

Child Welfare Case Update

Cases Decided from June 17, 2014 - September 16, 2014

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Abuse/Neglect/Dependency

Neglect: Adjudication Findings, Cost of Visitation

In re J.C., ___ N.C. App. ___ (July 15, 2014)
<http://appellate.nccourts.org/opinions/?c=2&pdf=31756>

Held: Affirmed adjudication of neglect and disposition order; Remanded for correction of clerical error regarding dependency

❖ **There is a dissent in part**

- When supported by clear and convincing competent evidence, findings of trial court are conclusive even when some evidence supports different findings.
- The new visitation statute, G.S. 7B-905.1, requires the court to order the conditions of visitation, which includes allowing the court to order that a parent pay the cost of supervised visitation. In so doing, the statute does not require the court to make a finding regarding the parent's ability to pay. If it becomes necessary, a parent may file a motion for review to address the ability to pay that cost. **Dissent: court should consider parent's ability to pay**

Facts: in 2013, DSS filed a petition alleging the children were neglected and dependent based in part on witnessing domestic violence between their parents, going back to 2008, being coached to make allegations, and the mother's refusal to develop an in-home services agreement with dss to address the issues. The mother testified she hesitated but did not refuse to make a plan. At the conclusion of the adjudication hearing, the court made an oral finding that children were neglected, but the written order adjudicated the juveniles as neglected and dependent (COA found the dependency box on the order was inadvertently checked). The court ordered custody to paternal grandmother and supervised visitation between the mother and children with the mother to bear the cost of the supervised visits. Respondent mother appealed.

Neglect Adjudication: Substantial Risk of Harm

In re J.C.B., ___ N.C. App. ___ (May 6, 2014); this case was stayed by the NC Supreme Court on 6/11/2014; however, the petition for writ of supersedeas was denied, and the stay was lifted on 8/19/2014.

<http://appellate.nccourts.org/opinions/?c=2&pdf=31564>

Held: Adjudication reversed; dismissed in part

- A finding of prior abuse alone is not sufficient to support an adjudication of neglect; there must be evidence of other factors showing the abuse or neglect is likely to be repeated. The findings of fact do not support the conclusion of law that the children were neglected based on a substantial risk that abuse or neglect might be repeated.

Facts: This action involves three children who were adjudicated neglected after the respondent father/custodian in this action was found to have sexually abused a different child who spent the night at his home. The three children in this action reside in the home and were present when the abuse of the juvenile spending the night occurred. The juvenile who spent the night was subsequently adjudicated abused (see companion case, *In re R.R.N.* ___ N.C. App. ___ (May 6, 2014), which is currently stayed by the NC Supreme Court). The trial court found the abuse of the other juvenile in the home when these three children were present created a substantial risk that abuse or neglect of the three children who are the subject of this action might occur.

Cease Reunification & Termination of Parental Rights: Findings of Fact

In re D.C., ___ N.C. App. ___ (September 16, 2014)
<http://appellate.nccourts.org/opinions/?c=2&pdf=31955>

Held: Affirmed

- Although the permanency planning order standing alone was deficient in its required statutory findings of fact regarding cease reunification, when applying the holding of [In re L.M.T.](#), ___ N.C. ___ (December 20, 2013), the termination of parental rights order cured that deficiency, for either a cease reunification permanency planning order or a termination of parental rights order standing alone or read together can be sufficient to satisfy the requirements of G.S. 7B-507(b).
- An order is sufficient when its written findings address the substance of the statutory required factors even if the order does not use the exact language of G.S. 7B-507(b).
- Although the trial court did not use the exact language of G.S. 7B-1110(a) regarding the factors to be considered when addressing the best interests of the juvenile in a termination or parental rights action, the findings indicated the court considered the relevant factors.

Facts: Trial court changed permanent plan to adoption and ordered a termination of parental rights petition be filed without ordering cease reunification. Respondent mother preserved her right to appeal. Later, respondent mother's rights were terminated, and she appealed on the grounds that the permanent planning order did not contain the required findings under G.S. 7B-507(b)(1) regarding cease reunification. She also appealed the termination of parental rights based upon the court's abuse of discretion when determining the best interest factors under G.S. 7B-1110(a). The court of appeals reversed the trial court due to insufficient findings in the permanency planning order, but after the NC Supreme Court decided *In Re L.M.T.*, this case was remanded to the court of appeals for reconsideration.

Termination of Parental Rights

Standing

In re S.T.B., ___ N.C. App. ___, (August 5, 2014)

<http://appellate.nccourts.org/opinions/?c=2&pdf=31839>

Held: Affirmed

- A child's guardian ad litem is the GAL program, which is a collective team (the individual volunteer, attorney advocate, GAL program coordinator and GAL Program clerical staff) and not one specific individual. The TPR petition that is signed and verified by a GAL program specialist by and through the attorney advocate and not the individual volunteer GAL is proper. This holding relies on the holdings in *In re J.H.K.*, 365 N.C. 171 (2011) and *In re A.N.L.*, 213 N.C.App. 266 (2011).

Grounds for failure to pay the reasonable cost of care

In re S.T.B., ___ N.C. App. ___, (August 5, 2014);

<http://appellate.nccourts.org/opinions/?c=2&pdf=31839>

Held: Affirmed

- A child support order is a determination of a parent's ability to pay for his child's needs. As a result, the finding that a parent failed to pay the court ordered child support is sufficient to terminate parental rights on the grounds of failure to pay for the reasonable cost of a child's care while in foster care. The petitioner is not required to prove the parent has an ability to pay, and the termination order need not find the parent has an ability to pay during the period the termination of parental rights is based upon.

Facts: Respondent Father appealed termination of his parental rights to his two children (one who had been adjudicated dependent; and one who had been adjudicated neglected) on the grounds that he failed to pay the reasonable portion of the cost of care while his children were in foster care. Prior to the termination of parental rights hearing, he was ordered to pay \$50/month in child support, which he did not pay.

Ground of Incapable of Providing Proper Care & Supervision

In re N.T.U., ___ N.C. App. ___, (July 1, 2014)

<http://appellate.nccourts.org/opinions/?c=2&pdf=31752>

Held: Affirmed

- Although a parent's incarceration is relevant, it is not determinative of a parent's incapability of providing proper care and supervision to his or her child as the parent may provide a viable alternative child care arrangement.
- A reasonable probability that the parent's incapability of proving proper care and supervision will continue for the foreseeable future does not require the court to find the incapability will last until a date certain or for a specific duration.

Facts: In 2011, Respondent mother was arrested in a motel room for her alleged connection to a homicide and armed robbery in South Carolina, and her infant son was present at the motel at the time of her arrest. N.T.U. was adjudicated neglected and dependent. On April 12, 2013, DSS filed for termination of respondent mother's parental rights. After hearing, the court terminated respondent mother's parental rights on the grounds of (1) neglect and (2) her inability to provide the proper care and supervision of N.T.U. such that he is dependent and there is a reasonable probability that the incapability will continue for the foreseeable future. Since the time of the initial nonsecure custody order, respondent mother was incarcerated while waiting for her criminal trial date. Although respondent mother identified three proposed placements, the court concluded they were all inappropriate: the first due to the adult male's incarceration for sexual abuse of a child and a child protective action in South Carolina, the second due to the NC DSS case worker observing physical discipline and the adult's failure to come to visits to establish a relationship with N.T.U., and the third due to a denied ICPC, unstable housing, and a crack-cocaine addiction by the adult male. Respondent mother appealed arguing the evidence did not support either ground for termination of parental rights.

Notice of Grounds; Incarceration and Deportation; Findings

In re B.S.O., ___ N.C. App. ___, (July 1, 2014)

<http://appellate.nccourts.org/opinions/?c=2&pdf=31747>

Held: Affirmed

- Although best practice is to state the ground for termination of parental rights specifically, the court may conclude a ground not specifically alleged so long as the facts in the petition are sufficient to put a party on notice of that ground. The facts and the use of the word “abandon” in the petition were sufficient to put the father on notice of the ground of willful abandonment.
- Although incarceration and/or deportation result in limited opportunities for a parent to care for his or her child, opportunities still exist. A parent may still communicate with the child, pay for the cost of care, and inquire about the child.
- One single event, such as one phone call, does not negate a finding of willful abandonment.
- The court may consider a parent’s conduct toward the child prior to the adjudication so as to assess the likelihood of future neglect for TPR.
- Findings are supported by the evidence, and to the extent there were slight discrepancies between the evidence and findings, they were harmless.

Facts: Years after the children were adjudicated neglected and dependent, DSS petitioned to terminate both parent’s parental rights on the grounds of neglect . Respondent father’s rights were terminated on the ground of willful abandonment as the court found the father was deported to Mexico after his incarceration, his whereabouts were unknown, he willfully failed to pay for the reasonable portion of the cost of the children’s care despite having the ability to do so, he did not propose relative placements, and he did not make efforts to be informed about or remain in contact with the children while they were in care. Respondent mother’s parental rights were terminated on the ground of neglect after the court found the likelihood of future neglect was high due to the mother’s failure to address her mental health issues and complete a domestic violence program, and her unstable relationships and housing. Respondent parents appeal.

UCCJEA

In re J.C., ___ N.C. App. ___ (July 15, 2014)
<http://appellate.nccourts.org/opinions/?c=2&pdf=31756>

Held: Affirmed

- Although written findings of fact regarding jurisdiction of NC being the child’s home state under the UCCJEA is best practice, G.S. 50A-201 does not require written findings but rather only requires that circumstances for jurisdiction must exist. Evidence supporting those circumstances is sufficient to establish subject matter jurisdiction under the UCCJEA.

Facts: Kentucky issued custody order regarding the children in 2008. The family moved to North Carolina in 2011 and have continuously resided in NC since then. In 2013, dss filed a petition alleging the children were neglected and dependent. Respondent mother appealed the adjudication in part on a lack of subject matter jurisdiction.

In re N.T.U., ___ N.C. App. ___ (July 1, 2014)
<http://appellate.nccourts.org/opinions/?c=2&pdf=31752>

Held: Affirmed

- For the initial neglect and dependency action, NC had temporary emergency jurisdiction because the child was present in NC and abandoned. G.S. 50A-204 does not require the court to make written findings of the circumstances that must exist for the court to exercise temporary emergency jurisdiction.
- At the time DSS filed the petition to terminate respondent mother's parental rights, NC had become the child's home state and no other custody action had been filed in another state, thus giving NC initial child-custody jurisdiction under G.S. 50A-201.

Facts: In September 2010, N.T.U. was born in South Carolina where he resided with his mother. One year later, respondent mother was arrested in a motel room in North Carolina, where she fled with N.T.U. in an effort to evade the South Carolina police. She was arrested, and DSS filed a petition and obtained initial and then continued nonsecure custody after the court found it had temporary emergency jurisdiction under the UCCJEA. N.T.U. was adjudicated neglected and dependent. On April 12, 2013, DSS filed for termination of respondent mother's parental rights, which was ordered. Since the time of the initial nonsecure custody order, no custody action was initiated anywhere. Respondent mother appealed arguing the court did not have subject matter jurisdiction.

In re J.D., ___ N.C. App. ___ (June 17, 2014)
<http://appellate.nccourts.org/opinions/?c=2&pdf=31727>

Held: Vacated and Remanded for Order of Dismissal

- G.S. 7B-1101 requires that the NC court specifically find in a termination of parental rights action involving a nonresident parent that it has subject matter jurisdiction under the UCCJEA pursuant to either an initial child custody proceeding (G.S. 50A-201) or modification jurisdiction (G.S. 50A-203).
- For modification jurisdiction pursuant to G.S. 50A-203, the initial state court's denial of a motion to intervene is not the equivalent of that state determining it no longer has exclusive continuing jurisdiction, or that NC was a more convenient forum to hear the child custody proceeding.

- The NC court lacked subject matter jurisdiction under the UCCJEA because there was nothing in the record demonstrating that the court of the other state determined it no longer had exclusive continuing jurisdiction as required by G.S. 7B-203.

Facts: “Josh” was born in 2006 in Indiana where he resided with both his parents. In 2008, a custody action was filed in Indiana, and in 2009, a custody order was issued by the Indiana court. In 2011, Josh and his mother moved to North Carolina, where they continue to reside. In August 2011, the Indiana court modified its 2009 custody order twice regarding visitation the father, who continued to reside in Indiana. Also in 2011, Josh’s paternal grandparents filed a motion to intervene in the Indiana custody action for the sole purpose of obtaining grandparent visitation as established by Indiana statute, and the Indiana court denied the motion. In 2012, Josh’s mother filed a petition to terminate father’s parental rights, and respondent father included in his answer a motion to dismiss for lack of subject matter jurisdiction, personal jurisdiction, and failure to state a claim upon which relief could be granted. The NC court denied the motions to dismiss concluding that the Indiana court declined continuing jurisdiction in the custody action by denying the paternal grandparents’ motion to intervene. After hearing, the NC court terminated father’s parental rights, and respondent father timely appealed.

Appeal

Standing and Notice

In re J.C.B., ___ N.C. App ___ (May 6, 2014); this case was stayed by the NC Supreme Court on 6/11/2014; however, the petition for writ of supersedeas was denied, and the stay was lifted on 8/19/2014.

<http://appellate.nccourts.org/opinions/?c=2&pdf=31564>

Held: Dismissed in part

- Respondent father has no standing to appeal the adjudication of the child named in the companion action as he is not a specified party enumerated in G.S. 7B-1002.
- Respondent mother did not file a timely notice of appeal of the civil custody order. Although a court may infer an intent to appeal, the notice of appeal filed in the abuse, neglect, and dependency action did not reference the Chapter 50 order, so no intent could be inferred. Writ of certiorari denied.

Facts: In a companion case, *In re R.R.N.* (currently stayed by the NC Supreme Court), a child was adjudicated abused by the trial court based upon a finding that her caretaker, who is the respondent father in this action, abused her in his home while she was at a sleep over.

He appealed the adjudication of that child. In addition, three children reside in respondent father's home: his child and his two nieces who he was a joint custodian of. The three children who resided in his home were adjudicated neglected. The trial court initiated a Chapter 50 custody action and ordered custody of the nieces to their maternal grandmother. The respondent mother/custodian appealed the court's adjudication and disposition without making a reference to the Chapter 50 order.

Counting the Time

Magazian v. Creagh, ___ N.C. App. ___ (July 1, 2014)
<http://appellate.nccourts.org/opinions/?c=2&pdf=31661>

Held: Dismissed, Appeal untimely

- Pursuant to N.C.R. App. P. 3(c)(1), a notice of appeal must be filed within 30 days after entry of the judgment if the party was served with the judgment within 3 days of the entry. Under G.S. 1A-1, Rule 6(a), the three day period does not include weekends and court holidays.
- Email is not a valid method of service, but actual notice is a substitute for service.
- Plaintiff received actual notice within 3 day period of entry of judgment (weekends do not count); therefore, notice of appeal must have been filed within 30 days of the entry of the judgment, not 30 days from receipt of notice. The time to appeal expired on October 21.

Facts: Order was entered on Friday, September 20, 2013. Plaintiff received actual notice of order by email on Wednesday, September 25, 2013. Plaintiff filed notice of appeal on Friday, October 25, 2013.

Related Criminal Cases

Contributing to Abuse or Neglect of a Juvenile

State v. Harris, ____ N.C. App. ____ (September 16, 2014)
<http://appellate.nccourts.org/opinions/?c=2&pdf=31662>

Held: Affirmed

- G.S. 14-316.1 does not require a parental or caregiver relationship between the defendant and the juvenile. Instead, it requires defendant's conduct to have placed the juvenile in a position where she did not receive proper care from a caretaker or was not provided necessary medical care. Defendant's behaviors made it so that this juvenile did not receive proper care from a caretaker.

Facts: At a party, the 67 year old Defendant approached an 8 year old who was in a bedroom and offered her a cup of liquor and tried to make her drink it, touched her buttocks, played with her hair, put his finger in her mouth and said "suck it baby," and talked about sucking on her breasts. He appeals his criminal convictions of contributing to the abuse or neglect of a minor and misdemeanor sexual battery.

Felony Child Abuse

State v. Mosher, Jr., ____ N.C. App. ____ (August 5, 2014)
<http://appellate.nccourts.org/opinions/?c=2&pdf=31166>

Held: Affirmed

- Felony child abuse convictions based upon G.S. 14-318.4(a3) intentional infliction of serious bodily injury and (a4) serious bodily injury resulting from a willful act or grossly negligent omission that shows a reckless disregard for human life are not mutually exclusive when there are two separate successive acts. Here, defendant was convicted of two counts of felony child abuse, the first under subsection (a4) by leaving the children unattended in a bathtub filled with scalding hot water, and then under subsection (a3) by intentionally holding one child in the scalding water after returning to them.

State v. McClamb, ___ N.C. App. ___, (July 1, 2014)
<http://appellate.nccourts.org/opinions/?c=2&pdf=31218>

- Pursuant to G.S. 14-318.4(a2), it is a Class D felony for any parent or legal guardian of a child younger than 16 to commit or allow to be committed any “sexual act” on the child. Defendant, the father of the victim, appeals his conviction of felony child abuse by sexual act based on having vaginal intercourse with his daughter. G.S. 14, Article 7A addresses “Rape and Other Sex Offenses” and defines “sexual act” at G.S. 14-27.1(4) to exclude vaginal intercourse. This allows for a distinction between crimes of rape, which is limited to vaginal intercourse, and sexual offenses, which excludes vaginal intercourse. However, that definition does not apply to G.S. 14, Article 39 “Protection of Minors.” The term “sexual act” found at G.S. 14-318.4(a2) includes vaginal intercourse since a distinction between rape and sexual offenses is not required in Article 39.

Expert testimony sexual abuse

State v. King, ___ N.C. App. ___, (July 15, 2014)
<http://appellate.nccourts.org/opinions/?c=2&pdf=31622>

Held: No error (Defendant’s conviction of one count of indecent liberties with a child)

- Although the pediatrician was not designated as an expert, the court’s qualification of her as an expert is implicit in its admission of her testimony regarding characteristics of children who have been sexually abused.
- Testimony describing a common characteristic of children who are sexually abused as not initially disclosing or only partially disclosing the abuse is not opinion testimony as to the individual child victim’s credibility.

Child Witness: Closing the Courtroom in Criminal Trial

Note: Although the VI amendment right to a public trial does not apply to an A/N/D proceeding, Art. 1, Section 18 of the NC Constitution states “All courts shall be open...”
For more information see,
http://www.sog.unc.edu/programs/judicial_authority_administration

See G.S. 7B-801(a) and (b) regarding factors the court must consider before closing the courtroom in a A/N/D or TPR action.

State v. Godley, __ N.C. App. __, (July 1, 2014)

<http://appellate.nccourts.org/opinions/?c=2&pdf=31461>

Held: No error

- Under the VI Amendment, a criminal defendant has a right to a public trial; however, the court may close the courtroom by applying 4-part test:
 1. The party seeking to close the courtroom must advance an overriding interest that is likely to be prejudiced
 2. The closure must be no broader than necessary to protect this interest
 3. The trial court must consider reasonable alternatives to closing the proceeding, and
 4. The trial court must make findings adequate to support the closure.
- There must be competent evidence to support the finding, and the court's own observations may be a basis for a finding of fact.

Facts: Defendant was charged with three counts of first –degree rape and taking indecent liberties with a child. The victim, who was 12, testified, and over defendant's objection, the court granted the state's oral motion to close the courtroom during her testimony. Defendant was convicted of taking indecent liberties with a child. Defendant appeals the closing of the courtroom.
