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JUVENILE LAW UPDATE

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Child's Guardian ad Litem

- The trial court did not err in conducting a termination of parental rights hearing when the child's guardian ad litem was not present.

In re J.H.K. __ N.C. __, __ S.E.2d __ (6/16/11).

<http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMS8zNjlQQTewLTEucGRm>

Facts: DSS filed a petition to terminate respondent-father's rights when the two children had been in foster care for about 2 ½ years, based on repeated failure to make sustained progress in dealing with substance abuse issues. The children's GAL filed a two-page report with the court but did not attend the termination hearings. The attorney advocate was present. The court adjudicated the neglect and dependency grounds and terminated respondent's rights.

The court of appeals held that it was error for the trial court to conduct the termination hearing without the presence of the children's GAL, interpreting the Juvenile Code to require the GAL's presence in order for the juvenile to be properly "represented." The court presumed prejudice and reversed and remanded. *See In re J.H.K.*, __ N.C. App. __, 695 S.E.2d 162 (7/6/10), <http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100012-1.pdf>

Held: The N.C. Supreme Court granted a petition for discretionary review and reversed. After reviewing the relevant statutes – G.S. 7B-601, 7B-1108, and 7B-1200 – the court

1. noted that the duties of the guardian ad litem and the attorney advocate are the duties of the GAL program, as set out in G.S. 7B-601.
2. pointed out that the statute permits one person who is an attorney to serve as both the child's guardian ad litem and the attorney advocate.
3. characterized the GAL program as one in which participants work as a team to represent the juvenile.
4. pointed out the extent to which a guardian ad litem's role involves out-of-court activities.
5. disagreed with the notion that the General Assembly intended to use the word "represent," in relation to the role of the GAL, to require the GAL to appear at every hearing, "unless the attorney advocate or the trial court deems the GAL's presence necessary to protect the minor's best interests."

The court remanded for the court of appeals to address issues it had not addressed in its first opinion.

- A GAL Program staff member may be appointed and serve as a child's guardian ad litem.
- Absence of the child's guardian ad litem from the adjudicatory and dispositional hearings was not error when the record showed that the Program adequately represented the child.
- Findings about a physical altercation initiated by respondent while holding an infant were sufficient to support the adjudication of abuse and neglect.

In re A.N.L., __ N.C. App. __, __ S.E.2d __ (7/5/11).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMS0xOC0xLnBkZg==>

Facts: Respondent mother and her boyfriend had a physical altercation, initiated by respondent, while respondent was holding the one-month-old child. Respondent fell while holding the child and was beaten repeatedly by her boyfriend. When law enforcement arrived, she did not disclose

that the boyfriend had beaten her. The child was not injured, but respondent suffered “knots and bruises.” Two days later DSS filed a petition alleging that the child was abused, neglected, and dependent, and the following day respondent signed a “memorandum of consent” agreeing to placement of the child with DSS. Eight days later the court appointed a GAL Program staff member as guardian ad litem and an attorney as attorney advocate for the child. The trial court adjudicated the child abused and neglected and continued custody with DSS and placement with respondent’s mother, after a hearing at which the attorney advocate questioned witnesses and concurred in DSS’s recommendations.

Held: Affirmed.

1. Appointment of a GAL Program staff member as the child’s guardian ad litem was not error and was consistent with statutory requirements.
2. Conducting the adjudication and disposition hearings without the child’s guardian ad litem being present was not error, because the record showed that the GAL Program adequately represented the child. [Citing *In re J.H.K.*, ___ N.C. ___ (2011). See summary above.]
3. Evidence supported the findings respondent challenged, and the findings supported the conclusion that the child was abused and neglected, where respondent created a substantial risk of serious physical injury to the child and failed to report the incident to law enforcement.

Abuse, Neglect, Dependency

Permanency planning: findings required when custody given to other parent

- At a permanency planning hearing, a child is “returned home” only if returned to the home of the parent from whose home the child was removed.
- When a case is remanded for additional findings, whether to take additional evidence is in the trial court’s discretion.

***In re J.M.D.*, ___ N.C. App. ___, 708 S.E.2d 167 (3/15/11)**

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDAxLTEucGRm>

Facts: In an earlier appeal [*In re J.M.D.*, 200 N.C. App. 617, 687 S.E.2d 710 (2009) (unpublished)], the court of appeals held that the trial court failed to make sufficient findings under G.S. 7B-907 in a permanency planning order granting custody to the child’s biological father, and remanded. Upon remand, the trial court refused to hear additional evidence or to allow the mother to make an offer of proof. The court made findings that primarily reiterated its opinion that the criteria listed in G.S. 7B-907(b) were not applicable because the child had been placed in the custody of a parent.

Held: Reversed and remanded.

1. At the hearing after remand, whether to take additional evidence was in the trial court’s discretion, and respondent did not show an abuse of discretion.
2. The court of appeals held (i) that the trial court, by not making findings under G.S. 7B-907(b) in its second order, failed to carry out the mandate of the court of appeals, and (ii) that the applicability of that subsection when the court places a child with a parent who is not the parent from whom the child was removed was the law of the case.

3. The findings that G.S. 7B-907(b) requires “if the juvenile is not returned home,” are required unless the juvenile is returned to the home of the parent from whose home the child was removed. Even though most of those are inapplicable, the court should have made findings under G.S. 7B-907(b)(6) – “[a]ny other criteria the court deems necessary.”
4. The part of the trial court’s order that purported to transfer the case to civil court upon proper motion of a party was invalid, because the court did not make the findings required by G.S. 7B-201 and 7B-911 and did not terminate jurisdiction in the juvenile case.
5. In a footnote, the court pointed to the father’s absence and the fact that he was not represented at the hearing on remand, as well as the question of whether the father’s attorney had been released from the case. The court directed that on remand the trial court both ensure that the father receive notice and consider whether counsel should be appointed for him.

Parent’s protected rights at permanency planning

- The court cannot award permanent custody to a non-parent without finding that the parents are unfit or have acted inconsistently with their constitutionally protected parental rights.

In re D.M., __ N.C. App. __, __ S.E.2d __ (4/19/11).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjgwLTEucGRm>

Facts: The juvenile was removed from her mother’s home, based on a petition alleging neglect and dependency. She was adjudicated dependent and placed in DSS custody, and DSS placed her with the maternal grandmother. After a home study of respondent father’s home was reported to be favorable, the court indicted that the father’s alcohol use required further assessment. DSS placed the child with the father but retained custody and placement authority. Eight months later DSS moved the child back to the grandmother’s home. At a subsequent permanency planning hearing the court awarded permanent custody to the grandmother and visitation for respondent father.

Held: Reversed and remanded.

1. Because the trial court found that neither parent was unfit and made no findings or conclusions as to whether the father had acted inconsistently with his constitutionally protected parental rights, the trial court erred in awarding custody to the grandmother.
2. Because these errors might recur, the court of appeals also noted that
 - a. none of the orders entered before the award of permanent custody included any findings or conclusions about reasonable efforts made by DSS to prevent removal from the father or to reunify the child with the father. Where the child had been removed from the custody of both parents separately, efforts with both parents were required and reasonable efforts findings were required in each order that continued custody with DSS.
 - b. several orders, including the permanent custody order, left the father’s visitation in the discretion of a treatment team. The trial court is required to set the parameters – time, place, and conditions – of parental visitation and cannot delegate that obligation.

Appeal from order in consolidated civil custody and juvenile cases

- Where civil custody and juvenile cases were consolidated, an order for temporary custody that changed custody was interlocutory.

***In re N.T.S.*, __ N.C. App. __, 707 S.E.2d 651 (3/1/11).**

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTU0LTEucGRm>

Facts: A civil custody order gave the parents joint custody of the child. DSS filed a petition alleging that the child was abused, neglected, and dependent. The court granted the father's motion to consolidate the civil custody action and the juvenile action. After a consent adjudication that the child was neglected and dependent, the child remained in DSS custody and the court conducted several disposition hearings. Eventually the court entered a "temporary order" that (1) awarded legal custody to the father and supervised visitation to the mother, (2) ordered the families to complete a Strengthening Families program, and (3) ordered that the court would review the case approximately four months later. The mother gave notice of appeal from this order and the adjudication order.

Held: Appeal dismissed as interlocutory.

1. The adjudication order was not a final appealable order under G.S. 7B-1001.
2. The mother argued that the temporary order was actually a disposition order that changed custody and therefore was immediately appealable. The court held, however, that the order was "best characterized" as a temporary order entered pursuant to G.S. Chapter 50 and that it was not immediately appealable because the court specified that it would be reviewed within a reasonable time. The court of appeals referred in particular to the trial court's "change of circumstances" findings, which were necessary to modify a civil custody order but not a juvenile order.

Parent's protected rights in custody action after dependency adjudication

- Juvenile court's jurisdiction ended when it returned custody to the parent, relieved the GAL and DSS, and did not indicate that further court action was contemplated.
- Grandparents who alleged unfitness had standing to bring custody action.
- Dependency adjudication was relevant but not determinative on issue of unfitness in later custody action.

***Rodriguez v. Rodriguez*, __ N.C. App. __, __ S.E.2d __ (4/19/11).**

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02OTA0MS5wZGY=>

Facts: After the children's father died, DSS filed a petition and obtained a nonsecure custody order. Plaintiff grandparents filed a Chapter 50 action for custody. The juvenile court adjudicated the children dependent in April, 2008, and in July, 2008, returned them to the mother's physical custody. The mother filed an answer and motion to dismiss in the custody action. The court denied the motion to dismiss, found that the mother had acted inconsistently with her parental rights, awarded primary custody to her, and awarded secondary custody in the form of visitation to the grandparents.

Held: Affirmed in part; reversed in part.

1. The court of appeals considered two issues related to subject matter jurisdiction and held that

- a. although no order in the juvenile case explicitly terminated jurisdiction, the terms of the last order, including the court's release of DSS and the GAL, indicated an intent to terminate jurisdiction, thus the court was not precluded from proceeding in the Chapter 50 case.
 - b. because plaintiffs' action was for custody, not just visitation, and plaintiffs alleged that the mother was unfit, had neglected the children, and had acted inconsistently with her parental status, they had standing to bring a custody action under G.S. 50-13.1(a). Therefore, the trial court properly denied the motion to dismiss.
2. The trial court properly considered the juvenile adjudication order, but an adjudication of dependency alone was not sufficient to show that the mother had acted inconsistently with her parental status. The trial court's findings were not sufficient to show that the mother voluntarily engaged in conduct that would trigger forfeiture of her protected parental status. Her inability to care for the children had been due largely to emotional issues related to her husband's death, and evidence of frequent moving, verbal disagreements, and one instance of bruising on a child were not sufficient to conclude that she should not have custody. Therefore, the trial court erred in awarding visitation to the grandparents.
- One judge dissented from this portion of the decision and would have found the trial court's findings sufficient to conclude that the mother had acted inconsistently with her parental status.

Termination of Parental Rights

Respondent's waiver of counsel

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

***In re P.D.R.*, __ N.C. App. __, __ S.E.2d __ (6/7/11).**

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

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

issue was whether the trial court erred in allowing respondent to waive counsel and represent herself at the termination hearing.

Held: Vacated and remanded.

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

Termination of parental rights: dependency ground; Rule 60 motion to set aside

- During an appeal, the trial court
 - can conduct a hearing to determine how it *would* rule on a Rule 60 motion;
 - cannot conduct a new disposition hearing.
- A parent does not have an “appropriate alternative child care arrangement” if he merely consents to a placement arranged by DSS.

***In re L.H.*, __ N.C. App. __, 708 S.E.2d 191 (3/15/11)**

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC01MjMtMS5wZGY=>

Facts: The infant was placed with the maternal grandmother pursuant to a safety plan, after the parents admitted they were unable to care for the child. (Both parents were retarded and had mental health issues.) Later the child was adjudicated dependent and the permanent plan became adoption by the grandmother. DSS petitioned to terminate both parents’ rights, and the court did so, based on G.S. 7B-1111(a)(6) (the dependency ground) and a determination that termination was in the child’s best interest. The father appealed. During the appeal, the father filed a Rule 60(b)(2) motion, asking the trial court to set aside the termination order based on newly discovered evidence relating to abusive conditions in the grandmother’s home and the child’s removal from the home and placement in foster care. Pursuant to *Bell v. Martin*, 43 N.C. App 134 (1979), *rev’d on other grounds*, 299 N.C. 715 (1980), respondent (i) asked the trial court to indicate how it would rule on the motion if an appeal were not pending, and (ii) filed a motion with the court of appeals to delay consideration of the appeal, which was granted. The trial court conducted a hearing on the Rule 60 motion in combination with a review hearing, but did not

consider specific allegations in the motion or whether they would have affected the initial decision. The trial court noted that the placement had disrupted, found that it would terminate parental rights even if the appeal were not pending, and denied the Rule 60 motion.

Held: Affirmed in part, reversed in part, and remanded.

1. The court affirmed the adjudication portion of the termination order, reversed both the ruling on the Rule 60 motion and the disposition portion of the termination order, and remanded for a new hearing on whether termination was in the child's best interest.
2. The trial court did not err in concluding that the father "lacked an appropriate alternative child care arrangement," where the father had taken no action to identify alternatives, but consented to and did not interfere with the placement arranged by DSS.
3. The trial court had jurisdiction, during the appeal, to indicate how it would rule on a Rule 60 motion if an appeal were not pending, and the court of appeals had jurisdiction to review the trial court's decision that the motion should be denied.
4. In considering the Rule 60 motion, the trial court failed to determine
 - a. whether any evidence of abusive conditions in the grandmother's home existed at the time of the termination hearing, and
 - b. whether respondent, with due diligence, could have discovered information about those conditions.
5. The trial court in effect conducted a new dispositional hearing, for which notice had not been given and which the court had no jurisdiction to conduct unless the prior order were set aside.