

**Social Services Attorneys' Summer Conference
Chapel Hill, NC**

February 23 – 24, 2012

JUVENILE LAW UPDATE

Cases Filed from August 2, 2011, to February 7, 2012

Janet Mason
School of Government
The University of North Carolina at Chapel Hill
(919) 966-4246
mason@sog.unc.edu

Abuse, Neglect, Dependency

- Findings. Incorporation of the petition's allegations does not constitute proper findings of fact.
- Nature of adjudication. Dismissal of the petition only with regard to the father was error even though allegations did not relate to the father's conduct.
- Visitation. Failure to address visitation is reversible error.

In re S.C.R., __ N.C. App. __, __ S.E.2d __ (November 15, 2011).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS00NTEtMS5wZGY=>

Facts: Respondent mother appealed from the order adjudicating her child dependent and neglected, placing the child in DSS custody, ceasing reunification efforts, and ordering a permanent plan of adoption or guardianship.

Held: Reversed and remanded.

1. The findings of fact were insufficient because the trial court improperly incorporated the allegations in the petition as its findings and failed to make its own independent findings.
2. The trial court erred in dismissing the petition with respect to the father on the basis that he was not involved in actions alleged in the petition. The court of appeals "caution[ed] trial courts to carefully distinguish between an adjudication proceeding, and termination of parental rights proceedings." The first addresses the status of the child, while the second focuses on the conduct of each parent individually.
3. The trial court may not order a permanent plan at a disposition hearing for which notice of a permanency planning hearing has not been given.
4. The trial court erred by failing to address visitation in the disposition order.

- Dispositional findings. Placing children in DSS custody without a finding that they needed more adequate care or supervision was error and required remand.

In re S.H. __ N.C. App. __, __ S.E.2d __ (November 15, 2011).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS03NTYtMS5wZGY=>

Facts: A younger child had been removed from the home after suffering cardiac arrest as a result of starvation. Evidence also showed that the three remaining children were disciplined inappropriately and had never received medical attention. The court adjudicated the three children neglected and placed them in the custody of DSS. The children had been residing with a maternal aunt, a therapeutic foster parent. Respondents appealed.

Held: Affirmed in part; remanded in part.

1. The court of appeals affirmed the adjudication, finding that the evidence – which included evidence of neglect of the youngest child – was sufficient to support the trial court's findings and conclusions.
2. The court also affirmed the substance of the trial court's disposition conclusion that it was contrary to the children's best interest to return to the parents' home.
3. The trial court erred, however, by placing the children in DSS custody without making the finding required by G.S. 7B-903(a)(2) – that the children needed more adequate care or supervision than they could receive in the parents' home.

- Disposition: custody and placement. The court's approval of mother's placement of children with a relative, without awarding custody to a relative or DSS, was not an abuse of discretion.

In re D.L., __ N.C. App. __, 715 S.E.2d 623 (September 20, 2011).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0yNTYtMS5wZGY=>

Facts: DSS filed a petition alleging neglect but did not seek nonsecure custody because the children were safe in a kinship care placement. The children's fathers were served but did not appear. The mother stipulated to the facts, and the court entered a consent order adjudicating neglect. At disposition, the court rejected the GAL's request that custody be given to the relative or to DSS, and instead "sanctioned" the continued placement of the children with the relative and ordered the mother to execute a power of attorney to authorize the relative to obtain medical, dental, and other services for the children. The GAL appealed.

Held: Affirmed.

The trial court's order was authorized by law and was not an abuse of discretion.

1. The court rejected the argument that the disposition was not authorized by the Juvenile Code, because custody was left with the mother, which is an authorized disposition.
2. The court distinguished *In re H.S.F.*, 177 N.C. App. 193 (2006), which reversed an order that gave joint legal custody to the parents, primary physical custody to the mother, and primary placement with the grandfather – holding that the statute does not allow the court to grant physical custody to a parent but order physical placement with someone else. Unlike *H.S.F.*, in this case the court did not order physical placement of the children with the relative, but merely approved the mother's decision about where the children should be placed.

Review and permanency planning

- Waiving review hearings. In waiving review hearings, the year that the child must have lived with a relative may include periods spent in the homes of more than one relative.
- Parents' superior rights. Constitutional argument about granting custody to a non-parent could

In re T.P. __ N.C. App. __, __ S.E.2d __ (November 15, 2011).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS02NDUtMS5wZGY=>

Facts: After the child was adjudicated dependent, respondent mother retained legal custody on the condition that physical placement remain with the maternal grandmother. Later, placement was changed to the home of the paternal grandparents. At a permanency planning hearing the court ceased reunification efforts and changed the permanent plan to relative placement, custody, and guardianship. At a subsequent review, the court granted legal and physical custody to the paternal grandparents, with whom the child had lived for about nine months, and waived further reviews.

Held: Affirmed.

1. After finding that most (but not all) of the findings of fact were supported by the evidence, the court of appeals held that the conclusion that placing custody with the paternal grandparents was in the child's best interest was based on sufficient findings that were supported by the evidence.
2. 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.
3. The court rejected respondent's argument that the trial court erred in waiving review hearings because the child had been with the paternal grandparents less than one year. The court of

appeals held that when combining the time spent in the home of the maternal grandmother with the time the child had lived with the paternal grandparents, the child had “resided with a relative” for at least one year, as required by G.S. 7B-906(b)(1).

Appeal of order ceasing efforts

- Ceasing efforts. Ceasing reunification efforts without making one of the prerequisite ultimate findings required by G.S. 7B-507(b) is reversible error.
- Effect of reversal on termination order. Reversal of the order ceasing reunification efforts required reversal of the order terminating parental rights with which it was appealed.

In re I.R.C., __ N.C. App. __, 714 S.E.2d 495 (August 2, 2011).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS05Ny0xLnBkZg==>

Facts: In November, 2008, the child was adjudicated neglected and dependent after respondent mother left her repeatedly with various people, left her alone at times, and did not comply with safety plans. After a permanency planning hearing in March, 2010, the court found that respondent had failed to attend counseling sessions and to provide proof of attending Al-Anon meetings, and had admitted taking prescription drugs that were not hers. The court also found that the child disclosed that she had been sexually abused by her father and that the child was receiving tutoring from her foster parents and attending therapy. The court ordered that the permanent plan be changed to adoption, that DSS cease reunification efforts, and that DSS file a petition to terminate respondent’s rights. Respondent filed a “Notice to Preserve Right to Appeal” from the order. DSS filed a termination petition and an order terminating respondent’s rights was entered in November, 2010. Respondent appealed both orders.

Held: Reversed and remanded.

1. The court of appeals considered only the permanency planning order that ceased reunification efforts, which respondent could not appeal when it was entered but had preserved the right to appeal as provided in G.S. 7B-1001(a)(5).
2. The trial court made findings of fact about respondent’s failure to complete a case plan, but did not link those findings to an ultimate finding that further reunification efforts would be futile or would be inconsistent with the juvenile’s health, safety, and need for a safe, permanent home within a reasonable period of time. [G.S. 7B-507(b)(1)] Ceasing reunification efforts without that ultimate finding – or a finding of one of the other conditions set out in G.S. 7B-507(b) – is error. (The court stated that if the trial court had included one of those findings as a conclusion of law, it would have affirmed.)
3. The court of appeals will not infer from other findings that reunification efforts would be futile or inconsistent with the juvenile’s health, safety, and need for a safe, permanent home within a reasonable period of time.
4. G.S. 7B-1001(a)(5) does not specify what should occur when an order ceasing reunification efforts and an order terminating parental rights are appealed together. Here, the appellate court treated the reversal of the order ceasing reunification efforts as requiring reversal of the order terminating parental rights and remanded “for further proceedings.” It is not altogether clear what those further proceedings should look like.

Termination of Parental Rights

- **Review pending – Waiver of counsel.** The standard and procedures for allowing a respondent parent to waive the right to counsel in a termination of parental rights proceeding are the same as when a defendant waives the right to counsel in a criminal case.

In re P.D.R., ___ N.C. App. ___, 713 S.E.2d 60 (June 16, 2011), *disc. rev. allowed (petitioner's petition)*, ___ N.C. ___, 717 S.E.2d 369 (August 25, 2011), *disc. rev. allowed (respondent's petition)*, ___ N.C. ___, 717 S.E.2d 370 (August 25, 2011).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNTE5LTEucGRm>

Facts: The petition on which the three children were adjudicated neglected and dependent included allegations of domestic violence and that respondent mother had ongoing mental health issues and did not seem able to understand questions or respond appropriately. The court appointed a guardian ad litem for respondent. After adjudication and when the children had been in foster care for over a year, the court changed the permanent plan from a concurrent plan of reunification and adoption to adoption only, and DSS filed petitions to terminate respondent's parental rights. The court appointed a guardian ad litem for respondent in that proceeding. Respondent's appointed counsel sought to withdraw, and respondent indicated that she wanted to represent herself. The trial court had questioned respondent about whether she understood that she had a right to appointed counsel and whether she understood that a petition had been filed to terminate her rights. When asked whether she wanted appointed counsel, respondent said 'no,' but refused to sign a waiver form. After a break, but after one witness had testified, the court made further inquiries and made oral findings about respondent's understanding of her rights. The court adjudicated grounds and terminated respondent's rights. On appeal, the only issue was whether the trial court erred in allowing respondent to waive counsel and represent herself at the termination hearing.

Held: Vacated and remanded.

1. After reviewing U.S. Court cases and North Carolina cases dealing with the waiver of counsel in criminal cases, the court of appeals held that the same rules that apply to waiver in a criminal case apply in a termination of parental rights proceeding.
2. Before allowing a respondent in a termination of parental rights proceeding to proceed pro se, the court must determine that the waiver is knowing, intelligent, and voluntary. To do that, the court must follow a procedure similar to the one set out in G.S. 15A-1242 for criminal cases – determine after a thorough inquiry that respondent
 - a. has been clearly advised of the right to counsel;
 - b. understands and appreciates the consequences of a decision to waive counsel; and
 - c. comprehends the nature of the petition, the proceedings, and termination of her rights.
3. After determining that a respondent knowingly and voluntarily waived her right to counsel, as described in 2, above, the court's options are to
 - a. allow respondent to proceed pro se because she has the mental fitness to represent herself, or
 - b. deny her request to proceed pro se because she does not have the basic competence required to present a defense without the assistance of counsel.

This determination must be supported by proper findings of fact.

Jurisdiction when motion filed during appeal

- Filing a motion to terminate parental rights while an appeal in the underlying case is pending does not deprive the trial court of jurisdiction in the termination case when the court takes no action “exercising jurisdiction” before the appellate court’s mandate issues.

In re M.I.W., __ N.C. __, __ S.E.2d __ (January 27, 2012).

<http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMi8xNDhQQTEuLTEucGRm>

Facts: The court of appeals, in an unpublished opinion, affirmed an order terminating respondents’ rights. The court rejected respondents’ argument that the trial court lacked subject matter jurisdiction in the termination action because the motion in the cause was filed while respondents’ appeal of the disposition order in the underlying case was pending.

Held: The Supreme Court affirmed (with two justices dissenting).

1. Interpreting the language in G.S. 7B-1003(b), the court distinguished between “having” jurisdiction and “exercising” jurisdiction, holding that the statute did not deprive the trial court of jurisdiction during the appeal, but prohibited the court only from exercising jurisdiction and conducting hearings.
2. In the juvenile court context, exercising jurisdiction “requires putting the court’s jurisdiction into action by holding hearings, entering substantive orders or decrees, or making substantive decisions on the issues before it.” The trial court’s entering two orders to continue the hearing in the termination case did not violate G.S. 7B-1003(b).
3. Because the trial court did nothing that constituted exercising jurisdiction until after the mandate issued and the 15-day period in which a petition for discretionary review could have been filed, the court did not err in denying respondents’ motion to dismiss the termination action and did not violate G.S. 7B-1003.

Verification of petition.

- Social worker’s verifying the petition before it was signed by the DSS attorney did not deprive the trial court of subject matter jurisdiction.

In re M.M., __ N.C. App. __, __ S.E.2d __ (December 6, 2011).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS05MjktMS5wZGY=>

Facts: Verification of a petition to terminate respondent’s rights was signed by the social worker for DSS. Four days later the petition was signed by the DSS attorney, and two days after that the petition was filed. On appeal from an order terminating her rights, respondent argued that the trial court lacked subject matter jurisdiction because the petition was not properly verified and the social worker could not have verified a petition that was not in existence when she signed the verification.

Held: Affirmed.

1. Nothing in the record established that the petition was not in existence when the social worker signed the verification.
2. Respondent did not show any failure to comply with Rule 11 or the Juvenile Code in regard to signing and verification of the petition.

Jurisdiction; UCCJEA

- Where a N.J. court had awarded custody to the mother, who moved to N.C., and the father remained in N.J., the court here lacked subject matter jurisdiction to terminate the father's rights, in the absence of findings required by G.S. 7B-203.

In re J.A.P., __ N.C. App. __, __ S.E.2d __ (January 17, 2012).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMTg2LTEucGRm>

Facts: After a court in New Jersey awarded custody to the mother, she and the child moved to North Carolina. Several years later the mother filed an action to terminate the father's rights, and the court here entered an order terminating his rights. The father appealed, arguing that the N.C. court did not have jurisdiction under the UCCJEA.

Held: Vacated.

1. The court of appeals rejected the mother's argument that the father's jurisdictional argument should not be considered because no custody order was in the record. The court pointed out that it was the mother's duty under G.S. 50A-209 to file a copy of the custody order and that her pleading on its face made clear that a custody order had been entered in N.J.
2. Because no N.J. court had determined that it no longer had exclusive continuing jurisdiction or that N.C. was a more convenient forum, and no court here or there had determined that no party resided in New Jersey, N.C. lacked jurisdiction to modify the N.J. order.

Guardian ad litem for the child.

- When respondent parent files an answer to a termination petition, the trial court's failure to appoint a guardian ad litem for the child is reversible error.
- Appointment of an attorney advocate for the child, without a GAL, is not sufficient.

In re J.L.H., __ N.C. App. __, __ S.E.2d __ (November 15, 2011).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS01NzUtMS5wZGY=>

Facts: In a private action by the child's mother to terminate the father's rights, the father filed an answer many months after the petition was filed. The trial court appointed an attorney advocate, but not a guardian ad litem, for the child. The court adjudicated grounds, made best interest findings, and ordered the termination of respondent's rights.

Held: Reversed and remanded.

1. A respondent's filing of an answer denying material allegations of a petition to terminate parental rights, regardless of when the answer is filed, requires appointment of a guardian ad litem for the child.
2. Failure to appoint a GAL for the child when one is required is reversible error.
3. Appointment of an attorney advocate does not satisfy the requirement that a guardian ad litem be appointed for the child [citing *In re R.A.H.*, 171 N.C. App. 427 (2005).]

- Neglect ground. When respondent made progress in substance abuse treatment only when incarcerated or in a residential program, the evidence supported the finding of a reasonable probability of a repetition of neglect.

In re J.H.K., __ N.C. App. __, 715 S.E.2d 563 (September 6, 2011).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMi0yLnBkZg==>

Facts: The trial court terminated respondent's rights after adjudicating the neglect and dependency grounds. In an earlier appeal, the court of appeals reversed because the children's GAL was not present at the hearing. The supreme court reversed and remanded for consideration of other issues in the case, which are the subject of this opinion.

The children were adjudicated neglected and dependent based on the parents' substance abuse problems and unsanitary and dangerous conditions in the home. At the time of the termination hearing the children had been in foster care for two and a half years. While they were in foster care, respondent father participated in a residential treatment program and later in a prison program while he was incarcerated for violating probation. When he left the treatment program and when he was released from prison he relapsed, stopped staying in touch with DSS, did not visit the children, and did not follow his case plan. At the time of the hearing respondent was incarcerated again, had completed the New Directions program, and was working on his substance abuse and other issues.

Held: Affirmed.

These and other findings supported the trial court's conclusion that the neglect ground existed. In addition, the trial court did not abuse its discretion in terminating respondent's rights.

- Prior neglect. Evidence of past neglect and continued instability in housing and employment after release from prison supported a conclusion that the neglect ground existed.

In re C.G.R. __ N.C. App. __, 717 S.E.2d 50 (October 18, 2011).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0yNjMtMS5wZGY=>

Facts: One child came into care and was adjudicated neglected after police raided the home where he and respondent lived with others and found drugs, large amounts of cash, and guns. The other child, born while respondent was in prison, was adjudicated dependent. One order terminating respondent's rights was reversed and remanded. DSS filed new motions seeking termination. After a hearing the court adjudicated three grounds, including neglect, for terminating respondent's rights to the younger child. Without taking additional evidence the court amended its first order regarding the older child and terminated respondent's rights in relation to him. Evidence and findings related to respondent's unstable housing and employment since her release from prison; her lack of insight into the children's needs and the effect of her actions on the children; uncertainty about respondent's ability to acquire stable housing or employment; and the fact that the older child suffered from PTSD.

Held: Affirmed.

1. Evidence and findings supported the neglect ground for termination in the younger child's case.
2. In the case of the older child, the court should have taken evidence and made findings regarding conditions and events since the entry of the first termination order. However, the evidence and findings in the younger child's case applied equally in the older child's case and were sufficient to support adjudication of the neglect ground. The court cited *In re Safriet*, 112 N.C. App. 747(1993), which held that remand for findings is unnecessary when all of the evidence supported such findings.

- Abandonment. Evidence and findings were sufficient to support adjudication of willful abandonment as a ground for termination of parental rights.
- Multiple grounds. The appellate court is not required to review all adjudicated grounds.

In re C.I.M., __ N.C. App. __, 715 S.E.2d 247 (August 2, 2011).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0yMjMtMS5wZGY=>

Facts: The four children were adjudicated neglected and dependent in October 2009 (based on petitions filed in May 2009) and placed in DSS custody. At a permanency planning hearing in July, 2010, the court found that respondent father had failed to comply with the court's order that he complete a GAINS assessment and psychological evaluation, attend parenting classes and anger management counseling, submit to random drug screens, and pay child support. DSS filed a petition to terminate respondent's rights, alleging five different grounds. The court adjudicated four of the grounds, including willful abandonment, and terminated respondent's rights.

Held: Affirmed.

1. The court of appeals reviewed only the abandonment ground and held that the evidence supported the findings and the findings supported the conclusion that respondent had willfully abandoned the children for six months preceding the filing of the petition.
2. The court rejected respondent's argument that the appellate court was required to review all of the adjudicated grounds and, if any of them were not upheld, remand the case for a new disposition hearing. The court reiterated that adjudication of any one ground is sufficient to terminate a parent's rights.
3. After reviewing the trial court's findings, the court of appeals held that the trial court had considered the factors set out in G.S. 7B-1110(a)(1) – (6). (Note: Effective October 1, 2011, G.S. 7B-1110(a) was rewritten by section 16 of [S.L. 2011-295](#) to require the court, in addition to considering the statutory criteria that are relevant, to make written findings about them.)

Dismissal of petition

- Father's name on child's birth certificate, when father and mother were not married, created rebuttable presumption that he had established paternity of the child either judicially or by affidavit.
- Unchallenged findings of fact supported trial judge's conclusion that none of the alleged grounds for terminating parental rights had been proved by clear and convincing evidence.

In re J.K.C., __ N.C. App. __, __ S.E.2d __ (January 17, 2012).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS03ODMtMS5wZGY=>

Facts: After years of DSS involvement, lack of success in dealing with substance abuse issues, and the children's being in and out of foster care, the mother relinquished to DSS. The guardian ad litem filed a petition to terminate rights of the father, who was serving a 9-year prison sentence and was due to be released in early 2013. At the conclusion of the evidence the trial court dismissed the petition, finding that none of the alleged grounds had been established by clear and convincing evidence. The guardian ad litem appealed.

Held: Affirmed.

Following are some of the factors the court of appeals cited in upholding the trial court's order dismissing the petition.

1. Neglect. After finding that there was a prior adjudication of neglect, the trial court properly considered respondent's actions and changed conditions since then – including respondent's substantial compliance with his case plan, keeping in contact with DSS, completing substance abuse and other courses available to him, and sending gifts to the children through his mother – and did not find a substantial probability of a repetition of neglect.
2. Willfully leaving the child in care without making reasonable progress. Factors the same or similar to those above for neglect.
3. Failure to pay cost of care. Respondent earned \$1.00 a day and had money in an account from relatives, but provided no support for the children. However, the record included evidence that respondent had written to DSS about providing support for the children and was informed that it could not be arranged because he was earning less than minimum wage.
4. Failure to establish paternity. Noting that petitioner's burden with this ground is difficult because it involves proving negatives, the court pointed to the fact that the children's birth certificates had been amended to indicate respondent as the father. Although no affidavit or order of paternity was presented, DSS in its reports referred to respondent as the biological, not the putative father. The court articulated a new presumption – appearance of the father's name on the children's birth certificate creates a rebuttable presumption that his paternity has been established by affidavit or court order. Here the presumption was not rebutted.
5. Dependency. There was no evidence that respondent was incapable of providing care and supervision due to a condition specified in the statute or any similar cause or condition. Respondent's incarceration was not sufficient to establish this ground.

Sufficiency of order after remand

- When an order is reversed and remanded, the order is defunct and the trial court must enter a new entire, complete order upon remand.

In re A.R.P., __ N.C. App. __, __ S.E.2d __ (January 17, 2012).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMTE2LTEucGRm>

Facts: In an earlier opinion the court of appeals reversed a termination order and remanded for additional findings on the question of willfulness with regard to the ground of willfully leaving the child in foster care, etc. [G.S. 7B-1111(a)(2)] In a new order, the trial court incorporated by reference the transcript of a hearing, made new findings about willfulness, and made a “supplemental” conclusion of law. This order did not include the findings and conclusions or decree from the original order.

Held: Reversed and remanded for entry of a complete order.

1. Incorporation of an entire transcript into an order does not constitute a finding of fact. (In addition, the transcript was not included in the record on appeal.)
2. When the first order was reversed and remanded, it became ineffective. The trial court was required to enter an entirely new and complete order and could not assume that the provisions of the first order were somehow incorporated into its new order.

