

Summer Conference for Social Services Attorneys
Wrightsville Beach, NC

July 2013

CASE LAW UPDATE

Abuse, Neglect Dependency, and Termination of Parental Rights

Cases Decided from February 19, 2013 through July 16, 2013

PROCEDURE

- *DSS may voluntarily dismiss petition prior to adjudicatory hearing pursuant to G.S.1A-1, Rule 41*
- *Rule 60 motion was proper way to challenge DSS' authority to voluntarily dismiss petition*

In re E.H., ___ N.C. App. ___, ___ S.E.2d ___ (June 4, 2013).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMy0yNzMtMS5wZGY>

Facts: DSS filed a petition alleging that the children had been sexually abused by the father. Before adjudication, DSS voluntarily dismissed the petition without prejudice. The children's GAL, asserting that DSS lacked authority to take a voluntary dismissal, asked the trial court to schedule an adjudication hearing. The trial court directed the GAL that filing a Rule 60 motion to set aside the dismissal was the proper way to raise the issue of DSS's authority to dismiss. The GAL filed a Rule 60 motion, which the trial court denied, and the GAL appealed.

Held: Affirmed

1. Acknowledging inconsistencies in some other kinds of cases, the court of appeals held that in a juvenile proceeding a motion pursuant to Rule 60 was the appropriate way to raise the issue of whether DSS had authority to take a voluntary dismissal.
2. The order denying the Rule 60 motion was appealable under G.S. 7B-1001 because it both determined that the trial court lacked jurisdiction and determined the action and prevented any other judgment from which appeal could be taken.
3. G.S. 1A-1, Rule 41, applies in juvenile proceedings to permit DSS to take a voluntary dismissal of its petition prior to adjudication hearing.
 - a. Nothing in the Juvenile Code prohibits application of the rule and applying it is consistent with the purposes of the Code, with judicial efficiency, and with the responsibilities the Code gives to DSS in having the burden to prove by clear and convincing evidence abuse or neglect.
 - b. Allowing DSS to take a voluntary dismissal does not thwart the duties of the GAL or leave the child unprotected, because the GAL's role and duties are contingent on the existence of a petition and there are numerous ways to protect children.
 - c. The legislature gave only DSS the authority to determine whether a petition should be filed, and requiring consent of the GAL or parent to dismiss a petition is contrary to the statutory scheme.
 - d. The GAL and parents cannot seek affirmative relief in a juvenile proceeding and thus cannot be viewed as being in the position of parties who have filed counterclaims for purposes of precluding a voluntary dismissal.

Termination of Parental Rights: Contents of TPR Order; Reopening the Evidence

- *Trial court has broad discretion to re-open a matter before entry of a judgment.*

In re B.S.O., ___ N.C. App. ___, 740 S.E.2d 483 (Feb. 19, 2013).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi04NzgtMS5wZGY>

Facts: At the conclusion of a termination of parental rights hearing, the trial court seemed to make some findings, took the matter under advisement, directed the DSS attorney to prepare a proposed order, and ordered DSS to continue respondent's visitation and reasonable efforts until further order of the court. Respondent made a motion for review and to reopen the evidence, asserting new facts that could impact the case. The trial court denied the motion on the basis that it had essentially made a ruling based on the evidence already presented and that it would be improper to reopen the evidence. The court then entered an order denying the motion and a written order terminating respondent's rights on the same day.

Held: Reversed and remanded

1. Because the trial court had not entered a written order or even made a definite ruling in court at the time of respondent's motion, the court was in error in stating that it could not reopen the evidence.
2. Whether to reopen the evidence was in the court's discretion and, acting under a misapprehension of the law, the court failed to exercise its discretion, requiring reversal and remand for proper consideration of respondent's motion.
3. A trial court has broad discretion to re-open a matter and hear additional evidence before entry of its order or judgment.

Adoption: Motions for Equitable Relief; Transfer to District Court

- *Motion is treated by substance, not label*
- *A special proceeding before the clerk of superior court is transferred to district court when a request for equitable relief is raised*

For the Adoption of C.E.Y., _____ N.C. App. ____ (July 16, 2013)

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMy02NS0xLnBkZg==>

Facts: Father of CEY was served in prison with adoption petition and TPR petition regarding his daughter. He forwarded his paperwork to his court appointed attorney for the TPR action, mistakenly believing his attorney would be representing him in the adoption proceeding as well. Due to his failure to respond to the adoption petition in a timely manner, the clerk of superior court determined his consent was not required for the adoption. Father filed a motion to set aside the clerk's order under Rules 59 and 60 and gave notice of appeal of the order to district court. . The clerk transferred the case to the district court. The district court dismissed the motion on the basis that the clerk's order was not a final order for purposes of Rule 60 and dismissed the appeal on the basis that only final orders can be appealed pursuant to G.S. 48-2-607(b) or G.S. 1-301.2(e).

Held: Reversed and Remanded

1. The appeal to the court of appeals, although interlocutory, was proper because a trial court's determination that a parent's consent to adoption is not required affects a substantial right.
2. Although respondent characterized his challenges to the clerk's order as an appeal and a Rule 60 motion, a motion must be treated according to its substance, not label, and respondent's motion was a request for equitable relief.
3. District court had jurisdiction to hear respondent's motion pursuant to G.S. 1-301.2(b), which requires transfer to district court when "a request for equitable relief is raised in a . . . pleading or written motion in an adoption proceeding."

Other Issues:

A party may waive the statutorily required notice of a permanency planning hearing by participating in the hearing without objecting to the lack of notice. See In re J.P., ___ N.C. App. ___, ___ S.E.2d ___ (June 4, 2013) summarized on page 12

ICWA

Applicability of ICWA When Non-Custodial Indian Parent Facing TPR

- *When an Indian child is involved in a custody proceeding addressed by ICWA, ICWA does not apply if the Indian parent never had physical or legal custody of the Indian child*
- *The requirement to provide remedial/reunification services to an Indian parent applies only if there had been a relationship between the Indian parent and child.*
- *The adoption preferences under ICWA do not apply where no alternate party has formally sought to adopt the Indian child.*

Adoptive Couple v. Baby Girl, 570 U.S. ____ (June 23, 2013)

http://www.supremecourt.gov/opinions/12pdf/12-399_8mj8.pdf

Facts: Baby girl's biological father is a member of the Cherokee Nation, and she is an Indian child under ICWA. Her mother is not Indian. The parents ended their relationship during the pregnancy. In a text to mother, biological father stated he relinquished his rights to the child. Mother contacted an adoption agency and selected a non-Indian couple in South Carolina as the adoptive parents. Adoptive parents supported mother during pregnancy. Three months after father relinquished his rights by text to mother, Baby Girl was born. Father did not support mother during pregnancy or during the first 4 months of Baby Girl's life. Father was served with a petition for adoption of Baby Girl and signed an acknowledgement and that he was "not contesting the adoption." The next day, father contacted an attorney and contested the adoption and sought custody. DNA testing proved he was Baby Girl's biological father. Adoptive parents sought to terminate father's parental rights and adopt Baby Girl. Applying ICWA, the South Carolina trial court denied the adoption and awarded custody of Baby Girl to dad based on a failure of the adoptive parents to show Baby Girl would suffer serious emotional or physical harm with biological father. The Supreme Court of South Carolina affirmed. Adoptive parents petitioned for certiorari, which was granted by the U.S. Supreme Court.

Held: Reversed and remanded

(decision written by Justice Alito and joined by Roberts, Kennedy, Thomas and Breyer)

1. ICWA establishes federal standards that govern state-court child custody proceedings involving Indian children. The purpose of ICWA is to prevent the removal of Indian children from their homes.
2. The provision of 25 U.S.C. §1912(f) that requires the court find Baby Girl would suffer serious emotional or physical damage if biological father had "continued custody" is inapplicable because he never had custody of the Indian child. Having never had physical or legal custody of Baby Girl, removal of an Indian child is not at issue.
3. The provision of 25 U.S.C. § 1912(d) that requires a party seeking to terminate parental rights to an Indian child to prove active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts failed does not apply when there was never a relationship between the parent and Indian child.
4. Section 1915(a) addressing adoptive placement preferences with Indian families is inapplicable in cases where no alternative party has formally sought to adopt the child.

Neglect: Adjudication; Disposition; Indian Child Welfare Act

- *Where a nonsecure custody order indicated that DSS would investigate whether the Indian Child Welfare Act applied, remand was required to determine the outcome of that investigation.*
- *Broad requirements directed to parents did not exceed court's dispositional authority.*

In re A.R., ___ N.C. App. ___, ___ S.E.2d ___ (June 4, 2013).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi0xNTU0LTEucGRm>

Facts: In a nonsecure custody order the court had noted the parents' claim that the children might be associated with an Indian tribe and found as a fact that DSS would undertake the necessary investigation in that regard. The children were adjudicated neglected based primarily on exposure to ongoing domestic violence and the parents' failure to seek medical care. One child was also adjudicated abused based on being hit by a board during a domestic violence incident. At disposition the court found that it was contrary to the children's best interest to remain in the home and ordered the parents to do a number of things relating to mental health assessment recommendations; taking prescribed medication; having a substance abuse evaluation; random drug screens; documenting any new residence and employment or income; maintaining contact with DSS; and following recommendations of the child medical evaluation. The parents appealed the adjudication and disposition orders.

Held: Affirmed in part and remanded in part

1. The findings of fact that were not challenged on appeal were sufficient to support the conclusion that the children were neglected, based on exposure to domestic violence and failure to obtain medical care.
2. Conditions the trial court placed on the parents were reasonably related to the reasons the children came into care, and they did not exceed the scope of the court's dispositional authority.
3. The court of appeals determined that the trial court had at least cause to suspect that the children were Indian children for purposes of the Indian Child Welfare Act (ICWA) and, erring "on the side of caution" to avoid possible future delays, remanded for the trial court to determine the results of DSS's investigation of any applicable notification requirements under ICWA.

FINDINGS

Permanency Planning: Changing Plan and Ceasing Reunification Efforts; Findings

- *Permanency Planning Orders must comply with G.S. 7B-507*

In re A.P.W., ___ N.C. App. ___, 741 S.E.2d 388 (Feb. 19, 2013).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi04MDctMS5wZGY>

Facts: At a permanency planning hearing the court changed the permanent plan for respondent mother's three children from reunification to adoption and directed the filing of a petition to terminate parental rights. The order did not explicitly cease reunification efforts or make findings related to doing so. Respondent gave notice of her intent to appeal. Later DSS filed a termination petition, and the court terminated respondent's rights after adjudicating three grounds. Respondent appealed both the permanency planning order and the termination order.

Held: Reversed and remanded

The court of appeals reversed both the permanency planning order and the order terminating respondent's rights and remanded the case.

1. Because the permanency planning order continued custody with DSS, it was required to, but did not, contain findings "as to whether [DSS] should continue to make reasonable efforts to prevent or eliminate the need for placement." G.S. 7B-507(a)(3).
2. The permanency planning order, by changing the plan to adoption and ordering DSS to file a termination action, "implicitly ceased reunification efforts" and failed to include the findings required by G.S. 7B-507(b) for doing so.
3. Respondent gave proper and timely notice of appeal. G.S. 7B-507(c).

Dependency: Ceasing Reunification Efforts and Awarding Guardianship; Findings

- *Permanency planning orders must comply with G.S. 7B-507 and 7B-907(b).*
- *A party may be estopped from taking wholly inconsistent positions at different points in the same case.*
- *Findings must be supported by evidence in the record, and the findings must support the conclusions.*

In re I.K., ___ N.C. App. ___, ___ S.E.2d ___ (May 21, 2013).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi0xMDUzLTEucGRm>

Facts: The child was adjudicated dependent based on both parents' lack of appropriate living arrangements and the mother's having attempted suicide. At the first permanency planning hearing the court ceased reunification efforts with the mother and ordered a concurrent permanent plan of reunification with the father or guardianship to the foster parents. At a second permanency planning hearing, the court found that the father had complied with parts of the case plan but had not provided a plan of care for the child should the father be hospitalized. DSS recommended continuing reunification efforts and the guardian ad litem opposed that position. The court ceased reunification efforts with the father, awarded guardianship to the foster parents,

and gave the father four hours a month of unsupervised visitation that could be increased in the guardians' discretion. The father appealed.

Held: Reversed and remanded

1. The court of appeals rejected DSS's argument that the court needed to examine the cessation of reunification efforts only if it determined that guardianship was not in the child's best interest.
 - a. First the court noted that DSS had changed its position – from supporting a primary plan of reunification to opposing continued reunification efforts – without making any attempt to explain or address the reason for doing so.
 - b. A permanency planning order must address the factors and questions set out in G.S. 7B-907(b) and G.S. 7B-507 and therefore must address reunification efforts.
2. The evidence did not support the trial court's critical findings relating to reunification efforts, and the findings did not support the conclusion about ceasing reunification efforts:
 - a. No evidence supported the finding that there was an "appreciable risk" that respondent would sexually or physically abuse the child.
 - b. Evidence in fact indicated that those risks did not exist.
 - c. Some findings merely recited evidence, which does not constitute findings of fact.
 - d. Findings did not explain why the child could not be returned home immediately or within six months or why returning home was not in her best interest.
 - e. The court improperly considered positive aspects of the foster care placement before determining whether respondent would be able to parent the child.
3. DSS's claims about risks to the child and the trial court's order were inconsistent with supporting and providing for respondent to have unsupervised visitation with the child.
4. On remand, whether to take additional evidence is in the trial court's discretion.

Permanency Planning: Ceasing Reunification Efforts and Termination of Parental Rights; Findings

- *Evidence was sufficient to support cease reunification due to reasonable probability of future neglect*

In re T.J.C., ___ N.C. App. ___, 738 S.E.2d 759 (Feb. 19, 2013).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi05MjctMS5wZGY>

Facts: The children were adjudicated neglected and placed in DSS custody, based largely on ongoing domestic violence between the parents. After a permanency planning hearing when the children had been in foster care for a year, the court ceased reunification efforts in an order that included numerous findings of fact about the parents' ongoing relationship, the effects of the domestic violence on the children, the parents' limited parenting skills and intellectual abilities, and their failure to benefit from services. The father filed a notice of intent to appeal that order. DSS then filed a termination of parental rights action, and both parents appealed from the resulting order terminating their rights.

Held: Affirmed

With respect to both orders the court of appeals examined in some detail the trial court's findings and the evidence on which they were based.

1. The permanency planning order included the ultimate findings required by G.S. 7B-507(b) in order to cease reunification efforts, and those findings were supported by specific evidentiary findings that the evidence supported.
2. The order terminating the parents' rights on the basis of neglect also included sufficient findings that was supported by clear, cogent and convincing evidence of both past neglect and a reasonable probability of future neglect if the children were returned home.

Termination of Parental Rights: Stipulations and Findings

- *Parties may not stipulate to conclusions of law, such as a ground for termination exists. Parties may only stipulate to facts.*

In re A.K.D., ___ N.C. App. ___, ___ S.E.2d ___ (May 7, 2013).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi0xMzU1LTEucGRm>

Facts: In an action by the mother to terminate the rights of the father, the parties stipulated, for purposes of adjudication only, that the father had not seen the children for six months and that the abandonment ground for terminating his rights existed. Respondent's attorney indicated that at disposition he intended to show why the respondent had not seen the children for six months at the disposition hearing. Based on the parties' stipulation, the trial court concluded that the ground of willfully abandoning the children for six months before the filing of the petition existed. The court found that termination was in the children's best interest and terminated respondent's rights. Respondent appealed.

Held: Reversed and remanded

1. The conclusion that the abandonment ground existed was not supported by the findings of fact, because there was no finding or stipulation that the respondent's abandonment of the children was willful only that he had not seen the children for six months prior to the filing of the petition.
2. Respondent's intent to explain the abandonment at disposition indicated an intent to contest the willfulness of the abandonment.
3. Parties may stipulate to facts, but not to questions of law. Thus, parties may not stipulate that a ground for termination exists (or that a child is abused or neglected). Instead, if that is the intent, stipulations should establish facts from which the court can conclude that a ground for termination exists (or that a child is abused or neglected).

Termination of Parental Rights: Neglect; Findings

- *A parent's compliance with a case plan and cooperation with services does not preclude adjudication of the neglect ground for termination.*
- *Evidence was sufficient to support finding of the probability of a repetition of neglect if the children were returned home.*

In re D.A.H.-C., ___ N.C. App. ___, ___ S.E.2d ___ (June 4, 2013).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi0xNTM3LTEucGRm>

Facts: The children were removed from the home and adjudicated neglected after another child in the home was seriously injured by respondent's husband. That child later died and the husband was convicted and sentenced and thus was out of the home. The children were returned to respondent on a trial basis and she and the children later resided with the father of one of the children. That man hit one of the children with a belt and the children revealed to DSS that he frequently physically punished them. Respondent did not intervene to protect them and was herself the victim of domestic abuse. The children were again removed from the home and adjudicated to be neglected, and one child was also adjudicated abused. The trial court ordered that reunification efforts cease but that respondent continue to have visitation with the children. That order was affirmed by the court of appeals. Respondent had complied with her case plan, participated in services, visited the children regularly, and paid child support. DSS sought termination of parental rights and the court adjudicated the neglect ground and terminated respondent's rights.

Held: Affirmed

1. Evidence was sufficient to support the finding of a substantial probability that the children would be neglected, if not abused, if returned to the mother's custody.
2. Although respondent had complied with the case plan, the court found no indication that doing so affected the likelihood that she would protect the children. The court pointed to evidence and findings about the "culture of violence" in which respondent had lived and her strong sense of duty to defer to a husband or partner.
3. Although the trial court's order quoted sections of the earlier appellate court decision in the case, the court of appeals held that it was clear that the trial court had made its own independent findings based on evidence in the record.

Neglect: Adjudication; Stipulations vs. Consent Order; Permanent Plan; Visitation

- *Stipulation of parties to facts and disposition is not a consent order if it is not sanctioned by the court*
- *Visitation order must provide a minimum outline of contact (time, place, conditions)*

In re L.G.I., ___ N.C. App. ___, ___ S.E.2d ___ (June 4, 2013).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi0xMzY5LTEucGRm>

Facts: In court the parties did not dispute the adjudication of neglect based on the child's medical condition due to the mother's use of illegal drugs during pregnancy. Medical records were introduced without objection and considered by the court. At disposition, respondents claimed that their "agreement" to the adjudication was contingent on DSS's continuing reunification efforts. The trial court rejected that position, stating that the adjudication was based on the evidence, not the parties' consent, and proceeded to disposition. The court ceased

reunification efforts and scheduled a later permanency planning hearing, but encouraged the parents to continue to make efforts on their own. The court also ordered that any visitation be supervised by DSS in its discretion.

Held: Affirmed and remanded

1. The record did not reflect that the adjudication order was a consent order or was contingent on a specific outcome at disposition. At most, the mother stipulated to certain facts. A consent order requires the sanction of the court.
2. Although the trial court stated verbally that adoption was the best permanent plan, the court did not order a permanent plan, but scheduled a hearing for that purpose later and encouraged the parents to take steps to comply with their case plan on their own.
3. The part of the order providing for visitation was insufficient, and the court of appeals remanded for the trial court to provide a minimum outline of a visitation schedule.

VISITATION

See In re: LGI (above)

Neglect Adjudication; Hearsay; Visitation

- *Skype is not visitation under 7B-905(c); G.S. 50-13.2(a) applies to all custody cases*

In re T.R.T., ___ N.C. App. ___, 737 S.E.2d 823 (Feb. 19, 2013).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi05MDUtMS5wZGY>

Facts: The child, age 5, had previously been adjudicated neglected and placed in DSS custody because of respondent mother's mental health problems and her inability to provide proper care and supervision. The court returned the child to the mother, and a month later DSS filed a new neglect petition alleging inadequate care and supervision, injurious environment, respondent's refusal to cooperate with DSS and with services that were offered, her deteriorating mental health, and her noncompliance with medical and mental health treatment directives. The trial court adjudicated the child to be neglected, continued custody with DSS, and ordered that visitation occur electronically through SKYPE.

Held: Affirmed in part; reversed and remanded in part

1. The court of appeals affirmed the neglect adjudication, holding that the findings that were based on proper evidence were sufficient to support a conclusion of neglect. With respect to some specific findings, the court noted that
 - a. one was based only on "allegations";
 - b. one was based on impermissible hearsay, but because respondent had not objected at trial the court could properly consider it; and
 - c. one was based on evidence to which the trial court had sustained an objection and, therefore, should not have considered it.
2. Although there was no finding that the child had suffered actual impairment, the trial court's ultimate finding that he was at risk of substantial harm was sufficient.
3. Ordering contact only through SKPYE did not constitute "visitation" and did not comply with the visitation provisions in G.S. 7B-905(c).
4. Orders in juvenile cases that provide for electronic communication with a child must comply with G.S. 50-13.2(e), which provides that "[e]lectronic communication may not be used as a replacement or substitution for custody or visitation."

Note: The court of appeals held that G.S. 50-13.2(e), which addresses electronic contact, "is a generic provision which applies to all custody actions," including those in juvenile court. The court reasoned that unlike subsection (a), which refers to custody orders entered under G.S. 50-13.2, subsection (e) refers only to "[a]n order for custody of a minor child." That reasoning would suggest that subsections (b) through (d) of G.S. 50-13.2 also apply in juvenile cases – unless they deal with subjects that are addressed more specifically in the Juvenile Code. These subsections include provisions about domestic violence, grandparent visitation, requirements to abstain from consuming alcohol and submit to continuous alcohol monitoring, and taking a child out of state.

Neglect / Abuse: Adjudication and Disposition; Notice/Objection; Permanent Plan; Visitation

- *Visitation order must have minimum outline of specificity regarding time, place, and conditions*
- *A party may waive the statutorily required notice of a permanency planning hearing by participating in the hearing without objecting to the lack of notice.*

In re J.P., ___ N.C. App. ___, ___ S.E.2d ___ (June 4, 2013).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMy0zNS0xLnBkZg>

Facts: The parties entered into a consent adjudication order, and the court ordered a temporary concurrent permanent plan of reunification or custody/guardianship and scheduled a subsequent disposition hearing. At that hearing the court ceased reunification efforts; ordered a permanent plan of custody or guardianship; and ordered that DSS offer the father supervised visitation every other week and that visitation be reduced to once a month if the father missed visits without notice or acted inappropriately.

Held: Adjudication affirmed; disposition affirmed in part and reversed in part

1. If it was error for the court to order a temporary permanent plan at adjudication, respondents showed no prejudice as a result and any error was corrected by the court's later order of a permanent plan.
2. Respondents could not complain of lack of notice that the disposition hearing would be a permanency planning hearing, when they attended and participated in the hearing without objecting to the lack of notice.
3. The trial court's findings were sufficient to support ceasing reunification efforts because the court related the findings to the conclusion that it would be contrary to the children's best interest to be returned to respondents.
4. The part of the order providing for visitation was insufficient. The court of appeals reviewed earlier cases addressing the need for more specificity about the time, location, and other details of a visitation plan and reversed that part of the order.

GROUNDNS FOR TPR

Termination of Parental Rights: Willfully Leaving Child in Other Placement

In re L.C.R., ___ N.C. App. ___, 739 S.E.2d 596 (April 2, 2013).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi0xMTk1LTEucGRm>

Facts: In March, 2008, the children were adjudicated neglected, placed in DSS custody, and placed physically with paternal grandparents. In September, 2008, after a permanency planning hearing, the court awarded custody to the grandparents and converted the case to a civil custody action under G.S. 7B-911. In 2011, the grandparents filed a petition to terminate the parents' rights, alleging the grounds of (1) willfully leaving the children in foster care or other placement for at least a year without showing to the court's satisfaction that reasonable progress under the circumstances had been made in correcting the conditions that lead to the children's placement; (2) incapability due to substance abuse; and (3) willful abandonment. The trial court adjudicated all three grounds and terminated the parents' rights.

Held: Affirmed

The court of appeals affirmed after analyzing only the first ground set out above.

1. The period of time the children had been in the custody of petitioners after the juvenile case was converted to a civil custody case was properly counted toward the one year of court-ordered placement outside the home. The court rejected respondent's argument that only the six months under the juvenile court order should count. Civil custody is a disposition under 7B.
2. The court also rejected respondent's argument that the ground should not be available when petitioners have custody in a private custody action because the standard for regaining custody in the civil action is greater than "reasonable progress" set out in the termination ground. The court of appeals held that making reasonable progress did not require that the parent be in a position to regain custody in a civil action, and that the conversion of the case to a civil custody case was irrelevant to the trial court's ability to determine whether respondent had made reasonable progress.

GROUNDNS FOR NEGLECT

Criminal Conviction for Contributing to Neglect of a Minor

State v. Stevens, ___ N.C. App. ____ (July 16, 2013)

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi0xMzk0LTEucGRm>

The court of appeals upheld defendant's appeal of his conviction for contributing to the delinquency and neglect of a minor, a Class 1 misdemeanor. Evidence was sufficient to prove the elements of the crime: Defendant was at least 16, the minor was younger than 12, and defendant caused the minor to be in a place or condition where the minor could be adjudicated neglected as defined by G.S. 7B-101. The State was able to show beyond a reasonable doubt that defendant knowingly or willfully caused the juvenile to be in a place or condition where the juvenile could be adjudicated neglected. And, the state showed by clear and convincing evidence that the juvenile was neglected. During a bike ride with the juvenile, defendant took the juvenile away from his neighborhood, later caused an eye injury to the juvenile, did not seek treatment of that injury, and abandoned the juvenile when the juvenile was sleeping in a parking lot, leaving the juvenile without the proper supervision of his parents.

UNMARRIED FATHER'S CONSENT: CONSTITUTIONAL IMPLICATIONS

Adoption: When unwed father's consent is required

- *An order finding that an unwed father's consent to adoption was not required was immediately appealable.*
- *The adoption statute may have been unconstitutional as applied to an unwed father.*
- *A biological father has an interest in the opportunity to develop a relationship with his child.*
- *By taking timely steps to assume parental responsibility an unwed father may develop a constitutional interest sufficient to require his consent to the child's adoption.*

In re S.D.W., ___ N.C. App. ___, ___ S.E.2d ___ (July 2, 2013).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi0xMzYyLTEucGRm>

Facts: The child's mother and father dated for several months, but he did not know about her pregnancy or the birth of the child after they stopped dating. Within weeks after the child was born, the mother relinquished the baby to an adoption agency, claimed untruthfully that she did not know the father's whereabouts, and gave an improper name for the child's father. Prospective adoptive parents filed a petition to adopt in November 2010, and the father first learned of the child's existence in April 2011. After the father contacted the adoption agency petitioners voluntarily dismissed a termination action (against a father with the incorrect name), removed a stay on the adoption proceeding, and had notice of the adoption proceeding served (on the father's brother). The father, pro se, wrote to the clerk of court and petitioners' attorney asking what he had to do to obtain custody of the child and seeking a DNA test to establish paternity. A test subsequently showed a 99.99 percent probability that he was the father. The father filed a motion to intervene in the adoption proceeding and a motion to dismiss the adoption proceeding. Petitioners made a motion for summary judgment on the question of whether the father's consent to the adoption was required. After a hearing, the trial court denied the father's motions and granted petitioners' motion for summary judgment on the basis that the father's consent to the adoption was not required because he had taken none of the steps listed in G.S. 48-3-601 before the filing of the adoption petition.

Held: Reversed and remanded

1. Although the appeal was interlocutory, a determination that a biological father's consent to adoption is not required affects a substantial right and would cause irreparable damage to father and is, therefore, immediately appealable.
2. The court of appeals rejected the father's argument that his consent was required by G.S. 48-3-601, and held that the trial court correctly interpreted the statutes in concluding that his consent was not required.
3. The court went on, however, to consider whether the father's consent was required under the N.C. or federal constitution, a question that North Carolina appellate courts have not reached before when considering the rights of an unwed father in an adoption. Earlier cases, relying solely on the wording of the adoption and termination of parental rights statutes, have not treated a mother's deceit or the father's lack of knowledge of the child's existence as relevant

to whether his consent was required or his rights could be terminated. *See, e.g., In re Adoption of Anderson*, 360 N.C. 271 (2006); *In re Adoption of Byrd*, 354 N.C. 188 (2001); *A Child's Hope, LLC v. Doe*, 178 N.C. App. 96 (2006); *In re T.L.B.*, 167 N.C. App. 298 (2004).

4. After analyzing *Lehr v. Robertson*, 463 U.S. 248, other U.S. Supreme Court decisions, and decisions of other states' courts that have considered the issue, the court of appeals held as follows:

“[A] biological father, who prior to filing of the adoption petition was unaware that the mother was pregnant and had no reason to know of the pregnancy, promptly takes steps to assume parental responsibility upon discovering the existence of the child has developed a constitutionally protected interest sufficient to require his consent where the adoption proceeding is still pending.”

5. The court emphasized that constitutional rights of a biological father do not result solely from the biological relationship. Rather, biology gives that one man the *opportunity* to develop a relationship with the child, and a father who takes that opportunity can establish a relationship that results in full blown parental rights. The unwed father has an “inchoate interest” in that opportunity. In this case, the court said, the adoption statute’s consent provisions “may be unconstitutional as applied to the father if he can show that he promptly attempted to grasp the opportunity of fatherhood once he discovered his son’s existence, but the statute foreclosed that opportunity.”
6. Because the court of appeals could not make factual findings, it remanded the case to the trial court for an evidentiary hearing on steps the father took after learning of the child’s existence.

Concurrent adoption and custody actions

- *The district court may have concurrent jurisdiction in adoption and custody actions involving the same child.*
- *The potential for conflicts in the two cases and the absence of statutory guidance for resolving them required in this case that the court hold the custody action in abeyance pending completion of the adoption proceeding.*

Jones v. Welker, ___ N.C. App. ___, ___ S.E.2d ___ (July 2, 2013).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi0xMTU0LTEucGRm>

Facts: The father in *S.D.W.*, the case summarized above, also filed an action seeking custody of the child while the adoption proceeding was pending. The trial court dismissed the custody action on the basis that it lacked subject matter jurisdiction.

Held: Reversed and remanded

1. An adoption proceeding was not a prior pending action that deprived the court of subject matter jurisdiction in a custody action, because the parties and precise issues in the two cases were not the same.

2. The court of appeals noted the lack of statutory provisions addressing simultaneous custody and adoption proceedings and also noted that the plaintiff had not made a motion to consolidate the two actions.
3. Because both proceedings involved custody issues, the court held that “potential unresolvable conflicts between the two proceedings” required that the trial court hold the custody action in abeyance pending completion of the adoption proceeding.