

**RECENT APPELLATE COURT DECISIONS:  
Abuse, Neglect, Dependency & Termination of Parental Rights**

October 23, 2009

**Jurisdiction**

- Failure to issue a proper summons in neglect case did not affect subject matter jurisdiction, and respondents waived any objection to personal jurisdiction by appearing and stipulating to neglect. Therefore, order giving custody to DSS was valid, and DSS had standing to initiate termination of parental rights proceeding.

**In re K.J.L., 363 N.C. 343, 677 S.E.2d 835 (6/18/09).**

**Facts:** In the underlying neglect/dependency action, in which DSS obtained custody of the child, no summons was ever properly issued because the summons was not signed by a clerk or assistant or deputy clerk, but the parents appeared and stipulated to neglect. The parents appealed from a subsequent order terminating their parental rights, arguing that the trial court lacked subject matter jurisdiction. The court of appeals held that failure to issue a summons deprived the trial court of subject matter jurisdiction in the underlying case and that the order giving DSS custody of the child (and standing to file the termination action) was void.

**Held:** Reversed and remanded.

1. Lack of a proper summons implicates only personal, not subject matter, jurisdiction.
2. “Even without a summons, a court may properly obtain personal jurisdiction over a party who consents or makes a general appearance, . . .”
3. Respondents’ appearance in the underlying case without raising any objection to jurisdiction waived any defenses based on personal jurisdiction.
4. The court had jurisdiction in the neglect case, the order giving DSS custody was valid, and DSS had standing to petition for termination of parental rights.

- Subject matter jurisdiction attaches when a summons is issued. (*disavowed in K.J.L., above.*)
- Defects or irregularities in the summons or in service of process relate to personal, not subject matter, jurisdiction and can be waived.

**In re J.T., 363 N.C. 1, 672 S.E.2d 17 (2/6/09).**

**Facts:** In an action to terminate parental rights, a summons was issued, but it did not name the child as a respondent and the summons was not served on the child’s guardian ad litem or attorney advocate. Both the GAL and attorney advocate participated fully in the hearing, however, without raising any objection to the summons or service of process. The court of appeals reversed the order terminating parental rights, holding that the failure to name the child as a respondent in the summons deprived the trial court of subject matter jurisdiction.

**Held:** Reversed. The Supreme Court held that:

1. The trial court obtained subject matter jurisdiction when a summons was issued, and any problem with the summons or service of process related only to personal jurisdiction.
2. The attorney advocate and GAL waived any issue with respect to defects or irregularities in process or service of process by participating in the proceeding.

**Note:** After the supreme court decided *J.T.*, but before its decision in *K.J.L.*, the court of appeals decided *In re N.E.L.*, \_\_\_ N.C. App. \_\_\_, 676 S.E.2d 907 (6/2/09), in which respondent accepted service of a summons that had expired without endorsement or issuance of an alias and pluries summons. The court of appeals held that the trial court's jurisdiction discontinued and expired before respondent's parental rights were terminated because there was no valid summons.

After its decision in *K.J.L.*, the supreme court granted discretionary review in *N.E.L.* for the limited purpose of remanding the case to the court of appeals for reconsideration in light of *K.J.L. In re N.E.L.* \_\_\_ N.C. \_\_\_, 682 S.E.2d 385 (8/29/09).

After *K.J.L.*, the court of appeals decided the case below that also involved an expired summons.

- Where summons expired and no summons was served on respondent, lack of a valid summons did not deprive the trial court of subject matter jurisdiction.
- In the underlying dependency case respondent waived any objection based on insufficiency of service or process by making a general appearance.

**In re J.D.L.**, \_\_\_ N.C. App. \_\_\_, 681 S.E.2d 485 (8/18/09).

**Facts:** In the initial dependency proceeding respondent was never served with a summons and the summons expired, but respondent appeared in court and admitted the allegations of dependency. Subsequently respondent was served with a summons and petition to terminate parental rights. After a hearing the court terminated respondent's rights on the grounds of dependency and abandonment.

**Held:** Affirmed.

1. Failure to issue a summons or the expiration of a summons affect only personal jurisdiction and any defects can be waived. The court discussed the recent Supreme Court cases on this issue – *In re J.T.*, 363 N.C. 1 (2009), and *In re K.J.L.*, 363 N.C. 343 (2009).
2. DSS had standing to petition for termination, and the evidence supported the court's findings and conclusions terminating parental rights on basis of abandonment and dependency.

- When petitioners did not have standing to seek termination, the trial court did not have subject matter jurisdiction.

**In re B.O.**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (9/1/09).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2009/pdf/090400-1.pdf>

**Facts:** A guardian appointed by the court entered an agreement giving temporary guardianship to petitioners for a specific period of time. After that agreement ended, the children remained with petitioners, the court terminated the guardianship, and the court granted placement of the child with petitioners. When the child had been with them for about 15 months, petitioners filed an action to terminate respondent's rights, asserting that they were the child's custodians.

Respondent appealed from an order terminating her rights.

**Held:** Vacated.

1. When the petition was filed the child had not resided with petitioners for two years, and petitioners did not satisfy any other criteria in G.S. 7B-1103 for having standing.
2. The Juvenile Code does not equate custody and guardianship. Petitioners were not the child's guardians, and the Code does not give custodians standing to petition for termination.

## Procedure

- Trial court erred in allowing amendment of the petition to conform to the evidence.
- G.S. 1A-1, Rule 15, does not apply in a termination proceeding to permit amendment of the petition or motion to conform to evidence presented at the adjudication hearing.

**In re B.L.H., 190 N.C. App. 142, 660 S.E.2d 255 (5/6/08), affirmed per curiam, 362 N.C. 674, 669 S.E.2d 320 (12/12/08).**

**Facts:** DSS filed a petition to terminate respondent's rights on two grounds – neglect and non-payment of child support. After testimony of the social worker, over respondent's objection, the trial court granted DSS's motion to amend the petition to conform to the evidence and allege the additional ground of willfully leaving the child in foster care for more than a year without making reasonable progress in correcting the conditions that led to placement. The court adjudicated only this ground and entered an order terminating respondent's rights.

**Held:** Reversed.

1. It was error for the trial court to allow the amendment to conform to the evidence, because
  - a. Article 11 of G.S. Chapter 7B is silent with regard to such amendments, and
  - b. applying G.S. 1A-1, Rule 15, to allow the amendment amounted to conferring a new procedural right, which the court has held it will not do in termination cases.
2. The court then held that the petition as filed did not give sufficient notice that the added ground might be litigated, because the children had not been in care for a year when the petition was filed and the ground could not have been alleged at that time.

- Amendment of the petition to allege the identity of a formerly unknown parent did not constitute the filing of a new action such that actions taken by respondent between the filing of the original and amended petitions would serve to defeat termination under G.S. 7B-111(a)(5).

**In re M.M., \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (10/6/09).**

**Facts:** DSS filed a petition to terminate the rights of the child's mother, the legal father, and an unknown father. At the hearing required by G.S. 7B-1105, the mother named respondent as a possible biological father. Based on DNA tests results, the court at a review hearing found that respondent was the biological father, joined him as a party in the juvenile case, and ordered DSS to serve him in the termination action. After service, respondent filed an answer and motion to dismiss because the petition did not allege that he was the child's father. The court granted a continuance during which DSS amended the petition to include respondent as a named party. After a hearing the court terminated respondent's rights on the basis of G.S. 7B-111(a)(5) – failure of a putative father to take specified steps before the filing of the petition.

**Held:** Affirmed.

1. The trial court rejected respondent's argument that amendment of the petition constituted the filing of a new petition and that the court's finding that respondent was the child's biological father was a judicial determination of paternity that occurred before the filing of the new petition, thus defeating the only ground alleged.
  - a. DSS and the trial court followed the proper procedures for a case involving an unknown parent. At the hearing on an unknown parent required by G.S. 7B-1105, the mother identified respondent as a possible father for the first time, the court ordered paternity testing, and respondent was joined as a party. Respondent's interpretation would defeat the purpose of those procedures.
  - b. The issue was governed by G.S. 7B-1105, the Juvenile Code's specific procedures for cases involving unknown fathers, not by G.S. 1A-1, Rule 15, which deals with amendments. The "amendment" in this case was actually a supplemental pleading that clarified the parties but was not necessary in order for the court to have personal jurisdiction over respondent.

2. The court of appeals did not decide whether the trial court's finding that respondent was the child's biological father constituted a judicial determination of paternity for purposes of the steps set out in G.S. 7B-1111(a)(5). Respondent was required to establish paternity before the filing of the original petition, and the court's finding was made after the petition was filed.
3. The court of appeals held that the trial court did not abuse its discretion in terminating respondent's rights even though respondent's mother expressed a desire to take custody of the child.
  - a. At disposition in a termination case, the court "may, but is not required to, consider the availability of a relative placement."
  - b. Although it was not clear that the foster parents could adopt the child, "nothing [in G.S. 7B-1110] requires that termination lead to adoption in order for termination to be in a child's best interests."
  - c. Respondent had never seen, inquired about, or attempted to visit or pay support for the child.

- Supreme court held that when a petition already alleged abuse, an amendment to allow factual allegations of sexual abuse of one of the children, based on disclosure she made after the petition was filed, was not error.

**In re M.G., \_\_\_ N.C. \_\_\_, 681 S.E.2d 290 (8/28/09).**

**Facts:** DSS petition alleged that four children were abused, neglected, and dependent. The petition included allegations under four subdivisions of the definition of "abused juvenile," including sexual abuse, but did not include factual allegations of sexual abuse with respect to M.B. After the petition was filed, M.B. disclosed inappropriate sexual conduct by respondent, and DSS moved to amend the petition to add allegations about the child's disclosure. The court allowed the amendment and adjudicated M.B. to be abused based on both sexual abuse and a parent's creating or allowing risk of serious nonaccidental physical injury.

The court of appeals vacated the portion of the order adjudicating M.B. abused on the basis of sexual abuse, holding that the trial court erred in allowing the amendment because it changed the nature of the conditions on which the petition was based, in violation of G.S. 7B-800.

**Held:** Reversed in part and remanded.

1. The amendment in this case did not change the nature of the condition alleged.
2. The supreme court examined the definition of "abused juvenile" and concluded that the various forms of abuse have in common "the existence or serious risk of some nonaccidental harm inflicted or allowed by one's caretaker."
3. The additional factual allegations "fell within the nature of the abuse condition that was initially alleged."
4. The court did not address any issues regarding notice, because it was clear in this case that the parties had extensive notice of the amendment before the adjudication hearing.

## Parents' Rights

- Where evidence supporting findings was contained in reports that were admitted without objection, respondent could not assert on appeal that the evidence was not sufficient to support the findings.
- Failure to serve the father of one child with notices of hearings and numerous other documents filed in the case after his appointed counsel withdrew was reversible error with respect to that child.

**In re H.D.F., \_\_\_ N.C. App. \_\_\_, 677 S.E.2d 877 (6/16/09).**

**Facts:** Respondent mother's three children, each with a different father, were adjudicated neglected based on her substance abuse problems, her repeated failure to provide proper care and supervision, and her recurring refusal to communicate or cooperate with either DSS or the children's schools about their needs. At disposition, (1) one child was placed in the custody of his father; (2) a second child was placed in DSS custody and placed physically with his father; and (3) the third child was placed in DSS custody, based in part on a finding that his father had not attended a number of the hearings to offer evidence that he was fit and proper to have custody. Respondent mother and the father of the third child appealed.

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

1. The court dismissed the part of respondent mother's appeal relating to the third child, after taking judicial notice that the child had been placed back with the mother.
2. The court rejected respondent mother's arguments relating to sufficiency of the evidence, because the findings to which she objected were supported by evidence in reports that were admitted without her objection.
3. The court rejected respondent father's argument that his waiver of counsel had not been knowing and voluntary, because the waiver was reflected in a stipulated agreement indicating that the court, through the facilitator, had reviewed the consent order with the parties and that they understood its terms and voluntarily agreed.
4. The court reversed with respect to the third child, because after that child's father waived his right to counsel, numerous notices and documents were filed in the matter but not served on him. There was no indication that he had notice of the disposition hearing or of other significant parts of the case, including parts that occurred during the period the court found that he failed to appear and participate.

- Evidence was sufficient to support adjudications of abuse and neglect.
- Trial court erred by failing to address visitation in order that removed custody from parents.

**In re C.M., \_\_\_ N.C. App. \_\_\_, 678 S.E.2d 794 (7/7/09).**

**Facts:** Respondents (mother and father) lived together with their child (girl) and father's child (boy) from his marriage. When the children, who were close in age, were not quite two years old, father took the boy to the races and returned late in the evening. When the boy would not go to bed, the father slapped the boy's head and told him to shut up. The next day the boy was left at a cousin's house while the family shopped, and otherwise was with respondents. That evening mother called 911 twice, requesting an ambulance only the second time, when the boy had trouble breathing and was unresponsive. At the ER the child was found to have bruises on his back and chin and a subdural hematoma. Respondents argued in the waiting room, and a nurse

took the girl to keep her from getting hurt. At the adjudication three doctors testified that the boy had suffered a blow to the head within a relatively short time before being brought to the hospital. Although unable to testify with absolute certainty, or to specify exactly where or how the injury occurred, each testified that the injuries very likely were non-accidental. A fourth doctor testified that the injuries most probably were caused accidentally. The court adjudicated the boy abused and neglected and the girl neglected, and placed both in the custody of DSS.

**Held:** Affirmed and remanded.

1. The court of appeals affirmed the adjudications, holding that the trial court's findings were supported by clear and convincing evidence and supported the court's conclusions.
2. With respect to the neglect adjudication of the girl, the trial court had discretion to consider its adjudication that the boy was abused. Other findings supporting the neglect adjudications related to domestic violence, the mother's total dependence on the father and lack of resources, and the father's deceitfulness.
3. The trial court erred by failing to address visitation in the disposition order. The court may deny visitation based on proper findings and conclusions, but otherwise must include a visitation plan in the disposition order.

- Notice of appeal from only the adjudication order was not effective, and amended notice of appeal was not timely.
- Although the trial court's order did not address visitation, respondent could not assert on appeal error with respect to an outcome that she herself had sought.

**In re K.C., \_\_\_ N.C. App. \_\_\_, 681 S.E.2d 559 (9/1/09).**

**Facts:** Trial court adjudicated two teenagers neglected and dependent and ordered that they remain in DSS custody. The trial court made findings about respondent's refusal to work with DSS toward reunification, her expressed desire to have nothing to do with the children until DSS straightened them out, her failure to visit the children, and her expression of an intention not to visit with them. Respondent's notice of appeal referred only to the adjudication order. An amended notice, which also referred to the disposition order, was filed more than 30 days after entry of the disposition order. On appeal, respondent's only argument was that the trial court erred in failing to include a visitation plan in the disposition order.

**Held:** Affirmed

1. The court of appeals first granted DSS's motion to dismiss the appeal because notice of appeal was not timely. The court then allowed respondent's petition for a writ of certiorari in order to review the merits of the case.
2. The court held that although the trial court failed to comply with the statutory duty to address visitation in the disposition order, respondent in this case "invited" the error by her many representations that she did not want or intend to visit the children. Therefore, she could not complain on appeal that the court did what she effectively asked the court to do.

- Order transferring case to civil court and terminating jurisdiction lacked required findings.
- Findings were not sufficient to support the court's best interest determination.
- Award of custody to grandparent "subrogate[d] respondent's paramount rights as a parent."

**In re J.B., \_\_\_ N.C. App. \_\_\_, 677 S.E.2d 532 (6/16/09).**

**Facts:** In May 2007 the child, who had been living with his father and the father's girlfriend, was placed in DSS custody as a neglected juvenile and placed in the home of the paternal grandmother. Home studies of the mother's and grandmother's homes indicated in July 2008 that the child would be safe in either home and was not in need of protection. At a review hearing in August/September 2008, both DSS and the child's GAL recommended that custody be returned to respondent mother. The court concluded that it was in the child's best interest to remain with the grandmother, ordered that the grandmother have physical and legal custody of the child, terminated jurisdiction in the juvenile case, and transferred the matter to Chapter 50 court. The mother appealed.

**Held:** Reversed and remanded.

1. Although it was not clear whether the hearing was a review or permanency planning hearing, or both, the trial court's order did not include findings sufficient for either type of hearing.
  - a. It made no reference to the permanent plan and whether or why it had changed from reunification.
  - b. It did not address whether reasonable efforts should continue.
  - c. It did not address whether the child could return home within six months.
  - d. There was no finding that the child's return home was unlikely.
  - e. The order did not specify rights retained by the parents and it improperly delegated decisions about visitation.
2. The order lacked the findings required by G.S. 7B-911 for transferring a case to civil district court. It neither created nor modified a Chapter 50 custody order, did not make the grandmother a party to any civil action, did not make required findings about placement being the permanent plan for the child, and did not indicate that there was no longer a need for state intervention on the child's behalf.
3. The court's precise best interest determination was not clear, but its findings were insufficient to support the award of custody to the grandmother, given evidence of the mother's compliance with the case plan and the assessments made by DSS and the GAL.
4. The court of appeals stated that the award of custody to the grandmother without sufficient findings "subrogates respondent's paramount rights as a parent."

- Findings were insufficient to permit use of the "best interest" standard in deciding custody between a non-offending parent and relatives.
- The Juvenile Code does not prohibit awards of joint custody.

**In re B.G., \_\_\_ N.C. App. \_\_\_, 677 S.E.2d 549 (6/16/09).**

**Facts:** The child, who was adjudicated neglected, remained with her mother initially, then was placed in the custody of DSS and placed physically with an aunt and uncle ("the relatives"). After a permanency planning hearing the court placed the child in the joint legal custody of the relatives and the father, with the father to have structured visitation. The court based its order on

a best interest determination, stating that the child could be returned to the father, but citing the child's wishes, the strong bond that had developed between the child and the relatives, and the fact that remaining with the relatives allowed the child to see her mother and siblings. The order referred to the father as "a non offending parent who has not acted inconsistently with [his] constitutionally protected right to the care and custody and control of the child."

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

1. The trial court misstated the standard for applying the best interest standard in a custody contest between a parent and non-parent. In order to apply that standard there must be a showing that the parent is unfit or has acted inconsistently with his or her constitutionally protected rights as a parent.
2. The court of appeals rejected respondent's arguments
  - a. that awarding joint custody was not a dispositional alternative available to the court, and
  - b. that findings required for a permanency planning hearing and about the relatives' ability to provide for the child were insufficient.

- A permanency planning order that changes custody and names a guardian must make findings of fact about the factors listed in G.S. 7B-907(b).

**In re J.V.**, \_\_\_ N.C. App. \_\_\_, 679 S.E.2d 843 (7/7/09).

**Facts:** Respondent father appealed from a permanency planning order changing custody of his child from DSS to relatives, naming those relatives as guardians, and giving respondent supervised visitation. Until the permanency planning hearing, the permanent plan had been reunification, with an alternate plan of custody with a relative or other person. The trial court heard evidence and made extensive findings of fact about the history and current circumstances of the parties, including a finding that respondent had completed his case plan and done everything the court had ordered. The court awarded guardianship to the relatives, released DSS and the child's guardian ad litem, gave respondent supervised visitation, and ordered another review within six months.

**Held:** Vacated and remanded.

1. The trial court failed to make the finding required by G.S. 7B-907(b), whether it was possible for the child to return home within six months and, if not, why.
2. The trial court's "finding" that the child's return home would be contrary to her health, safety, welfare, and best interests was actually a conclusion of law, because it was "a determination which requires an exercise of judgment."

## Adjudication Issues

- When one child is adjudicated abused at same hearing in which another child is then adjudicated neglected, the trial court has discretion to consider the fact that the second child lives in a home where another child has been subjected to abuse by an adult who regularly lives in the home.

**In re D.B.J.**, \_\_\_ N.C. App. \_\_\_, 678 S.E.2d 778 (7/7/09). (*Also see C.M., summarized above*).

**Facts:** Father appealed adjudication that the child was neglected, but did not challenge any of the trial court's findings. Findings related to the child's exposure to domestic violence and substance abuse; mother's obtaining a domestic violence protective order but continuing to have contact with respondent; and the adjudication at same hearing that the child's half-sibling, who lived in the home, was an abused juvenile.

**Held:** Affirmed.

Trial court's findings were sufficient to support the conclusion that the child was a neglected juvenile.

- Imprecise statement of the standard of proof as "clear and cogent" was not prejudicial error.
- Findings were sufficient to support adjudication of the abandonment ground.

**In re M.D.**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (9/15/09).

**Facts:** Petitioner-mother had physical custody of the two children after the parties separated in 2000, and later a court awarded her custody and gave respondent-father only supervised visitation. Petitioner remarried and in 2008 she petitioned to terminate respondent's rights on grounds of abandonment and failure to pay support for one year. After a hearing, the court adjudicated the ground of abandonment as to both children and the ground of non-payment of support with respect to one. (Respondent was not under order to pay support for the other child, who had special needs and received Medicaid.)

**Held:** Affirmed.

1. The trial court did not commit prejudicial error in stating in its order a standard of proof of "clear and cogent," rather than "clear, cogent, and convincing." The court of appeals did not decide whether the two standards are substantively different, but noted that the trial judge had stated the correct standard in open court, the main issues were not in sharp dispute, and respondent had not challenged the sufficiency of the evidence to support any of the findings.
2. The court rejected respondent's challenge to the sufficiency of the findings to support the conclusion that the abandonment ground existed. The trial court had made extensive findings about respondent's failure to visit, call, inquire about, or have any contact with the children for more than six months before the petition was filed.
3. At disposition, the trial court considered the relevant factors and did not abuse its discretion in terminating respondent's rights.

- The findings supported adjudication of the ground of willfully leaving the child in foster care for more than a year without showing reasonable progress under the circumstances in correcting conditions that led to removal, as well as the court’s conclusion that termination was in the child’s best interest.
- Because the petition did not allege the dependency/incapability ground, the trial court did not err in failing to adjudicate whether respondents, due to their cognitive limitations, were unable to provide the child with proper care.

**In re S.C.H., \_\_\_ N.C. App. \_\_\_, 682 S.E.2d 469 (9/15/09).**

**Facts:** The child was born with cocaine exposure and special medical needs in October 2004. In 2005 he was placed in nonsecure custody with DSS, adjudicated neglected by consent order, and continued in DSS custody. In September 2005 the court found that respondents had made progress and returned physical custody to them. At a review about six months later, the court found that the mother left the child alone in a room with the door closed, which she had been advised not to do; on more than one occasion it appeared that the child’s diaper had not been changed regularly; the child was found in the crib with dried vomit on her clothing; although advised not to do so, the mother continued to leave the child in the crib alone with a bottle; respondents moved without notifying DSS; and their home had safety issues. The court ordered additional services and authorized DSS to return the child to respondents when the services were in place. At a subsequent hearing, DSS’s court summary stated that the mother had violated probation by not paying the fees; respondents had been evicted and moved to another county; they had tried to take the child out of daycare without permission; they had failed a parenting test and did not reenroll in a parenting program; the father was not employed and there was no indication that he was seeking employment; and they were not participating in reunification services. DSS recommended that it be relieved of reunification efforts. (The opinion does not indicate whether the trial court found all of these statements as facts or what the court ordered at the hearing.)

In September 2007 DSS filed a petition to terminate respondents’ rights. After hearings in December 2008, the trial court adjudicated the grounds of neglect, willfully leaving the children in care for more than a year without showing reasonable progress, and failure to pay support, and entered an order terminating respondents’ rights.

**Held:** Affirmed.

1. The court of appeals reviewed the trial court’s findings with respect to the ground of willfully leaving the child in foster care. The majority rejected the argument that the trial court had erred in failing to take into account respondents’ cognitive limitations in regard to the “willfulness” prong of the ground, finding that willfulness was sufficiently established by findings about their failure to provide personal items, cards, or letters, and their failure to participate in reunification services.
2. In response to the dissent, the majority said that because the “incapability” ground had not been alleged, it would have been improper for the trial court to adjudicate whether respondents were capable of providing proper care.
3. The majority held that the trial court did not abuse its discretion in terminating parental rights. Although the trial court did not make findings specifically about the parent-child bond, it made extensive findings about other factors and, in the adjudication stage, had made findings about the lack of contact between the parents and child. The majority concluded it was apparent that the trial court had considered the bond between respondents and the child.

**Dissent:** Judge Elmore dissented in a lengthy opinion and would have reversed and remanded on the basis that neither the grounds adjudicated nor best interest had been established by clear, cogent, and convincing evidence.

- Evidence and findings were sufficient to support the neglect ground to terminate mother’s rights.
- Evidence and findings were sufficient to support the ground that father of illegitimate child failed to take steps necessary to prevent termination of his rights.

**In re S.C.R., \_\_\_ N.C. App. \_\_\_, 679 S.E.2d 905 (8/4/09).**

**Facts:** The child was placed in DSS custody in April, 2008, and was adjudicated neglected in May, 2008. Facts leading to the adjudication included the father’s incarceration, the mother’s substance abuse, and domestic violence between the mother and her boyfriend. Both parents entered into a case plan with DSS and after adjudication the court ordered many of the same terms. The mother failed to complete requirements of the plan or the court’s order, other than submitting to random drug screens. She enrolled in but was terminated from a substance abuse treatment program; tested positive for marijuana eight times and, at the last screening, for “benzos” and cocaine; and failed to attend 18 of 29 scheduled visits.

The father remained incarcerated on a cocaine trafficking conviction, with a release date of July, 2009. He earned a small amount but did not pay child support or purchase anything for the child. Although his parents had brought the child to visit him, after DSS obtained custody he saw the child only in court. He wrote letters to and had numerous photographs of the child. He filed an affidavit of parentage that both he and the mother signed, but only after the termination motion was filed.

In June, 2008, the court ceased reunification efforts and changed the plan to adoption, with a concurrent plan of reunification. In August, 2008, DSS filed a motion to terminate parental rights. The court adjudicated the neglect and dependency grounds for terminating the mother’s rights. With respect to the father the court adjudicated the neglect ground and the father’s failure to take steps to legitimate or support the child before the termination action was initiated. The court found that termination was in the child’s best interest and terminated both parents’ rights.

**Held:** Affirmed.

Father’s appeal.

1. The court did not consider the father’s argument that holding the termination hearing less than 9 months after DSS took custody of the child violated his due process rights, because he had neither sought a continuance nor raised the constitutional issue in the trial court.
2. The court rejected the father’s argument that the trial court made insufficient findings when it ceased reunification efforts and changed the plan, finding that he had failed to give the notice required to preserve that issue for appeal.
3. The father failed to make the showing required to support a claim of ineffective assistance of counsel.
4. The trial court’s findings supported its conclusion that the father failed to take any of the steps that would have prevented termination of his parental rights to his illegitimate child.
  - a. The court stated that even though “a father may have ‘acted consistently with acknowledging his paternity,’ strict compliance” with the statute is required, citing *A Child’s Hope, LLC v. Doe*, 178 N.C. App. 96, 105, 630 S.E.2d 673, 678 (2006).
  - b. Judge Wynn, referring to the “poignant dissent” in *A Child’s Hope*, concurred in the result, but would have affirmed on the basis of the neglect ground.

### Mother's appeal

1. Referring to specific evidence in the record, the court held that the trial court's findings were supported by clear and convincing evidence and supported the conclusion that the neglect ground had been established.
2. The trial court's findings indicated that it considered appropriate "best interest" factors, and the court did not abuse its discretion in terminating the mother's rights.

- Failure to state the basis for nonsecure custody in the initial nonsecure custody order did not deprive the trial court of jurisdiction in a subsequent termination proceeding.
- Findings of fact that are conclusory and primarily recite statutory wording of a ground are not sufficient to support a conclusion that a ground exists.

### **In re T.P., \_\_\_ N.C. App. \_\_\_, 678 S.E.2d 781 (7/7/09).**

**Facts:** DSS filed petitions to terminate respondent's rights to three children. At the hearing a social worker testified about respondent's failure to comply with case plans, substance abuse problems, and failure to make progress in correcting problems that led to the children's placement. The court entered an order terminating respondent's rights.

**Held:** Reversed and remanded.

1. The court of appeals rejected respondent's argument that the trial court's failure in the original nonsecure custody order to specify a particular basis for nonsecure custody deprived the trial court of jurisdiction.
2. The trial court had general jurisdiction to hear the type of matter involved, and its subject matter jurisdiction in the particular case was invoked by the filing of a properly verified petition.
3. Insufficient findings of fact required reversal. The findings were not sufficiently specific, mainly quoted statutory language, and were not adequate for meaningful appellate review.
4. G.S. 1A-1, Rule 52, applies to termination cases, requiring the court to "find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment."

- In a criminal case, social worker's testimony that defendant "was substantiated as the perpetrator" in relation to two children constituted plain error.

### **State v. Giddens, \_\_\_ N.C. App. \_\_\_, 681 S.E.2d 504 (8/18/09), *petition for writ of supersedeas allowed*, \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_ (9/17/09).**

**Facts:** Defendant was convicted of first degree sex offense, first degree rape, and taking indecent liberties with a child. At the trial, a DSS child protective services investigator, who was not qualified as an expert witness, testified about DSS's receipt of a report, its assessment and procedures, and its substantiation of defendant as a perpetrator.

**Held:** New trial.

The court of appeals applied the "plain error" doctrine and held that permitting the social worker's testimony was reversible error because the testimony expressed an improper opinion as to defendant's guilt and was likely to have impacted the jury's determination.

**Dissent:** The dissent disagreed with the majority's treating the testimony as if it were by an expert and the majority's conclusion that the testimony likely impacted the outcome.

**Note:** In juvenile cases, references to testimony that an individual was “substantiated as a perpetrator” are few or nonexistent. However, juvenile cases frequently refer to testimony or findings about prior reports that were substantiated or not substantiated by DSS. In most cases there is no indication that the evidence has been challenged or asserted as error on appeal. It was argued in *In re Mashburn*, 162 N.C. App. 386, 591 S.E.2d 584 (2004), where the trial court considered evidence of allegations and a pending case in another county and made findings that referenced both a substantiation and “a number of reports” that were not substantiated. With respect to that evidence the court of appeals held that admitting the testimony was not error because the evidence “was not considered for the truth of the matter asserted; but rather, to provide the history and context of the Department of Social Service's interaction” with respondent.

### Appeal Issues

- Notice of appeal filed after court’s oral rendering of its judgment but before entry of the written order was timely.

**In re S.F.**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (8/4/09).

**Facts:** The trial court orally announced its decision to terminate respondent’s rights, and nine days later respondent filed a notice of appeal. The court’s order was not entered (written, signed, and filed with the clerk) until more than a month later, and no other notice of appeal was filed.

**Held:** Affirmed.

1. The court of appeals denied the motion of DSS and the child’s guardian ad litem to dismiss the appeal for lack of jurisdiction, stating, “[T]his Court has squarely held that notice of appeal given within thirty days after rendering of judgment in open court, but before entry of judgment, is timely,” citing *Darcy v. Osborne*, 101 NC. App. 546, 548, 400 S.E.2d 95, 96 (1991). [**Note:** The significance of the phrase “within thirty days” is not clear, because it generally refers to a period after entry of judgment, not after rendering of the judgment.]
2. DSS and the child’s guardian ad litem also moved to dismiss because the notice of appeal did not include a certificate of service. The court (a) noted that case law establishes that “failure to show proof of service affects personal jurisdiction and does not deprive [the] court of subject-matter jurisdiction;” (b) cited a juvenile case in which the appeal was dismissed for failure to attach a certificate of service to the notice of appeal; and (c) noting that all parties had actual notice of the appeal, allowed respondent’s petition for certiorari.
3. The record supported the trial court’s conclusion that respondent willfully left the child in foster care for more than 12 months without showing reasonable progress in correcting conditions that led to placement.

- During appeal from a termination of parental rights order, the trial court’s jurisdiction is limited to entering temporary orders affecting the child’s custody or placement.

**In re K.L., \_\_\_ N.C. App. \_\_\_, 674 S.E.2d 789 (4/7/09).**

**Facts:** In an appeal from an order terminating her parental rights, respondent asserted that the trial court lacked subject matter jurisdiction because the summons in the underlying neglect proceeding had not been signed by the clerk. While the appeal of the termination order was pending, the trial court granted a motion by DSS in the underlying neglect case to amend the summons by allowing the clerk to sign it. After dismissing respondent’s appeal from that order, the court of appeals granted her petition for a writ of certiorari to consider the issue of whether the trial court had jurisdiction to amend the order in the underlying neglect case during the pendency of an appeal in the termination case.

**Held:** Vacated.

Construing G.S. 7B-1003, the court held that

1. subsection (c) applied because the action was initiated by petition, not motion; and
2. it provides that during the appeal of a termination order, “the trial court has jurisdiction – in both the TPR action and the underlying abuse, neglect, and dependency action – *only* to ‘enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile.’”

The court reasoned that reading the statute to create a broader exception to the general rule restricting a trial court’s jurisdiction during an appeal (G.S. 1-294), would contradict legislative intent, which was to “authorize continued jurisdiction for a limited purpose: protection of the child pending appeal.”

- Trial court did not have jurisdiction to amend its order after notice of appeal was given, when the amendment changed the effect of the order.

**In re C.N.C.B., \_\_\_ N.C. App. \_\_\_, 678 S.E.2d 240 (6/16/09).**

**Facts:** The trial court entered its order terminating respondent’s rights on the basis of the only ground alleged, the parent’s inability to provide proper care for the child. Respondent filed notice of appeal, and three days later the trial court entered a “corrected order” purporting to correct “clerical mistakes and errors arising from oversight or omission.” This order added a finding of fact that respondent lacked an appropriate alternative child care arrangement, which was not in the original order or the court’s oral rendition.

**Held:** Reversed and remanded.

1. The court of appeals reviewed the amended order for the sole purpose of determining subject matter jurisdiction and concluded that the trial court did not have jurisdiction to enter that order under G.S. 1A-1, Rule 60(a). The added finding of fact was essential to a conclusion that the ground existed, and without the “correction” the order did not support an adjudication of the ground.
2. Rule 60 does permit the trial court to correct clerical mistakes and errors arising from oversight or omission, up to the time an appeal is docketed in the court of appeals, but here the change was substantive.

3. The court of appeals then reviewed the original order and reversed and remanded on the basis that it did not include the essential finding about lack of an alternative child care arrangement.

**Dissent:** The dissent would have affirmed, stating that

1. because notice of appeal was given only from the original order, not the “corrected” order, only the original order should have been considered on appeal, and
2. because appellant did not assign error to the trial court’s findings of fact or conclusions of law, those were binding on the court of appeals and the order should have been affirmed.