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**CASE UPDATE**

**Cases Filed from July 21, 2009, through February 16, 2010**

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## NEGLECT AND ABUSE

### Amendment of abuse/neglect petition

- Supreme Court held that when a petition already alleged abuse, an amendment to allow factual allegations of sexual abuse of one of the children, based on disclosure she made after the petition was filed, was not error.

**In re M.G., 363 N.C. 570, 681 S.E.2d 290 (8/28/09).**

<http://www.aoc.state.nc.us/www/public/sc/opinions/2009/pdf/36-08-1.pdf>

**Facts:** DSS filed a petition alleging that four children were abused, neglected, and dependent. The petition included allegations under four subdivisions of the definition of “abused juvenile,” including sexual abuse, but did not include factual allegations of sexual abuse with respect to M.B. After the petition was filed, M.B. disclosed inappropriate sexual conduct by respondent, and DSS moved to amend the petition to add factual allegations about the child’s disclosure. The court allowed the amendment and adjudicated M.B. to be abused based on both sexual abuse and a parent’s creating or allowing risk of serious nonaccidental physical injury.

**Court of Appeals:** The court of appeals vacated the part of the order adjudicating M.B. abused based on sexual abuse, on the basis that the trial court erred in allowing the amendment because it changed the nature of the conditions on which the petition was based, in violation of G.S. 7B-800.

**Supreme Court:** Reversed in part and remanded.

1. The amendment in this case did not change the nature of the condition alleged.
2. The court examined the definition of “abused juvenile” and concluded that the various forms of abuse have in common “the existence or serious risk of some nonaccidental harm inflicted or allowed by one’s caretaker.”
3. The additional factual allegations “fell within the nature of the abuse condition that was initially alleged.”
4. The court did not address any issues regarding notice, because it was clear in this case that the parties had extensive notice of the amendment before the adjudication hearing.

### Permanency planning hearing

- Permanency planning hearing was insufficient when court relied solely on written summaries, prior orders, and arguments of counsel.

**In re D.Y., \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (1/19/10).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091087-1.pdf>

**Facts:** At a permanency planning hearing, the court considered written summaries by DSS and the guardian ad litem, prior orders, and arguments of counsel. Respondent was given an opportunity to address the court, but was not sworn and did not take the stand. No witnesses testified. The trial court found that it was not possible for the children to return home, that respondent had not completed the family service plan, that the children had expressed a wish not to return to respondent’s home, and that their return would be contrary to their welfare. The court declined to return the children to respondent’s custody and ordered that they remain in their placements. (The opinion does not indicate who had legal custody of the children or whether that changed as a result of the permanency planning hearing order.)

**Held:** Reversed and remanded for new hearing.

1. The trial court failed to hold a proper hearing.
2. “[B]ecause no evidence was presented, the trial court’s findings of fact are unsupported, and its conclusions of law are in error.”

The court of appeals relied in particular on *In re Shue*, 311 N.C. 586 (1984) and *In re D.L.*, 166 N.C. App. 574 (2004). Both cases were decided in part on the basis of trial court error in restricting the evidence a party was allowed to present. In *D.L.*, as in *D.Y.*, DSS’s only evidence was a written summary, and the court of appeals found that DSS had presented no competent evidence to support the trial court’s findings. Some of the opinion suggests error in failure to make sufficient findings when an order incorporates and overly relies on written summaries. The main point, however, seems to be the failure to have any sworn witnesses – in effect, the failure to actually hold a hearing.

**Permanency planning order; delays in conducting hearings**

- Trial court’s conclusions of law were contradictory and not supported by the findings of fact.
- Proper remedy for delay in conducting hearings and entering orders was a petition for writ of mandamus, not seeking relief on appeal.

**In re E.K.**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2/2/10).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091057-1.pdf>

**Facts:** Children came into DSS custody and were placed in foster care in May 2005. In October 2005 they were adjudicated neglected or abused and neglected. After a kinship care assessment, DSS recommended against placement with the maternal grandmother. In February 2006 the court allowed the grandmother’s motion to intervene. The permanent plan remained reunification with the mother. In December 2006 the court allowed the foster parents’ motion to intervene. After many continuances, a permanency planning order was entered in March, 2008, continuing custody with DSS, approving placement with the foster parents, ceasing reunification efforts with the mother, ordering that a permanent plan be established within 30 days, and scheduling a hearing for April 9, 2008. The hearing was not held until May, 2009, after numerous continuances. In the resulting permanency planning order the court incorporated its findings from the March 2008 order and made additional findings, many of which related to DSS’s concerns about the grandmother as a placement resource. The court’s conclusions included that (1) no relatives were willing and able to provide proper care and supervision in a safe home, and (2) primary custody to the foster parents and secondary custody with the grandmother was in the child’s best interest. The court awarded joint custody to the foster parents and grandmother, designating the grandmother as a secondary placement and specifying numerous conditions applicable to both. DSS appealed.

**Held:** Affirmed in part; reversed in part.

1. The court of appeals reversed the part of the order that awarded secondary custody to the grandmother. The trial court’s conclusions of law were contradictory – concluding both that no suitable relative was available and that secondary custody with the grandmother was in the child’s best interest.
2. The findings of fact did not support the conclusions of law, given that numerous findings related to reasons DSS did not recommend placement with the grandmother and to the children’s stronger relationship with the foster parents.
3. The court of appeals strongly disapproved the long delay in entry of the permanency planning order, the failure to conduct hearings according to statutory timelines, and the more than 25 continuances that did not appear to be required by extraordinary circumstances. Citing *In re T.H.T.*, 362 N.C. 446 (2008), however, the court held that the proper remedy for delay in holding hearings was to file a petition for a writ of mandamus during the delay.

### **Terminating jurisdiction vs. closing the case**

- Trial court order stating, “Case closed,” did not terminate the court’s jurisdiction.
- Where custody had been awarded to grandparents at disposition, the court had jurisdiction to consider DSS’s motion to reassume custody.  
*[Issue of best interest determination in termination of parental rights action is discussed below.]*

**In re S.T.P., \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2/16/10).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091281-1.pdf>

**Facts:** In 1999 the child was born cocaine positive and was adjudicated neglected and dependent. At disposition, the court adopted DSS’s recommendations and placed the child in the custody of the maternal grandparents. The order stated, “Case closed.” Several years later the grandfather died, and DSS received reports relating to the grandmother’s care of the child and substance abuse. In 2007, DSS filed a “Motion In The Cause To Reassume Custody,” in the same case and obtained a nonsecure custody order. The court returned custody to DSS and entered orders relating to a goal of reunification with the grandmother. In 2008, the court changed the plan to adoption, and DSS filed a petition to terminate parental rights. On appeal from an order terminating their parental rights, the parents argued that the trial court lacked subject matter jurisdiction because the May 1999 order closing the case had the effect of terminating the court’s jurisdiction.

**Held:** Affirmed.

1. “Closing a case file is not the equivalent of the trial court terminating its jurisdiction.”
2. The trial court’s order awarded custody to the grandparents and ordered the father to stay away. The parties were not returned to their pre-petition legal status as would have been the case if the court terminated its jurisdiction.

**Note:** It appears from the opinion that the disposition order closing the case had the effect of no review and permanency planning hearings being held as required by G.S. 7B-906 and -907. DSS is required by statute to schedule the hearings. Because the child had not resided with the grandparents for a year when the order was entered, the statutory criteria for waiving review hearings did not exist.

### **Neglect and dependency: notice of appeal; visitation; invited error**

- Notice of appeal from only the adjudication order was ineffective, and an amended notice of appeal was not timely.
- Respondent could not assert on appeal error with respect to an outcome that she sought.

**In re K.C., \_\_\_ N.C. App. \_\_\_, 681 S.E.2d 559 (9/1/09).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2009/pdf/090445-1.pdf>

**Facts:** The trial court adjudicated two teenagers to be neglected and dependent and ordered that they remain in DSS custody. The trial court made findings about respondent’s refusal to work with DSS toward reunification, her expressed desire to have nothing to do with the children until DSS straightened them out, her failure to visit the children, and her expression of an intention not to visit with them. Respondent’s original notice of appeal referred only to the adjudication order. An amended notice of appeal, which also referred to the disposition order, was filed more than 30 days after entry of the disposition order. On appeal, respondent’s only argument was that the trial court erred in failing to include a visitation plan in the disposition order.

**Held:** Affirmed

1. The court of appeals first granted DSS's motion to dismiss the appeal because (1) respondent's first notice of appeal referenced only the adjudication order, and (2) the second, amended, notice of appeal was filed more than 30 days after entry of the disposition order. The court then allowed respondent's petition for a writ of certiorari in order to review the merits of the case.
2. The court held that although the trial court failed to comply with the statutory duty to address visitation in the disposition order, respondent in this case "invited" the error by her many representations that she did not want or intend to visit the children. Therefore, she could not complain on appeal that the court did what she effectively asked the court to do.

### **Abuse, neglect, dependency: standing to appeal**

- Party invoking court's jurisdiction has burden of establishing that the party has standing.
- Record was insufficient for appellate court to determine whether respondent was the child's "custodian" for purposes of standing to appeal.
- Respondent also failed to establish that she was a "non-prevailing" party.

**In re T.B., \_\_\_ N.C. App. \_\_\_, 685 S.E.2d 529 (11/3/09).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2009/pdf/090575-1.pdf>

**Facts:** Maternal grandmother appealed from order adjudicating the child to be neglected and placing the child in the custody of the paternal grandparents. Before DSS became involved the child had lived with respondent for some period of time but also received care from the paternal grandparents. Respondent had returned the child to his mother without notifying DSS, contrary to prior agreements. All parties stipulated to neglect, and respondent did not attend the disposition hearing. Her attorney on her behalf asked that the other grandparents not be given permanent custody and that respondent be given visitation.

**Held:** Appeal dismissed.

1. Respondent had the burden of establishing her standing to appeal, and she failed to do that.
  - Although the record contained references to a civil custody action, respondent's being given temporary custody, and the other grandparents' intervening in that action, it contained no court order or other indication that respondent had been given legal custody of the child.
  - The record did not support a determination that respondent was the child's custodian by virtue of assuming the status and obligations of a parent, because she had returned the child to the mother and it was unclear for what periods of time the child was with respondent or what portion of the child's care she provided.
2. Respondent failed to establish that she was a non-prevailing party, because she had not sought custody of the child and had been granted visitation as she requested.

## TERMINATION OF PARENTAL RIGHTS

### Termination of parental rights: standing

- When petitioners in a termination proceeding did not have standing to seek termination, the trial court did not have subject matter jurisdiction.

**In re B.O.**, \_\_\_ N.C. App. \_\_\_, 681 S.E.2d 854 (9/1/09).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2009/pdf/090400-1.pdf>

**Facts:** A guardian appointed by the court entered an agreement giving temporary guardianship to petitioners for a specific period of time. After that agreement ended, the children remained with petitioners, the court terminated the guardianship, and the court granted placement of the child with petitioners. When the child had been with them for about 15 months, petitioners filed an action to terminate respondent's rights, asserting that they were the child's custodians. Respondent appealed from an order terminating her rights.

**Held:** Vacated.

1. When the petition was filed the child had not resided with petitioners for two years, and petitioners did not satisfy any other criteria in G.S. 7B-1103 for having standing to petition for termination of parental rights.
2. The Juvenile Code does not equate custody and guardianship. Petitioners were not the child's guardians, and having custody of a child, by itself, does not confer standing to petition for termination of parental right.

### Termination of parental rights; standing; jurisdiction in underlying case

- Expiration of summons before service on respondent did not affect jurisdiction where respondent made general appearance without objecting to service.

**In re S'N.A.S.**, \_\_\_ N.C. App. \_\_\_, 686 S.E.2d 917 (12/22/09).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2009/pdf/090959-1.pdf>

**Facts:** In the underlying neglect and dependency case, respondent was served after several hearings had occurred and after the summons expired. Respondent attended two nonsecure custody hearings. She did not attend the adjudication hearing and was served the day after that hearing. The children were adjudicated neglected and dependent and placed in DSS custody, with respondent having supervised visitation. Later DSS filed petitions to terminate respondent's rights. On appeal from orders terminating her rights, respondent argued that DSS did not have standing to file the petitions because the orders giving DSS custody were void, due to the expiration of the summons before respondent was served, and the court had neither personal nor subject matter jurisdiction when it awarded custody to DSS.

**Held:** Affirmed.

1. The summons relates only to personal jurisdiction, and expiration of the summons or failure to issue a summons does not affect subject matter jurisdiction. *In re K.J.L.*, 363 N.C. 343, 677 S.E.2d 835 (2009).
2. By making a general appearance without objecting to lack of service, respondent waived any objection to personal jurisdiction.

### **Termination of parental rights: jurisdiction**

- Lack of valid summons did not deprive court of subject matter jurisdiction.
- In underlying dependency case respondent waived any objection based on insufficiency of service or process by making a general appearance.

**In re J.D.L., \_\_\_ N.C. App. \_\_\_, 681 S.E.2d 485 (8/18/09).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2009/pdf/090025-1.pdf>

**Facts:** In the initial dependency proceeding respondent was never served with a summons and the summons expired, but respondent appeared in court and admitted the allegations of dependency. Subsequently respondent was served with a summons and petition to terminate parental rights. After a hearing the court terminated respondent's rights on the grounds of dependency and abandonment.

**Held:** Affirmed.

1. Failure to issue a summons or the expiration of a summons affects only personal jurisdiction and any defects in the summons or in service can be waived. *In re J.T.*, 363 N.C. 1, 672 S.E.2d 17 (2009); *In re K.J.L.*, 363 N.C. 343, 677 S.E.2d 835 (2009).
2. DSS had standing to petition for termination, and the evidence supported the court's findings and conclusions terminating parental rights on the basis of abandonment and dependency.

- Lack of valid summons did not deprive court of subject matter jurisdiction.
- Respondent and the juvenile, through the GAL, waived any objection to personal jurisdiction.

**In re N.E.L., \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2/16/10).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/081573-2.pdf>

On remand from the N.C. Supreme Court, the court of appeals rejected respondent's argument that the trial court lacked subject matter jurisdiction because no valid summons was served on respondent, the juvenile, or the juvenile's guardian ad litem.

1. Following the holding in *In re K.J.L.*, 363 N.C. 343, 677 S.E.2d 835 (2009), the court held that problems with or the absence of a summons affects only personal, not subject matter, jurisdiction.
2. Both respondent and the GAL waived any objection to personal jurisdiction by appearing and participating in the proceeding without raising the issue.

### **Sufficiency of evidence and findings to establish grounds for termination**

- Evidence and findings were sufficient to support the neglect ground for termination.
- Evidence and findings were sufficient to support the ground that father of illegitimate child failed to take steps necessary to prevent termination of his rights.

**In re S.C.R., \_\_\_ N.C. App. \_\_\_, 679 S.E.2d 905 (8/4/09).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2009/pdf/090368-1.pdf>

**Facts:** The child was placed in DSS custody in April 2008 and was adjudicated neglected in May 2008. Facts leading to the adjudication included the father's incarceration, the mother's substance abuse, and domestic violence between the mother and her boyfriend. Both parents entered into a case plan with DSS, and after adjudication the court ordered many of the same terms. The mother failed to complete requirements of the plan or the court's order, other than submitting to random drug screens. She enrolled in but was terminated from a substance abuse treatment program; tested positive for marijuana 8 times and for "benzos" and cocaine once; and failed to attend 18 of 29 scheduled visits.



The father remained incarcerated on a cocaine trafficking conviction, with a release date of July 2009. He earned a small amount but did not pay child support or purchase anything for the child. Although his parents had brought the child to visit him, after DSS obtained custody he saw the child only in court. He wrote letters to and had numerous photographs of the child. He filed an affidavit of parentage that both he and the mother signed, but only after the termination motion was filed.

In June 2008 the court ceased reunification efforts and changed the plan to adoption, with a concurrent plan of reunification. In August 2008 DSS filed a motion to terminate parental rights. The court adjudicated the neglect and dependency grounds for terminating the mother's rights. With respect to the father the court adjudicated the neglect ground and the father's failure to take steps to legitimate or support the child before the termination action was initiated. The court found that termination was in the child's best interest and terminated both parents' rights.

**Held:** Affirmed.

Father's appeal:

1. The court did not consider the father's argument that holding the termination hearing less than nine months after DSS took custody of the child violated his due process rights, because he had neither sought a continuance nor raised the constitutional issue in the trial court.
2. The court rejected the father's argument that the trial court made insufficient findings when it ceased reunification efforts and changed the plan, finding that he had failed to give the notice required to preserve that issue for appeal.
3. The father failed to make showing required to support claim of ineffective assistance of counsel.
4. The trial court's findings supported its conclusion that the father failed to take any of the steps that would have prevented termination of his parental rights to his illegitimate child.
  - a. The court stated that even though "a father may have 'acted consistently with acknowledging his paternity,' strict compliance" with the statute is required, citing *A Child's Hope, LLC v. Doe*, 178 N.C. App. 96, 105, 630 S.E.2d 673, 678 (2006).
  - b. Judge Wynn, referring to the "poignant dissent" in *A Child's Hope*, concurred in the result, but would have affirmed on the basis of the neglect ground.

Mother's appeal:

1. Referring to specific evidence in the record, the court held that the trial court's findings were supported by clear and convincing evidence and supported the conclusion that the neglect ground had been established.
2. The trial court's findings indicated that it considered appropriate "best interest" factors, and the court did not abuse its discretion in terminating the mother's rights.

### **Termination of parental rights: sufficiency of evidence**

- Findings as to whether parents made reasonable progress were insufficient when they focused on an earlier period and did not address a substantial period just before the petition was filed.
- When parents visit the children or act in other parental ways during the relevant period, the abandonment ground for termination does not exist.

**In re F.G.J., \_\_\_ N.C. App. \_\_\_, 684 S.E.2d 745 (11/3/09).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2009/pdf/090522-1.pdf>

**Facts:** Children came into foster care because of a pattern of domestic violence, father's alcohol abuse, and failure to comply with service agreements. The court later appointed an uncle as the children's guardian. For a year and a half the parents did very little to address the issues that led to placement. Later they completed various courses and visited the children monthly. The uncle filed a petition to terminate the parents' rights, and the trial court adjudicated the abandonment ground and

the ground of willfully leaving the children in foster care for more than a year without making reasonable progress to address the issues that led to placement, and terminated both parents' rights.

**Held:** Reversed in part; vacated and remanded in part.

1. Failure to bifurcate the adjudication and disposition hearings is not reversible error if the trial court applies appropriate evidentiary standards at each stage. The trial court is presumed to be able to consider evidence according to the appropriate standards.
2. Even if testimony challenged by respondent father was impermissible hearsay, he failed to show that he was prejudiced by its admission.
3. Where the trial court found that the parents visited the children at least monthly, adjudication of the abandonment ground was error.
4. The court of appeals could not adequately review an order that made no findings about the parents' progress for a substantial period just before the filing of the petition and instead focused on an earlier period. The court noted that the trial court "could have found that the progress made by respondents was not reasonable under the circumstances," but the court of appeals refused to speculate on the trial court's rationale and remanded for further findings.

#### **Termination of parental rights: dependency ground**

- The dependency ground for termination cannot be sustained without findings to support a conclusion that the parent lacked a suitable alternative arrangement.

**In re N.B., \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (11/3/09).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2009/pdf/090811-1.pdf>

**Facts:** Respondent mother appealed from an order terminating her parental rights on the dependency ground, G.S. 7B-1111(a)(6). Respondent had a history of substance abuse, mental illness, and criminal convictions. The trial court found that she had left the children in the care of relatives and others, including the couple they were with, who had been in the children's lives 'since birth' and were the proposed adoptive parents.

**Held:** Reversed and remanded in part; affirmed in part.

1. The trial court failed to make findings that would support a conclusion as to whether respondent had a suitable alternative arrangement – the absence of which is an essential element of the dependency ground for termination. The court of appeals remanded for further findings.
2. The court of appeals rejected respondent's argument that the children had not had adequate guardian ad litem representation, when the record showed that they did have a guardian ad litem for the proceeding that was before the court for review. Any error in that regard in earlier proceedings was not before the court.

#### **Termination of parental rights: standard of proof; abandonment ground**

- Imprecise statement of standard of proof as "clear and cogent" was not prejudicial error.
- Findings were sufficient to support adjudication of the abandonment ground.

**In re M.D., \_\_\_ N.C. App. \_\_\_, 682 S.E.2d 780 (9/15/09).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2009/pdf/090500-1.pdf>

**Facts:** Petitioner-mother had physical custody of the two children after the parties separated in 2000, and later a court awarded her custody and gave respondent-father only supervised visitation. Petitioner remarried and in 2008 she petitioned to terminate respondent's rights on grounds of abandonment and failure to pay support for one year. After a hearing, the court adjudicated the

ground of abandonment as to both children and the ground of non-payment of support with respect to one. (Respondent was not under order to pay support for the other child.)

**Held:** Affirmed.

1. The trial court did not commit prejudicial error in stating in its order a standard of proof of “clear and cogent,” rather than “clear, cogent, and convincing.” The court of appeals did not decide whether the two standards are substantively different, but noted that the trial judge had stated the correct standard in open court, the main issues were not in sharp dispute, and respondent had not challenged the sufficiency of the evidence to support any of the findings.
2. The court rejected respondent’s challenge to the sufficiency of the findings to support the conclusion that the abandonment ground existed. The trial court had made extensive findings about respondent’s failure to visit, call, inquire about, or have any contact with the children for more than six months before the petition was filed.
3. At disposition, the trial court considered the relevant factors and did not abuse its discretion in terminating respondent’s rights.

**Termination of parental rights: ground of willfully leaving child in foster care; best interest**

- The findings supported adjudication of the ground of willfully leaving the child in foster care for more than a year without showing reasonable progress under the circumstances in correcting conditions that led to removal, as well as the court’s conclusion that termination was in the child’s best interest.
- Because the petition did not allege the dependency/incapability ground, the trial court did not err in failing to adjudicate whether respondents, due to their cognitive limitations, were unable to provide the child with proper care.

**In re S.C.H., \_\_\_ N.C. App. \_\_\_, 682 S.E.2d 469 (9/15/09) (appeal pending).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2009/pdf/090363-1.pdf>

**Facts:** The child was born with cocaine exposure and special medical needs in October 2004. In 2005 he was placed in nonsecure custody with DSS, adjudicated neglected by consent order, and continued in DSS custody. In September 2005 the court found that respondents had made progress and returned physical custody to them. At a review hearing about six months later, the court found that the mother left the child alone in a room with the door closed, which she had been advised not to do; on more than one occasion it appeared that the child’s diaper had not been changed regularly; the child was found in the crib with dried vomit on her clothing; although advised not to do so, the mother continued to leave the child in the crib alone with a bottle; respondents moved without notifying DSS; and their home had safety issues. The court ordered additional services and authorized DSS to return the child to respondents when the services were in place. At a subsequent hearing, DSS’s court summary stated that the mother had violated probation by not paying the fees; respondents had been evicted and moved to another county; they had tried to take the child out of daycare without permission; they had failed a parenting test and did not reenroll in a parenting program; the father was not employed and there was no indication that he was seeking employment; and they were not participating in reunification services. DSS recommended that it be relieved of reunification efforts. (The opinion does not indicate whether the trial court found all of these statements as facts or what the court ordered at the hearing.)

In September 2007 DSS filed a petition to terminate respondents’ rights. After hearings in December 2008 the trial court adjudicated the grounds of neglect, willfully leaving the children in care for more than a year without showing reasonable progress, and failure to pay support, and entered an order terminating respondents’ rights.

**Held:** Affirmed.

1. The court of appeals reviewed the trial court’s findings with respect to willfully leaving the child in foster care. The majority rejected the argument that the trial court had erred in failing to take into account respondents’ cognitive limitations in regard to the “willfulness” prong of the ground, finding that willfulness was sufficiently established by findings about their failure to provide personal items, cards, or letters, and their failure to participate in reunification services.
2. In response to the dissent, the majority said that because the “incapability” ground had not been alleged, it would have been improper for the trial court to adjudicate whether respondents were capable of providing proper care.
3. The majority held that the trial court did not abuse its discretion in terminating parental rights. Although the trial court did not make findings specifically about the parent-child bond, it made extensive findings about other factors and, in the adjudication stage, had made findings about the lack of contact between the parents and child. The majority concluded it was apparent that the trial court had considered the bond between respondents and the child.

**Dissent:** Judge Elmore dissented in a lengthy opinion and would have reversed and remanded on the basis that neither the grounds adjudicated nor best interest had been established by clear, cogent, and convincing evidence.

**Termination of parental rights: procedures when unknown father identified**

- Amendment of the petition to allege the identity of a formerly unknown parent did not constitute the filing of a new action such that actions taken by respondent between the filing of the original and amended petitions would serve to defeat termination under G.S. 7B-111(a)(5).

**In re M.M., \_\_\_ N.C. App. \_\_\_, 684 S.E.2d 463 (10/6/09).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2009/pdf/090610-1.pdf>

**Facts:** DSS filed a petition to terminate the rights of the child’s mother, the legal father, and an unknown father. At the hearing required by G.S. 7B-1105, the mother named respondent as a possible biological father. Based on DNA tests results, the court at a review hearing found that respondent was the biological father, joined him as a party in the juvenile case, and ordered DSS to serve him in the termination action. After service, respondent filed an answer and motion to dismiss because the petition did not allege that he was the child’s father. The court granted a continuance during which DSS amended the petition to include respondent as a named party. After a hearing the court terminated respondent’s rights on the basis of G.S. 7B-1111(a)(5) – failure of a putative father to take specified steps before the filing of the petition.

**Held:** Affirmed.

1. The trial court rejected respondent’s argument that amendment of the petition constituted the filing of a new petition and that the court’s finding that respondent was the child’s biological father was a judicial determination of paternity that occurred before the filing of the new petition, thus defeating the only ground alleged.
  - a. DSS and the trial court followed the proper procedures for a case involving an unknown parent. At the hearing on an unknown parent required by G.S. 7B-1105 the mother identified respondent as a possible father for the first time, the court ordered paternity testing, and respondent was joined as a party. Respondent’s interpretation would defeat the purpose of those procedures.
  - b. The issue was governed by G.S. 7B-1105, the Juvenile Code’s specific procedures for cases involving unknown fathers, not by G.S. 1A-1, Rule 15, which deals with amendments. The “amendment” in this case was actually a supplemental pleading that clarified the parties but was not necessary in order for the court to have personal jurisdiction over respondent.

2. The court of appeals did not decide whether the trial court's finding that respondent was the child's biological father constituted a judicial determination of paternity for purposes of the steps set out in G.S. 7B-1111(a)(5). Respondent was required to establish paternity before the filing of the original petition, and here the petition was filed before the court's finding about paternity.
3. The court of appeals held that the trial court did not abuse its discretion in terminating respondent's rights even though respondent's mother expressed a desire for custody of the child.
  - a. At disposition in a termination case, the court "may, but is not required to, consider the availability of a relative placement."
  - b. Although it was not clear that the foster parents could adopt the child, "nothing [in G.S. 7B-1110] requires that termination lead to adoption in order for termination to be in a child's best interests."
  - c. Respondent himself had never seen the child, inquired about the child, or attempted to visit or pay support.

### **Termination of parental rights: best interest**

- Findings demonstrated that trial court properly considered the statutory dispositional factors. *[Jurisdictional issue is discussed above.]*

**In re S.T.P., \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2/16/10).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091281-1.pdf>

**Facts:** Respondent argued on appeal that the trial court's findings of fact did not support the conclusion that termination of parental rights was in the child's best interest. Respondent did not challenge any of the findings, which dealt with the substantial history of the case, the parents' and grandmother's inability to establish a safe home for the child, their failure to address substance abuse issues, and professional assessments of the child's needs. The court of appeals quoted from a number of the findings, which numbered up to 98 or more.

**Held:** Affirmed.

The court of appeals held that

1. the uncontested findings demonstrated that the trial court properly considered the factors listed in G.S. 7B-1110(a), and
2. the trial court did not abuse its discretion in terminating parental rights.

### **Termination of parental rights: notice of appeal**

- Notice of appeal filed after the court's oral rendering of its judgment but before entry of the written order was timely.

**In re S.F., \_\_\_ N.C. App. \_\_\_, 682 S.E.2d 712 (8/4/09).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2009/pdf/090426-1.pdf>

**Facts:** The trial court orally announced its decision to terminate respondent's rights. Nine days later respondent filed a notice of appeal. The court's order was not entered (written, signed, and filed with the clerk) until more than a month later, and no other notice of appeal was filed.

**Held:** Affirmed.

1. The court of appeals denied the motion of DSS and the child's guardian ad litem to dismiss the appeal for lack of jurisdiction, stating, "[T]his Court has squarely held that notice of appeal given within thirty days after rendering of judgment in open court, but before entry of judgment, is timely," citing *Darcy v. Osborne*, 101 NC. App. 546, 548, 400 S.E.2d 95, 96 (1991). [Note: The

significance of the phrase “within thirty days” is not clear, because it generally refers to a period after entry of judgment, not after rendering of the judgment.]

2. DSS and the child’s guardian ad litem also moved to dismiss because the notice of appeal did not include a certificate of service. The court (a) noted that case law establishes that “failure to show proof of service affects personal jurisdiction and does not deprive [the] court of subject-matter jurisdiction;” (b) cited a juvenile case in which the appeal was dismissed for failure to attach a certificate of service to the notice of appeal; and (c) noting that all parties had actual notice of the appeal, allowed respondent’s petition for certiorari.
3. The trial court’s extensive findings, which were not challenged on appeal, were sufficient to support the conclusion that grounds for termination existed.

### **Termination of parental rights: trial court action after remand**

- Trial court must follow appellate court’s mandate upon remand.
- Trial court’s failure to adjudicate one or more alleged grounds means those grounds do not exist.
- When more than one ground is alleged, trial court should adjudicate the existence or nonexistence of each of them.
- If trial court adjudicates only one of several alleged grounds, the petitioner must cross assign error to preserve for appeal the issue of the trial court’s failure to adjudicate the other grounds.

**In re S.R.G., \_\_\_ N.C. App. \_\_\_, 684 S.E.2d 902 (11/3/09).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2009/pdf/090789-1.pdf>

**Facts:** Earlier in the same case, DSS filed a petition to terminate parental rights, alleging neglect, failure to pay support, and abandonment. After a hearing the trial court adjudicated the abandonment ground, without commenting on the other two alleged grounds, and terminated respondent’s rights. On appeal from that order, the court of appeals (1) held that the trial court’s findings did not support its conclusion that respondent had willfully abandoned the child for six months immediately preceding the filing of the petition; (2) held that although many of the findings seemed to relate to a different ground, that ground had not been alleged and could not have been adjudicated; and (3) reversed and remanded for action consistent with the opinion. *In re S.R.G.*, \_\_\_ N.C. App. \_\_\_, 671 S.E.2d 47 (2009). After remand, the trial court took no additional evidence but, relying on its earlier findings, adjudicated the neglect ground and terminated respondent’s rights on that basis.

**Held:** Reversed.

1. G.S. 7B-1109(e) requires the trial court to adjudicate the existence or non-existence of any of the statutory grounds, so the trial court’s failure to adjudicate the neglect or nonsupport ground was a determination that they did not exist. The trial court may not exercise its discretion and address fewer than all of the alleged grounds.
2. DSS failed to cross-assign error to the trial court’s failure to adjudicate the other two grounds and thus had not preserved those issues for appeal.
3. The court of appeals also relied on the “law of the case” doctrine, which prohibits a trial court’s reconsidering an issue that has been previously answered on appeal in the same case.

## **Relinquishment and adoption**

Once a final order of adoption is entered,

- the district court no longer has jurisdiction under G.S. Chapter 7B, and
- the adoption may be challenged only through procedures in G.S. Chapter 48.

**In re W.R.A., \_\_\_ N.C. App. \_\_\_, 685 S.E.2d 151 (11/3/09).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2009/pdf/090592-1.pdf>

**Facts:** While the child was in DSS custody the father signed a relinquishment. Respondent mother signed a relinquishment for adoption by a specified couple, but then revoked it, and DSS filed a motion to terminate parental rights. In court, at DSS's request before the case was continued to a later date, the court ordered respondent to provide a urine sample for a drug test and she refused. After talking with her attorney, respondent signed another relinquishment conditioned on adoption by the same couple specified earlier – making the relinquishment irrevocable. After a final order of adoption was entered, respondent and relatives filed a “motion for appropriate relief” pursuant to G.S. 15A-1415 *et seq.*, in the juvenile matter, asking that the adoption be set aside because her relinquishment was given under duress. The trial court dismissed for lack of jurisdiction.

**Held:** Affirmed.

1. An action to terminate parental rights is a civil action, and criminal procedures in G.S. Chapter 15A are not applicable.
2. After the final order of adoption was entered, the trial court no longer had jurisdiction in the termination or underlying juvenile action.
3. The proper procedure for challenging an order of adoption is the one set out in G.S. 48-2-607, which allows a claim based on fraud or duress to be made within six months after the fraud or duress was or should have been discovered.

## **MISCELLANEOUS**

### **Hague Convention; jurisdiction**

- When petition for return of custody under the Hague Convention was not verified, the trial court lacked subject matter jurisdiction.

**City of Mannheim v. Steven B., \_\_\_ N.C. App. \_\_\_, 687 S.E.2d 496 (12/22/09).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2009/pdf/090845-1.pdf>

**Facts:** After receiving communications from the U.S. State Department and a children's services agency in Germany, DSS filed a petition alleging that the child was abused, neglected, and dependent – later amended to allege only dependency. The German agency filed a petition in the same court under the Hague Convention seeking immediate return of the child to Germany, alleging that a German court had awarded custody to the agency and that respondent mother had wrongfully removed the child from the country. The trial court consolidated the juvenile and Hague Convention actions, ordered the return of the child to Germany, and stayed that order pending appeal.

**Held:** Vacated in part and remanded in part.

1. The action under the Hague Convention was governed by the Uniform Child Custody Jurisdiction and Enforcement Act [*see* G.S. 50A-302], which requires that petitions seeking expedited enforcement be verified [*see* G.S. 50A-308(a)]. Applying the N.C. Supreme Court's reasoning in *In re T.R.P.*, 360 N.C. 588, 636 S.E.2d 787 (2006), the court of appeals held that the trial court lacked subject matter jurisdiction in the Hague Convention matter because the petition was not verified.

2. The trial court continued to have jurisdiction in the dependency matter filed by DSS. Because the trial court had not ruled on respondents' motion to dismiss that action, the court of appeals could not consider that matter

### **Adoption; custody**

- Adoption decree was not void for lack of subject matter jurisdiction when adoption court waived certain statutory provisions and granted adoption to a domestic partner without depriving the biological parent of her parental rights.
- The parties were precluded from challenging the validity of the adoption based on procedural or statutory violations.
- Because the adopting party was a parent, the appropriate standard in a custody dispute between the parties was best interest.

**Boseman v. Jarrell**, \_\_\_ N.C. App. \_\_\_, 681 S.E.2d 374 (8/18/09).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2009/pdf/080957-1.pdf>

**Facts:** Plaintiff adopted her domestic partner's child after the adoption court granted the parties' motion to waive statutory provisions that otherwise would have terminated the biological mother's parental rights upon her partner's adoption of the child. The adoption decree specified that it did not sever any of the biological mother's rights with respect to the child. After the parties separated and defendant restricted plaintiff's access to the child, plaintiff filed a custody action seeking joint custody, with her having extensive visitation and defendant's retaining primary physical custody. Defendant counterclaimed for custody, sought a declaration that the adoption decree was void, and made motions to dismiss plaintiff's action. The trial court declined to rule on the validity of the adoption, which had occurred in a different county, on the basis that the court lacked jurisdiction to set aside the order of another trial court. The court made findings, concluded that defendant had acted inconsistently with her constitutional parental rights, and awarded joint custody.

**Held:** Affirmed in part, vacated in part, and remanded.

1. The trial court's belief that it did not have jurisdiction to address the validity of the adoption decree was erroneous, and the court abused its discretion in not addressing that issue. A motion to set aside an order under G.S. 1A-1, Rule 60(b), is an exception to the general rule that one judge may not overrule or change the judgment of another.
2. To expedite resolution, the court of appeals itself addressed the issue of whether the adoption decree was void, and held:
  - a. The adoption decree was not void, because the court that entered it had jurisdiction to hear adoption matters, the parties met the residence requirements for jurisdiction, and any failure to follow statutory procedures or requirements did not affect subject matter jurisdiction.
  - b. Even if the adoption decree was erroneous or contrary to law, the proper remedy was appeal, and a motion under Rule 60(b) could not substitute for an appeal.
  - c. Under G.S. 48-2-607 neither party could challenge the validity of the adoption.
3. The court noted that the adoption was not explicitly a "same-sex" adoption, described it instead as "a direct placement adoption with a waiver of the full terms of parental consent and legal obligations specified" in the adoption statutes, and stated that the result would have been the same if the parties had been an unmarried heterosexual couple. The court concluded that the result was fully consistent with the stated purposes of the adoption laws.



4. Because plaintiff was a parent of the child as a result of the adoption decree, the trial court correctly applied the best interest standard in deciding custody and it was not necessary to address whether defendant had acted inconsistently with her paramount rights as a parent.

**Delinquency: juvenile’s access to records; continuances**

- The juvenile had an absolute right to review his DSS and mental health records.
- Denial of the juvenile’s motion for a continuance to prepare for the disposition hearing was an abuse of discretion.

**In re J.L., \_\_\_ N.C. App. \_\_\_, 685 S.E.2d 11 (9/1/09).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2009/pdf/081306-1.pdf>

**Facts:** After adjudication for first-degree burglary and robbery with a dangerous weapon, the juvenile moved to continue the disposition hearing scheduled for a week later, to give him time to review the predisposition report. The court denied the motion. At the disposition hearing, the court (1) granted the juvenile’s GAL’s motion to quash a subpoena for records on the basis that insufficient time was allowed to gather them; (2) after reviewing DSS and mental health records, ordered that the DSS court summary was admissible but that other records were either cumulative or not relevant (these were sealed for appellate review); (3) denied the juvenile’s motion to continue; and (4) committed the juvenile to “training school.”

**Held:** Reversed and remanded.

The court of appeals reversed, holding that

1. the trial court abused its discretion when it reviewed the juvenile’s DSS and mental health records and allowed the juvenile to review only some of them;
2. the juvenile had an absolute right to review his own mental health and DSS records to search for mitigating evidence;
3. G.S. 7B-2901(b) gives the juvenile a right to examine his DSS files and mental health records;
4. the court abused its discretion in denying the juvenile’s motion for a continuance to allow preparation for the disposition hearing.