

# ***Child Welfare Case Update***

*For Social Services Attorneys, Winter 2016 Conference*

Cases Decided from July 21, 2015 – February 2, 2016

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## Abuse, Neglect, Dependency

### Caretaker

**In re R.R.N.**, \_\_\_\_ N.C. \_\_\_\_ (August 21, 2015)

**Held: Affirmed COA** (reversed trial court)

- The trial court must apply a totality of the circumstances test to determine if an adult relative is “entrusted with the juvenile’s care” such that the adult is a caretaker as defined by G.S. 7B-101(3). Factors include the duration, frequency, and location of the care provided by the adult relative as well as the decision-making authority that is given to the adult relative. The adult relative must have a significant degree of parental-type responsibility for the child. A temporary arrangement for supervision is not the equivalent of entrusting an adult relative with the care of a juvenile such that the adult relative is a caretaker.
- The Juvenile Code requires a balance between protecting children and parents’ fundamental rights to parent their children. When applying the purpose of the Juvenile Code, “ultimately, the best interest of the child is the lodestar, but if parents act appropriately to protect their child, their constitutional right to rear that child is paramount,” and DSS may not intervene in the private realm of the family.

- The adult relative who acted as the child's supervisor for one night on one occasion (a sleepover) while the child's mother retained the ultimate responsibility for the child's overall health and welfare is not a caretaker.

## Adjudication: Hearsay Statements of the Child

In re M.A.E., K.M.E., and E.G.H., \_\_\_ N.C. App. \_\_\_ (July 21, 2015)

### Held: Affirmed

- Rule 803(24) of the NC Rules of Evidence allows for the admission of hearsay that is not specifically identified in Rule 803 if the statement
  - has the equivalent circumstantial guarantees of trustworthiness,
  - is offered as evidence of a material fact, and
  - is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable effortsand
  - the general purposes of the rules of evidence and the interests of justice will be best served by the statement's admission.
- A party must give notice to the adverse party of his/her intent to use the statement.
- Admission of a hearsay statement pursuant to Rule 803(24) is reviewed for an abuse of discretion. The court did not abuse its discretion when it admitted the 8-year old child's statements to the DSS social worker that were made at school or to a forensic interviewer made the next day at the children's advocacy center (this was videotaped).
- The child's statements were more probative than other evidence that was reasonably available to DSS even though the court did not rule specifically on whether the child was available to testify. The record showed the child's testimony would be detrimental to her welfare.
- When determining if the statement has a circumstantial guarantee of trustworthiness, the court must consider four factors ("the Valentine factors"):
  - Whether the declarant had personal knowledge of the underlying events,
  - Whether the declarant is motivated to speak the truth,
  - Whether the declarant has ever recanted the statement, and
  - Whether the declarant is available at trial for meaningful cross-examination.
- Failure to make findings of all four Valentine factors is not fatal, for an appellate court will look to the entire record to determine if the statement is admissible.
  - The record contains evidence that the child was unavailable at trial due to the detrimental affect testifying would have on her welfare.
  - The record contains evidence that the child was motivated to speak the truth when she made the statements. She was in a comfortable and safe setting, used age-appropriate language, was asked open ended questions, and did not appear afraid or upset.
- When determining the guarantee of trustworthiness of the statement, a court will look at whether the witness is capable of expressing herself about the matter so as to be understood and of understanding the duty to tell the truth. The court did not abuse its discretion when determining the statement had a guarantee of trustworthiness when the

court found the child understood the difference between the truth and a lie but would be unlikely to understand the concept of swearing on a bible.

- The court declined to review the admission of the 12-year old child's hearsay statements because the respondents were not prejudiced by the admission of these statements. There was sufficient independent evidence that supported the trial court's findings and conclusions.

## Adjudication: Findings of Fact

**In re C.B.**, \_\_ N.C. App. \_\_ (February 2, 2016)

**Held: Affirmed**

**There is a dissent**

- Findings of fact that were challenged by the respondent mother were supported by clear and convincing competent evidence in the record. The evidence included testimony from the child welfare social workers and for some of the challenged findings, respondent mother's own testimony.
- Unchallenged findings are binding on appeal. Some of the findings that were challenged by the respondent mother were supported by additional unchallenged findings of fact made by the court.

## Abuse: Cruel or Grossly Inappropriate Procedures to Modify Behavior

**In re F.C.D.**, \_\_ N.C. App. \_\_ (December 1, 2015)

**Held: Affirmed**

- The findings are supported by competent evidence and support the conclusion that the child was abused.
- A juvenile is abused when his or her parent, guardian, custodian, or caretaker uses or allows to be used upon him or her cruel or grossly inappropriate procedures or devices to modify his or her behavior. G.S. 7B-101(1)(c). This definition focuses on the severity and brutality of the procedures and devices that are used by the parent, guardian, custodian, or caretaker and does not examine the child's behavior that the procedures or devices were meant to correct.
- The following procedures constitute abuse: forcing the child to sleep outside on at least two cold nights in February, binding the child to a tree, ordering the child to pray while the caretaker held a firearm, requiring the child to conduct a self-baptism in a bathtub of water, striking the child with a belt all over his body, and telling the child he was possessed by a demon such that the child began to believe it was true.

## Abuse: Sexual Acts By and Upon a Juvenile

**In re M.A.E., K.M.E., and E.G.H.**, \_\_ N.C. App. \_\_ (July 21, 2015)

**Held: Affirmed**

- The definition of abuse at G.S. 7B-101(1)(d) includes a parent who has permitted or encouraged the commission of certain sex crimes by, with, or upon the child. The evidence supported the court's findings that the older sibling repeatedly sexually abused

the younger sibling and the respondent parents were aware of the abuse based on the younger sibling's disclosures of her victimization. The evidence also showed the older sibling was adjudicated delinquent after admitting to multiple counts of second degree statutory rape and second degree statutory sexual offences against his younger sisters. The evidence further supports the finding that the respondent parents did not take appropriate remedial measures to prevent the sexual abuse from recurring. Based on the definition of abuse, the older sibling who committed the acts and the younger sibling victim are abused juveniles.

## Neglect: Injurious Environment

**In re Q.A.**, \_\_\_ N.C. App. \_\_\_ (January 19, 2016)

### **Held: Reversed & Vacated in Part; Remanded**

- Neglect is based on the circumstances and conditions surrounding a child, not the fault of a parent. When five siblings are subjected to the same circumstances (lack of plumbing, electricity, food, and a home while in the care of their grandmother), they are all living in an injurious environment and are neglected. The court erred in adjudicating two siblings neglected (mother unavailable and father incarcerated) but dismissed the action as to the other three siblings because placement with their father was an option.
- Disposition is required after an adjudication. Availability of parent is factor to consider at disposition when determining placement and continued jurisdiction in juvenile action.

**In re F.C.D.**, \_\_\_ N.C. App. \_\_\_ (December 1, 2015)

### **Held: Affirmed**

- The findings are supported by competent evidence and support the conclusion that the child was neglected.
- G.S. 7B-101(15) includes in the definition of neglect that it is relevant whether the juvenile lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home. This definition gives the court some discretion in determining if the child is at risk for a particular kind of harm based on the child's age and living environment.
- An injurious environment may include a home that exposes a child to witnessing another child's abuse and neglect even when the child who is the witness is not physically harmed him/herself. Evidence that the child's witnessing her brother's abuse and neglect would be distressing for her and could cause fear and worry that something like that might happen to her supports the court's adjudication of neglect.

## Neglect: Harm to Child

**In re J.R.**, \_\_\_ N.C. App. \_\_\_ (October 6, 2015)

### **Held: Reversed**

- The findings are not supported by competent evidence and also do not support the conclusion that the child was neglected.
- An adjudication of neglect requires that the failure to provide proper care, supervision, or discipline results in the child experiencing some physical, mental, or emotional impairment or substantial risk of such impairment. Neglect also requires

a parent, guardian, custodian, or caretaker to engage in “either severe or dangerous conduct or a pattern of conduct either causing injury or potentially causing injury to the juvenile.”

- A court should look at the totality of the evidence when determining if the child is neglected. The mother’s lack of stable housing, causing frequent moves, did not impede her ability to care for and supervise her child nor did it expose her child to an environment injurious to his welfare. The child’s contact with his father at a public bus stop and on the public bus was also not neglect even though it was a violation of the safety agreement signed by both the respondent mother and father and a violation of the father’s probation resulting from his conviction of taking indecent liberties with a minor. There was no evidence that this single contact harmed the child or created a risk of harm to the child.

## Neglect : Child with Serious Mental Health Condition

In re C.B., \_\_ N.C. App. \_\_ (February 2, 2016)

**Held: Affirmed**

**There is a dissent based on a parent’s constitutional right to choose a different course of medical treatment for her child than what is recommended by the medical provider and preferred by DSS**

- The court’s ultimate finding that the child was neglected was supported by the multiple court findings of fact that demonstrated the 10-year old child had significant mental health issues resulting in multiple psychiatric hospitalizations in a short period of time; the mother minimized and denied the seriousness of the child’s condition; the mother continuously failed to obtain meaningful mental health treatment for her daughter and exacerbated her daughter’s condition; and the child was at substantial risk of a physical, mental, or emotional impairment as a result.
- Although a parent has a paramount constitutional right to care, custody, and control over her child, that right is not absolute and does not include neglecting her child’s welfare. In this case, the parent was unjustified in her unwillingness or inability to obtain meaningful medical care for her child who was experience a serious illness. The failure to obtain medical treatment constitutes neglect.
- The sibling of the child with a severe mental illness is also a neglected juvenile based on the following findings of fact: the respondent mother allowed her daughter to be continually exposed to her sibling’s erratic and violent behavior, and the child was directly and negatively affected by each of the incidents she was exposed to; respondent mother was not concerned about the effect the exposure was having on her daughter; and respondent mother failed take efforts to mitigate the sibling’s behavior by obtaining meaningful medical services for the sibling. The court noted the definition of neglect includes the relevance of whether the juvenile lives in a home where another juvenile has been subjected to neglect.

## Neglect: Out-of-State Acts

In re T.N.G., \_\_ N.C. App. \_\_ (December 15, 2015)

**Held: Affirmed**

- Acts that occurred in South Carolina may be considered by the North Carolina trial court when determining whether the child was neglected. It was undisputed the child was left in SC, “was shifted among various adults whose relationship to the child was increasingly attenuated” and was eventually left with her father’s half-brother’s stepmother’s mother-in-law, who was 78 years old.
- Evidence that the 9-year-old child shared a bed with two other children, one of whom was her 7-year-old male cousin, who tried five times to kiss or touch her private parts, supports the conclusion that the child did not receive proper care or supervision from a parent.
- Additional evidence that the child was present when adults were using marijuana and that she was passed around from one adult’s home to another without her parent determining if these adults were fit caretakers supports the conclusion that she was at substantial risk of harm or impairment.

## Dependency

**In re C.B.**, \_\_ N.C. App. \_\_ (February 2, 2016)

**Held: Affirmed**

**There is a dissent based on a parent’s constitutional right to choose a different course of medical treatment for her child than what is recommended by the medical provider and preferred by DSS**

- A child is dependent when her parent (guardian or custodian) (1) is unable to provide for her care or supervision and (2) lacks an appropriate alternative child care arrangement. The findings of fact that show the 10-year old child had significant mental health issues resulting in multiple psychiatric hospitalizations in a short period of time; respondent mother refused to participate in and obstructed the development of an appropriate hospital discharge plan for her daughter; respondent mother failed to obtain any meaningful mental health services for her daughter when her daughter was in her custody; and respondent mother failed to identify any viable placement alternatives outside of the mother’s home support the court’s determination that the child was dependent.

**In re T.N.G.**, \_\_ N.C. App. \_\_ (December 15, 2015)

**Held: Reversed**

- The order did not contain any findings and there is no indication in the record of evidence addressing the respondents’ ability to provide care or supervision to the child.

## Appeal of Adjudication After Temporary Disposition Order

**In re P.S.**, \_\_ N.C. App. \_\_ (August 4, 2015)

**Held: Appeal Dismissed**

- Procedural history: After a child was adjudicated neglected, the action was transferred to another judicial district for the initial dispositional hearing. At adjudication, the court



entered a *temporary* disposition order that granted custody of the child to DSS and approved the child's current placement with a relative pending the dispositional hearing and order. Respondent mother appealed the adjudication and change of venue.

- G.S. 7B-1001(a) authorizes an appeal of a "final order." An adjudication is not a "final order" until there is a final disposition order after the dispositional hearing. Citing prior cases, G.S. 7B-1001(a)(3) does not authorize an appeal of a temporary disposition order. Appeal of the adjudication must be made after the dispositional hearing is held and a "final" initial dispositional order is entered.
- A change in custody made in a temporary disposition order prior to the initial dispositional hearing is similar to a nonsecure custody order or an interlocutory temporary custody order in a G.S. Chapter 50 civil custody action, neither of which may be appealed. A temporary dispositional order is not "an order that changes legal custody of a juvenile" that may be appealed pursuant to G.S. 7B-1001(a)(4).

## Adjudication: GAL for Respondent Parent

In re D.L.P. and H.L.P., \_\_\_ N.C. App. \_\_\_ (August 18, 2015)

### Held: Vacated and Remanded

- When a court determines a respondent parent is incompetent and requires a Rule 17 GAL, the court may not proceed with a hearing if the appointed substitute GAL is not present.
- In this case, the record does not reflect when the court determined the respondent mother required a substitute GAL. The respondent mother was not present at the adjudication hearing and had not communicated with her attorney. It appears a GAL was appointed to the mother because of her erratic and harmful behavior at the disposition hearing along with evidence of her difficulties that resulted from a traumatic brain injury. Because the timing of the court's determination of the mother's need for a GAL is unknown, and the GAL appointed for the respondent mother was not present at the adjudication or disposition hearings, the orders adjudicating the juveniles neglected and dependent and the disposition orders are vacated. Case is remanded for further proceedings.

## Ineffective Assistance of Counsel (IAC)

In re C.B., \_\_\_ N.C. App. \_\_\_ (February 2, 2016)

### Held: Affirmed

#### There is a dissent based on an insufficient record to determine the issue

- A successful ineffective assistance of counsel claim requires a parent to show (1) the attorney's performance was deficient, and (2) the deficient performance was so serious that it deprived the parent of a fair hearing. Respondent mother claimed IAC because her attorney did not review her daughter's medical records or subpoena the hospital social worker and psychiatrist. Respondent mother failed to meet her burden to prove IAC as the attorney's conduct did not fall below an objective standard of reasonableness and there was not a reasonable probability that there would have been a different result. DSS presented "overwhelming" evidence to support the adjudications of both children.

## Disposition: Authority to Order Services

**In re T.N.G.,** \_\_ N.C. App. \_\_ (December 15, 2015)

**Held: Affirmed**

- The court had the authority under G.S. 7B-904 to order the respondent father to maintain stable employment and obtain a domestic violence assessment. The addendum to the petition alleging neglect stated in part that the respondent reported he is unemployed and unable to care for his daughter and DSS has concerns about the respondent parents admitted domestic violence history. The evidence at the hearing established a nexus between the circumstances that led to the child's removal from her father's custody and the court's dispositional order.

## Disposition: Evidence/Reports

**In re J.H.,** \_\_ N.C. App. \_\_ (December 1, 2015)

- The Rules of Evidence do not apply to a disposition hearing. A report may be submitted to and considered by the court without a formal proffer and admission into evidence as exhibits. When reports are received by the court, a party must object to the court's consideration of the report at the hearing in order to preserve the issue of the court's consideration of the report for an appeal.

## Disposition: Visitation

**In re J.H.,** \_\_ N.C. App. \_\_ (December 1, 2015)

**Held: Remanded**

- An order that awards the mother monthly visitation in North Carolina to be supervised by the maternal grandparents at a location of their choice does not comply with G.S. 7B-905.1. Although the order establishes the frequency and level of supervision for the visits, it fails to establish the length of the visit, which is also required by the statute.

## Disposition: Guardianship

**In re J.H.,** \_\_ N.C. App. \_\_ (December 1, 2015)

**Held: Remanded**

- The court must make independent findings that the prospective guardians have adequate financial resources to provide for the child. Findings that the prospective guardians met the child's well-being needs, had guardianship of the child's sibling, and that the child had no current financial or material needs are insufficient to support a finding that the prospective guardians have adequate financial resources.
- The court must verify the guardians are aware of the legal significance of a guardianship.
- For a permanent plan that considers custody or guardianship to a non-parent, the court must address whether the parent is unfit or has acted inconsistently with his/her parental rights.

## Disposition: Waive Review Hearing

**In re J.H.**, \_\_ N.C. App. \_\_ (December 1, 2015)

**Held: Remanded**

- The court must make findings of each of the five factors set forth in G.S. 7B-906.1(n) to waive further permanency planning hearings. Failure to do so is reversible error. There were no findings for three of the five factors.

## Responsible Individual List (RIL)

**In re F.C.D.**, \_\_ N.C. App. \_\_ (December 1, 2015)

**Held: Affirmed**

- The RIL hearing was heard with the juvenile adjudicatory hearing regarding abuse and neglect. The respondent was not deprived of her right in the RIL hearing to represent herself or retain her own attorney when her court appointed attorney in the juvenile abuse and neglect action represented her on both matters.
- Respondent mother allowed the child's caretaker (an adult who lived in the household) to use cruel or grossly inappropriate devices or procedures to modify her son's behavior. Allowing such use satisfies the definition of abuse at G.S. 7B-101(1)(c). Respondent mother's name was appropriately placed on the RIL.

## Termination of Parental Rights

### District Court Jurisdiction

**In re A.L.**, \_\_ N.C. App. \_\_ (January 19, 2016)

**Held: Affirmed**

- Even when a department had custody of a child as a result of a properly executed relinquishment, the district court did not have jurisdiction to issue custody review orders after DSS voluntarily dismissed a petition alleging neglect and dependency. Any custody review orders entered after the petition was dismissed were void.
- The district court acquired jurisdiction when a petition to terminate parental rights was filed by a person or agency with standing. The department had standing to initiate this new action based on the mother's relinquishment of custody of the child to the department (G.S. 7B-1103(a)(4)).

### Subject Matter Jurisdiction: G.S. 7B-1101

**In re M.C.**, \_\_ N.C. App. \_\_ (December 15, 2015)

**Held: Vacated**

- Subject matter jurisdiction for a termination of parental rights (TPR) requires compliance with both G.S. 7B-1101 and the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) found in G.S. Chapter 50A.
- G.S. 7B-1101 requires that the child resides in, is found in, or is in the legal or actual custody of a county department or licensed child-placing agency in the judicial district at the time the TPR petition or motion is filed. If a child does not fall under one of these criteria, the court does not have subject matter jurisdiction under G.S. 7B-1101. In this case, the petitioner had custody of the two children who are the subject of this action. The children have resided with their mother/the petitioner in Washington state since 2007, and the children were not found in North Carolina when the petition was filed. The district court did not have subject matter jurisdiction over the TPR action.
- Although the respondent appealed the orders based on the UCCJEA, the court may sua sponte review the issue of subject matter jurisdiction de novo at any time. The UCCJEA addresses a state's jurisdiction to enter child custody orders; it does not address venue within the state.

## Standing

**In re J.A.U. and S.A.U.**, \_\_\_ N.C. App. \_\_\_ (August 18, 2015)

**Held: Vacated**

- Maternal grandmother who had custody of child pursuant to a G.S. Chapter 50 custody order is not a “judicially appointed guardian of the person of the juvenile,” and therefore, does not have standing to initiate a TPR pursuant to G.S. 7B-1103(a)(2). Despite the 2013 change in the definition of “custodian” under the Juvenile Code, the Code still recognizes a distinction between guardian and custodian. Only a guardian has standing to initiate a TPR.
- The evidence does not support the court's finding that the child lived with the petitioner for most of the child's life and instead supports a finding that the child lived with the petitioner for less than one year before the TPR petition was filed. G.S. 7B-1103(a)(5) requires a child to have continuously resided with the petitioner for two years preceding the filing of the TPR petition. The statutory standard is not based on the relationship between the child and petitioner but is instead based on the time the child resided with the petitioner prior to filing the petition.
- Standing is a threshold issue and without proper standing by a petitioner for TPR, a court does not have subject matter jurisdiction over the action.

## Grounds: Hearsay Evidence

**In re C.R.B.**, \_\_\_ N.C. App. \_\_\_ (January 19, 2016)

**Held: Affirmed**

- Over respondent mother's hearsay objection, the DSS social worker testified to events based upon a DSS report that included information about the case prior to this specific social worker's involvement with the family. Findings of fact to support the court's conclusion that the mother willfully left the children in foster care for more than 12 months without showing reasonable progress to correct the conditions that led to the children's removal (G.S. 7B-1111(a)(2)) were based on the social worker's testimony.

That testimony relied in part on the DSS report. The testimony was not hearsay as it fell under the business record exception to hearsay codified at G.S. 8C-1, Rule 803(6).

- At hearing, a foundation for the business record exception must be made by a person familiar with the records and system under which the business record is made but is not required to be authenticated by the person who made the actual business record. The social worker testimony satisfied the foundation requirement for the business record exception. Her testimony regarding what was in the record was admissible.

## Grounds: Findings

**In re A.B.**, \_\_\_ N.C. App. \_\_\_ (January 19, 2016)

**Held: Affirmed**

- All findings of fact for an adjudicatory hearing must be supported by clear, cogent, and convincing evidence (G.S. 7B-1109). Although the order did not state *all* the findings were made by clear, cogent, and convincing evidence, the trial court used the correct standard when it orally indicated the standard it was applying (clear, cogent, and convincing evidence), had one of the 70 findings state the appropriate standard, and did not have any other contradictory standard contained in the order.
- It was not error for the court to find “the Department of Social services has substantially proven the facts that were alleged in paragraphs a-k of the termination of parental rights petition by clear, cogent, and convincing evidence.” Citing *In re J.W.*, \_\_\_ N.C. App. \_\_\_, 772 S.E. 2d 249 (2015), it is not necessarily reversible error for a trial court’s findings of fact to mirror the wording of a party’s pleading. Although one finding of fact includes the language of the petition, there were a total of 70 findings of fact, making it clear that the trial court made an independent determination of the facts and did not merely recite the allegations in the petition.

## Neglect

**In re C.L.S.**, \_\_\_ N.C.App. \_\_\_ (January 19, 2016)

**Held: Affirmed**

**There is a dissent**

- *Citing* previous published opinions, “incarceration alone ... does not negate a father’s neglect of his child.” A parent can show an interest in his child’s welfare despite being incarcerated.
- There was sufficient evidence provided through the DSS social worker that the father neglected C.L.S. by failing to provide love, support, affection, and personal contact to the child from the time paternity was established up to the termination hearing. Specifically, after the father’s paternity was adjudicated, he stated he did not want to pursue reunification. Later, he expressed an interest in reunification but failed to attend appointments with the social worker. After being incarcerated, he failed to sign the case plan, meet the child, or provide financial support for the child.

**In re E.L.E.**, \_\_\_ N.C. App. \_\_\_ (October 6, 2015)

**Held: Reversed**

- A termination of parental rights based on neglect requires a finding about the probability of the repetition of neglect when the child has not been in the parent’s

custody for a significant period of time before the TPR hearing. Without this finding the court may not terminate a parent's rights on the ground of neglect set forth at G.S. 7B-1111(a)(1).

**In re M.P.M.**, \_\_\_ N.C. App. \_\_\_ (September 1, 2015)

**Affirmed** \*There is a dissent

- A parent's rights may be terminated on the grounds of neglect when there is evidence of neglect at the time of the adjudication hearing and of a probability that the neglect will be repeated if the child is returned to the parent's care. A court may look to the historical facts of the case when predicting the probability that neglect will occur in the future.
- Completion of a case plan by a parent does not preclude a court's conclusion that the grounds of neglect exist for termination of that parent's rights. In this case, the respondent father participated in a psychological evaluation, attended ten therapy sessions, and interacted appropriately during his supervised visits with his daughter. Attendance alone is not sufficient. The court's conclusion that he failed to learn in therapy how to protect his daughter, particularly from her abusive mother, and therefore, was likely to result in a future neglect was supported by findings of fact.
- The findings of fact were supported by competent, clear, cogent, and convincing evidence, including the DSS social worker's testimony. The court found that respondent father failed to acknowledge his participation in the abuse of the children that were in the home, lied about his continued contact with the children's mother, and was unable to protect his daughter from her abusive mother.
- A trial court may consider a respondent's in-court demeanor. The court's findings of fact of a "respondent's in-court demeanor, attitude, and credibility...are left to the trial judge's discretion."

## Grounds: Willfully Leave in Foster Care for 12+months w/o Making Reasonable Progress to Correct Conditions

**In re E.L.E.**, \_\_\_ N.C. App. \_\_\_ (October 6, 2015)

**Held: Reversed**

- A mother's termination of parental rights cannot be based on G.S. 7B-1111(a)(3) [for a continuous period of six months before the filing of the TPR petition, a parent has willfully failed to a reasonable portion of the cost of a child's care when the child has been placed in the custody of a county department, licensed child caring institution, or foster home] when the child is in the custody of relatives pursuant to a civil custody order. Although the child was initially placed in the petitioner's home as part of an abuse, neglect, and dependency case, seven months before the TPR petition was filed, the juvenile court terminated its jurisdiction after entering a civil custody order that granted custody to the petitioners. The petitioners, who are the child's great aunt and uncle, are not a foster home as defined by G.S. 131D-10.2. Because they had legal custody of the child, the definition of foster home that requires the child's placement in the home by a child placing agency was not met. Because they are related to the child by blood, the petitioners do not meet the other

criteria of a foster home, which is to provide full-time foster care for two or more children who are unrelated to the adult members of the household.

**In re S.D.**, \_\_\_ N.C. App. \_\_\_ (September 1, 2015)

**Reversed and Remanded**

- Pivotal findings of fact are not supported by the evidence, and the findings of fact do not support the conclusion of law that the respondent mother failed to make reasonable progress to correct the conditions that led to the child's removal.
- Respondent mother was ordered to:
  - consistently visit with her child, and the court found the mother consistently and punctually attended the visits;
  - obtain and maintain suitable housing, and the court stated (there were not findings in the order) the housing was suitable (mother had been living in a friend's home for 9 months);
  - submit to a substance abuse evaluation and follow recommendations, and the court found she completed an evaluation, which had no treatment recommendations, and she had one drug screen that was negative;
  - complete a parenting class and demonstrate knowledge of what she learned, and the court found she attended a program; and
  - maintain regular contact with the DSS social worker, and the court found that she did.
- Respondent mother was also ordered to resolve all pending criminal charges. The court found the mother's charges were unresolved and there was no indication as to when a resolution would occur. However, the evidence showed that respondent's criminal charges may have been resolved in a week's time. Although it is not reasonable to wait years for the criminal process to conclude, the potential for an imminent resolution should have been considered.
- Respondent mother was ordered to obtain and maintain legal employment sufficient to meet both her and her child's needs. The court found the mother obtained a part time job, earning \$435/month, and that she applied for SSI. Although the social worker indicated \$435/month was insufficient to meet the needs of a household of two, parental rights may not be terminated on the sole basis of poverty. G.S. 7B-1111(a)(2).
- Mother was ordered to complete a psychological evaluation and follow recommendations. The finding of fact that the evaluation recommended "intensive individual counseling" was not supported by evidence that showed the mother complete "individual counseling services." The court found the mother attended therapy as recommended by her therapist.
- "While 'extremely limited progress is not reasonable,' ...certainly perfection is not required to reach the 'reasonable' standard."

## **Grounds: Failure to Pay Reasonable Portion of Cost of Care**

**In re A.L.**, \_\_\_ N.C. App. \_\_\_ (January 19, 2016)

**Held: Affirmed**



- By operation of law (G.S. 48-3-703), the department acquired custody of the child upon the mother's executed relinquishment to the department. As a result, the child is placed in the custody of a county department of social services. One ground to terminate parental rights is based on a parent's failure to pay a reasonable portion of the cost of care for a juvenile placed in the custody of a county department when the parent is physically and financially able to do so. G.S. 7B-1111(a)(3).
- The evidence supports the court's findings that the father had an ability to pay a reasonable amount of child support and that he failed to do so. There was a child support order. He signed a memorandum of agreement that he had an ability to pay. There was evidence he was employed as a mechanic and a truck driver. He only made two payments in three years and they were made in connection with contempt proceedings brought against him.

## Findings: Remand Instructions

**In re A.B.**, \_\_\_ N.C. App. \_\_\_ (January 19, 2016)

### **Held: Affirmed**

- When the appellate court remands an order that was appealed to the trial court with specific direction to make its order internally consistent, the remand requires the trial court to make new findings and omit other findings. These changes would contradict findings the trial court had orally rendered for inclusion in the first order.
- When applied in context, the direction on remand for the trial court to "clarify" its findings of fact and conclusions of law required the trial court to make whatever changes necessary to make the order internally consistent. This would result in significant changes from the first order that was internally inconsistent.
- When a remand allows for a trial court to exercise discretion in determining if it will receive additional evidence, the trial court is not obligated to consider new evidence. Even with the passage of time, the determination of whether to hear new evidence is left with the trial court, and in this case, no motion was made for the court to hear new evidence, and respondent failed to show how the court abused its discretion by not hearing new evidence before entering a new order.

## UCCJEA

### No Home State

**In re T.N.G.**, \_\_\_ N.C. App. \_\_\_ (December 15, 2015)

### **Held: Subject Matter Jurisdiction Existed**

- Timeline:
  - From birth in 2005 until November 2013, the child resided in North Carolina.



- Father brought child to South Carolina in November 2013 and left her there with his half-brother, who then gave the child to his stepmother, who in May 2015 gave the child to her mother-in-law.
- September 2014, the child's paternal grandparents were contacted by the last person child was left with, and the paternal grandparents picked up the child and brought her back to live with them in North Carolina.
- October 2014, the paternal grandparents made a report to the county DSS, who filed a petition alleging neglect and dependency.
- The mother and paternal grandparents lived in North Carolina from child's birth through the date the petition was filed; and with the exception of a ten month period, the child and her father resided in North Carolina.
- At a hearing in October 2014 to address the respondent father's motion to dismiss for lack of subject matter jurisdiction under the UCCJEA, the court found it had temporary emergency jurisdiction under the UCCJEA. Six months after the petition was filed, the child was adjudicated neglected and dependent. Respondent father appeals.
- North Carolina had initial child custody jurisdiction under the UCCJEA, G.S. 7B-201(a)(2). NC was not the home state under G.S. 50A-102(7) when the petition was filed because the child had only been back in NC for a few weeks (versus six months). Although SC had been the child's home state within six months before the petition was filed, no parent or person acting as a parent resided in SC when the petition was filed as required by G.S. 7B-201(a)(1). Neither state was the home state at the time the petition was filed. NC had "significant connection jurisdiction" because:
  - the child, both her parents, and the paternal grandparents who were acting as her parent all have a significant connection to NC and
  - there is substantial evidence of the child's care, protection, training, and personal relationships available in NC.

## Modification Jurisdiction (G.S. 50A-203): A/N/D

**In re J.H.**, \_\_ N.C. App. \_\_ (December 1, 2015)

**Held: Vacate and remand**

Timeline:

- April 2013, child born in NC and lives in NC
- November 22, 2013, mother and child move to TX, father remains in NC
- January 29, 2014, Texas custody order, sole custody to mother, father not yet established paternity. This order is not in the court of appeals record so it is unclear if the TX court exercised temporary emergency jurisdiction, exclusive continuing jurisdiction, or acted in substantial conformity with the UCCJEA.
- February 20, 2014, mother and child return to NC
- March 7, 2014, DSS files A/N/D petition in NC, nonsecure custody granted to DSS, and child placed with maternal grandparents
- June 19, 2014, adjudication (neglected and dependent) and disposition order
- September 2, 2014, review order
- February 23, 2015 permanent planning order of guardianship to maternal grandparents and the court finds the mother resided in TX since the inception of

the case

- Texas issued an initial custody order, requiring NC to have either modification jurisdiction (G.S. 50A-203) or temporary emergency jurisdiction (G.S. 50A-204).
- NC did not have modification jurisdiction because only one of the two jurisdictional requirements was met. The requirement that NC have jurisdiction to make an initial custody determination was met because NC was child's home state six months before the A/N/D action was commenced in March, since the child lived in NC from his birth in April 2013 until November 22, 2013. The second requirement that TX determines that it no longer has exclusive continuing jurisdiction or NC would be a more convenient forum, or neither parent nor the child presently reside in TX was not met. The court found the mother resided in TX. The NC court never communicated with the TX court for the TX to determine if it had continuing exclusive jurisdiction.
- Under G.S. 50A-204, NC had temporary emergency jurisdiction to enter the nonsecure custody order because the child was present in NC and the order was necessary to protect the child who is subjected to mistreatment or abuse. However, the NC court did not communicate with the TX court or specify in the order the time period for the temporary order. The adjudication, disposition, review, and permanency planning orders are vacated.
- Remanded for the NC trial court to examine the Texas order and determine if TX exercised temporary emergency jurisdiction, exclusive continuing jurisdiction, or jurisdiction in substantial conformity with the UCCJEA when issuing its January 2014 order. Depending on the trial court's determination of how the TX court exercised jurisdiction, the NC court must communicate with the TX court. If NC determines it does not have subject matter jurisdiction, it must dismiss the petition.

## Related Criminal Cases

### Parental Kidnapping

**State v. Pender**, \_\_\_ N.C. App. \_\_\_ (September 1, 2015)

#### **Vacated (convictions of 2<sup>nd</sup> degree kidnapping of defendant's sons)**

(no error as to remaining convictions: violating DVPO, possession of firearm by a felon; first degree burglary, assault by pointing a gun, second degree kidnapping)

- **Facts:** Defendant confined twelve people, several of whom were younger than 16 years old, in a bedroom for 30 – 45 minutes and held them at gunpoint. Two of the minors were defendant's children.
- G.S. 14-39(a) includes in the definition of kidnapping the unlawful confinement of any person under 16 years of age without the consent of a parent or legal custodian of the child. There is no kidnapping when a parent or legal custodian consents to the unlawful confinement of his own minor child, even if the child does not consent. Only one parent is required to consent. A legislative change would be needed to charge a parent with kidnapping of his own minor child.
- A victim's age is not an essential element of the crime of kidnapping, but is a factor that

relates to the state's burden of proof in showing consent was not provided by the parent or guardian of a child younger than 16. An indictment that alleges a child younger than 16 (versus the child's parent or legal custodian) did not consent is adequate.