

District Court Judges Summer Conference 2010

Supplement to Juvenile Law Update

(not handed out)

Termination of parental rights: ruling on motion to continue

- Trial court's denial of respondent's motion to continue the adjudicatory hearing was an abuse of discretion.

In re D.W., ___ N.C. App. ___, 693 S.E.2d 357 (3/2/10).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091349-1.pdf>

Facts: DSS filed a motion to terminate respondent's rights. On the date the case was scheduled for adjudication, respondent's attorney moved for a continuance because his client was not there, he could communicate with her only by mail, there was no confirmation that she had received notice of the hearing, she had attended all earlier hearings in the case, and there was possible confusion as to where the hearing was to be held. The judge initially did not understand the nature of the hearing, thought there was "just information to be read into the record," and indicated a need to be in another courtroom. The court proceeded with the hearing with understanding that there would be "limited questions" of experts (indicating that meant three or four questions). Respondent's counsel again moved for a continuance and the motion was denied. When the hearing resumed after a recess the court acknowledged its initial confusion about the type of hearing, but denied another motion to continue. After hearing more evidence, the court adjudicated grounds for termination, heard additional disposition evidence, and concluded that termination was in the child's best interest.

Held: Reversed

1. Making clear that it rejected a rigid rule that a parent's absence from the hearing would always require reversal, the court of appeals held that in this case the trial court's denial of respondent's motion for a continuance "impaired justice" and was an abuse of discretion. The court noted that the record was "replete with indicia of the extraordinary nature of the circumstances" of the case. In addition to factors described above, the court noted the effect of the time constraints and the fact that the court was informed that the respondent suffered from a mental disability.
2. One judge concurred in a separate opinion and
 - a. did not think lack of notice of the hearing was a factor because statements in the record created a presumption that respondent received notice and there was no evidence to the contrary, and
 - b. given the absence of a notice issue or any allegation of prejudice as to evidence presented, did not think the court erred in denying the continuance.

The judge concurred in the result, however, because of the non-deliberative nature of the hearing, the absence of evidence directly about terminating parental rights, the critical nature of evidence the respondent could provide, the fact that the motion for a continuance was a "modest request," and the need to "assure fundamental fairness."

Termination of parental rights: guardian ad litem for parent

- Whether to conduct a hearing to inquire into a respondent's competency or capacity is in the trial court's discretion.
- The time limit for conducting the TPR hearing is not jurisdictional.

In re A.R.D., ___ N.C. App. ___, ___ S.E.2d ___ (6/15/2010).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100153-1.pdf>

Facts: DSS's involvement with respondent began in 2006 when her grandfather reported that her behavior was erratic and that she had stated she hated her child and was going to cut her up and put her in the garbage disposal. DSS filed a neglect petition and the child was placed in nonsecure custody with the grandfather. The court adjudicated the child abused and neglected, finding that the child showed no visible signs of neglect but making other findings about respondent's "temper, her emotional imbalance and extreme resistance to an authority figure such as DSS." The court ordered that respondent be evaluated by a psychiatrist and psychologist and comply with treatment recommendations. Results of any evaluations did not appear in the appellate record.

At reviews respondent was ordered to continue with mental health services and parenting classes. The child was returned to her for a trial placement, but the following day she told DSS she could not care for the child because of conflicts with the grandfather. When a social worker came to remove the child, respondent screamed and had to be restrained by law enforcement. The record included other references to respondent's "history of emotional outbursts and erratic behavior," and her "depression, uncontrollable temper, and emotional imbalance." DSS alleged in the TPR petition that the child was dependent and respondent was incapable of providing proper care, and in its order the court found that she was incapable of properly caring for the child and created an atmosphere of potential danger for the child.

DSS filed the TPR petition on 5/13/08; hearings were held in January, March, and May, 2009; and adjudication and disposition orders were entered in June and August, 2009, terminating respondent's rights on grounds of (1) neglect and (2) willfully leaving child in care for more than a year without making reasonable progress to correct conditions. On appeal, respondent asserted as error the trial court's failure to appoint a guardian ad litem for respondent and failure to conduct the hearing within 90 days after the petition was filed.

Held: Affirmed (with dissent).

1. The trial court did not abuse its discretion by not conducting a hearing to inquire into whether respondent needed a guardian ad litem or in not appointing a guardian ad litem for her. The court referenced the definition of "incompetent adult" in G.S. 35A-1101 (lacks sufficient capacity to manage own affairs or make or communicate important decisions), and the definition of "diminished capacity" from the case *In re M.H.B.*, 192 N.C. App. 258, 262 (2008) ("a lack of ability to perform mentally"), and concluded that the record did not show circumstances that would "call into question respondent-mother's mental competence, her ability to perform mentally, or to act in her own interest." In contrasting this case with others in which an abuse of discretion was found – *In re N.A.L.*, 193 N.C. App. 114 (2008); *In re M.H.B.*, 192 N.C. App. 258 (2008) – the court pointed to specific mental health diagnoses in those cases and specific acts of respondents in those cases indicating possible incapacity.
2. The lack of timeliness in holding the hearing was not jurisdictional, and respondent failed to show that she was prejudiced by the delay.

Dissent: The dissent would not have distinguished this case from *N.A.L.* and *M.H.B.*, and would have held that the trial court abused its discretion by not conducting a hearing to inquire into respondent's need for a guardian ad litem.

Termination of parental rights: best interest determination; notice of appeal

- Trial court's findings were not sufficient to support its conclusion that termination of parental rights was in child's best interest, when the order did not reflect consideration of all the statutory factors.
- Notice of appeal was timely filed based on Rule 27(a) of the Rules of Appellate Procedure.

In re E.M., ___ N.C. App. ___, 692 S.E.2d 629 (3/2/10).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091370-1.pdf>

Facts: The trial court adjudicated multiple grounds for termination of parental rights and concluded that termination was in the child's best interest. Of the factors listed in G.S. 7B-1110(a) that the court must consider in determining whether termination is in the child's best interest, the order reflected consideration of only the juvenile's age and the permanent plan of adoption. It did not indicate that the court had considered the likelihood of the child's being adopted, the bond between the child and parent, or the quality of the relationship between the child and the proposed adoptive parent, guardian, custodian, or other permanent placement.

Held: Remanded for additional findings of fact.

1. The court of appeals first denied the guardian ad litem's motion to dismiss the appeal for failure to give timely notice of appeal. The court of appeals took judicial notice that the 30th and 31st days after entry and service of the order were a Sunday and a legal holiday, respectively, and held that filing of the notice of appeal on the 32nd day was timely based on Rule 27(a) of Rules of Appellate Procedure.
2. The court of appeals stated that the use of the word "shall" in G.S. 6B-1110(a) made the trial court's consideration of the listed factors mandatory. Noting that there was evidence in the record from which the trial court could have made findings regarding the factors not reflected in the order, the court of appeals remanded for additional findings.

Delinquency: complaints; filing timelines

- Statutory time limits for filing of juvenile petitions are not jurisdictional.
- A "complaint" is a written and sworn document asserting specific allegations of delinquency.

In re D.S., ___ N.C. ___ (6/17/10), reversing ___ N.C. App. ___, 682 S.E.2d 709 (6/16/09).

<http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/273PA09-1.pdf>

Facts: On 9/25/07 the court counselor received a complaint about an incident that occurred at school, involving the juvenile's touching a female student with an object several times. On 10/10/07 the counselor filed a petition based on the complaint, alleging simple assault. On 11/15/07 the court counselor received a second complaint relating to the same incident, and the next day the counselor filed a second petition alleging sexual battery. The trial court adjudicated the juvenile delinquent for both offenses.

The court of appeals held that the trial court lacked subject matter jurisdiction with respect to the second, sexual battery, petition because it was untimely filed, reasoning that receipt of a second complaint about the same incident could not be the basis for a second petition based on that incident, thus extending the time within which a petition could be filed. The court did not discuss what constituted the "complaint."

Held: Reversed (as to this issue).

1. The second petition was timely filed because it was filed the day after a new “complaint” was received. The Juvenile Code, when it says “after the complaint is received,” means after the court counselor receives a written, sworn document alleging acts of delinquency. When the initial complaint did not allege a sexual battery, the court counselor could not file a petition alleging that offense based on that complaint.
2. Nothing in the Juvenile Code indicates a legislative intent for the time limits in G.S. 7B-1703 (for filing a juvenile petition) to relate to subject matter jurisdiction. While interpreting them that way might serve the Code’s purpose of expediting juvenile cases, it would be contrary to other purposes of the Code.

Delinquency: credit for time spent in secure custody

- When days of intermittent confinement are ordered at disposition, a juvenile is not entitled to credit for time spent in secure custody pending disposition.
- G.S. 15-196.1, relating to credit for time served in criminal cases, does not apply to juvenile proceedings.

In re D.L.H., ___ N.C. ___ (6/17/10), reversing ___ N.C. App. ___, 679 S.E.2d 449 (7/21/09).
<http://www.aoc.state.nc.us/www/public/sc/opinions/2010/pdf/350PA09-1.pdf>

Facts: Pursuant to G.S. 7B-1903(c), the juvenile spent 55 days in secure custody awaiting disposition. Then, as part of the disposition, the court ordered that she spend 14 days in detention. The trial court rejected the juvenile’s argument that she was entitled to credit for the days she was in secure custody pending the disposition. The court of appeals reversed, holding that G.S. 15-196.1 applied and required that she be given credit for the time spent in custody pending disposition.

Held: Reversed (as to this issue).

1. “The General Statutes do not authorize credit for time served before disposition in the juvenile context.”
2. Based on the facts of the case, secure custody pending disposition was reasonable. It was not a response to the juvenile’s delinquent conduct, but was what the trial court in its discretion thought was the “best temporary situation available” for the juvenile while information was being gathered to enable the court to make an informed determination of an appropriate disposition.
3. Due process did not require that credit be given for the days in post-adjudication, pre-disposition custody.
4. Delinquency proceedings are not criminal prosecutions, and criminal procedure law is not to be incorporated wholesale into juvenile cases.
5. The legislature’s specific incorporation of some Chapter 15A provisions into the Juvenile Code, and its provision in G.S. 7B-2514(f) for a juvenile who receives a definite commitment to receive credit for time spent on post-release supervision, indicate a lack of legislative intent to incorporate or apply the credit provisions of G.S. 15-196.1 to juvenile proceedings.

Note: The Supreme Court stated that the decisions of the court of appeals with respect to other issues in the case, which were not before the Court, remain undisturbed. These include a holding that a juvenile in secure custody after adjudication and pending disposition is entitled to a hearing at least every ten days on the need for continued secure custody.