

2013 Child Welfare Legislation

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Session Law 2013-129

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CIP STATUTE CHANGES

Affecting the beginning of a juvenile case.

Parties

- Who must participate?
- Who may participate?
- Should the participation be limited in time, or scope?

Parties

- The child is a party to the case.
- The petitioner shall remain a party until the court terminates its jurisdiction in the case. [new Section 7B-401.1 (a)]

Four categories of adult participant:

- Parent
- Guardian
- Custodian
- Caretaker

Hierarchy

- Parents
- Guardian/custodian
- Caretaker.

Parent

- Status derives from: biological fact, or sworn & consequential acknowledgement, or court determination.
- Status imparts: the right to the care, custody, and control of the child, a liberty interest that cannot be diminished without due process and equal protection under the law.

Parent

- A/N/D case party? Necessary party under 7B-401.1. Exception: terminated, relinquished, or convicted of crime in conception.
- Standard for removal:
 - clear, cogent & convincing evidence of conduct inconsistent.
 - best interests of the child.

Parent

- Right to counsel: the strongest. Statutory right to appointed counsel, if indigent (in most places, provisional appointment at time of summons issue.)
- Retention of rights: what rights the court has not specifically removed from the parent are retained by the parent. Ex: medical decision-making, visitation, power to relinquish.

Parent

- If a parent regains legal custody of his child by complying with the court-ordered plan for reunification, is he fully restored to all of his parental rights, and the constitution's protection of same?

Parent

- New section 7B-401 states: “If the court has retained jurisdiction over a juvenile whose custody was granted to a parent and there are no periodic judicial reviews of the placement, the provisions of Article 8 of this subchapter shall apply to any subsequent report of abuse, neglect, or dependency determined by the director of social services to require court action pursuant to G.S. 7B-302.”

Guardian or custodian

- Change Note: SL 2013-129 changed the definition of “Custodian” set out in Section 7B-101 (8), so that now the term only applies to a person or agency that has been awarded legal custody of a juvenile by a court.

Guardian or custodian

- Status derives from: court action only.
- Status imparts: for a custodian, only those powers the court sees fit to grant. For a guardian, the powers defined by the governing statute, 35A-1220 et seq, or 7B-600.

Guardian or custodian

- A/N/D Case Party? Yes. If a person holds guardianship or court-ordered custody at the time a juvenile petition is filed, then that person is a necessary party to the case, and should be served. 7B-401.1 (c) & (d).

Guardian or custodian

- If a person is appointed guardian or granted custody *as the child's plan for permanence*, then that person automatically becomes a party to the case.

Guardian or custodian

- A person who held guardianship or court-ordered custody at the time the petition was filed may be discharged as a party by the court at any time if the court finds that:
 - the person does not have legal rights that may be affected by the action and
 - the person's continuation as a party is not necessary to meet the juvenile's needs. [7B-401.1 (g).]

Guardian or custodian

- Standard for removal: generally the best interests of the child. Some additional requirements must be met for removal of guardian appointed as the permanent plan. [7B-600 (b).]

Guardian or custodian

- Right to counsel: may retain counsel. Statute does not provide for appointment of counsel. (In practice, the IDS has paid for counsel for a guardian or custodian, if the trial court enters an order for same.)

Guardian or custodian

- Retention of rights: guardians and custodians hold only the rights and powers the court chooses to give them, and retain no others.

Caretaker

- Change Note: the change of definition for “custodian” has left all those acting *in loco parentis* without a court order to fall into the least powerful and most diverse group: “caretakers”.
- Status derives from: child’s circumstances.
- Status imparts: no legal right to child.

Caretaker

- A/N/D/ Case Party? Maybe.
- Under 7B-401.1(e) a caretaker shall be a party only if (i) the petition includes allegations relating to the caretaker, (ii) the caretaker has assumed the status and obligation of a parent, or (iii) the court orders the caretaker be made a party.

Caretaker

- The court may discharge a caretaker-made-party at some later moment in the case, when it finds a lack of legal rights to be affected by the action, and that continuation of party status is not necessary to meet the juvenile's needs [7B-401.1(g).]

Caretaker

- Standard of removal: best interests.
- Right to counsel: if made a party, can retain counsel.
- Retention of rights: none.

Caretaker

- Reasons *for* making a caretaker a party, at the outset:
 - a party can be compelled to testify.
 - testimony as to a party's statements may not be hearsay.
 - if caretaker will remain in household, court may need power to order him to take curative action, and hold him in contempt if he does not.
 - party status can end.

Caretaker

- Reasons *not* to make caretaker party:
 - 1. May block stipulations or consent orders.
 - 2. His participation may cause delay prejudicial to parents or child.
 - 3. if caretaker is perpetrator of abuse, his very presence in courtroom may intimidate child witness.
 - 4. may use discovery in juvenile case to prepare a criminal defense.

Intervention

- New section 7B-401.1 (h): Except as provided in G.S. 7B-1103 (b), the court shall not allow intervention by a person who is not the juvenile's parent, guardian, custodian or caretaker, but may allow intervention by another county department of social services that has an interest in the proceeding.

Issuance of Summons

- 7B-406 (a) now reads that a summons shall be issued to “every party named in the petition, except the juvenile.”

Pre-adjudication hearing

- New section 7B-800.1 calls for a pre-adjudication hearing to address several issues. This hearing can be combined with a nonsecure custody hearing, or any pretrial motions, or preliminary practices set by local rules.

Pre-adjudication hearing

- Retention or release of provisional counsel
- Identification of parties
- Paternity issues.
- Identification and notification of relatives
- Summons, service, and notice issues.
- GAL appointments
- Discovery
- Amendment of petition
- Continuance of adjudication hearing.
- Any other....

Pre-adjudication hearing

- Purpose is to prevent delay by assuring that when the case is first set for adjudication, all needed parties are present, clearly within the personal jurisdiction of the court, and ready to proceed.

Continuances

- 7B-803 has always provided continuance for extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile.
- Now, it states that “resolution of a pending criminal charge against a respondent arising out of the same transaction or occurrence as the juvenile petition shall not be the sole extraordinary circumstance for granting a continuance.”

Venue

- Section 7B-400 (a) now includes this sentence:
Notwithstanding G.S. 153A-257, the absence of a juvenile from the juvenile's home pursuant to a protection plan during an assessment or the provision of case management services by a department of social services shall not change venue if it subsequently becomes necessary to file a petition.
- If County A does a COI investigation for County B, County A can now file a petition in either county.
- A pre-adjudication change in venue does not change the identity of the petitioner.

RIL Judicial Review

- Only permitted as an independent hearing (§7B-311(b)(2) & §7B-324(a)(2))
- Adds *ex parte* hearing for continuing with hearing when individual is avoiding service. (§7B-323(a1))
- Director required to provide a form, rather than instructions for filing and serving the petition (§7B-320(b))
- Hearing to be scheduled within 45 days, instead of 15 (§7B-323(b))
- Stay permitted when criminal charges are pending (§7B-324(b))

Non-Relative Kin §7B-505 & 506

- New language makes it clear that, if the court does not place with a relative, it may place with non-relative kin.
 - An individual having a substantial relationship with the juvenile
 - For children in State recognized tribes, a member of a State or Federally recognized tribe
- Court must find that placement is in child's best interest (important for MEPA)
- Court may also order agency to notify the State recognized tribe.

Waiver of Appointed Counsel

- New § 7B-602(a1) and § 7B-1101.1(a1) specify waiver is permitted only after:
 - The court examines the parent
 - The court makes findings that waiver is knowing and voluntary
- The court's examination shall be reported as provided in §7B-806

Guardians Ad Litem for Parents

- In re P.D.R. (2012) held that there were two types of GAL's:
 - Substitution for incompetence
 - Assistive for diminished capacity
- New §7B-602 and 7B-1101.1 limit appointment to incompetent
- Assistive role eliminated
- RPC 1.14 governs attorney's representation of client with diminished capacity

Service of TPR Petition

- New language in §7B-1106 applies when parent has an attorney in underlying case
 - Requires service of TPR petition on attorney, pursuant to Rule 5

Visitation - §7B-905.1

- New statute addressing visitation
- DSS now allowed discretion as long as court determines minimum, frequency, length of visits, and any supervision needed
- The court can specify conditions for suspension
- Specific visitation plan required for guardianship or custody with someone else
- Parties have right to file a motion for review
- Custody mediation available

§7B-906 and §7B-907 Merge

- New §7B-906.1 streamlines review and permanency planning hearings
- All hearings after first review are permanency planning hearings
- Duty to conduct review hearings automatically waived after custody with parent only. Waiver after any other award of custody requires findings under § 7B-906.1(n)

Reviews after Relinquishment

- Amends §7B-909
- After relinquishment by a parent, reviews will be held every six months until the adoption decree is issued, as with post-TPR reviews
- Clarifies that motion for review may be filed when Court is already exercising jurisdiction
- Clarifies that relinquishing parent shall not be considered a party
- See, also, S.L. 2013-236, amending §7B-909 to allow for a relinquishment to be voided in certain circumstances

Court's Role at Post-TPR Review

- Amends §7B-1112.1
- DSS required to consider current placement provider wanting to adopt in adoption selection committee
- Foster parents receive notice of the selection
- If not selected, DSS must provide copy of motion for judicial review to foster parent (10 days to file)
- §7B-908 amended to clarify that “prospective adoptive parents” refers to the person(s) selected in §7B-1112.1



What Provisions from Past Case Law Remain?

Other Provisions of SL 2013-129

- §7B-911 requires court to consider whether jurisdiction should remain with juvenile court or be transferred to civil custody court, when custody is placed with a parent or other appropriate person
- §7B-1111(a)(5) amended to specify statutory authority for various methods of establishing paternity
- §7B-1114 amended to allow reinstatement after adoption completed in another jurisdiction or following a relinquishment
- § 7B-1001 clarifies two types of appellate notice and party signature requirements

Odds and Ends

Creative Short Titles

- Family, Faith & Freedom Protection Act
- Healthy Marriage Act
- Reclaim North Carolina Act

UDPCVA

- Our state has adopted the Uniform Deployed Parents Custody and Visitation Act.
- Adds a new Article 3 to Chapter 50A.
- Written to be in harmony with UCCJEA, UIFSA, and the Servicemembers Civil Relief Act.

UDPCVA

- The Act encourages parents about to be deployed to arrange for custodial responsibility of children by agreement with the other parent.
- Such agreements are temporary by definition, and end when the deployment ends.
- When an agreement has not been made, the court may enter a temporary order affecting custody, to address the child's needs during the parent's deployment.

UDPCVA

- Amends section 50-13.3, to make clear that a parent's past deployment or future deployments cannot be the "only basis in determining the best interests of the child."
- What the court can consider is "any significant impact" caused by deployment upon the child's wellbeing, as one of several factors in determining best interests.

SL 2013-35

- Bumps up the penalties for all felony child abuse.
- Now range from Class G to Class B2.
- Requires court to note on the criminal judgment entered at conviction a determination that the crime involved child abuse.
- (Similar requirement for crimes related to domestic violence.)

SL 2013-35: impact.

- With higher penalties, we can expect defendants to fight conviction harder.
- When we review criminal records of parents, or prospective care providers, we will know when their past crimes involved child victims or DV.

From the knickers-in-a twist
department:

Foster care ombudsman for Gaston County

- Creates a *new party* to juvenile actions, the “foster care ombudsman”.
- This person is supposed to “have experience in child welfare and State laws and policies governing children in foster care” and “shall remain objective and impartial when performing his or her duties.”

Ombudsman's duties

- Investigate & report to the court in specific cases.
- “be a party in all actions under 7B-906 and 7B-907 *on behalf of* the foster parents, and permitted to speak on their behalf.”
- Request the assistance of an attorney when needed. (to be paid for by the County Commissioners.)
- Compile and make available to the Board [of County Commissioners] any data the ombudsman has collected in the course of exercising his or her official duties.

Ombudsman

- Applies only to Gaston County.
- Expires July 1, 2015.
- Questions:
- If he/she represents all foster parents currently before the court in his/her county, how will conflicts of interest be handled?
- Is DSS required to invite this person to all PPAT or CFT meetings related to foster children?
- The ombudsman is required to report any cause to suspect A/N/D to DSS, but can he/she keep information as to lesser emerging problems in the foster home from the agency?

Foster Care Children's Bill of Rights

- House Bill 510, not yet law, but likely to pass.
- List of eleven things that the general assembly “promotes” in the provision of foster care.
- All of these things are already incorporated into best foster care practice as taught by DHHS.
- Failure to provide any of these things does not create a cause of action against the State, DHHS, or “a person or entity providing foster care pursuant to this Article.”

Grandparent visitation rights

- SB627 seeks to establish a legislative study committee on grandparent visitation rights and “the use of health-related conditions as a factor in determining child custody”.