Issues in Juvenile Cases:
Abuse, Neglect, Dependency, and Termination of Parental Rights

December 5, 2012

I. New ground for termination of parental rights

S.L. 2012-40 (H 235) added to G.S. 7B-1111(a) this new ground for termination of parental rights:

> (11) The parent has been convicted of a sexually related offense under Chapter 14 of the General Statutes that resulted in the conception of the juvenile.

As with other grounds, before terminating a parent's rights on this basis the court must both adjudicate the ground and determine that termination of the parent's rights is in the child's best interest.

The act, which became effective October 1, 2012, is silent with respect to whether its applicability is determined

- by the date of the criminal offense,
- by the date of the conviction, or
- without regard to either.

Under existing statutory provisions, a person who is convicted of one of three specific sexual offenses that results in the conception of a child loses parental rights to that child as a direct result of the conviction, without the necessity of a civil action to terminate parental rights. Legislation creating these provisions did include applicability language. *See* S.L. 2004-128 and S.L. 2008-117. The covered offenses are:

- first-degree rape, under G.S. 14-27.2, if the offense occurred on or after December 1, 2004;
- second-degree rape, under G.S. 14-27.3, if the offense occurred on or after December 1, 2004; and
- rape of a child by an adult offender, under G.S. 14-27.2A, if the offense occurred on or after December 1, 2008.

Each of those criminal statutes states that a person convicted under the statute "has no rights to custody of or rights of inheritance from any child [born as a result of] [conceived during] the commission of the rape, nor shall the person have any rights related to the child under Chapter 48 [adoption] or Subchapter 1 of Chapter 7B [abuse, neglect, dependency, and termination of parental rights] of the General Statutes."

Given the absence from S.L. 2012-40 of language limiting its applicability, is it possible that the ground is available regardless of when the crime or the conviction occurred? That is not likely. North Carolina courts have stated the principle that a statute is presumed to apply only prospectively unless the legislation clearly states or necessarily implies that it should apply

retroactively. *See, e.g.*, Gardner v. Gardner, 300 N.C. 715 (1980); *In re* Protest of Atchison, 192 N.C. App. 708 (2008); Springer Eubank Co. v. Four County Elec. Membership Corp., 142 N.C. App. 496 (2001); Wilson Ford Tractor, Inc. v. Massey-Ferguson, Inc., 105 N.C. App. 570, *aff'd*, 332 N.C. 662 (1992). The state supreme court, in Ray v. North Carolina Dept. of Transp., ___ N.C. ___, 727 S.E.2d 675 (2012), analyzed the applicability of a statute that amended the State Tort Claims Act in terms of whether the amendment clarified or substantively altered existing law. The court held that the statute applied retroactively because it merely clarified the scope of the State Tort Claims Act. Analyzing retroactivity in Twaddell v. Anderson, 136 N.C. App. 56 (1999), the court distinguished substantive amendments, which apply prospectively only, from those that are interpretive, procedural, or remedial.

S.L. 2012-40, enacting the new termination ground, neither expresses nor implies an intent that it apply retroactively. The new ground is substantively different from all of the other grounds, and it can hardly be viewed as a clarifying or procedural amendment. So there is little basis for thinking the law applies retroactively.

The similarity between the new ground for termination and the effect of the rape convictions described above, when the rape results in the conception of the child, might suggest that the new law applies only when the sexually related offense occurs on or after October 1, 2012, the act's effective date. However, because the new ground is the conviction, not the criminal act itself, it is possible and seems more likely that prospective application means the ground is available when the conviction occurs on or after October 1, 2012.

If that is the case, would terminating a parent's rights based on a conviction that occurs on or after October 1, 2012, for an offense that was committed before October 1, 2012, violate the *ex post facto* clause because the parent did not have notice of this possible consequence when the offense was committed? (Or, if the legislature had specifically provided for completely retroactive application, would application of the statute to a conviction that occurred before the act's effective date be an *ex post facto* violation?) Probably not. North Carolina courts have held that retroactive civil laws do not violate the *ex post facto* clause. *See, e.g.,* Pitt County v. Dejavue, Inc., 185 N.C. App. 545 (2007).

In other states, retroactive application of legislation making a parent's conviction for the intentional homicide of the child's other parent a ground for termination has withstood challenges based on violation of the prohibition against *ex post facto* laws. Courts in Wisconsin and Texas rejected the challenges because the legislation did not have a punitive intent. *See In re* E.M.N., 221 S.W.3d 815 (Tex. App., 2007); In Interest of Amanda A., 194 Wis.2d 627, 534 N.W.2d 907 (1995).

Apart from any issue relating to its applicability, a more likely challenge to the new termination ground might be based on substantive due process. A court addressing that kind of challenge would be required to identify and balance "the claims of families, children, and those state agencies charged with protecting their welfare." Doe *ex rel.* Johnson v. South Carolina Dept. of Social Services, 597 F.3d 163, 186 (4th Cir, 2010) (Wilkinson, J., concurring in the judgment).

A Wisconsin statute making incestuous parenthood a ground for termination of parental rights faced such a challenge twice. In State v. Allen M., 214 Wis.2d 302, 571 N.W.2d 872 (Wis. App., 1997), the appellate court held that the statute was "narrowly tailored to serve the

State's compelling interests in the welfare of children, preservation of family, and maintenance of an ordered society." Distinguishing that case, which involved a brother and sister who were the parents of three children, the Wisconsin Supreme Court held several years later that the statute was unconstitutional as applied to a mother whose three children were conceived as the result of sexual abuse by her own father. *In re* Zachary B., 271 Wis.2d 51, 678 N.W.2d 831 (2004). The court held that incestuous parenthood, by itself, was not sufficient to establish the mother's unfitness, and that application of the statute to her violated her right to substantive due process.

North Carolina case law provides little direct guidance. In *In re* J.L., 183 N.C. App. 126 (2007), the court of appeals held that a child could not be adjudicated dependent based on a finding that the child was conceived as a result of the father's commission of statutory rape, when there were no findings that the father could not care for the child and lacked an alternative child care arrangement. The court's holding, based on the precise wording of the statutory definition of "dependent juvenile," was that the trial court's findings did not support its legal conclusion that the child was a dependent juvenile. With a statute now clearly stating that those facts could establish a ground for terminating the father's rights, it is not clear how our courts will respond to challenges to the statute itself or to its application in particular circumstances.

II. Has the question of Constitutional limits in termination of parental rights and adoption cases really been resolved?

A parent who challenged on due process grounds termination of his rights based on the new ground would likely face an argument stemming from *In re A.C.V.*, 203 N.C. App. 473, 692 S.E.2d 158 (2010). There, while expressing doubt about the fairness of the outcome, the court of appeals held that it was bound by *Owenby v. Young*, 357 N.C. 142, 579 SE2d 264 (2003), and *A Child's Hope, LLC v. Doe*, 178 N.C. App. 96, 630 SE2d 673 (2006), and that the establishment of any statutory ground for termination is sufficient to remove the parent's constitutionally protected status.

The Juvenile Code uses the term "best interest" at least 49 times in relation to child abuse, neglect, dependency, and termination of parental rights. Since at least the early 1900s, courts in North Carolina have referred to the child's welfare or best interest as the "polar star" that should guide courts "to a right conclusion" in making child custody decisions. *See Ex parte* Turner, 151 N.C. 474, 66 S.E. 431, 432 (1909). See also *In re* J.H.K., 365 N.C. 171, 175, 711 S.E.2d 118, 121 (2011) (referring to "the polar star of protecting the minor child's best interests); Matter of Montgomery, 311 N.C. 101,109, 316 S.E.2d 246, 251 (1984) (referring to the "fundamental principle underlying North Carolina's approach to controversies involving child neglect and custody, to wit, that the best interest of the child is the polar star").

In cases involving custody disputes between a parent and someone other than a parent the North Carolina Supreme Court has recognized a constitutionally required parental preference, which permits a court to apply the best interest standard only if the court first determines that the parent is unfit or has acted inconsistently with his or her constitutionally

protected parental status. *See* Price, v. Howard, 346 N.C. 68, 484 S.E.2d 528 (1997); Petersen v. Rogers, 337 N.C. 397, 445 S.E.2d 901 (1994). Application of the holdings in these cases to awards of custody or guardianship in juvenile cases has been gradual, as the line of cases summarized below illustrates. At least when the court awards custody or guardianship as a permanent plan in a juvenile case, applicability of the parental preference is now clear. *See, e.g., In re* D.M., __ N.C. App. __, 712S.E.2d 355 (2011).

What is the relevance of *Petersen v. Rogers* (1994) and *Price v. Howard* (1997) in juvenile cases? (Citations given in summaries that follow.)

Before those cases, the Code's "best interest" standard was relatively unquestioned.

> "Although the court found the appellant was a fit and proper person to have custody of the child, the test under the [Juvenile Code] as to where custody is placed is what best meets the needs of the child and what is in the child's best interests." *In re Yow*, 40 N.C. App. 688 (1979).

Only gradually were the holdings of Petersen and Price referred to and incorporated into juvenile cases:

1994	***Petersen*** decided; quoted in *Bost v. Van Nortwick* (tpr)
1997	***Price v. Howard***
2000	*In re Huff* – (tpr)
2001	*In re Byrd* – (sup. ct.) (adoption)
	In re Nesbitt – (tpr)
2002	*In re Pittman* – (abuse/neglect)
	In re Stratton – (abuse/neglect)
2004	*In re Shuler* – (adoption)
	In re Rholetter – (abuse/neglect)
2005	*In re T.K.* – (perm. planning)
2009	*In re B.G.* – (perm. Planning)
2010	*In re A.C.V.* – (tpr)
2011	*Rodriguez* (dependency; custody)
	In re D.M. – (perm. planning)

Pre-Termination of Parental Rights Cases

- In re Stratton (2002). Once it has been determined that a parent is unfit or has neglected his child, the parent loses his decision-making ability as of right.

- In re Rholetter (2004). Concerns about mother's home were not sufficient to rebut constitutional presumption that she was fit and proper.

- In re J.A.G. (2005). Where there were no grounds to prolong child's removal from his mother's custody, trial court abused its discretion in concluding it was in child's best interest to remain in DSS custody.

- In re T.K. (2005). Affirmed change of plan to guardianship. "[A]t this stage the best interests of the children, not the rights of the parents, are paramount." [Dissent thought *Petersen* findings were required. Supreme court affirmed.]

- In re B.G. (2) (2009). Trial court found father was "non-offending" parent, but ordered joint custody to father and relatives. COA held best interest test was not proper without finding that father was unfit or had acted inconsistently with constitutionally protected rights.

- In re D.M. (2011). Trial court awarded custody to grandmother, visitation to father. COA held that was error where trial court found neither parent unfit and made no findings or conclusions as to whether father had acted inconsistently with his constitutionally protected rights.

Civil Custody Actions

- *Rosero v. Blake* (2003). Affirmed custody to biological father, holding that biological father's parental interest is not less than the mother's.

- *Rodriguez v. Rodriguez* (2011). In a civil custody action following a juvenile court adjudication of dependency, the court held that the dependency adjudication was relevant, but not sufficient to show that the mother had acted inconsistently with her parental status.

Termination of Parental Rights and Adoption

- *In re Nesbit* (2001). In TPR emphasizes best interest is proper consideration only after finding of unfitness.

- *Adoption of Byrd* (2001). Putative father's consent to adoption was not required. [Two justices dissented, based on *Petersen and Price*.]

- *Owenby v. Young* (2003). In a custody action against the child's father, the grandmother failed to establish that the father was unfit or had acted inconsistently with his constitutionally protected status. In dicta the court stated that there are at least two methods a court may use to find that a natural parent has forfeited his or her constitutionally protected status:
    1. parental conduct inconsistent with protected status;
    2. a finding of any of the statutory grounds for termination of parental rights under G.S. 7B-1111.

  Then the court stated that the statutory procedure for termination of parental rights was not the subject of the present case.

In re D.D.H. (2005) (unpublished). In an appeal from termination of his parental rights, respondent cited *Owenby* for the proposition that alcohol abuse alone was not sufficient to terminate his parental rights. In a footnote, the court of appeals noted that *Owenby* involved a custody dispute between a father and grandmother, and that the Supreme Court, after briefly discussing G.S. 7B-1111, said "This statutory procedure is not the subject of the present case." Therefore, the court of appeals concluded that *Owenby* was inapplicable to the TPR case.

- *Adoption of Shuler* (2004). Biological father's consent not required. Failure to satisfy any of the statutory requirements would render his consent to the adoption unnecessary. Citing *Byrd*.

- *Adoption of Anderson* (2006). Putative father's consent not required. Relying on *Byrd.*

- *A Child's Hope v. Doe* (2006). Applied "bright line" rules of Byrd and Anderson to uphold termination of putative father's rights.

- *In re A.C.V* (2010). The court held that *Owenby* and *A Child's Hope* controlled in a termination case appealed by a putative father. The court stated that adjudication of any termination ground removed the parent's constitutionally protected status and justified application of best interest standard. The court also pointed to the underlying tension between the constitutional rights of putative fathers and G.S. 7B-1111 as appellate courts have interpreted it, and said that it was difficult to conclude that the father's constitutional rights were assured, especially in light of protections offered to parents in abuse, neglect, and dependency cases.

Summaries of Juvenile Cases Related to "Best Interest" under *Petersen* and *Price*

PETERSEN V. ROGERS, 337 N.C. 397 (1994).

Bost v. Van Nortwick, 117 N.C. App. 1 (1994).
The court of appeals reversed an order terminating a father's rights, in an action brought by his former wife. The court emphasized the "best interest" standard and "polar star," found that the trial court abused its discretion in making the best interest determination. The court quoted from *Petersen*: "[P]arents' paramount right to custody would yield only to a finding that they were unfit custodians because of bad character or other, special circumstances…"

PRICE V. HOWARD, 346 N.C. 68 (1997).

In re Huff, 140 N.C. App. 288 (2000).
In a termination of parental rights case, the court cited *Petersen*, but only with respect to the proper consideration of religious practices.

In re Byrd, 354 N.C. 188 (2001).
The supreme court affirmed a holding that a putative father's consent to his child's adoption was not required because he had not provided reasonable, tangible support before the petition was filed. The father had filed a petition for a prebirth determination of his right to consent to adoption, and he filed a response to the adoption petition stating that his consent was required. Two justices dissented in part, expressing concern that the holding conflicted with the court's earlier holdings in *Petersen* and *Price*. The dissenting justices noted that the constitutional argument was not raised at trial or on appeal, but stated, "There are no facts to indicate that respondent has acted inconsistently with his protected parental interests."

In re Nesbitt, 147 N.C. App. 349 (2001).
The court of appeals reversed an order terminating a mother's rights, holding that the ground had not been established by clear, cogent, and convincing evidence. It appeared that the trial court had blended its consideration of grounds and best interest. The court cited *Petersen* to emphasize that best interest is a proper consideration only after a finding of unfitness and quoted from it as follows: "'[E]ven if it were shown, …that a particular couple desirous of adopting a child would best provide for the child's welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child *adequately*.'" The court stated that an independent determination of the parent's fitness must be made, and only if the parent is found to be unfit is application of the best interest standard proper.

In re Pittman, 149 N.C. App. 756 (2002).
Affirming an adjudication of abuse and neglect, the court of appeals held that the mother could not invoke *Miranda* to suppress a statement she had made to a law enforcement officer. The court acknowledged the mother's argument that a constitutionally protected interest was at stake, but said, "[T]he common thread running throughout the Juvenile Code is that the court's primary concern must be the child's best interest." Citing *Price*, the court said that a parent's constitutional "interest in the custody and care of the child is balanced against the state's well-established interest in protecting the welfare of children."

In re Stratton, 153 N.C. App. 428 (2002).
Respondents' ten children were adjudicated neglected and dependent based on evidence that they lived in squalid conditions; had inadequate food, clothing, and housing; and were not attending school or being instructed at home. They were placed in DSS custody. DSS proposed to have the children immunized, but the parents expressed religious objections. The court of appeals upheld DSS's authority to have the children immunized. Citing and quoting from both *Petersen* and *Price*, the court stated that once the trial court found unfitness, neglect or other action inconsistent with the parent's constitutionally protected interest, the court should make a basic determination of what is in the child's best interests. In this case, the court said, immunization was in the children's best interest.

The court of appeals did not discuss

- whether an adjudication of neglect, by itself, is always sufficient to overcome the parents' constitutionally protected status;
- whether specific findings must be made with respect to each parent, since an adjudication is a judgment about the child's status, not the actions of the parents;
- G.S. 7B-903(a)(2)c., which addresses consent to medical care for children in DSS custody.

Rosero v. Blake, 357 N.C. 193 (2003).
Although not a juvenile case, the supreme court's decision in *Rosero* is relevant to cases involving termination of a putative father's rights or the issue of whether a putative father's consent to an adoption is required. In this custody case, the court affirmed an award of custody to the child's biological father, reiterating that the rights of a biological father are not lesser than those of a child's mother. The court cited *Petersen* and *Price* as well as a number of U.S. Supreme Court cases that "acknowledge that, absent a showing that the biological or adoptive parents are unfit, that they have otherwise neglected their children's welfare, or that some other compelling reason exists, the paramount rights of both parents to the companionship, custody, care, and control of their minor children must prevail."

Owenby v. Young, 357 N.C. 142 (2003).
Dicta from this custody case has been cited and relied on in termination of parental rights cases involving putative fathers. In *Owenby*, where the mother of the child's deceased mother brought an action for custody against child's father, the court held that the grandmother had failed to establish by clear and convincing evidence that the father was unfit or had acted inconsistently with his constitutionally protected parental status – citing and quoting both *Petersen* and *Price*. The dicta that shows up later in some juvenile cases reads as follows:

> There are at least two methods a court may use to find that a natural parent has forfeited his or her constitutionally protected status. First, N.C.G.S. § 7B-1111 sets forth nine different grounds upon which a court may terminate parental rights. … The finding of any one of the grounds is sufficient to order termination. … This statutory procedure is not the subject of the present case. Second, when a court finds parental conduct inconsistent with the protected status, the parent's paramount *right* to custody may be lost.

In re Adoption of Shuler, 162 N.C. App. 328 (2004).
Citing *Byrd*, supra, the court of appeals affirmed a holding that the biological father's consent to adoption was not required. The court said, "Under the mandate of the statute, a putative father's failure to satisfy any of these requirements before the filing of the adoption petition would render his consent to the adoption unnecessary." The court did not make reference to *Rosero*, supra. In allowing the father's interlocutory appeal to proceed, however, the court did cite *Owenby*, supra, in acknowledging the putative father's "fundamental right" in relation to his child. The opinion mentions neither *Petersen* nor *Price*.

In re Rholetter, 162 N.C. App. 653 (2004).
The trial court adjudicated the children to be abused and neglected while in the care of the father and step-mother and placed them in DSS custody pending disposition. Two home studies of the mother's home in South Carolina were done. The trial court found that concerns raised by a second home study were not sufficient to rebut the constitutional presumption that the mother was a fit and proper person to have custody of the children, under *Petersen*, and awarded custody to the mother. On appeal, the father argued that the trial court improperly used the *Petersen* presumption to award custody to the mother. Rather than address the applicability of the *Petersen* presumption at disposition in a juvenile case, the court of appeals said that since the trial court had applied the best interest standard when it awarded custody to the mother, "any misapplication of the *Petersen* presumption [was] without consequence."

In re JAG, 172 N.C. App. 708 (2005).
The court of appeals in this case appears to have applied the *Petersen* presumption to the disposition phase of a juvenile case, although it does not cite *Petersen*, *Price*, or any other case in that part of the opinion. The court of appeals affirmed the part of the trial court's order that adjudicated the child to be abused based on a non-accidental head injury that occurred when the child was in the sole care of the father. However, the court held that conclusions that the child was neglected and dependent were based on findings that were not supported by the evidence.
The findings that were proper, the court said, indicated no basis for continuing the child in the custody of DSS, when there were no findings to support a conclusion that the mother could not care for the child or that the child would not be safe in her care. The court reversed the disposition part of the order, stating since there were no grounds to prolong the removal of custody from the mother, "the trial court abused its discretion in finding and concluding it was in the juvenile's best interest that his custody remain with DSS."

In re D.D.H., 168 N.C. App. 239 (unpublished).
In an appeal from an order terminating her parental rights, respondent cited *Owenby*, supra, for the proposition that alcohol abuse alone was not sufficient to terminate her parental rights. In a footnote, the court of appeals noted that *Owenby* involved a custody dispute between a father and grandmother, and that the supreme court, after briefly discussing G.S. 7B-1111, had said "This statutory procedure is not the subject of the present case." Therefore, the court of appeals concluded that *Owenby* was inapplicable to the TPR case.

In re T.K., 171 N.C. App. 35, *aff'd per curiam*, 360 N.C. 163 (2005).
The majority affirmed the trial court's permanency planning order ceasing reunification efforts, changing the permanent plan for three children from reunification with the mother to guardianship of a relative, and denying the mother visitation rights. On appeal, the mother argued that the trial court had not adequately considered the progress she had made. In affirming the trial court's order, the court of appeals said the following:

> After careful consideration, the court had no assurances respondent-mother had made sufficient progress for the children to be returned to her care. … Here the court properly made findings of fact as to the respondent-mother's progress (or lack thereof) and as to the best interest of the children. However, as we stated above, at this stage the best interests of the children, not the rights of the parents, are paramount.

One judge dissented because the trial court's order did not find by clear and convincing evidence that respondent's conduct was inconsistent with her constitutionally protected status or that she was unfit – citing and quoting *Moore v. Moore*, 160 N.C. App. 569 (2003) and its quotes from *Petersen*.

In re Adoption of Anderson, 360 N.C. 271 (2006). The trial court found that the biological father's consent to adoption was not required, because he had not taken any of the steps necessary to prevent a ground for termination of parental rights. The court of appeals reversed and remanded for additional findings. Relying heavily on *Byrd*, supra, the supreme court reversed. In the court of appeals [*In re Adoption of Anderson*, 165 N.C. App. 413 (2004)] the father raised, but the court did not address, the argument that the trial court's construction of the statute and case law violated his rights to due process and equal protection. (It is not clear whether that argument was made in the trial court.) In allowing the father's interlocutory appeal, the court of appeals did cite *Shuler*, supra, in acknowledging the putative father's "fundamental right" in relation to his child. Neither the court of

appeals nor the supreme court referred to *Petersen*, *Price*, or *Rosero*, supra, and the supreme court's opinion did not mention the constitutional argument.

A Child's Hope, LLC v. Doe, 178 N.C. App. 96 (2006).
The court of appeals reversed the trial court's order finding that grounds to terminate the putative father's rights had not been proved by clear and convincing evidence. The court held that uncontroverted evidence showed that he had not met the requirements of G.S. 7B-1111(a)(5), relying on the "bright line rules" regarding the rights of putative fathers established by the state supreme court in *Byrd* and *Anderson*, supra. The court of appeals did not refer to *Petersen*, *Price*, or *Rosero*, supra, and there is no indication that a constitutional argument was made.

In re B.G., 191 N.C. App. 399 (2008) (unpublished).
The child was removed from her mother's home and placed in DSS custody. Later she was placed temporarily with relatives, but the plan became reunification with her father. At a permanency planning hearing the court noted a positive home study of the father's home and ordered specific visitation as part of a transition to the father's home. At a later permanency planning hearing, however, the court placed the child in the joint custody of her father and an aunt and uncle, gave the aunt and uncle physical custody, and ordered visitation for the father. On appeal, the father argued that the order violated his constitutionally protected interest in the care and custody of his daughter, citing *Price*. The court of appeals refused to consider the argument, because the record did not indicate that it had been made at trial, but reversed because the order did not include the findings required by G.S. 7B-907, including whether it was possible for the child to return home within six months.

In re B.G. (2) 197 N.C. App. 570 (2009).
On remand, the father did make the constitutional argument. The trial court acknowledged his constitutional rights and that he was a "non-offending" parent, but concluded that in balancing his rights with those of a third party and the child's best interest, the court should resolve the matter according to the child's best interest. In a new permanency planning order the court ordered the same custody arrangement – joint custody to the father and relatives and primary physical custody to the relatives. The court of appeals reversed again, citing *Price* and *Adams v. Tessener,* 354 N.C. 57 (2001) (holding in custody case that trial court's findings supported a determination that father's conduct was inconsistent with his protected interest). The court held that the trial court had not properly applied the best interest test because it had not found that respondent was unfit or had acted inconsistently with his protected status. The court noted that there was evidence in the record from which the trial court *could* have made such a finding, but remanded the case, noting the "gravity of the constitutional right involved."

A.C.V., 203 N.C. App. 473 (2010).
The mother relinquished the child to an adoption agency, the child was placed in an adoptive home the day after he was born, and the agency filed a termination petition against the biological father. The trial court terminated his rights based on his failure to take any of the actions specified in G.S. 7B-1111(a)(5). The court of appeals affirmed, rejecting the father's argument that his due process rights were violated because the court terminated his rights without finding that he was unfit or had neglected the child. The court of appeals referred to the state supreme court's statement in *Owenby*, supra, noting "that a finding under any of the provisions in section 7B-1111 will result in a parent 'forfeit[ing] his or her constitutionally protected status.'" The court seemed somewhat uncomfortable with its own decision, acknowledging that cases such as *A.C.V.* and *A Child's Hope*, supra, indicate tension between the constitutional rights of putative fathers and G.S. 7B-1111(a)(5) as the courts

have interpreted it. The court went on to state that it was "difficult, under the circumstances of this case, to conclude that [respondent's] constitutional rights were assured," especially given protections parents are afforded in abuse, neglect, and dependency cases. Nevertheless, the court held that *Owenby* and *A Child's Hope*, supra, controlled and that adjudication of a ground under G.S. 7B-1111(a)(5) removed respondent's constitutionally protected status as the child's parent and justified application of the best interest standard.

Rodriguez v. Rodriguez, __ N.C. App. __, 710 S.E.2d 235 (2011).
After the children's father died, the children were adjudicated dependent and placed in DSS custody. Grandparents filed a Chapter 50 custody action. About three months after the adjudication, the children were returned to the mother's physical custody. She filed an answer and motion to dismiss in the custody action. The court denied the motion to dismiss, found that the mother had acted inconsistently with her parental rights, awarded primary custody to her, and awarded secondary custody in the form of visitation to the grandparents. The court of appeals reversed the part of the order that gave the grandparents visitation. The court held that the trial court properly considered the dependency adjudication, but that it alone was not sufficient to show that the mother had acted inconsistently with her parental status, and that the findings were not sufficient to show that the mother engaged in conduct that resulted in forfeiture of her protected parental status – citing *Petersen* and *Price*.

In re D.M., __ N.C. App. __, 712S.E.2d 355 (2011).
The child was adjudicated dependent and placed in DSS custody, and DSS placed her with the maternal grandmother. After a home study of respondent father's home was reported to be favorable, the court indicted that the father's alcohol use required further assessment. DSS placed the child with the father but retained custody and placement authority. Eight months later DSS moved the child back to the grandmother's home. At a subsequent permanency planning hearing the court awarded permanent custody to the grandmother and visitation for respondent father. Citing *In re B.G. (2)*, supra, the court of appeals reversed, holding that because the trial court found that neither parent was unfit and made no findings or conclusions as to whether the father had acted inconsistently with his constitutionally protected parental rights, the trial court erred in awarding custody to the grandmother.

In re T.P. __ N.C. App. __, 718 S.E.2d 716 (2011).
At a permanency planning hearing the court granted legal and physical custody to the paternal grandparents and waived further reviews. Because respondent had not objected at trial to the finding that she had acted inconsistently with her protected parental status, the appellate court would not address whether the trial court properly applied the best interest standard. A constitutional issue not raised at the trial level will not be considered for the first time on appeal.

III. Applicability of the Rules of Civil Procedure in juvenile court[1]

The court of appeals has said that "the Rules of Civil Procedure apply only when they do not conflict with the Juvenile Code and only to the extent that the Rules advance the purposes of the legislature as expressed in the Juvenile Code." *In re L.O.K.*, 174 N.C. App. 426, 431, 621 S.E.2d 236, 240 (2005).

In a number of cases the appellate courts have addressed the applicability of particular Rules of Civil Procedure in juvenile cases. *See, e.g.*, *In re* Quevedo, 106 N.C. App. 574, 419 S.E.2d 158 (1992). The courts also have set out an approach to determining whether a particular rule applies. *See In re* B.L.H., 190 N.C. App. 142, 660 S.E.2d 255 (holding that in a termination of parental rights case that there is no right to amend a petition to conform to the evidence pursuant to Rule 15 of the Rules of Civil Procedure), *aff'd per curiam*, 362 N.C. 674, 669 S.E.2d 320 (2008). *See also In re* G.B.R., ___ N.C. App. ___, 725 S.E.2d 387 (May 1, 2012) (holding that the trial court erred in allowing an amendment to a termination petition to conform to the evidence, but that the appellant was not prejudiced by the error).

In summary, B.L.H. suggests the following:

A. *A Rule of Civil Procedure applies when the Juvenile Code explicitly references the rule.*

For example, the Juvenile Code specifically provides for service of process pursuant to Rule 4 or Rule 5, entry of judgment pursuant to Rule 58, and appointment of a guardian ad litem for a parent pursuant to Rule 17.

B. *A rule or part of a rule will not apply where the Code provides a different procedure.*

In juvenile cases some procedures that ordinarily would be governed by the Rules of Civil Procedure are established instead by the Juvenile Code itself. For example, provisions in G.S. 7B-800 relating to amending petitions prevail over Rule 15 of the Rules of Civil Procedure, and the appointment of guardians ad litem for children is governed by G.S. 7B-601 rather than Rule 17.

C. *A rule or part of a rule will apply when necessary to fill a procedural gap in the Juvenile Code's provisions.*

Some appellate court decisions have held that specific rules apply in juvenile proceedings. In other cases the court has referenced or applied a Rule of Civil Procedure without discussion and with no suggestion that the rule's applicability was in doubt.

D. *A rule will not apply when it would confer a procedural right that is not granted by the Juvenile Code.*

For example, the court has held that neither summary judgment nor the filing of counterclaims is permissible in a juvenile case. *See, e.g.*, *In re* Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981); *In re* J.N.S., 165 N.C. App. 536, 598 S.E.2d 649 (2004).

[1] This topic is discussed more fully in section 4.1 of the manual ABUSE, NEGLECT, DEPENDENCY, AND TERMINATION OF PARENTAL RIGHTS IN NORTH CAROLINA, School of Government, 2011, with updates through October 2012, available online at http://shopping.netsuite.com/s.nl/c.433425/it.A/id.4228/.f.

Is there still uncertainty about some of the Rules?

- **Are the discovery provisions in G.S. 7B-700 exclusive? If not, which Rules of Civil Procedure relating to discovery apply in juvenile cases?**

  Before October 1, 2009, G.S. 7B-700 read as follows:

  > **§ 7B-700. Regulation of discovery; protective orders.**
  >
  > (a) Upon written motion of a party and a finding of good cause, the court may at any time order that discovery be denied, restricted, or deferred.
  >
  > (b) The court may permit a party seeking relief under subsection (a) of this section to submit supporting affidavits or statements to the court for in camera inspection. If, thereafter, the court enters an order granting relief under subsection (a) of this section, the material submitted in camera must be available to the Court of Appeals in the event of an appeal.

  As rewritten effective October 1, 2009, G.S. 7B-700

  - allows DSS to share all relevant information, except the identity of the reporter, with other parties.
  - authorizes the chief district court judge to adopt local rules or issue an administrative order addressing information sharing among parties and the use of discovery.
  - provides that "[a]ny party may file a motion for discovery." The motion must specifically describe the information sought and must state that the movant has made a reasonable effort to obtain the information directly from DSS or pursuant to local rules or administrative order or that it cannot be obtained that way.
  - authorizes the court to deny, restrict, or defer discovery and to conduct in camera inspections.
  - appears to apply to all proceedings under Subchapter I of the Juvenile Code.

- **When if ever does Rule 24 apply in a juvenile case to require or allow intervention?**

  Intervention of right: In Hill v. Hill, 121 N.C. App. 510, 466 S.E.2d 322 (1996), the court of appeals applied Rule 24 and reversed the trial court's denial of DSS's motion to intervene in a private termination of parental rights action. The court held that DSS should have been allowed to intervene of right, because its interest in seeking continued reimbursement from the father for public assistance the mother received was not protected by the other parties.

  G.S. 7B-1103(b) provides that anyone who has standing to file a petition for termination of parental rights may intervene in a pending abuse, neglect, or dependency case for the purpose of filing a motion seeking termination of parental rights. This is the only mention of intervention in the Juvenile Code.

Permissive intervention: The Juvenile Code is silent with respect to permissive intervention. Would applying Rule 24 to permit relatives, foster parents, or others to become parties to a juvenile case through permissive intervention fill a procedural gap, or would it confer a right not provided for in the Code? Is the ability to ask the court to exercise its discretion to allow intervention really a "right"?

In Matter of Baby Boy Scearce, 81 N.C. App. 531, 345 S.E.2d 404 (1986), the court of appeals held that Rule 24 applied to allow permissive intervention by foster parents and that allowing intervention in the case was not an abuse of discretion. The case began when DSS filed a petition asking the court to take jurisdiction for purposes of terminating the rights of an unknown father. After the father was identified and became involved, the case seems to have transformed into a custody case. While some juvenile cases make reference to someone's having intervened, the applicability of Rule 24 does not appear to have been the subject of other decisions in juvenile cases.

The fact that G.S. 7B-200(d) allows the court to consolidate a pending civil custody action and a juvenile action would suggest that allowing someone to intervene in a juvenile case to make the same custody claim is permissible. Case law, however, would prevent a parent from filing a counterclaim for custody in a termination of parental rights action filed by the other parent. *See In re S.D.W.*, 187 N.C. App. 416, 653 S.E.2d 429 (2007); *In re* Peirce, 53 N.C. App. 373, 281 S.E.2d 198 (1981).

Assuming that Rule 24 applies to allow permissive intervention, issues still may arise as to whether

- the person seeking intervention has filed and served a motion and a pleading setting forth a legitimate claim or defense;
- the person has standing to assert the claim or defense;[2]
- the claim or defense has a question of law or fact in common with the juvenile action;
- intervention would cause undue delay or would prejudice other parties' rights.

IV. Does the Interstate Compact on the Placement of Children (ICPC) apply when the court awards custody or guardianship of a child to an out-of-state parent or relative?[3]

When an out-of-state placement is subject to the ICPC, the placement cannot occur without a positive home study from the other state. All fifty states have adopted the compact, which in North Carolina is codified as Article 58 of G.S. Chapter 7B. The compact provides for the Association of ICPC Administrators, which comprises the compact administrators from every state, to issue regulations to implement the compact. [ICPC regulations can be found at http://icpc.aphsa.org/Home/regulations.asp.]

[2] Two civil custody cases that are helpful in determining whether a motion to intervene is sufficient are *Quesinberry v. Quesinberry*, 196 N.C. App. 118, 674 S.E.2d 775 (2009), and *Smith v. Barbour*, 195 N.C. App. 244, 671 S.E.2d 578 (2009).

[3] Jane Thompson, Assistant Attorney General and Child Welfare Attorney for the N.C. Department of Health and Human Services, contributed to this response.

A. Amendments to the regulations in 2011 and 2012 raise questions about the continued reliability of the holdings in two older N.C. appellate court decisions. In *In re* Rholetter, 162 N.C. App. 653, 592 S.E.2d 237 (2004), the court of appeals held that the provisions of the ICPC did not apply at a permanency planning hearing when the court awarded custody to an out-of-state mother. The child had been removed from the father and stepmother in this state, and custody was eventually given to the mother who lived in South Carolina. The court held that the award of full custody to a non-removal parent was not a "placement" under the compact because it was not for purposes of foster care or preliminary to an adoption.

   Later the court of appeals held that the ICPC did not apply to a permanency planning order awarding guardianship to a relative in another state, again reasoning that such an award was not a placement for purposes of foster care or preliminary to an adoption. *In re* J.E., 182 N.C. App. 612, 643 S.E.2 70 (2007). The majority distinguished the holding in an earlier case that the ICPC applied to out-of-state relative placements under G.S. 7B-505 (nonsecure custody) and 7B-903 (disposition), noting that those statutes specifically require ICPC compliance, while neither G.S. 7B-600 (guardianship) nor G.S. 7B-907 (permanency planning) mentions the ICPC.

B. In 2011 and 2012, the association substantially rewrote some of the ICPC regulations, including Regulation 3, which covers definitions, placement categories, applicability, and exemptions. The current version of Regulation 3 recognizes placements with out-of-state non-removal parents as being exempt from ICPC compliance, but *only* if the court

   1. has no evidence that the out-of-state parent is unfit,
   2. does not seek any evidence of fitness from the receiving state, and
   3. relinquishes jurisdiction over the child immediately upon placement with the parent.

   Regulation 3 does allow a request for a "courtesy check" of the non-removal parent's home by the receiving state, without invoking the full ICPC home study process. A "courtesy check" is totally discretionary with the receiving state. A placement with a non-removal parent made without ICPC compliance or with only a courtesy check will receive no monitoring or supervision in the receiving state.

   Under the North Carolina Juvenile Code, an order terminating the court's jurisdiction in a juvenile case renders all orders entered in the case ineffective. [G.S. 7B-201(b)] If ongoing legal custody, rather than just physical placement, with the out-of-state parent is needed, the trial court would have to either

   - retain jurisdiction, which would result in a requirement to comply with the ICPC, or
   - immediately enter an order in a civil custody action, pursuant to G.S. 7B-911, and terminate jurisdiction in the juvenile case – assuming that the ICPC applies only in juvenile proceedings.

C. The regulations provide no exemption from compliance with the ICPC for placement (including the award of custody or guardianship) with an out-of-state relative other than the non-custodial parent. Regulation 3(2)(a) states that the ICPC covers four categories of placement: adoptions, licensed foster homes (whether related or unrelated), group homes and residential placements, and placements with parents and relatives.

D. In the most recent N.C. case to address the ICPC, *In re* V.A., ___N.C. App. __, 727 S.E.2d 901 (July 17, 2012), the court of appeals held that the trial court's placement of the child with a relative in South Carolina, after South Carolina's home study had been negative, violated the compact. The court relied on both the definition of "foster care" in Regulation 3 and the requirement in G.S. 7B-903(a)(2)c. that, at disposition, placement of a child with an out-of-state relative comply with the ICPC.

E. Neither *Rholetter* nor *J.E.*, described above, made reference to the ICPC regulations. Rather, they relied on the plain wording of the compact itself. While *V.A.* referred to the regulations, it relied on a specific Juvenile Code requirement for ICPC compliance at a disposition. It is somewhat unclear what the result would be for an out-of-state placement with a parent or relative resulting from a permanency planning hearing, for which there is no specific requirement in the Juvenile Code for compliance with the compact. Should a court rely on Regulation 3, or on the holdings in *Rholetter* and *J.E.*, in determining whether compliance with the compact is required?

   Like the court in *Rholetter*, the Connecticut Supreme Court, in *In re* Emoni W., 305 Conn. 723, 48 A.3d 1 (2012), concluded that the compact's language, "for placement in foster care or as a preliminary to a possible adoption," does not include placement with a noncustodial parent. The court went on to say that "it is reasonable to conclude that the drafters determined that the statute should not be applied to out-of-state parents in light of the constitutionally based presumptions that parents generally are fit and that their decisions are in the child's best interests." In addition, the court stated in a footnote that even if the ICPC regulations have the force of law, they are invalid to the extent they impermissibly expand the scope of the compact itself.

V. Personal jurisdiction over out-of-state parents in termination of parental rights cases

A. The UCCJEA, at G.S. 50A-201(c), states that personal jurisdiction is neither necessary nor sufficient for a court to make a child custody determination (which includes termination of parental rights).

B. G.S. 7B-1101 says the court has jurisdiction to terminate a parent's rights, without regard to the parent's state of residence, if

   1. the court finds it would have non-emergency jurisdiction under the UCCJEA to make or modify a child custody determination, and

   2. the non-resident parent was served with process pursuant to G.S. 7B-1106, which requires the issuance and service of a summons upon the filing of a petition to terminate parental rights.

C. North Carolina courts have long held that minimum contacts are not required in child custody actions. *See, e.g.*, Harris v. Harris, 104 N.C. App. 574, 410 S.E.2d 527 (1991).

D. Appellate court decisions have held that minimum contacts are a prerequisite for exercising jurisdiction in some termination of parental rights actions. Case law suggests that a court in this state may terminate the rights of an out-of-state parent of a legitimate child (or of an illegitimate child if that parent is involved with the child) only if the parent

(i) has minimum contacts with N.C., (ii) submits to the court's jurisdiction, or (iii) is served while physically present in the state. Because the court's holdings that minimum contacts are required are based on the Due Process Clause of the Fourteenth Amendment, the effect of the legislation described in B.1 and 2, above, is unclear.

1. Although termination proceedings are *in rem*, to satisfy due process a non-resident parent must have minimum contacts with the state before a court here may terminate the parent's rights. *In re* Finnican, 104 N.C. App. 157 (1991); *In re* Trueman, 99 N.C. App. 579 (1990). *See also In re* J.W.J., 165 N.C. App. 696 (2004) (citing Finnican and *Trueman* and stating that "minimum contacts must exist in order for a trial court to exercise jurisdiction" in a termination of parental rights action).
2. Minimum contacts are not required in the case of a non-resident father of a child born out of wedlock if the father has failed to establish paternity, legitimate the child, or provide substantial financial support or care to the child and mother. *In re* Williams, 149 N.C. App. 951 (2002); *In re* Dixon, 112 N.C. App. 248 (1993).
3. Courts in some states have held that minimum contacts are never required in termination cases, on the basis that termination proceedings fall within the "status" exception. *See, e.g.,* In re R.W., 39 A.3d 682 (Vermont Sup. Ct., 2011); *In re* Thomas J.R., 663 N.W.2d 734 (Wisconsin Sup. Ct., 2003); S.B. v. Alaska, 61 P.3d 6 (Alaska Sup. Ct., 2002). The United States Supreme Court has recognized a status exception to the minimum contacts requirement, but not in relation to termination of parental rights. *See, e.g.,* Shaffer v. Heitner, 433 U.S. 186 (1977).

VI. How does termination of a parent's rights compare to determining that a parent's consent to adoption is not required

A. In an adoption, under G.S. 48-3-601 a putative father's consent to the adoption is required only if, before the adoption petition was filed,
   1. he has acknowledged his paternity of the child and
      - is obligated to support the child under a written agreement or court order; or
      - has provided reasonable, consistent support payments for the mother and child and regularly visited or communicated (or attempted to do so) with the mother during or after the term of pregnancy, or with the minor, or with both; or
   2. after the child's birth but before the child's placement for adoption or the mother's relinquishment, he has married the mother or attempted to marry her by a marriage solemnized in apparent compliance with law; or
   3. he has received the child into his home and openly held the child out as his biological child.

B. Under G.S. 7B-1111(a)(5), a ground for terminating a putative father's rights is the father's failure, before the filing of the termination petition or motion, to do any of the following:
   1. establish paternity judicially or by affidavit filed with DHHS; or
   2. legitimate the child or file a petition for legitimation; or

3. legitimate the child by marriage to the child's mother; or
4. provide substantial support or consistent care with respect to the child and mother.

C. In any adoption proceeding, if a parent is served with notice and does not respond, the parent's consent to the adoption is not required. [G.S. 48-3-603(a)(7)]

TERMINATION OF PARENTAL RIGHTS	ADOPTION
Respondent must be served with summons containing specified notices and a copy of the petition or motion.	Parent must be served with notice of the filing of the adoption petition and notice that he must file a response within 30 days. No summons is required.
Respondent has a statutory right to appointed counsel if indigent, and provisional counsel is appointed and named on the summons (unless the action is initiated by motion).	Court may appoint an attorney for a parent who is unknown or whose whereabouts are unknown and who has not responded to notice.
If respondent files an answer or response denying material allegations, the court must appoint a GAL for the child.	Court must appoint a GAL for the child if the parent is incompetent. Court may appoint an attorney or GAL for the child in a contested proceeding.
Court must conduct a hearing and the petitioner/movant must prove allegations by clear and convincing evidence.	Hearing on whether consent is required occurs only if parent files a response. Statute does not address burden/standard of proof.

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