
2. The court is not required in its order to delineate the evidence on which it relied in making findings of fact.
3. Findings about the children's low weight and height measures and their psychological and educational difficulties were sufficient to support the conclusion that neither respondent nor her partner was capable of meeting the children's needs.
4. The trial court erred in attempting to hold the neglect allegation in abeyance, as nothing in the Juvenile Code authorizes that and it did not appear from the record that the court's action was merely a continuance.
5. It was error for trial court not to address in disposition order terms of respondent's visitation with the children, effectively delegating decisions about visitation to others, which is impermissible.

Termination of Parental Rights: Sufficiency of Notice

- Certified mail receipt signed by someone other than respondent created a presumption of proper service that respondent failed to rebut.
- Lateness of the notice was harmless error where no prejudice was shown.
- Attorney's failure to object to notice at hearing at which respondent was not present constituted waiver of her right to object to the notice.

In re T.D.W., ___ N.C. App. ___, ___ S.E.2d ___ (4/20/10).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091519-1.pdf>

Facts: In dependency proceeding, DSS filed a motion to terminate respondent's rights. Respondent did not appear at the hearing and her attorney who was there did not object to the notice given to respondent. Respondent appealed order terminating her rights, asserting that the trial court erred, abused its discretion, and violated due process because the notice was not timely and was defective.

Held: Affirmed.

1. The certified mail receipt, signed by someone other than respondent, created a presumption that service was proper, and respondent presented no evidence and made no attempt to rebut that presumption.
2. Although notice of the date, time, and place of the hearing was sent 30 days later than it should have been according to statute, and the hearing was held later in the day than the time stated on the notice,
 - a. there was no indication that respondent was prejudiced by the untimely notice, thus the error was harmless; and
 - b. respondent waived her right to object because, even though she did not attend the hearing, her attorney was there and made no objection to the notice.

Termination of Putative Father's Rights

- Adjudication of a ground for termination of parental rights results in forfeit of parent's constitutionally protected status and allows court to apply the "best interest" standard.

In re A.C.V., ___ N.C. App. ___, ___ S.E.2d ___ (4/20/10).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091199-1.pdf>

Facts: In early stages of pregnancy, respondent father and child's mother continued to see each other; respondent went to some appointments with the mother; and the mother's father talked with respondent about the need for him to provide financial assistance. The child's mother decided to place the child for adoption and informed respondent of this. On April 15, the child was born. On April 16, the child's mother relinquished the child to the Agency for adoption; on April 17, the Agency filed a petition to terminate respondent's rights alleging that respondent failed to provide adequate support for the mother during the pregnancy. Respondent filed an answer asserting that he was not given an opportunity to care for the child although he had expressed his desire to do so, and that he was not aware that he could file legal documents to legitimate the child. The court adjudicated a ground for termination under G.S. 7B-1111(a)(5), found that termination was in the child's best interest, and terminated respondent's rights.

Held: Affirmed.

1. Nothing in the trial court's findings or the facts put forward by respondent showed that he or his parents provided any direct financial support or "consistent care" during the pregnancy, and respondent satisfied no other prong of G.S. 7B-1111(a)(5).
2. The court of appeals rejected respondent's argument
 - a. that the mother's relinquishment alone was insufficient to confer standing on the Agency to petition for termination of his rights.
 - b. that he could not comply with G.S. 7B-1111(a)(5) because he was a minor.
 - c. that the trial court erred by terminating his rights without finding that he was unfit or had neglected the child.
3. The court of appeals noted the potential unfairness to a putative father in application of the ground at issue in this case, but held that the court was bound by the holdings in *Owenby v. Young*, 357 N.C. 142, 579 S.E.2d 264 (2003) and *A Child's Hope, LLC v. Doe*, 178 N.C. App. 96, 630 S.E.2d 673 (2006) and the harsh interpretation of the statute that they represent.

Adoption: District Court's Jurisdiction

- District court did not have jurisdiction to set aside clerk's order in an adoption proceeding, when the adoption had been neither appealed nor transferred to district court.

Norris v. Midkiff, ___ N.C. App. ___, ___ S.E.2d ___ (4/20/10).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091329-1.pdf>

Facts: After children's father was incarcerated for killing their mother, plaintiff grandparents were awarded custody of the children in a civil action. They filed a petition to adopt the children. Defendant, another grandparent, filed a motion to intervene in the custody action and a motion for visitation. In the adoption, the clerk waived the 90-day time limit for disposition of an adoption and entered final decrees of adoption for both children. Plaintiffs filed a motion to dismiss defendant's motions in the civil custody action. Soon thereafter the clerk entered an order setting aside the adoption decrees, stating that a civil visitation action was pending and the plaintiff in that action had not been given notice of the adoption proceeding. The order directed the plaintiffs to give defendant notice of the adoption, which they did. Plaintiffs filed a motion seeking reinstatement of the adoption decrees. Defendant filed an amended motion seeking visitation, a motion for custody, and a motion to set aside the existing custody order. The court entered orders allowing the motion to intervene, appointing a guardian ad litem for the children, and consolidating the custody and adoption actions. After a hearing on the motion to reinstate the adoption decrees, the district court concluded that the clerk of court lacked authority to set aside the decrees and declared void the order setting them aside. The court also entered an order dismissing the custody action. Defendant/intervener appealed.

Held: Vacated and remanded.

1. The district court did not have jurisdiction to set aside the clerk's order setting aside the adoption decrees, because
 - a. petitioners in the adoption did not appeal the order, and
 - b. the order was interlocutory and therefore not appealable.
2. Because defendant was contesting the adoption, the clerk was required by G.S. 48-2-601(a1) to transfer the adoption action to district court, but did not do so.

The court of appeals remanded for the clerk to determine whether the adoption was still contested and, if it was, to transfer the adoption to district court for a hearing under G.S. 48-2-603 to determine whether the adoption was in the children's best interests.

Delinquency: School Searches

- Reasonableness standard applies to search of student at school by law enforcement officer when officer acts in conjunction with school administrators to maintain a safe environment.

In re D.L.D., ___ N.C. App. ___, ___ S.E.2d ___ (4/20/10).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091253-1.pdf>

Facts: An assistant principal and law enforcement officer at the high school observed the juvenile and two other students leave a bathroom and immediately reenter it when they saw the officer and principal. The officer entered the bathroom and saw the juvenile put something in his pants. The principal entered and told the officer they needed to "check it." The officer frisked the juvenile and found a container holding green material the officer identified as marijuana. The officer handcuffed the juvenile and escorted him to a conference room. After the principal said they needed to check to

make sure he had nothing else, the officer searched the juvenile and found \$59, which the juvenile stated was for his mother's rent – which the mother contradicted when she came to the school. The trial court denied the juvenile's motion to suppress all statements and physical evidence on Fourth and Fifth Amendment grounds. The juvenile was adjudicated delinquent for possession with intent to sell or deliver marijuana.

Held: Affirmed.

1. With regard to searches by law enforcement officers at school, North Carolina has adopted the reasonableness standard, which applies when
 - a school official initiates the search or law enforcement involvement is minimal – i.e., the officer acts in conjunction with a school official;
 - a school resource officer conducts the search based on his own investigation or at the direction of a school official, in furtherance of well-established education and safety goals.The traditional probable cause requirement applies when the search is conducted (i) by outside law enforcement officers as part of an independent investigation or (ii) by school officials, at the request or behest of outside law enforcement officers.
2. In this case, the law enforcement officer was acting in conjunction with and at the direction of a school administrator to maintain a safe and educational environment at the school, so the reasonableness standard applied.
3. The search was “justified at its inception” because there was reasonable cause to suspect that it would reveal illegal substances.
4. The search was not unnecessarily intrusive in light of the juvenile's age and gender and the nature of the offense.
5. The juvenile's statement that the money he had was “not from drugs” was spontaneous, not the result of interrogation, and motion to suppress it was properly denied.
6. Because of the officer's experience and training, the court did not err in allowing him to testify about traditional practices in the sale of drugs.

The opinion in the following case was filed May 4, 2010:

Neglect

- A child may be adjudicated to be neglected when the child has lived for a substantial period with a caretaker pursuant to a kinship agreement entered into before the filing of the petition.

In re K.J.D., ___ N.C. App. ___, ___ S.E.2d ___ (5/4/10).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091579-1.pdf>

Facts: Without court action, the child was placed with a grandparent in February 2008 after DSS made a determination of “in need of services” based on domestic violence in the home, the mother's assaultive behavior to others, and the father's substance abuse problems. The child remained in the grandmother's home throughout this case. In August 2008 DSS filed a petition alleging that the child was neglected, and the parties stipulated to facts relating to the child's placement and the parents' circumstances. The court dismissed the petition, finding that there was no evidence that the child had been present during any domestic violence or that the child had been exposed to marijuana. In April 2009, DSS filed a second petition. The parties stipulated to numerous facts and the court found additional facts – including that the child received proper care from the grandmother and that neither

parent had attempted to remove or expressed any intention of removing the child from the grandmother's home. Many findings related to the father's substance abuse issues and his failure to complete an assessment or obtain treatment; the mother's failure to complete an anger management program or make progress in addressing her anger; the mother's lack of independent housing and her incarceration because of a probation violation; both parties' failure to pay regular child support; the infrequent visits by the parents; and past domestic violence. The trial court concluded that over a period of 16 to 18 months, both parents had neglected the child by failing to correct the conditions that led to the kinship placement. The court concluded that the child was a neglected juvenile in that the parents had not provided proper care or supervision. At disposition, the court continued placement with the grandmother, allowed weekly supervised visits, and imposed various requirements on the parents. The mother appealed.

Held: Affirmed.

1. The conclusion that the child was a neglected juvenile was supported by findings showing that placement in kinship care with the grandmother was made because of the parents' inability to care for the child or meet the child's physical or economic needs; the mother's problems had continued uncorrected since the placement; and the child would be at substantial risk of harm if either parent removed the child from the placement.
2. References in the trial court's order to ASFA and the purposes of the Juvenile Code were unnecessary, and they did not affect the trial court's conclusions of law.
3. The trial court's dismissal of the first petition was not res judicata with respect to the second petition, because there was not an identity of issues between the two cases.

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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