

District Court Judges Summer Conference

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JUVENILE LAW UPDATE

Cases Decided from October 5, 2004, through June 7, 2005

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Delinquent Juveniles

School resource officer was acting in conjunction with a school official when he detained a student, and the detention was reasonable under the standard of *New Jersey v. T.L.O.*

In re J.F.M., ___ N.C. App. ___, 607 S.E.2d 304 (1/18/05), *appeal dismissed, review denied*, 359 N.C. 411, ___ S.E.2d ___ (4/6/05).

Facts: A deputy sheriff, who was also a school resource officer (SRO), investigated an affray involving T.B. and another student. While not seeing the affray, the SRO observed a group of students gathered outside on the school campus. He saw T.B. leaving the grounds and gave her three commands to stop, which she ignored. Continuing his investigation, the SRO spoke with a school administrator who told him that T.B. had been in the affray and was leaving the school campus. The SRO approached T.B. at a bus stop on the campus and told her that she needed to come back to the school to talk to the school administrator about the affray. She refused to go with the SRO, who responded by grabbing her arm and telling her she needed to come with him. J.F.M. then pushed the SRO and told T.B. to run. T.B. later returned and struck the SRO with an umbrella. T.B. and J.F.M. were adjudicated delinquent for resisting, delaying, and obstructing a public officer and assault on a public officer.

Holding: Affirmed.

The court of appeals, relying on *Wofford v. Evans*, 390 F.3d 318 (4th Cir. 2004) [extending reasonableness standard of *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), to detentions of students], and *In re D.D.*, 146 N.C. App. 309, 554 S.E.2d 346 (2001) (extending *T.L.O.* to searches by resource officers working in conjunction with school officials), held that the reasonableness standard of *T.L.O.* applied to a resource officer's detention of a student when acting in conjunction with a school official. The court examined the facts in this case and found that the resource officer was acting in conjunction with the school administration and his detention of the student was reasonable under *T.L.O.*

Did the trial court err by accepting the juvenile's admission without making the full inquiry required by statute? [Appeal pending in Supreme Court]

In re T.E.F., ___ N.C. App. ___, 604 S.E.2d 348 (11/16/04).

Facts: Juvenile, age fourteen, was alleged to be delinquent for robbery with a dangerous weapon and assault with a deadly weapon, for using a knife to threaten and rob several victims. At adjudication, the juvenile's counsel indicated that the juvenile would admit the charges. The trial court asked the juvenile questions, which the juvenile answered. The court did not ask the juvenile whether he was satisfied with his representation, and the juvenile did not sign a transcript of admission. The prosecutor recited a factual basis for the admission, and the court adjudicated the juvenile delinquent and committed him to DJJDP.

Holding: Reversed.

The court of appeals held that the trial court was required to present *all* of the inquiries and statements required by G.S. 7B-2407 before accepting a juvenile's admission. The majority rejected a dissenting judge's argument that a "totality of the circumstances" test should be applied. The majority discussed the differences between juvenile and criminal proceedings and stressed that in juvenile proceedings the state has a heightened duty to protect the rights of the juvenile.

The record must show affirmatively that a juvenile’s admission was knowing and voluntary.

In re W.H., ___ N.C. App. ___, 603 S.E.2d 356 (10/19/04).

Facts: At the same hearing, the juvenile admitted both a probation violation and a misdemeanor charge of assault inflicting serious injury. The juvenile signed a transcript of admission, with respect to the misdemeanor, which stated that the most restrictive disposition he could receive was a Level 2. During the hearing the court informed the juvenile that the most restrictive disposition the court could order was a Level 3, commitment to DJJDP for placement in a youth development center. The court ordered a Level 3 disposition and the juvenile appealed.

Holding: Reversed and remanded.

The court of appeals held that the trial court did not sufficiently inform the juvenile of the most restrictive disposition he could receive and, therefore, it was not possible to conclude that the juvenile’s admission was knowing and voluntary.

Trial court did not impermissibly delegate judicial authority by allowing others to determine the amount of restitution and specifics of residential treatment.

In re M.A.B., ___ N.C. App. ___, 611 S.E.2d 886 (5/3/05).

Facts: Juvenile was adjudicated delinquent for misdemeanor assault inflicting serious injury. In the disposition order, the court ordered the juvenile, among other things, to (1) pay restitution for the victim’s medical bills “in an amount to be determined,” and (2) “cooperate and participate in a residential treatment program as directed by court counselor or mental health agency.”

Holding: Affirmed.

The court of appeals rejected the juvenile’s argument that the court improperly delegated its dispositional authority with respect to the restitution and treatment portions of the order. The court distinguished this case from *In re Hartsock*, 158 N.C. App. 287, 580 S.E.2d 395 (2003) on the basis that the court in this case ordered restitution and participation in a residential treatment program and did not delegate to anyone else discretion to determine whether those dispositional alternatives should be used. The court did not consider the lack of specifics about the amount of restitution and the treatment program to be an impermissible delegation.

When the Juvenile Code authorizes either a Level 2 or a Level 3 disposition, the choice is in the trial court’s discretion.

In re N.B., ___ N.C. App. ___, 605 S.E.2d 488 (12/07/04).

Facts: Juvenile was adjudicated delinquent for assault with a deadly weapon inflicting serious injury. She had no prior adjudications, but since she was adjudicated for a violent offense, the court at disposition had a choice between Level 2 and Level 3 dispositions. The court reviewed the predisposition report, which indicated that the juvenile had a low risk of re-offending and a low need level. The court, however, was not satisfied with responses to why the juvenile had not returned to school after a five-day suspension, and committed the juvenile to DJJDP.

Holding: The court of appeals affirmed, holding that the court was required to select the most appropriate, not the least restrictive, disposition and had discretion to determine what disposition was appropriate. The juvenile, the court said, had not established that the court abused its discretion.

ABUSE, NEGLECT, DEPENDENCY

Trial court did not have jurisdiction when DSS filed a petition not preceded by a substantiation.

In re S.D.A., R.G.A., V.P.M. and J.L.M., ___ N.C. App. ___, ___ S.E.2d ___ (5/17/05).

Facts: Respondent mother became involved with an evangelical church and obtained work there, but later decided that church involvement was harming her children. A faith leader and his wife resisted letting her take the children, and respondent went to the sheriff, who referred her to DSS. She admitted problems relating to drug use and inappropriate discipline and ended up signing an agreement with the couple to give them custody until DSS approved the children's returning to her. Later she showed up to get the children and the couple filed a civil custody action and obtained an *ex parte* and later a temporary custody order giving them custody of the children. The same day the couple filed their action and again a few days later, DSS received reports that the children were being abused and neglected by corporal punishment and certain religious practices such as "blasting." The DSS referred the report to another county for an independent investigation. At the end of that county's investigation it reported that it found no evidence that the children were abused or neglected, was not substantiating the reports, and was closing its case. Nevertheless, the first county filed petitions alleging that the children were abused and neglected, citing the mother's actions in leaving the children with the couple and the treatment they were exposed to as a result. The couple was allowed to intervene. The trial court adjudicated the children abused and neglected and placed them in the custody of DSS. The couple appealed.

Holding: Vacated.

The trial court lacked subject matter jurisdiction because DSS had not followed its statutory duties before filing the petitions. There was no evidence of any reports or investigations other than those that were referred to another county and not substantiated. Without substantiating abuse or neglect after a required investigation, DSS cannot invoke the court's authority to intervene.

Respondent's expressed desire to "fire" appointed counsel did not constitute a waiver of the right to counsel.

In re S.L.L., ___ N.C. App. ___, 605 S.E.2d 498 (12/07/04).

Facts: At the adjudicatory hearing in a neglect proceeding respondent indicated that he no longer wanted to be represented by his appointed counsel, and the court released the attorney (the second the court had appointed) from the case. The court did not obtain a waiver from respondent and, despite respondent's statement that he wanted counsel, told respondent that he would have to represent himself. The court adjudicated the child to be neglected and respondent appealed.

Holding: Reversed and remanded for new hearing.

The trial court erred in failing to either obtain a written waiver from respondent or appoint new counsel. A respondent's statement that he does not wish to be represented by court-appointed counsel does not constitute an expression of an intention to represent himself. Citing criminal cases, the court stated that "in the absence of some substantial reason for the appointment of replacement counsel, an indigent must accept counsel appointed by the court unless he wishes to waive counsel and represent himself." Here, respondent's statement did not constitute a waiver.

Trial court erred in relying on findings of fact from a prior order that was on appeal.

In re T.M.M., ___ N.C. App. ___, 606 S.E.2d 416 (1/4/05).

Facts:

- 1/22/02 In an earlier case, two of respondent's children were adjudicated neglected and dependent and placed in DSS custody. Respondent appealed.
- 6/12/02 T.M. was born
- 6/13/02 DSS filed a petition and T.M. was placed in nonsecure custody.
- 3/6/03 Adjudication and disposition hearings were held in T.M.'s case.
- 4/2/03 An order was entered adjudicating T.M. to be neglected and dependent and placing him in DSS custody. In the order the court took judicial notice of earlier orders relating to T.M.'s siblings and adopted the findings in those orders. Respondent gave notice of appeal.
- 4/20/04 The court of appeals decided the appeal in the case relating to the siblings, remanding the case for the trial court to make ultimate findings of fact and clear conclusions of law.

Holding: Reversed and remanded.

The adjudication in T.M.'s case was not based on clear, cogent, and convincing evidence. The order was so thoroughly based on the orders in the earlier case, which the court had found inadequate and remanded, that the adjudication here was not supported by clear, cogent, and convincing evidence. In addition, the court of appeals found fault with the order in that it did not distinguish between findings of fact and conclusions of law and did not reference any of the several statutory bases for adjudicating neglect.

- **Weight given to evidence of neglect of another juvenile in the home was in trial court's discretion.**
- **Adjudication of dependency lacked necessary finding about availability of alternative child care arrangements.**

In re P.M., ___ N.C. App. ___, 610 S.E.2d 403 (4/5/05).

Facts: Respondent's other four children had been adjudicated neglected and placed with relatives. The trial court adjudicated the youngest child neglected and dependent based largely on evidence of the adjudications of the other children and the respondent's lack of understanding of the harm the other children had suffered. The court placed the child in the custody of DSS but authorized DSS to leave the child with respondent if she arranged for an appropriate caretaker approved by DSS to monitor her care of the child.

Holding: Affirmed in part; reversed in part.

The court's review was limited to whether the trial court's findings of fact supported the conclusion of law that the child was neglected and dependent. The court affirmed the adjudication of neglect, holding that the trial court had discretion to determine what weight to give the fact that the child lived in a home where other children had been neglected by an adult regularly living in the home (respondent) and on respondent's failure to follow through with a protection plan. The court reversed the dependency adjudication, however, because the trial court made no findings as to whether respondent had an appropriate alternative arrangement for the child's care.

Evidence was not sufficient to support trial court's findings with regard to one parent.

In re J.A.G., ___ N.C. App. ___, ___ S.E.2d ___ (6/7/05).

Facts: The 3-month-old child suffered severe head injuries while alone with the father, while the mother was not at home. The father later was criminally charged. The court adjudicated the child to be neglected and dependent "as to the mother," and abused, neglected, and dependent "as to the father." Only the mother appealed, and apparently the issues and arguments on appeal were framed in terms of whether the trial court had erred "as to" the mother.

Holding: Reversed and remanded.

The court of appeals held that several of the trial court's findings of fact challenged by the mother were not supported by clear, cogent, and convincing evidence. These included findings (1) that she had not provided appropriate care to the child in the past, based in part on evidence that the mother had left the child on a sofa without putting cushions around her, when at the time the child was immobile and not able to roll over, and (2) that the mother was not willing to investigate other possible placement arrangements for the child, when the mother in fact had provided names of at least four relatives as possible placement resources. The court of appeals concluded that the trial court's findings were not sufficient to support its conclusions that the child was neglected and dependent "as to the mother."

Note: The court of appeals did not question the way in which the mother's issues on appeal were framed and did not analyze whether it was proper for a trial court to make different adjudications "as to" each parent. The opinion does not address findings and conclusions regarding the father, who did not appeal; the child's status as a result of the injury the child suffered at the hands of the father; or what action the trial court should take as a result of the reversal and remand.

Evidence was sufficient to support neglect adjudication and cessation of efforts.

In re M.J.G., ___ N.C. App. ___, 608 S.E.2d 813 (3/1/05).

Facts: Infant was born weighing 2 lbs. 5 ozs. and placed in intensive care. Respondent mother visited her every night until, before the baby was released, she left her grandfather's home and her whereabouts were unknown. DSS filed a neglect petition and obtained nonsecure custody. The trial court adjudicated the child to be neglected and, at the disposition hearing three months later, ordered DSS to cease reunification efforts.

Holding: Affirmed.

The trial court's findings were supported by competent evidence in the record. In relation to both adjudication and disposition the court of appeals reviewed a number of the trial court's findings to determine whether they were supported by evidence in the record. Although it held that several were not, the court held that the remaining findings were sufficient to support the adjudication of neglect and the court's disposition. The court held specifically that the trial court did not err in considering the DSS and GAL reports in making its disposition.

PERMANENCY PLANNING

- **After parent consented to adjudication of dependency, failure to appoint guardian ad litem for her before a review hearing was error.**
- **Objection to participation of non-parties could not be raised for first time on appeal.**

In re L.M.C., ___ N.C. App. ___, ___ S.E.2d ___ (6/7/05).

Facts: Respondent's child came back into DSS custody after death of her grandmother who had been named as guardian. DSS filed a new dependency petition, and respondent admitted the allegations. The court gave temporary custody to JM and EC and at a later review hearing gave them permanent custody. At a permanency planning hearing, the court named JM and EC as the child's guardians. Respondent appealed.

Holding:

1. Because the petition had alleged dependency and court documents indicated that respondent had a long history of mental health issues that resulted in the child's dependency, failure to appoint a guardian ad litem for respondent was reversible error.
2. Because respondent had not objected to the trial court's allowing JM and EC to participate in hearings without intervening, she could not raise that issue on appeal. In addition, the court is entitled to hear from caretakers at review hearings. The court also noted that the "plain error" rule applies only in criminal cases and thus was not applicable here.

- **Appointment of guardian ad litem for parent was not required when petition alleged neither dependency nor mother's incapability.**
- **Respondent was not given adequate opportunity to present evidence.**
- **Incorporation of written summary did not constitute sufficient findings.**

In re D.L., ___ N.C. App. ___, 603 S.E.2d 376 (10/19/04).

Facts:

7/23/01	Neglect petition filed
10/18/01	Children adjudicated neglected and court approved placement with grandfather
3/2/02	Court relieved DSS of reunification efforts, named grandfather guardian
5/2/02	Respondents filed motions seeking return of custody, renewed reunification efforts, visitation, and new psychological evaluation of mother
5/17/02	After a hearing on the motion, the court granted visitation and a new psychological
9/13/02	After permanency planning hearing court announced its decision to continue guardianship with grandfather and declined to order reunification efforts
9/23/02	Respondents filed written notices of appeal, including certificates of service indicating that they were served by hand delivery on "the respective party," but they were not served on DSS
10/7/02	Trial court entered the order from the permanency planning hearing
5/15/03	Appellate entry forms filed with trial court
6/20/03	Notice of Appointment of Appellate Counsel mailed to all parties
10/6/03	Proposed record of appeal served on DSS attorney
11/7/03	DSS attorney wrote letter to respondents' attorneys regarding record on appeal
11/18/03	DSS filed motion to dismiss the appeal

Holding: Reversed in part and reversed and remanded in part.

1. GAL for parent. The trial court did not err in failing to appoint a guardian ad litem for the mother after she was diagnosed with a “schizo-affective disorder,” because the petition did not allege that the children were dependent or that the mother was incapable as the result of a debilitating condition of providing proper care. The court was not required to appoint, *sua sponte*, a guardian ad litem for the mother.
2. Right to present evidence. Trial court erred in failing to allow respondent mother to present evidence at the hearing. Respondent took the stand and presented arguments but no testimony relating to the permanent plan. The court did not permit her to present certain evidence about legal advice she had received and certain Bible verses.
3. Sufficiency of evidence and findings. Evidence was insufficient to support the trial court’s order. The only evidence DSS offered was a written summary, which the court incorporated into its order. The court of appeals said, “The adoption of the DSS summary into the Order is insufficient to constitute competent evidence to support the trial court’s findings of facts.” Although respondent father testified, the court made no findings about his testimony. In addition, the court failed to make the statutory findings necessary to support an order ceasing reasonable efforts.

- **Findings were insufficient to support ceasing reunification efforts.**
- **Blanket incorporation of summaries did not constitute sufficient findings.**
- **Although child had been in foster care more than a year, the court was required to make statutory findings before ceasing reunification efforts.**

In re M.R.D.C., ___ N.C. App. ___, 603 S.E.2d 890 (11/2/04), *review denied*, 359 N.C. 321, 611 S.E.2d 413 (3/3/05).

Facts: Child came into DSS custody in August, 2001. A permanency planning hearing began in October, 2002, and was completed in March, 2003. A permanency planning order entered in July, 2003, continued custody with DSS, relieved DSS from reunification efforts, and directed DSS to initiate a proceeding to terminate respondent’s rights.

Holding: Reversed and remanded with discretion in trial court to allow additional evidence.

1. The order failed to include sufficient findings of fact regarding the factors G.S. 7B-907(b) requires the court to consider. The “finding of fact” that the child’s paternal grandmother was not a suitable placement for the child was a conclusion of law and was not supported by findings of fact.
2. Sufficient findings were not made via three summaries the trial court admitted into evidence and incorporated into the order as findings of fact. In addition to noting that the summaries did not adequately address the suitability of the grandmother as a placement resource, the court disapproved the trial court’s blanket incorporation of the summaries, emphasizing the court’s obligation to conduct its own independent review and to exercise logical reasoning, and suggesting that such wholesale incorporation was an impermissible delegation of the court’s duty.
3. The child’s being in care for a year did not automatically relieve DSS of the duty to make reasonable efforts and did not relieve the court of the duty to consider and make findings about the factors in G.S. 7B-907(b). Since the trial court had entered a deficient permanency planning order, it could not determine whether the exception based on a permanent plan of custody or guardianship existed. The trial court’s bare finding that none of the exceptions to the requirement to initiate termination were present was not sufficient.

Trial court had authority to order concurrent permanent plans.

In re J.J.L., E.F.L., and S.A.L., ___ N.C. App. ___, ___ S.E.2d ___ (5/17/05).

Facts: At a permanency planning hearing after the children had been in care for several years, both DSS and the guardian ad litem recommended that reunification efforts cease and that the plan be changed to adoption. Because the mother had taken a number of steps to comply with the court's orders, however, the court ordered a concurrent plan of reunification and adoption. The children remained in placement with a distant relative who wanted to adopt the children if they became free for adoption. The father appealed.

Holding: Affirmed.

The court of appeals rejected respondent's argument that the court, by ordering a concurrent plan, had violated the part of G.S. 7B-907 that requires a permanent plan to achieve "a safe, permanent home within a reasonable time." The court of appeals treated the issue as one of statutory construction that was resolved by the plain wording of the statute. The court also referred to earlier opinions affirming orders for concurrent plans and described the extent to which the trial court clearly set out the parties' responsibilities under the concurrent plan.

Reversal of underlying adjudication required reversal of permanency planning order.

In re T.S., S.M., and T.M., ___ N.C. App. ___, 606 S.E.2d 406 (1/4/05).

Facts: Respondents appealed from the order adjudicating their children to be neglected and dependent and from the disposition order. While the appeal was pending, the trial court entered another order after conducting a permanency planning hearing.

Respondents appealed from that order.

Holding: Vacated.

Before this case was decided the court of appeals remanded the adjudication and disposition order for adequate findings of fact and conclusions of law. In light of that, the court of appeals vacated the permanency planning order, stating: "As this Court has determined the underlying adjudication orders did not properly determine the minor children to be neglected or dependent, the permanency planning order must be vacated."

- **Order that continued the permanent plan without change was not appealable.**
- **Appellant failed to show that counsel provided ineffective representation.**
- **Order continuing custody with DSS did not include necessary findings.**

In re B.P., S.P., and R.T., ___ N.C. App. ___, ___ S.E.2d ___ (4/19/05).

Facts: The children were adjudicated neglected and dependent in 1999 and placed in DSS custody. The trial court held several review hearings and at a permanency planning hearing in 2001 relieved DSS of the duty to make reunification efforts and ordered that the permanent plan for the children was "with approved caretakers." That plan was continued at four subsequent reviews. Respondent did not appeal any of these orders. After a permanency planning hearing in 2003, the court made no change in the plans for B.P. and R.T., but changed the plan for S.P. to adoption. Respondent appealed this order.

Holding: Dismissed in part and reversed in part.

1. The court of appeals dismissed the appeals as to B.P. and R.T., holding that the appeals were interlocutory because an order continuing a permanent plan without change is not a final order for purposes of appeal. Because the trial court's order did change the permanent plan for S.P., the court of appeals reviewed that order.

2. The court of appeals rejected respondent's argument that she received ineffective assistance of counsel, finding that she failed to set forth any particular deficiencies that deprived her of a fair hearing.
3. The opinion also finds error in the trial court's
 - a. failure to state orally the person or agency in whom custody is vested and the duration of the order, as required by statute, and
 - b. adopting DSS's recommendations as findings of fact, and
 - c. continuing custody with DSS without making proper findings as to relevant statutory criteria.

Initial permanency planning order that repeated directives of preceding review order was not a final order for purposes of appeal.

In re B.N.H., ___ N.C. App. ___, 611 S.E.2d 888 (5/3/05).

Facts: The child was placed in DSS custody in June 2003 and placed with the grandmother, and that continued after the child was adjudicated neglected and dependent in July 2003 (order actually entered in September 2003). At a review hearing in October 2003, custody and placement were unchanged and the court ordered DSS to continue reunification efforts. After a second review hearing in January 2004, the court continued custody with DSS and ordered DSS to cease reunification efforts. At the initial permanency planning hearing in February 2004, the court continued custody of the child with DSS and placement with grandmother and ordered that the permanent plan for the child be adoption. Respondent appealed, and petitioner moved to dismiss the appeal.

Holding: The court of appeals granted petitioner's motion to dismiss the appeal as interlocutory, holding that not all permanency planning orders are "final orders" for purposes of appeal. The court disagreed with the court's broad interpretation of "disposition" in *In re Weiler*, 158 N.C. App. 473, 581 S.E.2d 134 (2003), in which the court held that an order changing a permanent plan from reunification to adoption was a final order under G.S. 7B-1001. The court then found that it was not bound by *Weiler*, distinguishing it on the basis that it involved a change in the permanent plan whereas this case involved an initial permanency planning order that repeated the directive to cease reunification efforts included in the preceding review order, which respondent did not appeal.

TERMINATION OF PARENTAL RIGHTS

Reliance on same evidence and findings as earlier order that was on appeal invalidated termination order.

In re B.D., ___ N.C. App. ___, ___ S.E.2d ___ (4/19/05).

Facts: The trial court entered an order adjudicating the child neglected and abused and placing the child in DSS custody in February 2002. Respondents appealed, arguing in part that the trial court's findings were not supported by the evidence. In November 2002, while that appeal was pending, DSS filed a petition seeking termination of parental rights on the grounds of neglect and willfully leaving the child in foster care. In May 2003 the trial court entered an order terminating parental rights on both grounds. The order incorporated by reference findings made in the adjudication and disposition orders that were on appeal and made some new findings. Respondents appealed. While appeal of the termination order was pending, the court of appeals affirmed the adjudication and disposition orders in the first appeal.

Holding: The court of appeals reviewed the line of cases dealing with trial court jurisdiction when a juvenile order is on appeal and followed the line of cases – *Stratton*, *N.B.*, and *V.L.B.* – holding that the trial court did not err by entering a termination order while an underlying order was on appeal. Those cases, though, rested on the premise that the termination order was based on grounds independent of those that were the basis for the adjudication or permanency planning order that was pending on appeal. In this case, the court of appeals found that the termination order relied on the same evidence and findings that were being challenged in the pending appeal. Therefore, the court of appeals vacated the termination order.

Failure to file the required UCCJEA affidavit and allege that the action was not filed for the purpose of circumventing the UCCJEA did not defeat the trial court's jurisdiction.

In re J.D.S., ___ N.C. App. ___, ___ S.E.2d ___ (5/17/05).

Facts: In a private termination proceeding, petitioner failed to include a required UCCJEA allegation in the petition and to attach the required affidavit of status of child. The trial court found that two grounds existed and terminated respondent's parental rights. On appeal, respondent asserted that the trial court lacked subject matter jurisdiction because the petition was deficient.

Holding: Affirmed.

The court of appeals rejected respondent's argument that the trial court lacked subject matter jurisdiction because the petition did not include the required allegation that it was not filed to circumvent the UCCJEA and did not include or have attached the affidavit required by G.S. 50A-209. The court of appeals held that while compliance with these statutory provisions clearly is the better practice, failure to comply was not grounds for reversal where, as here – and as in *In re Humphrey*, 156 N.C. App. 533, 577 S.E.2d 421 (2003) – respondent failed to demonstrate prejudice.

Failure to comply with statutory requirements relating to the petition deprives the trial court of subject matter jurisdiction.

In re Z.T.B., ___ N.C. App. ___, ___ S.E.2d ___ (6/7/05).

Facts: In another private termination proceeding, petitioner failed to include in the petition any allegation about custody or guardianship having been awarded in an earlier proceeding and failed to attach a copy of a prior custody order. The court terminated respondent's rights.

Holding: Reversed. (One judge dissenting)

The majority in the court of appeals held that failure to comply with statutory mandates regarding the contents of the petition and the attachment of any custody order was fatal and deprived the court of subject matter jurisdiction. The court distinguished its holding in *In re Humphrey*, 156 N.C. App. 533, 577 S.E.2d 421 (2003), because the assertion omitted from the petition in *Humphrey* (that it was not filed for purposes of circumventing the UCCJEA) was addressed by other allegations in the petition and in the court's order.

Dissent: A dissenting judge would have affirmed the trial court's order on the bases that the issue was not one of subject matter jurisdiction, appellant had not demonstrated prejudice, and appellant had not properly preserved the statutory violations for review.

Failure to give statutorily required notice of termination motion required reversal.

In re D.A., Q.A., and T.A., ___ N.C. App. ___, 609 S.E.2d 471 (3/15/05).

Facts: DSS filed a motion for termination of parental rights in a pending neglect and dependency case and served respondent with a notice that did not comply with the content requirements of G.S. 7B-1106.1.

Holding: The court of appeals, relying on *In re Alexander*, 158 N.C. App. 522, 581 S.E.2d 466 (2003), vacated and remanded for rehearing, holding that "[b]ecause DSS failed to give the statutorily required notice, prejudicial error exists and a new hearing is warranted."

Note: In a footnote the court of appeals distinguished *In re Howell*, 161 N.C. App. 650, 589 S.E.2d 157 (2003), because in that case respondent did not object to process or service and agreed at the hearing that service had been proper. In this case, by contrast, the court said that the record revealed that respondent did not agree that notice was proper and objected to at least some aspects of notice or service.

Respondents waived any objection to adequacy of notice by not objecting and by participating in the proceeding.

In re B.M., M.M., An.M., and Al.M., ___ N.C. App. ___, 607 S.E.2d 698 (2/1/05).

Facts: DSS filed a motion for termination of parental rights alleging three grounds, but respondents were not served with the notice required by G.S. 7B-1106.1. After a hearing, in which respondents participated, the court terminated the parents' rights, and they appealed.

Holding: The fact that respondents were not served when the motion for termination was filed did not deprive the court of jurisdiction. Respondents waived their right to object to the adequacy of the notice because they made no objection to the trial court and participated in the termination proceeding.

Failure to appoint GAL for child in contested case required reversal.

In re J.L.S., ___ N.C. App. ___, 608 S.E.2d 823 (3/1/05).

Even though the respondent father did not file his answer until the day of the termination hearing, the trial court erred in failing to appoint a guardian ad litem for the child. In this private termination proceeding the court of appeals reversed the order terminating the putative father's rights and remanded for appointment of a GAL for the child and a new termination hearing.

Under former version of statute, failure to appoint GAL for a parent when the ‘incapability’ ground was alleged was reversible error.

In re D.S.C., ___ N.C. App. ___, 607 S.E.2d 43 (1/18/05).

Facts: DSS filed a petition to terminate parents’ rights, alleging the “dependency” ground and two others. The petition alleged the mother’s several serious health conditions, but did not allege any mental disability. When the petition was filed the statute required appointment of a guardian ad litem for a parent any time the dependency ground was alleged, without qualifying conditions regarding the cause of the parent’s incapability. The trial court did not appoint a guardian ad litem for the mother, but adjudicated the dependency ground and terminated her parental rights.

Holding: Reversed and remanded for rehearing.

The trial court erred in failing to appoint a guardian ad litem for respondent mother. The applicable version of the statute required appointment of a guardian ad litem any time the “incapability” ground was alleged, regardless of whether there were allegations of mental incapability.

Note: The court of appeals specifically declined to address whether appointment of a guardian ad litem on the facts of this case would be required under the current version of the statute.

Where petition alleged parent’s substance abuse history and inability to care for the child, failure to appoint GAL for parent was reversible error.

In re S.B., 166 N.C. App. 488, 602 S.E.2d 691 (10/5/04).

In re S.B., 166 N.C. App. 494, 602 S.E.2d 694 (10/5/04).

Facts: DSS filed a motion seeking to terminate respondent’s rights, alleging his extensive history of substance abuse and his inability to provide proper care for the child. The trial court did not appoint a GAL for respondent, but on appeal from the order terminating his rights he did not raise that issue.

Holding: The court of appeals considered the issue *sua sponte* and held that the failure to appoint a GAL for respondent was reversible error. In a separate opinion in a related case the court reversed an order terminating the mother’s rights, also because the ground and facts alleged in the petition required appointment of a guardian ad litem.

Where petition alleged substance abuse issues and dependency, failure to appoint GAL was reversible error.

In re T.B.K., 166 N.C. App. 234, 603 S.E.2d 805 (9/7/04).

Where the motion for termination clearly alleged the dependency ground and a number of the allegations related to respondent’s substance abuse issues, the court of appeals reversed and remanded for appointment of a guardian ad litem and a new hearing.

Failure to appoint GALs for parents when the petition alleged their incapability was reversible error, despite fact that court also found other grounds.

In re B.M., M.M., An.M., and Al.M., ___ N.C. App. ___, 607 S.E.2d 698 (2/1/05).

Facts: In May of 2001 DSS and the parents entered into a consent order adjudicating the four children dependent. DSS and other agencies provided numerous services to the family and developed several case plans, which the parents did not follow. In August of 2002 the court relieved DSS of reunification efforts and changed the plan from reunification to adoption. In June 2003 DSS filed a motion for termination of parental rights alleging three grounds, including that the parents were incapable of caring for the children and the reasonable probability that their incapability would continue for the foreseeable future. The court terminated the parents’ rights, and they appealed.

Holding: Reversed and remanded for new hearing.

The trial court's failure to appoint guardians ad litem for the parents was reversible error, where the petition alleged the parents' incapability of caring for their children; there was substantial evidence of the mother's mental health problems and the father's retardation; and the court adjudicated the incapability ground. The fact that the court also found other grounds is irrelevant, because the key is the petition's allegation of incapability.

Failure to appoint guardian ad litem when petition alleged the dependency ground and substance abuse was reversible error.

In re K.R.S., ___ N.C. App. ___, ___ S.E.2d ___ (6/7/05).

Facts: DSS filed a petition alleging three grounds for terminating respondent's rights, including the dependency/incapability ground. The petition also alleged respondent's use of crack cocaine and her failure to follow through with drug treatment. The trial court considered respondent's mental health issues at the disposition stage. No guardian ad litem was appointed for respondent.

Holding: Reversed and remanded.

Failure to appoint a guardian ad litem for respondent was error, even though the court terminated rights on two other grounds and not the dependency ground, when that ground was alleged in the petition and "evidence of respondent's mental health and substance abuse was 'so intertwined' with evidence supporting" the other grounds that separating them was virtually impossible.

Respondent failed to show that trial court abused its discretion in denying his motion for a continuance.

In re D.Q.W., ___ N.C. App. ___, 604 S.E.2d 675 (11/16/04).

Facts: After serving respondent at his last known address and by publication, DSS learned that he was incarcerated in the county. He then was served personally and an attorney was appointed for him the same day. The attorney was notified that the hearing would be held on a date three weeks later; the hearing was held that day; and the court terminated respondent's rights.

Holding: Affirmed.

The trial court did not abuse its discretion in denying respondent's motion for a continuance. Because neither the motion for a continuance nor a transcript of the court's consideration of the motion was in the record on appeal, the court of appeals could not tell what reason respondent had given for the motion, and respondent made no showing of prejudice or of how his preparation for the hearing would have been different had a continuance been granted.

Putative father was entitled to rebut presumption created by testing that he was not the child's father. In addition, test results were not properly introduced.

In re L.D.B., ___ N.C. App. ___, ___ S.E.2d ___ (1/18/05).

Facts: The child's mother surrendered the child for adoption to a child-placing agency. At first she refused to name the father, but later she named respondent. Respondent and the agency could not agree on procedures for obtaining a paternity test. The agency filed a petition to terminate respondent's rights, and the court ordered a paternity test. The agency's attorney sent a copy of the results directly to the court; the test showed a 0% probability that respondent was the child's father. At the hearing, which respondent and his attorney attended, the court entered an order finding that respondent was not the child's father and terminating the rights of the child's unknown father. The court did not allow respondent to present any evidence, testimony, or argument.

Holding: Reversed.

The trial court erred in excluding respondent from participating in the hearing and entering an order finding that he was not the child's father. The paternity test results were never introduced as evidence, and no evidence was presented at the hearing. The court made its finding based on a copy of the test results, which the judge saw before the hearing. Even if the results had been properly introduced, the court would have been wrong to exclude respondent from participation in the hearing. He was the only named respondent, and the test results at most created a rebuttable presumption that he was not the child's father. Due process required that he be given an opportunity to rebut the presumption. In addition, the trial court had no authority to proceed in the hearing with regard to the rights of any other potential father.

Respondent father's lack of knowledge of his illegitimate child was not a defense.

In re T.L.B., ___ N.C. App. ___, 605 S.E.2d 249 (12/7/04).

Facts: In this private termination proceeding respondent putative father claimed that he could not have taken steps to legitimate or support the child because he had not known of the child's existence. The trial court terminated his rights.

Holding: The court of appeals rejected respondent's argument, pointing out that evidence supported a finding that petitioner had told him about her pregnancy and, even though he might not have believed her, he took no steps to determine whether a child was born or whether he was the father. In addition the court repeated its holding in *In re Clark*, 95 N.C. App. 1, 381 S.E.2d 835 (1989), that whether in a juvenile proceeding or an adoption proceeding, "under neither statute is the illegitimate child's future welfare dependent on whether or not the putative father knows of the child's existence at the time the petition is filed."

Petitioner seeking termination of putative father's rights has the burden of proving that respondent failed to take any of the four actions set out in the ground.

In re I.S., ___ N.C. App. ___, 611 S.E.2d 467 (5/3/05).

Facts: Respondent, putative father, was incarcerated when the child was born in December 1997, and until May 2004. The child was adjudicated dependent and neglected and placed with respondent's sister, but later was moved to a foster home at the sister's request. Respondent was not present at any hearings in the case, but was represented by counsel at every hearing except one, a permanency planning hearing held after the attorney was allowed to withdraw. In September 2003 DSS filed a petition to terminate parental rights, and the child's mother relinquished her rights. Counsel was appointed for respondent and made a motion to dismiss the petition, but the motion was never heard or ruled on. Respondent and his attorney were present at the termination hearing. The attorney stipulated that grounds to terminate the mother's rights existed and that respondent had not filed any court documents relating to paternity of the child. The trial court found that respondent has stipulated to the ground set out in G.S. 7B-1111(a)(5) relating to a putative father who has not taken certain actions before the filing of the petition.

Holding: Reversed.

1. Although the trial court should have heard and ruled on respondent's motion to dismiss, the failure to do so was not prejudicial error because the trial court clearly had considered the issues raised by the motion and found respondent's arguments unpersuasive, so there was no reasonable likelihood that a different result would have occurred absent the error.
2. Evidence was not sufficient to support the court's findings that the four elements of the ground existed. The trial court's findings mischaracterized respondent's

stipulation as relating to all four elements when it related to only one. The burden, the court said, is on the petitioner to prove by clear and convincing evidence that respondent failed to take any of the four actions set out in the ground.

3. The court of appeals noted that the trial court used an incorrect standard when it stated at the dispositional stage that it could not “find by clear, cogent and convincing evidence that it was not in the best interest of the child to terminate respondent’s parental rights.” The best interest determination, the court of appeals said, is in the trial court’s discretion.

In action to determine whether putative father’s consent to adoption was required, petitioner had burden of proving both that respondent who had acknowledged the child was not obligated by court order or agreement to pay support and that he had not provided reasonable, consistent support.

Miller v. Lillich, ___ N.C. App. ___, 606 S.E.2d 181 (12/21/04).

Facts: Defendants’ wanted to adopt their daughter’s child and brought a district court action to determine whether the consent of the child’s father was required under G.S. 48-3-601. The trial court found that the father’s consent was required because he had acknowledged his paternity and had provided reasonable, consistent support according to his financial means and had regularly visited or communicated or attempted to visit or communicate with the biological mother during her pregnancy or with the child, or with both.

Holding: Affirmed.

1. The court of appeals rejected defendants’ argument that the statute should be read to require, in addition to the findings the trial court made, a finding that the plaintiff was obligated by a written agreement or court order to support the child, in order for his consent to be required. The plain language of the statute, the court said, made clear that these two requirements were in the disjunctive, not the conjunctive.
2. Appellants argued that the trial court erred in determining that plaintiff’s support payments were “reasonable and consistent.” They did not assign error to any of the trial court’s findings of fact, however, and the court of appeals held that the findings were sufficient to support the trial court’s conclusion.

Did a custody order prohibiting respondent from contacting petitioner or the child establish that he did not neglect or willfully abandon the child? [On 2/3/05, the N.C. Supreme Court allowed respondent’s petition for discretionary review.]

In re A.N.B., 165 N.C. App. 705, 601 S.E.2d 331 (Table) (unpublished) (8/3/04).

Facts: When the parties in this private termination action divorced, a consent custody order gave petitioner mother custody and ordered respondent father to have no contact or communication with petitioner, her family, or the child. Respondent never sought modification of the custody order or renewal of his visitation rights. The trial court entered an order terminating his rights on the grounds of neglect and abandonment.

Holding: In an unpublished opinion the court of appeals reversed, holding that the terms of the custody order were sufficient to show that respondent had not willfully abandoned or neglected the child.

- **Appellant who did not assign error to any finding of fact waived any argument as to the sufficiency of the evidence.**
- **Ground relating to failure to pay support pursuant to a court order or agreement did not require a finding of “ability to pay.”**

In re J.D.S., ___ N.C. App. ___, ___ S.E.2d ___ (5/17/05).

Facts: Respondent and the child’s mother were not married. In respondent’s absence, a Nevada court awarded petitioner sole custody, granted respondent visitation rights, and ordered respondent to pay 18% of his income as child support. In two later hearings the Nevada court gave petitioner permission to move to California, then to N.C., and ordered respondent to pay a specific amount of child support. Respondent did not appear at any of the hearings or appeal any of the orders. Petitioner’s first petition seeking to terminate respondent’s parental rights on the basis of non-payment of court-ordered child support was denied because, although respondent had not paid support, petitioner could not establish that respondent had notice of the Nevada court action and orders for a full year. Both parties received notice of that decision, and respondent, who lived in California, continued to not pay child support. Petitioner filed a second termination action, and after a hearing the court found that two grounds existed – failure to pay court-ordered child support and failure to provide substantial care and support – and terminated respondent’s parental rights.

Holding: Affirmed.

1. Respondent argued that the court erred in concluding that the two grounds existed, and he assigned error to certain of the trial court’s conclusions of law on the basis that they were not supported by sufficient evidence. He did not, however, assign error to any of the trial court’s findings of fact. The court of appeals held that respondent had not preserved the issue of sufficiency of the evidence and that the facts found by the trial court must be considered as true for purposes of the appeal. Even if the assignment of error could be read to challenge the sufficiency of the evidence, the court said, “An assignment of error generally challenging the sufficiency of evidence to support numerous findings of fact is broadside and ineffective.”
2. The court of appeals reviewed the trial court’s findings and held that they were sufficient to support the conclusions of law. A finding of ability to pay was not required, as it would be for a failure to pay the cost of a child’s care in foster care, the court said, because a finding of ability to pay was a necessary element of an order to pay child support.

One judge, dissenting in part, would have reversed and remanded because of the absence of findings of ability to pay and the failure of the order to state the “clear, cogent and convincing” standard of proof.

- **Evidence in the record was sufficient to support trial court’s findings as to parents’ incapacabilities.**
- **Consideration of mental health evaluations more than a year old was not error, given nature of parents’ problems.**
- **Trial court did not abuse its discretion in considering child’s adjustment in the foster-adopt home as one factor relating to best interest.**

In re V.L.B., ___ N.C. App. ___, 608 S.E.2d 707 (3/1/05).

Note: See related case, *In re V.L.B.*, 164 N.C. App. 743, 596 S.E.2d 896 (6/15/04), in which the court of appeals dismissed as moot respondents’ appeal of a permanency planning order on the basis that the termination of parental rights order at issue in this case had been decided.

Facts: Respondent mother's rights to seven children had been terminated in Michigan. Five of those children were respondent father's and his rights with respect to them were terminated. Respondents came to N.C. about a week before V.L.B. was born, and DSS obtained custody when the child was released from the hospital. The parties consented to a dependency adjudication. Both parents received psychological evaluations that indicated multiple and severe mental health problems. Despite father's abuse of the other children mother would not separate from him and she denied that she needed mental health treatment. DSS filed a petition to terminate both parents' rights on the ground that their rights to other children had been involuntarily terminated and that they lacked the ability to establish a safe home for the child. The court terminated respondents' rights and they appealed.

Holding: Affirmed.

1. The trial court's findings that respondents were unable to establish a safe home were supported by clear and convincing evidence. The record included extensive evidence relating to the nature and severity of the parents' mental and physical health problems.
2. The trial court did not err in considering psychological evaluations that had been done a year before the termination hearing. Given the nature and severity of the parents' problems, considering the year-old reports was not error.
3. At the best interest stage the trial court did not abuse its discretion in considering the child's positive adjustment in the foster-adopt home as one factor in determining that termination of parental rights was in her best interests. Evidence of that factor alone, however, would not support a finding of best interest.

Respondent failed to establish that the Indian Child Welfare Act applied.

In re A.D.L., J.S.L., and C.L.L., ___ N.C. App. ___, ___ S.E.2d ___ (4/19/05).

Facts: The trial court terminated the parents' rights on the grounds of neglect, willfully leaving the children in foster care without making reasonable progress, and failure to pay support.

Holding: Affirmed.

1. The court of appeals held that the Indian Child Welfare Act did not apply. The children were registered members of the Lumbee Tribe, which is state-recognized but not federally-recognized. For the Act to apply, there must be a determination that the action is a custody proceeding and that the child is an Indian child of a federally-recognized tribe. The party seeking to invoke the provisions of the Act has the burden of showing that the Act applies.
2. The court of appeals also held that
 - a. the factual allegations in the petition were sufficient to put respondent on notice of the issue of neglect;
 - b. evidence was sufficient to establish that respondent willfully left the children in foster care without making reasonable progress under the circumstances; and
 - c. the trial court did not abuse its discretion in determining that termination was in the children's best interest.

STATUTORY TIME LIMITS

Failure to hold timely permanency planning hearing was harmless error.

In re D.L., ___ N.C. App. ___, 603 S.E.2d 376 (10/19/04).

Facts:

7/23/01 Neglect petition filed and nonsecure custody order was issued.

10/18/01 Children adjudicated neglected and court approved placement with grandfather

9/13/02 Permanency planning hearing held

10/7/02 Permanency planning order entered

Holding: On different grounds, reversed in part and reversed and remanded in part.

The trial court erred in failing to hold the permanency planning hearing within 12 months from the first order removing custody. In light of the court's other holdings, however, the error was harmless.

DSS's failure to file termination petition within statutory time period was not reversible error – statutory directives may be *mandatory* or, as here, *directory*.

In re B.M., M.M., An.M., and Al.M., ___ N.C. App. ___, 607 S.E.2d 698 (2/1/05).

Facts: In May of 2001 DSS and the parents entered into a consent order adjudicating the four children dependent. DSS and other agencies provided numerous services to the family and developed several case plans, which the parents did not follow. In August of 2002 the court relieved DSS of reunification efforts and changed the plan from reunification to adoption. In June of 2003 DSS filed a motion for termination of parental rights alleging three grounds. The court terminated the parents' rights, and they appealed.

Holding: Reversed on other grounds and remanded for new hearing.

The trial court had jurisdiction to enter the termination order despite DSS's having waited eleven months after the court changed the permanent plan before filing the motion. The court of appeals distinguished between statutory language that is mandatory and that which is directory. Failure to meet the 60-day time limit for filing a termination petition or motion was not reversible error because (i) the provision is directory, not mandatory; (ii) reversing a termination order on that basis would work contrary to the very purpose of the requirement; and (iii) respondents did not show any prejudice as a result of the failure.

Entry of order more than six months after hearing was reversible error.

In re L.E.B. and K.T.B., ___ N.C. App. ___, 610 S.E.2d 424 (4/5/05).

Facts: Hearings on DSS's petition to terminate parental rights were held in February and March, 2003, and an order terminating respondent's rights was entered in September, 2003, more than 6 months later.

Holding: Reversed and remanded for new hearing.

The trial court erred in delaying entry of the order for more than six months after the hearing, and the delay was prejudicial to all parties. The court acknowledged its earlier holdings that failing to enter the order in a timely fashion was harmless error when no prejudice was shown. Here, the court concluded that the delay of more than six months was prejudicial in that it affected respondent's right to appeal and, in addition, that it was prejudicial to the interests of all parties.

Failure to enter order within 30 days was prejudicial error.

In re B.P., S.P., and R.T., ___ N.C. App. ___, ___ S.E.2d ___ (4/19/05).

Facts: The children were adjudicated neglected and dependent in 1999 and placed in DSS custody. The trial court held several review hearings, and at a permanency planning hearing in 2001 relieved DSS of the duty to make reunification efforts and ordered that the permanent plan for the children was “with approved caretakers.” That plan was continued at four subsequent reviews. Respondent did not appeal any of these orders. The court held a permanency planning hearing on 2/13/03 and entered an order on 8/13/03 making no change in the plans for B.P. and R.T., but changing the plan for S.P. to adoption. Respondent appealed this order.

Holding: Dismissed in part and reversed in part.

The court held that the trial court’s failure to enter the order for more than six months after the hearing was prejudicial error and required reversal. One judge dissented from this part of the opinion and would have held that respondent had the burden to show prejudice and failed to do that.

Entry of order 16 days after statutory period was not reversible error.

In re A.D.L., J.S.L., and C.L.L., ___ N.C. App. ___, ___ S.E.2d ___ (4/19/05).

Facts: The trial court terminated the parents’ rights on the grounds of neglect, willfully leaving the children in foster care without making reasonable progress, and failure to pay support. The order was entered 46 days after the hearing.

Holding: Affirmed.

Entry of the order 16 days after the 30-day period mandated by statute was not reversible error, where respondent did not argue or show prejudice. Only a concurring opinion acknowledged the court’s holding in *In re L.E.B. and K.T.B.*, ___ N.C. App. ___, 610 S.E.2d 424 (4/5/05) (see above), and the author of that opinion expressed the view that a 16-day delay was not *per se* prejudicial.

Entry of order seven months after hearing was reversible error.

In re T.L.T., N.C. App. ___, ___ S.E.2d ___ (5/17/05).

Facts: The order terminating parental rights was entered approximately seven months after the hearing.

Holding: Relying on *In re L.E.B.*, ___ N.C. App. ___, 610 S.E.2d 424 (2005), the court of appeals reversed and remanded for a new trial, pointing to prejudice to respondent in the delay of her ability to appeal and in her inability to seek visitation with the children.

APPEALS

Respondent was not required to re-establish indigence after giving notice of appeal.

In re D.Q.W., ___ N.C. App. ___, 604 S.E.2d 675 (11/16/04).

Facts: The court terminated the rights of respondent, who was represented by appointed counsel.

Petitioner’s Cross-Appeal:

DSS cross-appealed the trial court’s denial of its motion to dismiss respondent’s appeal because of error relating to respondent’s indigency status. The court of appeals affirmed the trial court’s order, holding

1. Respondent’s indigency and right to counsel were determined pursuant to G.S. 7A-450, *et seq.*, not G.S. 1-288.

2. There was no requirement that respondent serve his affidavit of indigency on petitioner or include it in the record on appeal.
3. Since respondent already had been determined indigent and had counsel appointed in the termination proceeding, there was no requirement that he again establish his indigency, since the appeal was a critical stage of the same proceeding.
4. Failure to comply with the service requirements of Rule 26 of the Rules of Appellate Procedure did not require automatic dismissal or deprive the court of jurisdiction.

- **DSS waived issue of whether notice of appeal was given properly by participating in appeal procedure.**
- **Respondent was not prejudiced by destruction of tape of earlier hearing.**

In re D.L., ___ N.C. App. ___, 603 S.E.2d 376 (10/19/04).

Facts:

After the children were adjudicated neglected and placement with grandfather in 2001, the court held several review hearings. After a permanency planning hearing on 9/13/02 the court announced its decision to continue guardianship with grandfather.

Respondents filed written notices of appeal, including certificates of service indicating that they were served by hand delivery on “the respective party,” but they were not served on DSS. The trial court entered the order from the permanency planning hearing in 10/03 and after that,

5/15/03 Appellate entry forms were filed with the trial court

6/20/03 Notice of Appointment of Appellate Counsel was mailed to all parties

10/6/03 Proposed record of appeal was served on the DSS attorney

11/7/03 DSS attorney wrote to respondents’ attorneys regarding the record on appeal

11/18/03 DSS filed a motion to dismiss the appeal

Holding: Reversed in part and reversed and remanded in part on other grounds.

1. Service of notice of appeal. DSS waived any argument about whether respondents properly filed and served the notice of appeal by participating in appeal procedures before raising the issue. In addition, DSS showed no prejudice, indicating that it learned of respondents’ appeals within a few days after the notice of appeal was filed.
2. Destruction of tapes. Respondent father’s due process rights were not violated when tapes from the 5/17/02 hearing were destroyed. Respondent claimed that the May hearing was the beginning of and part of the permanency planning hearing. Based on the transcript the court of appeals disagreed. In addition, respondent had not alleged any specific harm and had made no attempt to reconstruct a record of the testimony.

Failure of record to include order appointing GAL for child was not reversible error where it was clear from the record that the GAL participated.

In re A.D.L., J.S.L., and C.L.L., ___ N.C. App. ___, ___ S.E.2d ___ (4/19/05).

Facts: The trial court terminated the parents’ rights on the grounds of neglect, willfully leaving the children in foster care without making reasonable progress, and failure to pay support.

Holding: Affirmed.

The fact that the record did not include documents showing appointment of a guardian ad litem for the children did not require reversal, where it was clear from the record that the guardian ad litem was named in the termination petition, was present at every hearing, and carried out her duties.