

**District Court Judges Summer Conference
Wrightsville Beach**

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JUVENILE LAW UPDATE

(Cases filed from October 17, 2006, through May 15, 2007)

Janet Mason
Institute of Government
The University of North Carolina at Chapel Hill
(919) 966-4246
mason@sog.unc.edu

DELINQUENCY

- When a petition alleging delinquency is filed after the maximum 30-day period allowed by statute, the trial court does not have subject matter jurisdiction.

In re M.C., ___ N.C. App. ___, ___ S.E.2d ___ (5/1/07).

Facts: On 11/1/05 a detective verified a juvenile petition alleging that the juvenile was delinquent for committing misdemeanor larceny. The petition was filed on 12/2/05. After a hearing, the court adjudicated the juvenile delinquent and entered a disposition order. The juvenile appealed.

Held: Vacated and remanded for entry of an order dismissing the action.

The trial court lacked subject matter jurisdiction because the petition was not filed within the maximum time allowed – 30 days – after the complaint was received.

- The standards for the sufficiency of a delinquency petition are the same as for the sufficiency of an indictment.
- The court may not make a wholesale delegation to the court counselor of discretion to determine terms of probation.

In re S.R.S., ___ N.C. App. ___, 636 S.E.2d 277 (11/7/06).

Facts: The juvenile was adjudicated delinquent for misdemeanor communicating threats, for telling a teacher that he was going to harm her daughter. At disposition the trial court placed the juvenile on probation with terms that included (1) abide by rules set by the court counselor or the juvenile's parents, including rules about a curfew and with whom he associated; (2) cooperate with any out of home placement if deemed necessary or arranged by the court counselor, including a wilderness program; and (3) cooperate with any counseling recommended by the court counselor and comply with any assessments recommended by the court counselor.

Held: Affirmed in part; reversed in part.

1. The petition was sufficient, even though it alleged threats to both injure a person and injure property. Applying the same law that applies to the sufficiency of an indictment, the court concluded that the petition was sufficient because it referred to the proper statute, specifically described the conduct for which the juvenile was being charged, correctly named the victim, and gave the juvenile sufficient notice to prepare a defense.
2. The court of appeals affirmed the first probation term listed above because it closely resembled statutory wording of permissible conditions of probation. The court reversed with respect to the other two probation terms, relying on *In re Hartsock*, 158 N.C. App. 287, 580 S.E.2d 395 (2003), which held that the trial court may not delegate its discretion to others, including the court counselor. The record contained no finding or evidence that the juvenile might require out-of-home placement or any specific type of counseling or assessment.

- Before accepting a juvenile's admission, the trial court must personally address the juvenile regarding all six of the questions set out in G.S. 7B-2407(a).
- This duty exists even if the juvenile has signed a transcript of admission.

In re A.W., ___ N.C. App. ___, 641 S.E.2d 354 (3/6/07).

Facts: Juvenile appealed from an order that adjudicated him delinquent based on his admission to possessing marijuana with intent to sell and deliver and imposed a disposition. The juvenile's attorney filed an *Anders* brief.

Held: Reversed and remanded.

The trial court committed reversible error by accepting the juvenile's admission without satisfying all the requirements of G.S. 7B-2407(a). The court of appeals found no indication in the transcript that the court had informed the juvenile of his right to remain silent, the risk that any statement might be used against him, or his right to deny the allegations. The fact that the juvenile signed a transcript of admission did not relieve the trial court of the duty to orally address the juvenile regarding each of the six questions in G.S. 7B-2407(a).

- The juvenile must be allowed to withdraw his admission when the court told him and the transcript of admission showed that the maximum possible period of commitment was shorter than the maximum possible period stated in the commitment order.
- The trial court is not required to exhaust less restrictive alternatives before committing a juvenile to a youth development center.

In re D.A.F., ___ N.C. App. ___, 635 S.E.2d 509 (10/17/06).

Facts: The juvenile was alleged in four petitions to be delinquent for first-degree sex offenses. He waived probable cause and admitted to one count of first-degree sex offense. The other petitions were dismissed. In addressing the juvenile the court said, as did the transcript of admission, that the most restrictive disposition the juvenile could receive was commitment to the Department of Juvenile Justice and Delinquency Prevention (DJJDP) for placement in a youth development center for a minimum of six months and a maximum of his 19th birthday. At disposition the juvenile's attorney argued that the juvenile should be sent to a specific treatment facility in PA. The court committed the juvenile to DJJDP, and the order stated that the commitment was for a minimum period of six months and a maximum of the juvenile's 21st birthday.

Held: Reversed and remanded, with all four charges reinstated.

1. Acceptance of the juvenile's admission was error where the court's inquiry pursuant to G.S. 7B-2407 and the transcript of admission referred to a shorter absolute maximum period of commitment than was stated in the commitment order.
2. The court of appeals rejected the juvenile's argument that the trial court erred by failing to exhaust community resources before ordering commitment. The Juvenile Code, the court pointed out, no longer requires that less restrictive alternatives be exhausted, but requires the court to order the most appropriate disposition in light of the protection of the public, the juvenile's needs, and other factors. The court of appeals found that the trial court's determination was reasoned, not arbitrary, and that the trial court had not abused its discretion in ordering commitment.

- The statute requiring the court to make specific inquiries before accepting a juvenile's admission to the allegations in a petition does not apply when a juvenile admits the allegations in a motion to revoke probation.

In re D.J.M., ___ N.C. App. ___, 638 S.E.2d 610 (1/2/07).

Facts: Juvenile was on probation after being adjudicated delinquent for larceny of a motor vehicle and assault inflicting serious injury. At a probation violation hearing, the juvenile through his attorney admitted the alleged violations of probation – being aggressive toward another juvenile at his placement and being discharged from the placement as a result.

Held: Affirmed. The court of appeals rejected the juvenile's argument that the trial court should not have considered his admission of the probation violations because the court did not comply with the inquiry requirements of G.S. 7B-2407. That statute, the court said, is not applicable to a juvenile's admission in a probation revocation hearing.

- Supreme Court holds that crime against nature statute properly formed the basis for a delinquency adjudication when the juvenile had consensual sexual contact with a minor less than three years younger than he.

In re R.L.C., ___ N.C. ___, 643 S.E.2d 920 (5/4/07).

Facts: The juvenile, when he was 14, was dating a 12-year-old girl. The two had sexual intercourse and engaged in two separate incidents of fellatio in the back of the girl's mother's vehicle in a parking lot while her parents were bowling. More than a year later, the girl told an officer, who was investigating a fight between her and another girl, about her sexual conduct with the juvenile. The officer questioned the juvenile, who admitted that the girl had performed fellatio on him two or three times. Three juvenile petitions were filed alleging that the juvenile was delinquent for committing a crime against nature with the girl in violation of G.S. 14-177. The trial court dismissed one of the petitions for insufficient evidence and adjudicated the juvenile delinquent based on the other two. At disposition the court placed the juvenile on six months of unsupervised probation and ordered that he have no contact with the girl. The juvenile appealed to the court of appeals which, in a divided opinion, affirmed.

Held: Affirmed.

1. The Supreme Court refused to consider arguments that the adjudication violated equal protection or that the crime against nature statute was facially invalid based on *Lawrence v. Texas*, 539 U.S. 558 (2003) because these arguments were not made to the trial court or the court of appeals, were not set out in the dissenting opinion in the court of appeals, and were not set out in the notice of appeal, the assignments of error, or the juvenile's brief. The court limited its analysis to questions of statutory construction and whether the statute as applied to the juvenile was unconstitutional.
2. The General Assembly included age differential elements in several statutes setting out criminal sex offenses. The fact that it did not do so in the crime against nature statute indicates that no age differential element was intended, and the court refused to read one into the statute.
3. Applying the "rational basis" test to the statute as applied to the juvenile, the court concluded that the state could have a legitimate interest in preventing sexual conduct between minors, promoting proper notions of morality among youth, and promoting a healthy young citizenry. The court held that application of the statute in cases such as this one is a reasonable means of promoting a legitimate state interest and did not violate the juvenile's due process rights.

Concurrence: Justice Martin concurred in the result, emphasizing that the statute was unambiguous and that its plain meaning made the application of canons of statutory construction unnecessary.

Dissent: Justice Timmons-Goodson, joined by Justice Hudson, dissented on the basis that she did not think the General Assembly intended that the juvenile's conduct be subject to criminal prosecution.

- Possession of closed pocketknife on school property violates G.S. 14-269.2(d).

In re B.N.S., ___ N.C. App. ___, 641S.E.2d 411 (3/6/07).

Facts: The juvenile was adjudicated delinquent for possessing a weapon on school property, pursuant to G.S. 14-269.2(d). The weapon was a pocketknife with a 2.5 inch blade, which was closed when the knife was found in the juvenile's jacket pocket. The juvenile argued on appeal that the pocketknife was not a weapon for purposes of the statute.

Held: Affirmed.

The court of appeals held that the evidence was sufficient to support the delinquency adjudication. Considering both case law and legislative intent, the court concluded that the pocketknife was a weapon for purposes of the statute and that the operability of the pocketknife was irrelevant.

- Evidence was sufficient to support adjudication of delinquency for misdemeanor possession of stolen property but not felonious possession of stolen property.

In re J.H., ___ N.C. App. ___, 630 S.E.2d 457 (6/6/06), *affirmed per curiam*, 361 N.C. 110, 637 S.E.2d 538 (12/15/06).

Facts: Nine days after the juvenile's mother's car disappeared, she located her car and the juvenile at a home with an adult and several other teenagers. When asked in court whether the juvenile had said whether he took the car, the juvenile's mother testified that the juvenile "confessed." She then testified, however, that the juvenile had said nothing to her about taking or driving the car. The trial court adjudicated the juvenile delinquent for felonious possession of stolen property.

Held: Reversed in part and remanded.

The court of appeals held that because there was no evidence as to the value of the car, the evidence supported only an adjudication for misdemeanor possession of stolen property.

- Trial court did not abuse its discretion in denying juvenile's motion for a continuance or in ordering a Level 3 disposition.

In re D.A.S., ___ N.C. App. ___, 643 S.E.2d 660 (5/1/07).

Facts: While on probation for simple assault the juvenile disrupted a class at school, threw items across the room, used profanity toward the teacher, and kicked a door the teacher was holding open, causing a sprain to the teacher's wrist. The case came to court on a petition alleging assault on a government employee and a motion for review alleging violation of probation. The trial court adjudicated the juvenile delinquent for the offense alleged, found that the juvenile had violated probation, and entered a Level 3 commitment disposition, committing the juvenile for a minimum period of six months.

Held: Affirmed.

1. The trial court did not abuse its discretion in denying the juvenile's motion to continue the disposition hearing to obtain a copy of a psychological evaluation that had been performed several years earlier, when a risk and needs assessment and more current psychological information were available to the court.
2. Where the juvenile was adjudicated delinquent for a serious offense and had a high delinquency history level, the juvenile did not establish that the court abused its discretion in ordering a Level 3 disposition.
3. The trial court did not err in directing the prosecutor to ask the court counselor to clarify his recommended disposition.

ABUSE, NEGLECT, DEPENDENCY

- Supreme Court holds that trial court lacked subject matter jurisdiction at the review hearing stage when the petition that initiated the case had not been verified.

In re T.R.P., 360 N.C. 588, 636 S.E.2d 787 (11/17/06).

Facts: The child lived with her mother and the mother's boyfriend, who were discovered to be operating a methamphetamine lab in their home. At the recommendation of DSS the mother voluntarily placed the child with an aunt. Several months later DSS filed a petition alleging that the child was neglected, due to the mother's failure to follow the case plan. The petition was notarized, but it was not signed or verified. The trial court adjudicated the child to be neglected and placed him in the custody of DSS, with placement remaining with the aunt. At a review hearing, the court continued custody with DSS but ordered that the child be placed physically with his father subject to specified conditions. The mother appealed the review order and asserted on appeal that the trial court lacked subject matter jurisdiction because the petition initiating the case had not been verified. The court of appeals, with one judge dissenting, held that the verification requirement was jurisdictional and vacated the trial court's order. DSS appealed to the Supreme Court.

Held: The Supreme Court affirmed the decision of the court of appeals and remanded for a hearing to determine the status quo ante, subject to the filing of a new petition. The trial court lacked subject matter jurisdiction because the petition that initiated the matter was not verified. In a case of first impression, the court based its decision on the statutory language, prior decisions of the court of appeals such as *In re Triscari*, 109 N.C. App. 285, 426 S.E.2d 435 (1993), the gravity of the state action involved in such a proceeding, and the rule that subject matter jurisdiction may be raised at any time.

Dissent: Justice Newby dissented in a separate opinion, in which Chief Justice Parker and Justice Brady joined.

- Under the UCCJEA, the trial court has discretion, at any point in a custody proceeding, to determine that another state is a more appropriate forum.

In re M.E., ___ N.C. App. ___, 638 S.E.2d 513 (1/2/07), disc. review denied, ___ N.C. ___, ___ S.E.2d ___ (5/4/07).

Facts: The trial court adjudicated the child to be dependent in May 2000 and placed her in the custody of DSS. In 2002 the trial court entered orders placing the child in the legal and physical custody of her father who lived in Ohio. In 2004 the child's mother filed a motion asking that custody be placed back with her. After a hearing, in January 2005 the court entered an order keeping legal and physical custody with the father, giving mother certain visitation and notification rights, suspending further reviews, and "transferring" jurisdiction to Ohio. In an earlier appeal the court of appeals reversed the portion of the order that transferred jurisdiction, on the basis that it was not based on sufficient findings of fact and conclusions of law, and affirmed the remainder of the order. On remand, in a supplemental order the trial court made additional findings of fact and concluded as a matter of law that a court of proper jurisdiction in Ohio was a more appropriate forum, then stayed the matter for no more than three months to allow the father to bring a custody action in Ohio. The mother appealed from this order.

Held: Affirmed.

The trial court did not abuse its discretion in finding and concluding that North Carolina was an inconvenient forum. The UCCJEA allows a state to decline to exercise its jurisdiction at any time it determines it is an inconvenient forum and another state is a more appropriate forum. The trial court made numerous and sufficient findings to support its conclusion, and it was not necessary that a custody action have already been initiated in Ohio.

- Failure to attach an affidavit of status of minor child does not deprive the court of jurisdiction.
- Court can take judicial notice of files, documents, and orders and is presumed to have ignored any incompetent evidence; better practice is to give prior notice of intent to take judicial notice.
- Court may not delegate to DSS the determination of parents' visitation rights.

In re D.S.A., ___ N.C. App. ___, 641 S.E.2d 18 (2/20/07).

Facts: The court adjudicated the child to be neglected on the basis that she lived in an injurious environment, and placed her in the custody of DSS. The court found that the parents intended to take the child to their home in which a sibling had been sexually abused by the mother's then live-in boyfriend, who pled guilty to various sex offenses; the mother was awaiting trial on charges of felony child abuse; and respondents disagreed with each other regarding placing the child with paternal relatives. The court ordered that visitation would be in the discretion of DSS.

Held: Remanded for court-approved visitation plan.

1. DSS's failure to attach to the petition the affidavit required by G.S. 50A-209, by itself, did not deprive the trial court of jurisdiction.
2. The court did not err in taking judicial notice of files, documents, and orders, although it would have been better practice for the court to give the parties express notice that it intended to do so. The evidence was sufficient to support the court's findings, and the court is presumed to have ignored any incompetent evidence.
3. Placing the child in DSS custody, rather than with paternal relatives, was not an abuse of discretion where respondent father's paternity had not been confirmed by testing.
4. The trial court erred in leaving visitation in the discretion of DSS.

- Burden is on a party claiming that the Indian Child Welfare Act applies to establish that it does.
- The court may not delegate to DSS or another custodian determination of a parent's visitation rights.

In re C.P., ___ N.C. App. ___, 641 S.E.2d 13 (2/20/07).

Facts: DSS filed a petition alleging that respondent's three children were neglected. Before the adjudication hearing respondent claimed that she and the children might be members of the Pokagen Band of Potawatomi Indians and that the Indian Child Welfare Act applied. The court granted two continuances. Respondent applied for tribe membership and the tribe was notified of the court proceeding, but at the time of the hearing the tribe had made no response. The trial court ruled that that Act did not apply, adjudicated the children neglected, placed two children with their father in another state, and placed custody of the youngest child with DSS.

Held: Affirmed in part; remanded in part.

1. Trial court did not err in ruling that the Indian Child Welfare Act did not apply, because respondent offered no documents or evidence other than her own statement to support her claim that the Act applied.
2. Evidence was sufficient to support the trial court's findings and adjudication of neglect. [**Note:** Apparently the adjudication and disposition hearings were combined, because evidence cited by the court included testimony, the DSS court report, the Guardian ad Litem court report, and the summary of Family Preservation Services.]
3. Because the court made no findings about or provisions for visitation by respondent, the court apparently left visitation in the discretion of the custodian, which the statute does not permit.

- Chief district court judge did not err in issuing and applying a detailed administrative order governing discovery in all abuse, neglect and dependency cases.
- An adjudication that a child is abused, neglected, or dependent is about the circumstances and condition of the child, not the fault or culpability of a parent.

In re J.S., ___ N.C. App. ___, 641 S.E.2d 395 (3/6/07).

Facts: In 2002, after an adjudication of neglect and dependency, the child was placed in the joint custody of the father and paternal grandmother. In March 2006, DSS filed a petition alleging that the child was abused and neglected in that she had been beaten by respondent father. A nonsecure custody order placed the child with the paternal grandmother in Georgia. The parents filed motions for discovery of information from DSS just after the chief district court judge entered an administrative order pursuant to G.S. 7A-146 specifying procedures for all discovery in abuse, neglect, and dependency cases. On the hearing date the parents moved for continuances because they had not been able to review discovery materials within the time specified in the administrative order. The court denied the motions and adjudicated the child abused and neglected based on evidence that the father, among other things, had hit her, fracturing her hand and rupturing her spleen. The court continued custody with the grandmother, ordered the father to have no contact with the child, and ordered DSS to conduct a home study of respondent-mother's home.

Held: Affirmed.

1. The majority held that the issuance and application of the administrative order did not contradict the Juvenile Code and were not an abuse of discretion. Judge Levinson, dissenting but finding that respondents failed to show any resulting prejudice, thought the order was not authorized under G.S. 7A-146 and that it contradicted discovery provisions in G.S. 7B-700.
2. The trial court did not abuse its discretion in excluding testimony that was duplicative or in continuing custody with the grandmother and ordering a home study of the mother's home.
3. The court of appeals rejected respondent mother's argument that the trial court erred in concluding that the child was abused and neglected without assigning responsibility for the abuse and neglect to respondent father. Unlike proceedings to terminate parental rights, cases involving abuse, neglect and dependency focus on the circumstances and condition of the child, not on the conduct, fault, or culpability of the parent.

- Expert's opinion that child had been sexually abused, based on both physical findings and the child's statements, was properly admitted.
- Expert's testimony that her opinion would have been the same even without physical findings was error, but not "plain error" for purposes of defendant's appeal.

State v. Hammett, 361 N.C. 92, 637 S.E.2d 518 (12/15/06).

Facts: Defendant was convicted of sexual offense and taking indecent liberties with his thirteen-year-old daughter. The pediatrician who examined the daughter testified to her physical findings and, based on those and the girl's statements, her opinion that the child had been sexually abused. The court of appeals reversed, finding that the witness's testimony that her opinion would have been the same even if there had been no physical findings was plain error.

Held: The Supreme Court reversed, holding that even though the witness's second statement amounted to inadmissible testimony about the victim's veracity, given other evidence in the case it was not likely that the jury would have acquitted defendant even if the evidence had been excluded.

- The court did not err in dismissing neglect petitions at the end of the evidence.

In re H.M., ___ N.C. App. ___, 641 S.E.2d 715 (3/20/07).

Facts: After respondent parents argued in front of their four children at home, respondent father left the home with three of the children. A relative called law enforcement and the mother obtained warrants charging the father with assault by pointing a gun and communicating threats. A social worker talked to the mother and testified at the juvenile hearing that the mother told her the father had hit her and taken the children at gunpoint. The father returned the children to the mother at a relative's home, and the mother and children went to a domestic violence shelter at the social worker's request. The prosecutor dropped the criminal charges because the mother refused to testify, and the mother and children left the shelter. DSS filed a petition alleging that the children were neglected and dependent and obtained a nonsecure custody order. After a hearing, the court entered an order finding that DSS had failed to prove the allegations by clear and convincing evidence and dismissing the petitions. DSS appealed.

Held: Affirmed.

The court of appeals rejected DSS's arguments that the trial court erred (1) because several of the trial court's findings were not supported by the evidence, (2) when it concluded that DSS had not proved neglect and dependency by clear and convincing evidence, and (3) by dismissing the petitions.

- The trial court, with some reservations, had admitted into evidence the transcript of the nonsecure custody hearing, but found that the parents had given conflicting and confusing testimony that did not allow the trial court to determine credibility.
- The trial court had found that there was not clear evidence that the father pointed a gun at the mother, that the children had not gone with the father willingly, that domestic violence had occurred, or that the children were put in danger.
- After finding that DSS had not proved neglect and dependency by clear and convincing evidence, the trial court was required to dismiss the petitions.

- Evidence, including evidence of neglect of another child and failure to comply with case plan, was sufficient to establish neglect.
- Incorporation of reports as findings was not error when court also made extensive independent findings.
- Findings were sufficient to support conclusion that reunification efforts would be futile.
- Delay in conducting dispositional hearing was not prejudicial where respondent was responsible for some of the delay.

In re C.M., ___ N.C. App. ___, ___ S.E.2d ___ (5/15/07).

Facts: The mother's parental rights to one child had been terminated due to neglect. A couple of months after the birth of C.M. in June 2005, DSS began providing intensive case management services pursuant to a case plan that required supervision of the mother's care for the child by the father or grandmother. Respondents failed to comply with various provisions of the plan (by missing appointments, losing contact, and not following through with evaluations). In December, 2005, DSS filed a neglect petition. After an adjudication hearing in January, 2006, the court entered an order in March, 2006, adjudicating the child neglected, and after a disposition hearing in April, 2006, the court entered a disposition order in May, 2006, awarding custody to DSS and ceasing reunification efforts and visitation.

Held: Affirmed, and portions of appeal dealing with temporary disposition order dismissed.

1. Evidence of neglect of the mother's other child was relevant, and evidence of respondents' noncompliance with the case plan was sufficient to establish neglect.
2. Trial court did not err by incorporating reports and evaluations as findings of fact, where the court also made other extensive findings based on the evidence presented at the hearings. [Citing *In re J.S.*, 165 N.C. App. 509, 598 SE.2d 658 (2004), the court of appeals said: "A trial court may consider

written reports and make findings based on these reports so long as it does not ‘broadly incorporate these written reports from outside sources as its findings of fact.’”]

3. The trial court’s extensive findings were sufficient to support its conclusion that reunification efforts would be futile and should cease.
4. The court did not abuse its discretion in terminating respondent mother’s visitation rights.
5. The court did not err in entering a temporary disposition order before entering the final dispositional order, and the temporary order was not appealable.
6. Failure to have the dispositional hearing within 30 days after adjudication was not prejudicial error, where the delay was due in part to respondent’s failure to complete a psychological evaluation and to respondent’s joint motion for a continuance.

- The Confrontation Clause does not apply in civil cases.
- Continuance of a hearing to obtain psychological evaluations did not result in violation of the timeline for conducting the hearing.
- Where attorney violated appellate rules and made frivolous arguments, the court of appeals ordered the attorney to pay the costs of the appeal.

In re T.M., ___ N.C. App. ___, 638 S.E.2d 236 (12/19/06).

Facts: The trial court adjudicated the child to be neglected based on evidence showing that respondent was in relationships with abusive men and exposed the child to violence and excessive drinking, that the child had suffered physical injuries evidenced by bruising, and that the child displayed aggressive, violent, and volatile behavior.

Held: Affirmed.

1. Protections of the Confrontation Clause do not apply in civil cases, and even if the child’s out-of-court statements had been inadmissible hearsay, respondent failed to show that prejudice resulted from their admission.
2. Violation of statutory timelines is not jurisdictional. Respondent did not show prejudice, and because the hearing began within 90 days after the petition was filed the timeline was not violated even though the hearing was continued in order to obtain psychological evidence.
3. It was not error for the trial court to direct a party’s attorney to draft the order, and the court is not required to make detailed findings of fact in open court.
4. The trial court did not abuse its discretion in accepting a doctor as an expert with respect to counseling recommendations.
5. Finding that appellant’s statement of facts was “almost entirely naked argument” and included no citations to the record, that some of respondent’s arguments were frivolous, and that the court had admonished the same attorney before for rule violations, the court of appeals ordered that appellant’s counsel personally pay the costs of the appeal.

- An adjudication of neglect addresses the status of the child and does not require findings about the conduct of both parents.
- An adjudication of dependency requires a finding as to whether the parent has a suitable alternative arrangement for care of the child.
- Respondents failed to show prejudice resulting from holding adjudication hearing after the time period prescribed by statute.

In re B.M., ___ N.C. App. ___, 643 S.E.2d 644 (5/1/07).

Facts: The child tested positive for cocaine at birth. Respondent mother signed a safety assessment plan, but after domestic violence problems were identified she refused to sign a more extensive plan, agreeing

that she and the child would live with her mother. DSS filed a petition. The trial court adjudicated the child to be dependent and neglected, ceased reunification efforts, and established a permanent plan of adoption.

Held: Reversed, and remanded for additional findings with respect to dependency.

1. Although the trial court granted numerous continuances before the adjudication hearing, respondents did not object and failed to show prejudice resulting from the delay in holding the hearing.
2. Evidence, including evidence of cocaine use and domestic violence, was sufficient to establish that the child was neglected.
3. The trial court did not err in failing to require allegations and make findings regarding neglect “as to” the father, because an adjudication addresses the status of the child, not the culpability of a parent. [**Note:** Although this issue was framed in the opinion as relating to both neglect and dependency, the court addressed it only with respect to neglect. It is not clear from the opinion whether the trial court made findings regarding the father’s ability to care for the child. *See* In re. J.L., below.]
4. With respect to dependency, the trial court failed to make findings as to whether respondents had a “suitable alternative arrangement” for care of the child.

Concurrence: Judge Levinson concurred in the result, objecting to the court’s extension of the prejudice line of cases to circumstances in which an adjudication hearing is held after the time period established by statute.

- A finding that the child was conceived as a result of respondent father’s commission of statutory rape was not sufficient to support a conclusion that the child was dependent.

In re J.L., ___ N.C. App. ___, 643 S.E.2d 604 (5/1/07).

Facts: The child, born in 2005, was conceived when the mother was 15 and the father was 25. The mother lived with respondent father and his mother after her parents left the state. Respondent father was present when the child was born and acknowledged his paternity for the birth certificate. The child’s mother went into foster care when she left the hospital. The child was placed with her in foster care when he was discharged. Respondent father, supported by his family, stated that he wanted the child placed with him. The mother, after fighting with her foster mother and attempting to run away, was placed in a different foster home. The child was moved from the foster home because of inappropriate discipline. DSS filed a petition alleging that the child was dependent. The court granted nonsecure custody and authorized DSS to place the child with his paternal aunt or grandmother after completion of favorable home studies. Pending the home studies the court ordered DSS to facilitate visits with the relatives but ordered that respondent father have no visitation with the child. Respondent mother had run away and could not be found. When the petition was heard, respondent father appeared with his attorney. The court adjudicated the child to be dependent and concluded that he had been abandoned by respondent mother. At disposition, the court found that respondent father was current in support payments and was providing health insurance, but also found that he had committed statutory rape and should have no contact with the child and that efforts should not be made to reunify the child with respondent father. The court ordered that custody remain with DSS and that visits with the relatives, but not respondent continue and that placement with the paternal aunt continue to be explored. The court also ordered that DSS attempt to locate respondent mother so that she could be placed in foster care with the child.

Held: Reversed.

1. The trial court did not make sufficient findings regarding respondent father to conclude that the child was dependent, as it found neither that he was unable to care for the child nor that he was not able to make a suitable alternative arrangement.
2. A finding that respondent committed statutory rape was not sufficient to support a conclusion of dependency. The court also noted that a conviction of statutory rape would not deprive a parent of his parental rights.

- Corporal punishment (spanking) that does not cause “serious injury,” standing alone, does not constitute abuse.

In re C.B., ___ N.C. App. ___, 636 S.E.2d 336 (11/7/06), affirmed per curiam, ___ N.C. ___, 643 S.E.2d 587 (5/4/07).

Facts: Three children went to DSS to report abuse. The 13-year-old reported that his father had whipped him with a belt for misbehaving and showed the social worker bruising on his buttocks and arm. The children were fearful of returning home. DSS filed a petition and obtained a nonsecure custody order for the three children and a younger child who was at home. The trial court adjudicated all four children neglected and dependent and the 13-year-old abused. The father, who had denied the allegations, appealed.

Held: Reversed and remanded.

1. An adjudication of abuse requires a finding by clear and convincing evidence that the child suffered serious injury, and the court of appeals held that such evidence was not present in this case.
2. Because the adjudications of neglect were based on the abuse of one child, that adjudication could not stand.

- Whether an injury is “serious” for purposes of adjudicating abuse must be determined on a case by case basis.

In re L.T.R., ___ N.C. App. ___, 639 S.E.2d 122 (1/16/07).

Facts: The trial court adjudicated one child abused and neglected and the other child neglected based on findings that the stepfather had hit the 4-year-old child with a brush, causing a long bruise on his thigh; the mother had played a “thumping” game with the 5-year-old child, leaving bruising on the child’s face; and both respondents had told the children to lie about how the bruises occurred. The court placed the children in the custody of their biological father.

Held: Affirmed.

1. Evidence and findings were sufficient to support the adjudication of abuse of one child. The nature of injuries and whether they are “serious” must be examined on the facts of each case. Here an expert said that substantial force would have been required to inflict the bruise, which remained both visible and sore for days.
2. Evidence and findings were sufficient to support the conclusion that both children were neglected.
3. The court did not abuse its discretion in placing the children in the custody of their father, limiting the mother’s visitation rights, and ordering that the step-father have no contact with the children.

- An adult’s exclusive custody of a child who suffers non-accidental injuries that were not self-inflicted can support an inference that the adult inflicted the injuries.

State v. Wilson, ___ N.C. App. ___, 640 S.E.2d 403 (2/6/07).

Facts: Evidence showed that defendant’s young child suffered serious hot water and cigarette burns as well as a head injury that were not inflicted accidentally. Defendant was convicted of felony child abuse causing serious injuries.

Held: No error.

Finding that the evidence was sufficient, the court of appeals quoted from *State v. Liberato*, 156 N.C. App. 182, 576 S.E.2d 118 (2003), in which the court said: “[W]hen an adult has exclusive custody of a

child for a period of time during which the child suffers injuries that are neither self-inflicted nor accidental, there is sufficient evidence to create an inference that the adult intentionally inflicted those injuries.”

- The trial court did not have authority to order a parent to go to a child support enforcement agency to establish a support obligation.

In re A.S., ___ N.C. App. ___, 640 S.E.2d 817 (2/20/07).

Facts: Respondent lived with Child 1 and Child 1’s mother, KM. Child 2 lived a week with respondent and then a week with Child 2’s mother. K.M. admitted to law enforcement, medical personnel, and a social worker that on several occasions she had hurt Child 2, most recently by pushing her to the floor, with a resulting head injury. Respondent father told officials that KM sometimes threw things, did not take her antidepressant medication regularly, or had to be restrained. He had attempted unsuccessfully to have her committed.

The trial court adjudicated both children to be neglected, placed Child 1 in the custody of a paternal relative, and placed Child 2 with her mother. Respondent’s visitation with Child 1 was not limited, but his visits with Child 2 were limited to two supervised visits a week. The court ordered respondent to contact the Child Support Enforcement Agency to establish support obligations, to have a psychological evaluation and substance abuse assessment, and to go to parenting classes. The parties agreed that an adjudication of abuse in relation to Child 2 should not have been in the order and the court remanded for amendment of the order accordingly.

Held: Affirmed in part; remanded in part.

1. Evidence supported findings and a conclusion that the children lived in an environment injurious to their welfare and were neglected.
2. The trial court did not have authority to order respondent to contact the child support agency.
3. The trial court did have authority, under G.S. 7B-904, to order respondent to have the evaluation and assessment and to attend parenting classes.

Concurring in part; dissenting in part: Judge Levinson dissented only with respect to the remand to delete the abuse adjudication, arguing that the trial court properly adjudicated Child 2 to be an abused juvenile, even if only KW and not respondent was responsible for the child’s being abused.

- Notice of appeal is not properly served when no certificate of service is attached.

In re C.T., ___ N.C. App. ___, 641 S.E.2d 414 (3/6/07).

Facts: Respondent gave notice of appeal from an order adjudicating two children abused and neglected, but did not attach a certificate of service. The trial court denied a motion by DSS and the guardian ad litem to dismiss for failure to properly serve the notice by attaching the certificate of service. The same motion was made to the court of appeals after the record was filed.

Held: Appeal dismissed.

The court of appeals, Judge Wynn dissenting, held that failure to attach the certificate of service violated Rules 3 and 26 of the Rules of Appellate Procedure, that the violation was not “inconsequential,” and that DSS and the guardian ad litem had not waived the failure to include proof of service of the notice of appeal.

- After remand, the trial court may not hold a new hearing until the opinion is certified.
- Respondent failed to show prejudice from a 5-month delay in entry of the order.

In re T.S., III, ___ N.C. App. ___, 631 S.E.2d 19 (6/20/06), affirmed per curiam, ___ N.C. ___, 641 S.E.2d 302 (3/9/07).

Facts: In January 2002 the court adjudicated respondent's children neglected and dependent and placed them in DSS custody. In an unpublished opinion filed 4/20/04 and certified 5/10/04, the court of appeals remanded the case with instructions to make ultimate findings of fact and clear and specific conclusions of law. After the opinion was filed but before it was certified, the district court set the case for hearing and sent respondent a notice of hearing. The hearing was held on 5/13/04. DSS submitted a proposed order, to which respondent objected, and the court held the matter open for the parties to submit proposed findings or objections on or before 6/14/04. No submissions were made, and the court entered its order on 10/18/04 adjudicating the children neglected and dependent and placing them in DSS custody.

Held: Affirmed.

1. The trial court was not "exercising jurisdiction" when it set the case for hearing and sent notice to respondent, and the court had jurisdiction because it did not actually hold the hearing until after the court of appeals' opinion had been certified.
2. Respondent failed to show that she was prejudiced by the late entry of the order. Her assertion that she had been kept away from her children without just cause and that the delay was very hard for her, without more, was not sufficient. The court of appeals stated that the delay "did not preclude the reunification of the children and respondent," and noted that the trial court had jurisdiction during the appeal to review the case and change the child's placement pursuant to G.S. 7B-1103(b)(2), and that respondent could have asked for a review at any time.

ABUSE, NEGLECT, DEPENDENCY: REVIEW HEARINGS

- When the case was filed before 10/1/05, the petition alleged dependency, and much of the case centered on respondent's mental health and substance abuse issues, a guardian ad litem for the parent should have been appointed for the permanency planning hearing if not before.
- Leaving a parent's visitation rights in the discretion of a guardian is reversible error.

In re T.T., ___ N.C. App. ___, 641 S.E.2d 344 (3/6/07).

Facts: In a case filed before October 1, 2005, respondent's children were adjudicated neglected and dependent based on respondent's mental illness and the parents' substance abuse problems and failure to provide a stable home. At a permanency planning hearing almost a year later, the court changed the plan from reunification with one parent to adoption. At another hearing almost a year later, the court changed the plan from adoption to guardianship with a sibling's relatives with whom the children were placed. The order did not address visitation.

Held: Reversed and remanded.

1. Because the case was filed before October 1, 2005, the petition alleged dependency, and the court had heard substantial evidence and made numerous findings about respondent's substance abuse and mental health problems, the trial court erred in not appointing a guardian ad litem for respondent.
2. The trial court erred in failing to include a visitation plan in the order appointing guardians.

- When granting guardianship, the court must address rights and responsibilities that remain with the parent.
- The court may waive review hearings only after making the findings required by G.S. 7B-906.

In re R.A.H., ___ N.C. App. ___, 641 S.E.2d 404 (3/6/07).

Facts: After the case was remanded by the court of appeals for a new termination of parental rights hearing, the trial court held a new permanency planning hearing and changed the permanent plan from adoption to guardianship. The court appointed a guardian and stated that no more hearings would be held.

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

1. The trial court erred in ignoring the mandate of the court of appeals to hold a new termination hearing, but the error was not prejudicial.
2. The trial court did not err at the permanency planning hearing by considering findings of fact that had been made before the termination order was reversed.
3. The court of appeals reviewed several findings of fact challenged by respondent and found that each was supported by the evidence.
4. The trial court erred by failing to address rights and responsibilities that would remain with respondent, and the court's oral statement that visitation would be up to the guardian was contrary to law. The court of appeals remanded for the trial court to address visitation.
5. The trial court erred when it relieved all parties and attorneys of further responsibility and stated that there would be no further hearings in the matter. The court, at most, can waive review hearings under G.S. 7B-906, but here the court did not make the findings necessary to do that.

- Majority holds that ICPC did not apply when the court, at a permanency planning hearing, awarded guardianship to an out-of-state grandparent.
- The requirement that the trial court ensure that a person awarded custody or guardianship understands the nature of the status and has sufficient resources to provide for the child does not require specific findings of fact.

In re J.E., ___ N.C. App. ___, 643 S.E.2d 70 (4/17/07).

Facts: In 2000 the children were adjudicated neglected and placed in DSS custody after both parents had failed to provide proper care due to substance abuse issues, the father was arrested in California, and the children had been moved from parent to parent and among several other relatives. Legal custody was returned to the mother in 2002. In 2005 DSS filed another petition and the children were again adjudicated neglected and dependent. At a permanency planning hearing in 2006 the court found that respondent mother had a long history of noncompliance and that it was unlikely the children could be returned home within six months and changed the permanent plan to guardianship with a relative. After another permanency planning hearing a month later, the court placed the children in the guardianship of their maternal grandparents in Virginia.

Held: Affirmed.

The majority rejected respondent's argument that the court erred by failing to comply with the Interstate Compact on the Placement of Children. The court held that the trial court's action did not constitute a "placement" as that term is defined in the Compact, citing *In re Rholetter*, 162 N.C. App. 664, 592 S.E.2d 237 (2004), because the placement was not for foster care or preliminary to adoption.

Dissent: Judge Tyson, rejecting the majority's attempt to distinguish *In re L.L.*, 172 N.C. App. 689, 616 S.E.2d 392 (2005), dissented on the bases that

1. *Rholetter* spoke only to out-of-state placement with a parent.
2. although a positive ICPC home study had been conducted with respect to placement of one child with the grandparents, placement of the other child violated the ICPC.

3. by “closing the active case” with respect to the children, the trial court both violated the ICPC and deprived the children of any oversight of the placement by the Virginia DSS.

- Under G.S. 7B-911, the trial court may enter one order that serves to both modify a civil custody order and terminate jurisdiction in a juvenile proceeding, when the order is filed in both cases and includes findings and conclusions sufficient to support both actions.

In re A.S., ___ N.C. App. ___, 641 S.E.2d 400 (3/6/07).

Facts: In June 2004, in a civil action, respondents (mother and father) entered into a consent order that gave the parties joint custody and gave mother primary custody. The mother remarried in May 2005 and allowed the children to live with the father beginning that month. DSS began a neglect investigation in April 2005 and filed a petition alleging neglect in June 2005. The court adjudicated the children neglected based largely on findings about inappropriate discipline administered by the step-father, placed them in the custody of DSS, and left physical placement with the father. After a permanency planning hearing in July 2006, the court made numerous findings and gave the father exclusive custody, with scheduled visitation by the mother. The court then relieved DSS and the children’s guardian ad litem of further involvement, terminated juvenile court jurisdiction, and ordered that the order be included in the 2004 civil file.

Held: Affirmed.

1. The trial court did not fail to comply with G.S. 7B-911 by entering only one order that went in both the juvenile and the civil files.
2. The trial court’s findings (not including the court’s attempted incorporation of prior juvenile orders) were sufficient to support modification of the civil custody order and to constitute a finding that there was no need for continued state intervention on behalf of the children through a juvenile court proceeding.

- Supreme Court holds that remand for an evidentiary hearing was pointless where the trial court had terminated its jurisdiction at the conclusion of a review hearing.

In re A.P., ___ N.C. ___, 643 S.E.2d 588 (5/4/07), reversing per curiam, ___ N.C. App. ___, 634 S.E.2d 561 (9/5/06).

Facts: After adjudicating the child neglected and dependent based on conditions in respondent-mother’s home, the trial court placed the child in the custody of DSS, ordered a home study of the child’s biological father’s home, and left placement decisions in the discretion of DSS. After a review hearing the following month, February 2004, the court continued custody and placement discretion with DSS and authorized DSS to place the child with the biological father.

After another review hearing, in September 2004, the court held a review (or initial permanency planning) hearing, made various findings, concluded that giving custody to the biological father was in the child’s best interest, and “closed” the case. Respondent-mother appealed.

Court of Appeals: The majority, holding that by relying for evidence solely on the DSS report the trial court abrogated its fact-finding role, reversed and remanded for an evidentiary hearing on the question of who should have custody of the child.

Supreme Court: The Supreme Court reversed the order of the court of appeals for reasons stated in Judge Levinson’s dissent, which expressed the view that because the trial court had “closed” the case, terminating its jurisdiction, it had not entered any meaningful custody order. Rather, it had “returned the parties to their pre-petition status. *See In re Dexter*, 147 N.C. App. 110, 553 S.E.2d 922 (2001).” The Supreme Court did not address the evidentiary issue.

- The court of appeals did not have jurisdiction to review a civil custody order entered pursuant to G.S. 7B-911 when notice of appeal was given only from the juvenile review order.

In re H.S.F., ___ N.C. App. ___, ___ S.E.2d ___ (4/17/07).

Facts: At a review hearing, the court found that placement of the child in the legal custody of the father, with physical custody shared by the father and grandmother, was in the child's best interest. The court also ordered that the clerk open a Chapter 50 civil case and that the court's jurisdiction in the juvenile matter was terminated. The court entered a separate order in the newly created civil court action.

Respondent mother appealed from the juvenile court review order.

Held: Affirmed.

The court of appeals held that

1. the trial court's uncontested findings supported its conclusion that it was in the child's best interest to be placed in the legal custody of her father.
2. because respondent appealed only from the juvenile review order, the court of appeals did not have jurisdiction to consider her assignments of error regarding the civil custody order.

- Changing plan from reunification to guardianship was not error when the court found that respondent could care for the children only with constant assistance, which was not available or financially feasible.
- The trial court did not err in considering written DSS and psychological reports even though they were not formally introduced as evidence.
- Appellant did not show that she was prejudiced by a two-and-a-half month delay in entry of the permanency planning order.

In re J.J., ___ N.C. App. ___, 637 S.E.2d 258 (12/5/06), *disc. review allowed*, ___ N.C. ___, ___ S.E.2d ___ (5/4/07).

Facts: DSS filed a neglect petition alleging that respondent left the children unattended, missed their medical appointments, allowed people with drugs and alcohol in the home, left dangerous substances within their reach, and failed to keep her hearing aid working properly. DSS amended the petition to allege dependency, to which respondent stipulated, and the trial court placed the children in the legal custody of DSS for physical placement with their grandmother. More than two years later at a permanency planning hearing the court considered a DSS report, a psychological report, and testimony by a social worker that respondent could manage her children with assistance. The court found among other things that respondent could not care for the children without constant assistance and that resources to provide that were not available. Appellant's assignments of error to various findings were abandoned on appeal so the court of appeals treated the findings as binding.

Held: Affirmed, with one judge dissenting. The majority rejected each of respondent's arguments and held that:

1. It was not error for the trial court to consider the cost and availability of services.
2. The trial court did not err in considering a written DSS report and psychological report because the formal rules of evidence do not apply at review hearings.
3. Appellant failed to show that she was prejudiced by a two-and-a-half month delay in entry of the permanency planning order.
4. The trial court was not required to appoint a guardian ad litem for respondent when the petition did not allege that respondent was incapable of caring for the children due to some debilitating condition.

Dissent: Judge Tyson dissented on the bases that the delay in entry of the order was longer than computed by the majority, that respondent had shown prejudice as a result of the delay, and that the trial court had impermissibly changed the permanent plan for reasons of poverty.

- The court may not leave the parent's visitation rights to the discretion of a custodian.
- The trial court is not required to include a formal list of all the statutory factors considered in a permanency planning hearing.
- Two-month delay in holding hearing was not prejudicial.
- Where the nonsecure custody order was entered before DSS filed a petition, the trial court had subject matter jurisdiction beginning when the petition was filed.

In re L.B., ___ N.C. App. ___, 639 S.E.2d 23 (1/2/07).

Facts: DSS obtained a nonsecure custody order on August 17, 2004, and filed a verified petition on August 19, 2004, alleging that the child was neglected and dependent. It alleged that the child lived in an injurious environment because a sexual offender lived in the home and made the child uncomfortable, and that the mother overmedicated the child. The child was placed with her grandfather and step-grandmother by order dated December 23, 2004. At a permanency planning hearing in October 2005 evidence showed that respondent had completed parts of the case plan but had failed to obtain a psychological evaluation. Some visits had gone well but sometimes the child did not want to participate. The court ordered that the permanent plan change from reunification to guardianship with the relatives with whom the child was living. Respondent appealed.

Held: Affirmed in part; vacated in part; and remanded.

1. The court of appeals declined to impose sanctions or dismiss the appeal because of the lateness of DSS's brief. The court, however, did grant respondent's motion to strike portions of DSS's brief because it included and made references to an affidavit that was not part of the record.
2. The court of appeals rejected appellant's argument that the trial court lacked subject matter jurisdiction because the petition was filed after issuance of the nonsecure custody order and summons. Because the petition had been signed and verified and filed, after that time the court did have subject matter jurisdiction.
3. Respondent failed to show that prejudice resulted from a two-month delay in holding the permanency planning hearing.
4. The trial court's findings of fact were sufficient; the court is not required to include a formal listing of all the statutory factors.
5. The trial court erred when it ordered that respondent's visitation with the child would be in the discretion of the custodians.
6. Although the trial court should not broadly incorporate written reports from other sources as its findings, the trial court did not err in incorporating DSS and guardian ad litem reports and made proper findings in its order.
7. The trial court had authority to order respondent to undergo a psychological evaluation and did not abuse its discretion in doing so.

TERMINATION OF PARENTAL RIGHTS

- Failure to issue a summons referencing one of the two children deprived the trial court of subject matter jurisdiction in the case of that child, even though respondent participated in the proceeding without objecting.
- With respect to the other child,
 - (1) respondent did not establish that holding the hearing more than a year after the petition was filed was prejudicial, and
 - (2) evidence was sufficient to establish the neglect ground.

In re C.T. and R.S., ___ N.C. App. ___, 643 S.E.2d 23 (4/3/07).

Facts: Respondent's two children were placed in DSS custody in March, 2003, and remained there except for a two-month trial home placement in early 2004. In September 2004 DSS filed a petition alleging neglect as a ground for terminating respondent's rights. The summons that was issued and served with the petition named only one child, C.T. Respondent appeared at the hearing and participated in the proceeding with her attorney without objecting to service of process. The trial court concluded from the evidence that the neglect ground existed and terminated respondent's rights to both children.

Held: Reversed as to R.S. and affirmed as to C.T.

1. Because no summons was issued referencing R.S., the trial court lacked subject matter jurisdiction to terminate respondent's rights to that child. Respondent's participation in the proceeding did not constitute waiver, since subject matter jurisdiction cannot be waived.
2. Respondent failed to show prejudice from the fact that the hearing did not begin until 11 months after the petition was filed.
3. Evidence – including evidence of respondent's substance abuse, inadequate supervision, failure to follow treatment recommendations with respect to substance abuse, failure to meet the child's needs during a trial home placement, failure to comply with numerous DSS recommendations – was sufficient to establish that respondent had neglected the child.

- The trial court did not lack subject matter jurisdiction when a nonsecure custody order was attached to DSS's motion to terminate parental rights and the record included a later disposition order giving DSS custody of the child.
- Respondent did not show that holding the hearing more than 90 days after the motion was filed was prejudicial.

In re D.J.G., ___ N.C. App. ___, 643 S.E.2d 672 (5/1/07).

Facts: On July 1, 2005, DSS filed a motion in a pending case to terminate respondent's rights to the child and attached to the motion a copy of an earlier order from a 7-day hearing continuing nonsecure custody with DSS. The court granted respondent's request for an extension of time to file a response after respondent's attorney withdrew and new counsel was appointed, granted a continuance because respondent had requested certain discovery, and granted another continuance for a peremptory setting to allow sufficient time for the hearing. The hearing was held on December 12 and 13, 2005, and the order terminating respondent's rights was entered on January 10, 2006.

Held: Affirmed.

The court of appeals rejected respondent's argument

1. that the trial court lacked subject matter jurisdiction because DSS attached to the motion only the order continuing nonsecure custody. The court of appeals did not decide whether that order would have been sufficient, because the trial court had admitted into evidence and the record included the later order adjudicating the child to be neglected and placing custody with DSS.

2. that the trial court erred by holding the hearing more than 90 days after the motion was filed. The court noted both that failure to meet statutory timelines is not jurisdictional and that respondent had made no serious effort to show prejudice.

- Majority holds that the evidence was sufficient, without specific findings, to support the trial court's conclusion of law that it had subject matter jurisdiction under the UCCJEA.

In re T.J.D.W., ___ N.C. App. ___, 642 S.E.2d 471 (4/3/07).

Facts: In September 2003 respondent and her older child moved to N.C. from S.C., where the child for some period of time had been in the custody of the South Carolina DSS. The younger child was born in North Carolina. DSS first filed petitions regarding respondent's two children in May, 2004. In December, 2005, after the permanent plan for both children had been changed to adoption, DSS filed petitions to terminate the rights of respondent, who had been convicted of felony child abuse and sentenced to ten to thirteen years of imprisonment. The older child's father had relinquished his parental rights to DSS. The trial court adjudicated five different grounds for terminating respondent's rights and entered an order terminating her rights.

Held: Affirmed.

1. The court of appeals rejected respondent's argument that the trial court lacked subject matter jurisdiction with respect to the older child because of the earlier South Carolina custody action and because the termination order did not include specific findings of fact to support the trial court's conclusion that it had subject matter jurisdiction. The majority held that such findings, although the better practice, are not required. The court found that it was clear from the evidence in the record that when North Carolina began exercising jurisdiction in 2004, neither the child nor either parent continued to reside in South Carolina and North Carolina was the child's home state. Therefore the trial court properly exercised jurisdiction without regard to the earlier S.C. proceeding.
2. The court of appeals examined only the termination ground based on the respondent's having committed a felony assault resulting in serious bodily injury to the child, another child of the parent, or another child residing in the home, and held that the ground was properly established and provided a basis for termination of respondent's rights in relation to both children.

Dissent: Judge Tyson dissented, taking the position that the court was required to make specific findings to support its conclusion that it had subject matter jurisdiction under the UCCJEA and, because it did not, the court lacked jurisdiction in the case of the older child. He also would have vacated all orders relating to the younger child, as they were based on the initial adjudication that the older child was abused and neglected and the trial court lacked jurisdiction to make that determination.

Note: Both the majority and the dissent refer to a petition to terminate respondent's rights. If DSS did file a petition rather than a motion, it is interesting that both opinions treat the jurisdictional issue as being determined as of the time the initial abuse and neglect proceedings were initiated in 2004, not when the termination petition was filed in 2005.

- Failure to appoint guardians ad litem to represent the children when the initial petitions were filed and to ensure consistent representation of the children by guardians ad litem throughout the proceedings required reversal of the termination of parental rights order in a proceeding in which the children were represented by a guardian ad litem.

In re J.E., ___ N.C. App. ___, 644 S.E.2d 28 (5/15/07).

Facts: DSS filed a petition alleging that one child was neglected and dependent in October, 2002, and that another child was neglected and dependent in November, 2003. The record on appeal included no indication that a guardian ad litem was appointed for either child when these petitions were filed. Orders

entered following numerous hearings in the children's cases sometimes recited that a guardian ad litem was present and sometimes did not. A guardian ad litem appointed for the children in 2004 never appeared at a hearing. Five different guardians ad litem made appearance at various times, and four of those were not appointed. At the termination hearing the children were represented by a guardian ad litem who was not appointed and who had not represented them previously, and an attorney advocate.

Held: Reversed.

The trial court erred, and the children were prejudiced, by the court's

- failing to appoint guardians ad litem for the children when the initial petitions were filed;
- allowing a series of guardians ad litem to appear without being appointed;
- having some hearings with no guardian ad litem present;
- not ensuring a permanent guardian ad litem to represent the children throughout the proceeding, including at the termination hearing.

Dissent: Judge Hunter dissented on the basis that only the termination of parental rights order was before the court, and that the children were represented by both a guardian ad litem and attorney advocate in the termination proceeding. With respect to orders resulting from earlier stages of the case, respondent had neither objected nor appealed and the orders about which respondent complained were not properly before the court.

- Questions about the validity of service and absence of counsel for respondent raised questions of fundamental fairness requiring that the termination order be vacated.

In re K.N., ___ N.C. App. ___, 640 S.E.2d 813 (2/20/07).

Facts: At the hearing on DSS's petition to terminate respondent's rights on 5/26/06, respondent was not present and an attorney who represented her in the related abuse and neglect case was allowed to withdraw. DSS represented that respondent had been served and had not filed an answer. DSS's service attempts included the following:

- 10/18/05 Summons mailed to respondent at a post office box in Leicester, N.C., but no indication of how DSS ensured that she received it.
- 10/27/05 Summons issued this date, with address in Marshall, N.C., was in the record, but no indication of how service was made.
- 11/3/05 DSS filed an affidavit of service, indicating that copies of the summons and petition were sent certified mail, return receipt requested, to respondent at the Marshall address on 11/1/05; an attached certified mail receipt was signed by Hershel Jenkins, whose name appeared nowhere else in the record.

Two certificates of service for notices of hearing, one for a hearing that was continued, included the Marshall address for respondent and indicated that service was made by mailing a copy of the summons to the parties' attorney or attorneys of record. The second notice was for a hearing scheduled for the trial term of May 22, and did not give the specific date or time for the May 26 hearing. A DSS worker testified that she had left a message with respondent's brother as to when the hearing would be held.

Shortly after the hearing concluded, respondent entered the courtroom. The court reappointed the attorney who had been allowed to withdraw, to advise respondent about the appeal process. An order terminating respondent's rights was entered on 6/23/06.

Held: Vacated.

The court of appeals held that the record failed to show that respondent was given proper notice, and that her appearance after the hearing did not constitute a waiver of notice. The court noted that there was no evidence that the Marshall address was respondent's place of residence, that respondent gave a different address when she did come to court, and that no attorney had been appointed to represent respondent in the termination case. Those facts, plus her failure to respond or appear and the absence of information about the identity of Hershel Jenkins, rebutted any presumption of proper service.

- Custody pursuant to a valid nonsecure custody order is sufficient to confer on DSS standing to file a petition to terminate parental rights.

In re T.M., ___ N.C. App. ___, 643 S.E.2d 471 (4/17/07).

Facts: DSS filed a petition alleging that the child was neglected in June, 2002, and obtained nonsecure custody. After adjudication and disposition hearings the court placed the child in the custody of DSS. The court of appeals remanded the case, directing the trial court to make ultimate findings of fact and clear conclusions of law. After remand no new adjudicatory hearing was held, but a series of nonsecure custody orders continued nonsecure custody with DSS. One such order was entered shortly before DSS filed the petition to terminate respondent's rights. The court adjudicated four grounds for terminating the parents' rights and concluded that termination was in the child's best interest.

Held:

1. For purposes of standing, a nonsecure custody order placing custody of the child with DSS satisfied the requirement that a court of competent jurisdiction had awarded custody to DSS.
2. Neither party demonstrated prejudice resulting from DSS's failure to attach a custody order to the petition. It was clear from the record that the child was in DSS custody, that the mother had attended numerous hearings at which nonsecure custody had been awarded to DSS, and that the father's attorney had attended hearings even when respondent father was not present and the attorney's knowledge that custody was in DSS could be imputed to the father.
3. Respondent failed to show prejudice resulting from the fact that the termination petition was not filed within 60 days after the permanency planning hearing or that the hearing was held more than 90 days after the petition was filed. The court of appeals, though, "encourage[d] trial courts to consider sanctions of parties where appropriate when the parties fail to comply with the legislature's mandates."
4. The court of appeals reviewed the evidence and findings and concluded that there was clear and convincing evidence to support the trial court's conclusion that grounds existed under G.S. 7B-1111(a)(2). It therefore did not review the other grounds.

Dissent: Judge Tyson dissented and would have reversed on the bases that (1) the trial court lacked subject matter jurisdiction because DSS did not attach a custody order to the petition and respondent father demonstrated extreme prejudice; and (2) DSS violated the statutory timeline for filing the termination petition, and the hearing was held outside the time period prescribed by statute.

- When a termination proceeding is initiated by motion in the cause, a notice, not a summons, is required.
- Collateral estoppel and res judicata are affirmative defenses that may not be raised for the first time on appeal.

In re D.R.S., ___ N.C. App. ___, 638 S.E.2d 626 (1/2/07).

Facts: The children were adjudicated dependent in March, 2000, and placed in DSS custody. In June, 2002, DSS filed a petition to terminate respondent's rights, and in May, 2004, the court entered an order finding that grounds existed but that termination was not in the children's best interest. In December, 2004, DSS filed a motion in the cause seeking termination of respondent's rights and personally served respondent with the motion and notice at a permanency planning hearing. After a hearing the trial entered an order in August, 2005, terminating respondent's rights.

Held: Affirmed.

1. The court of appeals rejected respondent's argument that the trial court lacked subject matter jurisdiction because no summons was issued in the termination matter, holding that when termination is initiated by a motion in the cause, only the notice required by the statute, not a

summons, is required. Even if petitioner's failure to file a return of service had been error, respondent waived her right to object to the adequacy of notice by participating in the proceeding without objecting.

2. Because respondent asserted defenses of collateral estoppel and res judicata for the first time on appeal, those issues were not properly before the court. They are affirmative defenses that must be asserted in a responsive pleading in the trial court under G.S. 1A-1, Rule 8(c).

- Parents waived any challenge to the sufficiency of service or process by participating in the proceeding.
- Technical errors and violations of the Juvenile Code are reversible error only when appellant shows that the errors resulted in prejudice.

In re H.T., ___ N.C. App. ___, 637 S.E.2d 923 (12/19/06).

Facts: The child was adjudicated neglected based on domestic violence and substance abuse in the home, and physical custody was left with the mother who had entered a residential drug treatment program. After the mother repeatedly failed to return to the program after scheduled leaves, DSS filed a motion for review, and the court placed the child with a relative. After that the father's only contact with the child was two phone calls. The mother's contacts were limited. Both parents were incarcerated for periods of time and the mother was in and out of treatment programs. The child had a series of placements and ultimately a stable foster home placement. A year and a half after the child's placement the court changed the permanent plan from reunification to adoption. DSS filed a motion to terminate the parents' rights, which the court after a hearing granted.

Held: The court of appeals affirmed, rejecting all of respondents' arguments on appeal:

1. The record did not support respondents' contention that more than two years had passed since initiation of the proceeding, thus triggering a requirement for service pursuant to G.S. 1A-1, Rule 4, so service of the motion and notice pursuant to G.S. 1A-1, Rule 5, was proper.
2. Because Rule 5 service was permissible, service on respondent's attorney was proper.
3. Even if service had not been sufficient, respondents waived any objection by participating in the proceedings without raising that issue.
4. Although the motion [which the opinion refers to as a petition] asserted only the barebones legal bases alleged as grounds for terminating parental rights, it was sufficiently detailed because it incorporated by reference the entire juvenile file in the matter.
5. None of the following constituted reversible error, because respondent failed to show that any of them resulted in prejudice:
 - a. delays in filing the petition and holding the hearing,
 - b. failing to attach a copy of the custody order to the motion,
 - c. failing to hold a special hearing before adjudication, and
 - d. incomplete transcript of the proceeding.
6. Delegating drafting of the order to a party's attorney was not error.
7. Because respondent failed to challenge two of the grounds the trial court adjudicated, the court did not need to address his assignments of error with respect to other grounds.

- Failure to attach a custody order to the termination motion did not deprive the trial court of jurisdiction.
- The trial court could take judicial notice of earlier orders and reports in the case.

In re W.L.M., ___ N.C. App. ___, 640 S.E.2d 439 (2/6/07).

Facts: DSS filed a motion to terminate parental rights but did not attach to the motion a copy of the order giving DSS custody of the child. At the hearing, the court took judicial notice of prior orders and reports in the file, to which respondent did not object. Respondent did object to the court's taking judicial notice of the file in the case of another child, and the court did not take judicial notice of that file. Respondent appealed from an order terminating her rights.

Held: Affirmed.

1. DSS's failure to attach a copy of the custody order to the motion did not deprive the trial court of subject matter jurisdiction. The court of appeals distinguished this case from *In re Z.T.B.*, 170 N.C. App. 564, 613 S.E.2d 298 (2005), in which the court found a lack of subject matter jurisdiction because a custody order had not been attached to the petition or made part of the record. The failing in *Z.T.B.* apparently was not the technical failure to attach the order, but the fact that the record did not establish that DSS had standing to petition for termination. In the present case, the court found that there was no question about where the child was located or who had legal custody; the motion alleged specific facts about the order that had given DSS custody of the child and DSS's continued custody; the motion incorporated the entire underlying file, which included various orders giving DSS custody; the trial court took judicial notice of the entire file; and respondent showed no prejudice resulting from the failure to attach the custody order.
2. Citing earlier cases in which it has said the same thing, the court of appeals held that the trial court did not err in taking judicial notice of prior orders and reports in the case. The trial court is presumed to have disregarded any incompetent evidence, and respondent did not demonstrate that the court had relied in its findings on any incompetent evidence or that prejudice had resulted from the court's taking judicial notice of the file.
3. The fact that DSS filed the termination motion more than 60 days after the hearing at which the permanent plan was changed to adoption did not deprive the trial court of jurisdiction.
4. Conducting the termination hearing more than five months after the petition was filed was not reversible error where continuances occurred for valid reasons and respondent did not object to or demonstrate prejudice resulting from the continuances.

- Respondent who neither contacted the clerk to request counsel nor attended the hearing waived the right to appointed counsel.

In re R.R., ___ N.C. App. ___, 638 S.E.2d 502 (12/19/06).

Facts: The child and mother tested positive for cocaine when the child was born in November, 2002. DSS obtained custody soon after the child's birth, and the mother left the state and did not contact DSS. The mother stated that her pregnancy resulted from a sexual assault by an unknown person. In July, 2003, the court changed the permanent plan from reunification with the mother to adoption. Respondent father and the mother contacted DSS to assert his possible paternity and request a paternity test, which he could not afford. Before a review hearing in November, 2003, the mother and respondent married and had his name added to the child's birth certificate, pursuant to the procedure for legitimation by subsequent marriage. The court ordered respondent to take a paternity test if he wanted to participate in the proceeding, but respondent never did so. In July, 2004, DSS filed a petition to terminate the rights of respondent and of any unknown father. In May, 2005, the district court entered an order terminating respondent's rights on the grounds of neglect, willfully leaving the child in foster care, and abandonment. Respondent appealed.

Held: Affirmed.

1. The trial court did not err by failing to make further inquiries about paternity, because neither respondent's lack of paternity nor his failure to legitimize the child was alleged or at issue.
2. The trial court did not err by failing to appoint counsel for respondent when he neither contacted the clerk to request counsel nor attended the hearing.
3. Delay in holding the hearing was not reversible error where respondent failed to show prejudice, part of the delay resulted from difficulty in locating and serving respondent, respondent was not in communication with petitioner during the delay, and evidence supported multiple grounds for terminating parental rights.

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| <ul style="list-style-type: none">• Supreme Court, reversing the court of appeals, holds that findings were sufficient to support termination grounds of neglect or willfully leaving child in care without making reasonable progress. |
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In re J.T.W., ___ N.C. ___, 643 S.E.2d 579 (5/4/07), reversing per curiam, In re J.T.W., ___ N.C. App. ___, 632 S.E.2d 237 (8/1/06).

Facts: Respondent's child was adjudicated neglected in 2001 after the parents stipulated that the allegations in the petition were true. These included that three of respondent's older children had been placed in the guardianship of relatives, respondent had a history of instability, and she was not able to establish and maintain a residence or to maintain steady employment. The court conducted review hearings and in late 2002 changed the plan to adoption. In May, 2003, DSS and the child's guardian ad litem jointly filed a motion for termination of parental rights. After conducting hearings on several days the trial court made extensive findings that included: Respondent lived with her two younger children in an acceptable home that she had maintained for a year; before that she lived in a residential treatment facility and benefited from the programs there; since 1999 she had lived in more than 25 residences; she had been employed sporadically, most recently full time at a personal care facility earning \$8.50 per hour; respondent had transportation problems, including a long-suspended license; she had made regular child support payments only since May, 2003; she had had no visits with any of her children who were in custody since December, 2002, and the children had no observable bond with her; and she had been incarcerated on several occasions during the children's placements. In May, 2004, the court entered an order terminating respondent's rights on the grounds of neglect and willfully leaving the child in foster care for more than a year without making reasonable progress to correct the conditions that led to placement.

In the court of appeals the majority reversed, holding that the trial court's findings did not support a conclusion that respondent had not made reasonable progress in correcting conditions that led to the child's placement – instability in housing and employment – or that the child would be exposed to an injurious environment with respondent. Likewise, the majority found that the evidence did not indicate that neglect was likely to reoccur if respondent regained custody of the child. Chief Judge Martin dissented, and would have affirmed on the basis of neglect.

Held: The Supreme Court reversed, *per curiam*, stating: "Having carefully considered the opinion of the Court of Appeals, the record, briefs, and oral arguments, we conclude the trial court's findings were sufficient to support its conclusions of law"

- Evidence supported the conclusion that respondent father had not made reasonable progress to correct the conditions that led to the child's placement, when the child was removed due to the mother's substance abuse and respondent continued to live with the child's mother even though she continued to abuse drugs.
- Social worker's testimony was admissible because it was offered to show respondent's awareness of the terms of his case plan.

In re S.N., ___ N.C. App. ___, 636 S.E.2d 316 (11/7/06).

Facts: The child came into care after testing positive for marijuana at birth and was adjudicated neglected and dependent. Both parents made some progress with their case plans, but the mother continued to use drugs. The father continued to live with her although he had been told repeatedly that living with someone with an unresolved drug problem would not constitute a suitable living arrangement, even if he complied with all the terms of his case plan. The trial court changed the plan to adoption, and DSS filed a petition to terminate both parents' rights. The court granted the petition and only the father appealed.

Held: Affirmed.

1. The court of appeals rejected respondent's argument that testimony by a social worker about what respondent's drug counselor had said was inadmissible hearsay, because respondent did not establish
 - a. that the statements were offered for their truth or
 - b. that even if the testimony was impermissible hearsay, respondent was prejudiced by its admission.
2. The evidence and the trial court's findings were sufficient to support the conclusion that respondent had willfully left the child in foster care for more than a year without making reasonable progress to correct the condition that led to placement.

- Autopsy report and medical examiner's report were properly admitted as public records.
- Nine-year-old's statements to detective in response to questions 16 hours after the child's observation were properly admitted as excited utterances.
- To establish a ground based on the parent's commission voluntary manslaughter of another child, the petitioner is required to prove the elements of the offense by clear and convincing evidence, not beyond a reasonable doubt.

In re J.S.B., ___ N.C. App. ___, ___ S.E.2d ___ (5/15/07).

Facts: The trial court terminated respondent's rights to four children after adjudicating the grounds that she had committed voluntary manslaughter of her 14-month-old child, that she had neglected the children, and that she was incapable of providing care for the children. Respondent had been arrested and was incarcerated, but had not been convicted at the time of the termination hearing.

Held: Affirmed. The court of appeals considered only the first ground, voluntary manslaughter, and affirmed on the basis that the ground had been proved by clear and convincing evidence and that the trial court did not abuse its discretion in terminating respondent's rights. The court rejected respondent's argument that evidence used to establish the ground was inadmissible, holding that:

1. the medical examiner's investigation report and the autopsy report were admissible under the public records exception to the hearsay rule, and it was not error to allow a medical examiner who had not prepared the reports to use them to testify.
2. the fact that the medical reports included an opinion as to the cause of the child's death did not affect their admissibility.
3. it was not error to allow a police detective to testify over objection about a nine-year-old child's statements that she had seen her mother whip the 14-month-old child and hit him on the head. The statements were admissible under the excited utterance exception to the hearsay rule, where they were made 16 hours after the child's observation, while the child was withdrawn and teary-eyed and was

found in a fetal position in a corner of a room. The fact that the statements were made in response to direct questions did not necessarily mean they were not spontaneous.

4. the trial court applied the proper standard of proof, clear and convincing evidence. Petitioner was not required to prove the elements of the criminal offense beyond a reasonable doubt.

- The trial court was not required to appoint a guardian ad litem for respondent mother under the law applicable to cases filed before October 1, 2005.
- An issue relating to an earlier permanency planning order was not properly before the court.

In re J.M.W., ___ N.C. App. ___, 635 S.E.2d 916 (10/17/06).

Facts: Children were adjudicated dependent based largely on respondent's repeated criminal conduct and incarceration. After the court changed the plan from relative placement to adoption, DSS filed a termination action alleging neglect, abandonment, failure to pay support, and willfully leaving the child in foster care for more than a year without making reasonable progress to correct conditions that led to removal. There was evidence that respondent suffered from a depressive disorder. The court adjudicated all four grounds and terminated respondent's rights.

Held: Affirmed.

1. The court of appeals rejected respondent's argument that the trial court should have appointed a guardian ad litem for her (under law applicable to cases filed before October 1, 2005), finding that the dependency ground was not alleged and that mental illness was not a central factor in the court's findings, conclusions, or decision.
2. Because respondent argued error as to only two of the four grounds adjudicated, the court of appeals did not review the two she did argue.
3. Respondent's argument that DSS should have filed a domestic violence action to protect her and the children was not properly before the court because it related to an earlier order that respondent did not appeal.

- Evidence was sufficient to establish abuse and a likelihood of a repetition of abuse.

In re L.C., ___ N.C. App. ___, 638 S.E.2d 638 (1/2/07), *disc. review denied*, ___ N.C. ___, ___ S.E.2d ___ (5/4/07).

Facts: DSS filed a petition alleging that the children's mother was deceased and respondent father had disciplined the children inappropriately and left them unsupervised. The trial court adjudicated the children abused, neglected, and dependent. At a review hearing in August, 2003, the court found that respondent had completed an outpatient substance abuse program and parenting classes and had been drug-free since June, 2002, but may not have completed anger management classes and obtained a recommended psychological evaluation or provided proof of stable housing and income. The court ordered respondent to obtain the evaluation, continue substance abuse treatment, maintain housing at the half-way house where he lived, attend anger management classes, and abide by a restraining order that he stay 1,000 feet away from the children. The court also changed the plan from reunification to adoption or guardianship with a relative. In December, 2003, DSS filed a petition to terminate respondent's rights. In an order entered in September, 2004, the trial court terminated his rights, finding among other things that he had abused each of the children and that there was a reasonable probability that he would continue to abuse them if they were returned to his custody. After an initial appeal the matter was remanded for entry of appropriate conclusions of law. The trial court, without taking more evidence, entered a modified order with corrected conclusions of law, and respondent appealed.

Held: Affirmed.

1. Respondent argued that he had been denied effective assistance of counsel because his lawyer had been late for a hearing and the trial court had not allowed her to ask questions about matters that had already been covered. The court of appeals rejected the argument because respondent failed to show any resulting prejudice and also failed to make an offer of proof to show what questions the attorney would have asked.
2. In response to respondent's argument that the trial court erred by admitting the children's mental health records into evidence, the court of appeals held that even assuming that the records contained inadmissible hearsay, respondent failed to show that the court had relied on inadmissible evidence in making its findings.
3. The court also held that the trial court's findings were supported by the evidence and that they in turn supported the conclusion that the abuse ground to terminate parental rights existed, and that the trial court did not abuse its discretion in terminating respondent's rights.

- Evidence did not support findings or conclusion of neglect or other grounds.

In re C.W., ___ N.C. App. ___, 641 S.E.2d 725 (3/20/07).

Facts: Respondent was incarcerated for two months for DWI in 1998 and for almost a year in 2000-2001 for taking indecent liberties with a minor (a niece). In 2000 and 2001, the children's mother voluntarily placed the children at the Masonic Home without consulting respondent father. Respondent's probation was revoked in 2003 and he was reincarcerated, with a projected release date of May, 2006. Soon after that, DSS filed a petition and obtained custody based on the Home's having lost contact with the mother. In 2004 the children's mother relinquished her rights to DSS. Respondent attended a permanency planning hearing in 2005 after which the court ordered that the permanent plan was adoption. DSS filed a termination petition in 2005. Respondent attended the hearing and was represented by counsel. Evidence showed that while incarcerated he sent the children birthday and Christmas cards that usually included \$5.00, he asked that his parents in Iowa be considered as a placement resource, and he wrote letters to the children that DSS did not allow them to receive. He did not visit the children at the Home or make plans for them when he was not incarcerated, but the terms of his probation may have prohibited his seeing the children until he had a psychological evaluation. The trial court terminated respondent's rights on grounds of neglect; willfully leaving the children in care for more than a year; etc.; and willful abandonment.

Held: Reversed.

The court of appeals reviewed the evidence and findings and concluded that none of the grounds was supported by clear and convincing evidence and that a number of findings were supported by no evidence at all. The court noted in particular that DSS had never developed a case plan with respondent, that respondent took a number steps while incarcerated to maintain a relationship with the children, that there was not a prior adjudication or finding of neglect, and that DSS had not alleged abandonment as a ground for termination. [The court noted that a case plan and prior adjudication are not essential to establishing neglect as a ground for termination.]

- Termination order was deficient where it did not state the standard of proof and did not indicate which ground(s) the court was adjudicating.

In re D.R.B., ___ N.C. App. ___, 643 S.E.2d 77 (4/17/07).

Facts: The rights of the child's mother had already been terminated. The child's maternal grandfather and step-grandmother, alleging three different grounds, petitioned to terminate the rights of respondent father, who was serving a 30-year sentence for robbery. After a hearing the court entered an order terminating respondent's rights.

Held: Vacated and remanded.

The trial court's order was deficient in that it

1. did not indicate which ground or grounds it was adjudicating, making meaningful appellate review impossible; and
2. failed to state that findings were made by clear and convincing evidence.

The court of appeals vacated the order and remanded for entry of a proper order, specifying that the trial court could take additional evidence on remand.

- The record on appeal must include a notice of appeal that was filed with the trial court.

In re Me.B., ___ N.C. App. ___, 640 S.E.2d 407 (2/6/07).

Facts: In an appeal from an order terminating respondent's rights the record on appeal included appellate entries but did not include a notice of appeal.

Held: Appeal dismissed.

Failure to file a notice of appeal and include it in the record on appeal meant that the court of appeals did not have jurisdiction to consider the appeal, and respondent did not petition the court for a writ of certiorari requesting that the court consider the merits of the appeal.

- Filing of an *Anders* brief in a civil case, including a termination of parental rights case, is not allowed.

In re N.B., ___ N.C. App. ___, 644 S.E.2d 22 (5/1/07).

Facts: Respondent, who was serving a 30-year federal sentence, appealed the trial court's order terminating his rights to five children. While the appeal was pending, the Supreme Court denied the parties' joint petition for discretionary review asking the court to review the case and to overrule the court of appeals' decision in *In re Harrison*, 136 N.C. App. 831, 626 S.E.2d 502 (2000), which held that *Anders* briefs could not be filed in termination of parental rights cases.

Held: Affirmed.

The court or appeals reviewed the issue of applying *Anders v. California*, 486 U.S. 738 (1967) to civil cases, including how other states have resolved that question in termination of parental rights cases.

1. The court held that, being bound by *Harrison*, it was prohibited from extending the *Anders* procedure to termination proceedings.
2. The court, however, denied the motion of DSS and the guardian ad litem to dismiss the appeal as frivolous and exercised its discretion to review the record to determine whether the evidence supported the findings and conclusion of law. Having done that, the court concluded that the evidence supported the findings and the findings supported the conclusions, and that there was no merit in any of respondent's assignments of error.

- Entry of termination order almost six months after the hearing was prejudicial error.

In re J.N.S., ___ N.C. App. ___, 637 S.E.2d 914 (12/19/06).

Facts: In March 2004 the child's mother filed a petition to terminate the father's rights. Respondent filed a pro se response and asked for appointed counsel, who was appointed and filed an additional response. The trial court held hearings in July and August, 2004, and on March 10, 2005. The court entered an order terminating respondent's rights on August 23, 2005, nearly six months later.

Held: The court of appeals reversed, holding that late entry of the order was an egregious violation of the statute and that respondent had shown prejudice by asserting that (1) he was entitled to a speedy resolution of the petition, (2) the child was entitled to a permanent plan of care at the earliest possible age, (3) respondent's right to appeal had been delayed, (4) his relationship with the child was prejudiced

because the delay extended the time that he was separated from the child, and (5) petitioner barred him from communicating with the child after the disposition hearing and rendering of the order.

Concurrence: Judge Levinson filed a separate concurring opinion, stating that he concurred only because required to by prior holdings of the court and explaining his objections to the court's approach to the issue of timeline violations in juvenile cases.

- Entry of termination order more than five months after the hearing was prejudicial error.

In re C.L.K., ___ N.C. App. ___, 643 S.E.2d 458 (4/17/07).

Facts: On appeal from an order terminating respondent's parental rights, the court of appeals considered only the issue of whether late entry of the trial court's order required reversal. The hearing concluded and the court rendered its decision on October 11, 2005, and the order was entered on March 22, 2006.

Held: Reversed.

The majority reversed, holding that respondent had alleged and established prejudice as a result of the delay in entry of the order. Respondent had asserted that (1) all parties were entitled to a speedy resolution of the allegations; (2) the child was entitled to a permanent plan of care at the earliest possible age; (3) the delay in entry of the order delayed respondent's right to appeal; and (4) the delay extends the time parents are separated from their children to the prejudice of their relationship; and (5) petitioners barred respondent from communication with the child.

Dissent: Judge Geer dissented, based in part on the Supreme Court's holding in *In re T.S., III.*, ___ N.C. ___, 641 S.E.2d 302 (3/9/07), *affirming* ___ N.C. App. ___, 631 S.E.2d 19 (6/20/06).

- Failure to include a certificate of service with the notice of appeal, when not waived by the party entitled to be served, is reversible error.

In re A.C., ___ N.C. App. ___, 643 S.E.2d 470 (4/17/07).

Facts: Respondent gave notice of appeal from an order terminating his parental rights. DSS made a motion to dismiss the appeal on the basis that respondent failed to include a certificate of service with his notice of appeal.

Held: Citing *Ribble v. Ribble*, ___ N.C. App. ___, 637 S.E.2d 239 (11/21/06), the court of appeals dismissed the appeal for violation of Rules 3 and 26 of the Rules of Appellate Procedure. The court also denied respondent's motion for certiorari on the basis that it was not available in this circumstance.

Concurrence: Judge Hunter would have granted the petition for certiorari, noting that respondent was incarcerated and indigent and filed his own notice of appeal, but would have affirmed the order based on the finding of neglect.