

**District Court Judges Summer Conference  
Wrightsville Beach, NC**

**June 19, 2007**

**ADDENDUM**

**JUVENILE LAW UPDATE**

**(Cases filed June 5, 2007)**

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## Abuse, Neglect, Dependency

- The trial court could not adjudicate a condition that was not alleged in the petition.
- G.S. 7B-800 prohibited amendment of the petition to allege a different, additional condition.
- The trial court erred by awarding permanent guardianship to relatives at disposition, without conducting a permanency planning hearing of which respondent had proper notice.

### **In re D.C., \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (6/5/07).**

**Facts:** On 9/14/05, DSS filed a petition alleging that Child 1 was neglected and dependent, with factual allegations that referred to a December, 2004, incident in which respondent left the child, then age 16 months, unattended in a motel room; a history of domestic violence and unstable housing; respondent's mental retardation; and respondent's inappropriate use of disability payments. A nonsecure custody order placed the child in DSS custody, and he was placed physically with a maternal aunt and her husband. On 5/22/06, DSS filed a petition alleging that Child 2, born two days earlier, was dependent. The court ordered nonsecure custody, and that child was placed in foster care. Adjudication and disposition hearings for both petitions were held in June and August, 2006. In September, 2006, the court entered an order adjudicating both children to be neglected and, with respect to Child 1, ceasing reunification efforts, awarding permanent guardianship to the relatives with whom he was placed, and relieving DSS and the guardian ad litem of further responsibility.

**Held:** Affirmed in part; reversed in part; and remanded with instructions.

1. The trial court erred by adjudicating Child 2 to be neglected when the petition alleged only that he was dependent. The fact that the "neglect" block on the petition was not checked was not determinative, but the allegations in the petition did not give respondent sufficient notice that neglect would be an issue at the hearing.
2. By considering evidence of neglect and adjudicating Child 2 neglected, the trial court "essentially amended the juvenile petition" by allowing DSS to proceed on a condition not alleged in the petition." G.S. 7B-800 prohibits any amendment of a petition that changes the nature of the condition alleged.
3. At disposition, with respect to Child 1, the trial court
  - made sufficient findings to support the conclusion that reunification efforts should cease, and
  - erred in awarding permanent guardianship to relatives without conducting a permanency planning hearing of which respondent had proper notice.

- The trial court did not err in
  1. declining to order the production of or admit into evidence confidential substance abuse records relating to respondent parents and
  2. granting respondents' motion to dismiss at the close of petitioner's evidence.

### **In re E.P., \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (6/5/07).**

**Facts:** DSS filed a petition alleging that two children, ages two and 9 months, were neglected and dependent, with factual allegations that referred to respondents' alcohol and substance abuse problems, domestic violence, and evictions from two dwellings, as well as respondent mother's having left the children unattended when she locked herself in a room and cut her wrists while intoxicated. DSS filed an application with the trial court seeking disclosure of confidential alcohol and/or drug abuse records, for which DSS also issued a subpoena. Based on arguments of counsel, without viewing the records, the trial court declined to order production of the records or to admit them into evidence on the basis that the records went more to disposition than to adjudication. At the conclusion of the adjudication hearing the trial court found that the domestic violence was minor, that there was not substantial evidence of a connection between the parents' substance abuse or domestic violence and the welfare of the children, and that the family's problems were being addressed adequately in the family setting. The trial court

concluded that DSS had not proved its allegations by clear and convincing evidence and dismissed the petitions. The substance abuse records were made part of the record on appeal.

**Held:** Affirmed.

1. Although such records can be relevant at adjudication, in this case the trial court did not err in determining that the substance abuse records were not relevant at the adjudicatory stage and excluding them from evidence.
2. After reviewing the substance abuse records, the court of appeals concluded that they did not contain evidence that harm to the children had occurred or that the parents' substance abuse problems created a substantial risk of harm.
3. DSS was able to establish the parents' substance abuse without the disputed records and the records would have provided only duplicative evidence.

**Dissent:** Judge Geer disagreed with the majority's analysis of the issue of the records' relevance and admissibility. She would have held that the trial court erred as a matter of law by concluding that the records were not relevant without examining them.

- Even if the underlying action was initiated before 10/1/05, the trial court does not have jurisdiction to terminate parental rights while an appeal of an order in that action is pending.
- In a permanency planning order the trial court must make specific findings to comply with G.S. 7B-907 and cannot rely solely or primarily on incorporated orders and reports.

**In re Z.J.T.B., \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (6/5/07).**

**Facts:** In November, 2004, DSS filed petitions alleging that respondent's children were neglected and abused, with factual allegations that referred to numerous fractures the 3-month-old child had suffered and the failure of respondent or the child's father to adequately explain or take responsibility for the injuries. The court adjudicated that child to be abused and neglected and a second child to be neglected. The children were placed with maternal grandparents, who later asked that the children be removed because of health issues and conflicts with respondent. The children then were placed in foster care. After several review hearings, the final one in May, 2006, the trial court entered a permanency planning order providing that reunification efforts should cease and concluding that adoption was the best plan for the children. Respondent appealed. In February, 2007, the trial court entered an order terminating respondent's rights, and DSS moved to dismiss the appeal of the permanency planning order on the basis that it was moot.

**Held:** Vacated and remanded for entry of adequate findings and conclusions under G.S. 7B-907.

1. The appeal was not moot. The order terminating respondent's rights was void ab initio because the trial court, under G.S. 7B-1003(b)(1), did not have jurisdiction to proceed in the termination matter while appeal of the permanency planning order was pending.
2. Although the trial court's orders related to three of respondent's children, proper notice of appeal was given only with respect to two of the children. Inclusion of the third child's name in the appellate entries was not sufficient to preserve the right to appeal in that child's case.
3. The trial court's order did not include findings sufficient to comply with the requirements of G.S. 7B-907(b) and (c). Three of the nine findings merely adopted and incorporated prior orders, a DSS report, and a DSS home study report. The order did not make specific findings regarding the best plan of care to achieve a safe, permanent home for the children within a reasonable time or specifically find that adoption was the best plan for the children. The only DSS report included in the record on appeal related to the child whose appeal the court was not considering.

- In a permanency planning order the trial court is not required to make every finding listed in G.S. 7B-907.
- The trial court made sufficient independent findings in addition to incorporating reports.
- An attorney's statement in court is not evidence and cannot support a finding of fact.

**In re K.S., \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (6/5/07).**

**Facts:** In June, 2005, DSS filed a petition alleging that respondent's one-year-old child was neglected and dependent, with factual allegations that referred to respondent's substance abuse problems, her failure to follow through with treatment, her inappropriate placement of the child with respondent's mother in another county, and the facts that she had lived in a "crack house" and was pregnant. In July, 2005, the court adjudicated the child to be dependent and neglected, placed her in the custody of DSS, and ordered respondent to take several specific steps related to her substance abuse and other problems. A series of review hearings followed, and respondent made some progress but did not fully comply with court orders. In June, 2006, DSS recommended that the plan be changed to a concurrent plan of adoption and reunification, but the trial court continued the plan of reunification. At a September, 2006, review hearing evidence showed that respondent had been substance-free for 434 consecutive days, had completed treatment, was in transition housing, had completed a domestic violence program, and acknowledged that she had made some poor decisions in the past. Her housing had changed several times due to her inability to work and in one instance a domestic violence problem. DSS no longer recommended adoption as a concurrent plan and recommended that the plan remain reunification. The trial court nevertheless ordered that the plan be changed to adoption and termination of parental rights.

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

1. The court of appeals rejected respondent's argument that the trial court failed to make findings sufficient to comply with G.S. 7B-907. Although the order incorporated a DSS report, the court also made its own specific findings with respect to several statutory criteria. The court of appeals noted that it has held that the trial court is not required to make every finding listed in G.S. 7B-907.
2. The court of appeals also rejected the argument that several findings were not supported by evidence in the record, holding that even though there was evidence that would have supported a different finding, there also was competent evidence supporting the trial court's findings.
3. The trial court erred in finding that the child might suffer from RAD (reactive attachment disorder), because the only mention of that in the record was in a statement by the guardian ad litem's attorney, and attorneys' statements are not evidence.
4. Where the court stated orally that all visitation was suspended but the written order provided that visitation should take place according to the visitation schedule, only the order that was filed with the clerk applied. Because the record did not contain a visitation schedule, however, the case had to be remanded for clarification of respondent's visitation rights.

## **Termination of Parental Rights**

- Although the petition did not specifically reference G.S. 7B-1111(a)(6), the allegations gave respondent sufficient notice of that ground for termination.
- Respondent's recent progress and positive steps in addressing substance abuse issues did not preclude the trial court's terminating her rights after considering three years of repeated relapses.

**In re A.H., \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (6/5/07).**

**Facts:** From DSS's first involvement with respondent in 2002, when the child was burned by an iron and left unattended, for a three-year period respondent was in and out of substance abuse treatment facilities and programs. While she periodically made progress, she continually suffered relapses. In 2003 the child

was adjudicated dependent and placed in DSS custody. Respondent was adjudicated incompetent in 2003 but disappeared before a guardian was appointed. She had only one visit with the child in 2004. In September, 2005, the court relieved DSS of further reunification efforts and changed the permanent plan to adoption. DSS filed a petition to terminate respondent's rights in October, 2005, when respondent was incarcerated. Her competency was restored in April, 2006, and she made substantial progress before the termination hearings in June and July, 2006. She remained drug free and sober, remained voluntarily in a halfway house, and attended Narcotics Anonymous classes. The trial court adjudicated five different grounds for termination and concluded that termination was in the child's best interest.

**Held:** Affirmed.

1. The court of appeals reviewed the case to determine whether the trial court's findings supported its conclusion that a ground for termination existed. Respondent assigned error to various findings, but did not carry those assignments of error forward in her brief and therefore abandoned them.
2. The court of appeals found that the uncontested findings supported the conclusion that grounds for termination existed under G.S. 7B-1111(a)(6) and did not review the other grounds. Although the petition had not included the statutory reference to that ground, it sufficiently alleged the ground to give respondent adequate notice.
3. Respondent's recent progress and positive steps did not preclude the trial court's terminating her rights after considering the three years of repeated relapses.

- A trial court may not proceed in any termination of parental rights action filed on or after October 1, 2005, when an appeal from an underlying abuse, neglect, or dependency case is pending.
- The trial court erred by failing to carry out the mandate of the court of appeals after the permanency planning order was vacated and remanded.

**In re P.P., \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (6/5/07).**

**Facts:** In March, 2003, a permanency planning order relieved DSS of making further reunification efforts and changed the permanent plan to adoption. Respondent appealed the order, and DSS proceeded to file petitions to terminate respondent's rights. In an unpublished opinion filed in December, 2004, the court of appeals vacated the permanency planning order and remanded it to the trial court for findings and conclusions with respect to whether DSS had made reasonable efforts to prevent or eliminate the need for placement of respondent's children. The mandate issued on January 10, 2005. At a hearing on January 13, 2005, the trial court did not address the mandate, but continued the case. More than a year later DSS noticed a hearing as both a permanency planning and termination of parental rights hearing. The trial court denied respondent's motions to continue the termination hearing and to hold instead a "remand" hearing. In March, 2006, DSS filed new petitions to terminate respondent's rights. The trial court again denied respondent's motions to stay the termination hearing and to conduct a remand hearing. After a hearing in September, 2006, the trial court entered an order in October, 2006, terminating respondent's rights. On appeal, the parties did not dispute that the trial court should have granted respondent's motion for a review hearing or that the trial court did not comply with the mandate of the court of appeals with respect to the remanded permanency planning order.

**Held:** Vacated.

1. Because DSS filed new petitions to terminate parental rights after October 1, 2005, the trial court was prohibited by G.S. 7B-1003(b)(1) from proceeding with the termination hearing during the pendency of the appeal of the permanency planning order.
2. Even though the termination hearing occurred after remand in the earlier case, so that the appeal technically was not still "pending," the court of appeals held that applying the statute literally in this case would violate clear legislative intent.
3. The trial court erred in failing to carry out the mandate of the court of appeals after remand of the permanency planning order.

4. The majority noted that it also was error for the trial court to proceed in the termination action after the order changing the permanent plan to adoption had been rendered void when it was vacated and remanded by the court of appeals

**Concurrence:** Judge Levinson concurred in a separate opinion, agreeing that the termination order must be reversed on the basis that the trial court failed to conduct a permanency planning hearing after remand, but because the considerations in establishing a permanent plan at that hearing are not the same as the considerations at the best interest stage of a termination of parental rights action. He rejected the notion that failure to follow the mandate of an appellate court *always* requires reversal and noted that termination of parental rights actions are not always preceded by an order establishing a permanent plan. He limited his holding to the specific facts of the case.

- Delay of more than a year in holding the termination of parental rights hearing did not result in prejudice, but actually was to respondent's benefit, because it gave her "every possible opportunity to be reunited with her children."

**In re C.M., \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (6/5/07).**

**Facts:** Respondent's four children were adjudicated neglected and dependent in June, 2004. One was placed with a relative and three in foster care. A mediated case plan specified actions respondent should take. Review hearings were held periodically through May, 2006. Although the court sometimes found that respondent had made progress, it found consistently that she had not demonstrated her ability to parent the children without continued intervention. The court changed the permanent plan for three of the children to adoption and maintained reunification as the plan for the oldest child. In June, 2005, DSS filed petitions to terminate respondent's rights to the three children in foster care. DSS and the court continued efforts to reunify the oldest child with respondent, but after she failed to keep medical appointments, obtain his Medicaid card, determine when his last medical appointments had been, and to return him to his grandmother's home on a regular and timely basis, in May, 2006, the court changed the plan for that child to guardianship with the grandmother. The hearing on DSS's petitions to terminate respondent's rights to the three children was not held until July, 2006, more than a year after the petitions were filed. The court adjudicated three different grounds for termination and entered an order terminating respondent's rights and the rights of the children's fathers, who were not parties to the appeal.

**Held:** Affirmed.

1. Respondent failed to establish that she was prejudiced by the delay in conducting the termination of parental rights hearing. The court of appeals found that that delay actually benefited respondent, by giving her more time to demonstrate her parenting ability and continue her efforts to achieve reunification with the oldest child.
2. The court of appeals rejected respondent's argument that she was prejudiced because she was not able to question a psychologist who had evaluated her two years earlier and had since left the state. The evaluation had been excluded from evidence on motion of respondent, and to the extent the trial court made findings relating to the evaluation, they were not necessary to support the court's conclusions.
3. The trial court did not err by failing to make findings about the likelihood of adoption or other factors set out in G.S. 7B-1110(a), because the version of the statute that sets out those factors did not become effective until October 1, 2005, after the termination petitions were filed.
4. Evidence was sufficient to support the three grounds for termination, and the court did not abuse its discretion in ordering termination.