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JUVENILE LAW UPDATE

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Abuse, Neglect, Dependency, Termination of Parental Rights, Adoption

Neglect: required findings

- A finding that the child suffered or was at risk of injury or impairment is not required if the evidence supports the findings and the findings support the conclusion of neglect.

In re H.N.D., ___ N.C. ___, 704 S.E.2d 510 (12/20/10), reversing per curiam, ___ N.C. App. ___, 696 S.E.2d 783 (7/20/10), for reasons stated in the dissenting opinion.

Supreme Court:

<http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMC8zNTIBMTAtMS5wZGY=>,

Court of Appeals:

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC0yOTEtMS5wZGY=>

Facts: For three to four weeks the infant had lived with an unrelated couple who cared for 10 children in a 3-bedroom mobile home. DSS had received several reports of inadequate supervision of the children. The child’s 17-month-old sibling drowned in the pool at the home, and the next day DSS filed a petition alleging that the infant was neglected and obtained a nonsecure custody order. Evidence and the court’s findings indicated that respondent mother was aware of conditions in the home and had expressed concern about them, was present during one of DSS’s visits to the home, admitted using marijuana, and had lived in five residences in the past few months. The court adjudicated the child neglected, placed him in the custody of DSS, stated that the plan was reunification, and provided for visitation between respondent and the child.

Court of Appeals: Respondent appealed, and the court of appeals reversed and remanded, holding that the trial court’s findings were insufficient to support its conclusion that the child was neglected, because the court did not find that the child suffered or was at risk of injury or impairment.

Supreme Court: The supreme court reversed, for reasons stated in the dissent in the court of appeals. That dissent

1. stated that the trial court’s order met the test of appellate review – clear and convincing evidence supported the findings and the findings supported the conclusion;
2. pointed out that in the case cited by the majority, *In re Safriet*, 112 N.C. App. 747, 436 S.E.2d 898 (1993), the court affirmed an order that did not contain the finding the majority in this case said was necessary;
3. quoting from the court’s opinion in *Safriet*, said, “[a]lthough the trial court failed to make any findings of fact concerning the detrimental effect of Ms. Safriet’s improper care on [the juvenile’s] physical, mental, or emotional well-being, *all the evidence supports such a finding.*” *Id.* at 753, 436 S.E.2d at 902 (emphasis added); and
4. referenced *In re Helms*, 127 N.C. App. 505, 491 S.E.2d 672 (1997), in which “unstable living arrangements and exposure to dangerous people support[ed] [the] adjudication of neglect,” and *In re Nicholson and Ford*, 114 N.C. App. 91, 440 S.E.2d 852 (1994), which “recognize[ed] [the] trial court’s discretion in weighing evidence of another child’s death as a relevant factor in neglect proceedings.”

Consent order; disposition evidence and order; notice of appeal

- Notice of appeal from adjudication order given within 30 days after entry of initial disposition order was timely.
- Court was not required to inquire directly of respondent whose attorney indicated her consent to entry of adjudication order.
- Statements by people at dispositional hearing who were not sworn were not competent evidence to support dispositional findings.
- Order directing DSS to file termination action effectively ceased reunification efforts but did not include findings required for doing so.

In re J.N.S., ___ N.C. App. ___, 704 S.E.2d 511 (11/2/10).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC00OTktMS5wZGY=>

Facts: In 2003 respondent's child was abused by the father, who pled guilty to felony child abuse. The child was adjudicated abused and neglected and placed in DSS custody, and in 2005 was returned to respondent's custody after she completed a case plan. Respondent had three more children, and in September 2009 DSS became involved around issues of domestic violence and improper supervision. Several Team Decision Making Meetings were held, but respondent continued to have contact with one child's putative father (the other party to the domestic violence) in the children's presence. The children were placed briefly with the maternal grandparents, who quickly became overwhelmed and could not keep them. DSS filed a petition in October 2009 alleging that the children were neglected and dependent, and acquired nonsecure custody. In November 2009, the parties consented to an adjudication of neglect and dependency. In the disposition order entered January 11, 2010, the court ordered that custody remain with DSS, that respondent have visitation of one hour per week, and that DSS file a petition to terminate respondent's rights. On January 27 respondent filed a notice of appeal from the disposition order, and on February 8, 2010, she filed an amended notice of appeal from the adjudication and disposition orders.

Held: The court affirmed the adjudication order and vacated and remanded the disposition order.

1. Notice of appeal. The time for filing notice of appeal from an adjudication order begins to run from date of entry of the disposition order. The court of appeals rejected DSS's argument that notice of appeal from the adjudication order was untimely when it was filed more than 30 days after entry of the adjudication order but within 30 days after entry of the initial disposition order. Interpreting the language of G.S. 7B-1001(a)(3), the court held that any other interpretation was contrary to the plain wording of the statute, was inconsistent with the nature of juvenile proceedings, and would cause significant problems in the appeals process.
2. Consent order. The trial court properly entered a consent adjudication order without inquiring directly of respondent about whether she consented (which respondent argued was constitutionally required), when her attorney indicated consent and drafted most of the order's contents, and where respondent made no objection and raised no constitutional issue at the trial court level.
3. Dispositional evidence. Dispositional hearings may be informal and the court may consider and base findings of fact on written reports. Here, however, some findings were based on statements of parties and relatives to whom the court directed questions during the hearing. Because these individuals were not sworn, their statements were not competent evidence to

support dispositional findings. The findings that were based on competent evidence were not sufficient to support the court's order.

4. Ceasing reunification efforts. Although the trial court did not address explicitly the continuation or cessation of reunification efforts, it effectively ceased reunification efforts when it ordered DSS to initiate termination of parental rights proceedings. The order did not include the findings required by G.S. 7B-507(b) as a pre-condition for ceasing efforts.

Permanency planning: findings required when custody given to other parent

- At a permanency planning hearing, a child is “returned home” only if returned to the home from which the child was removed.
- When a case is remanded for additional findings, whether to take additional evidence is in the trial court's discretion.

In re J.M.D., ___ N.C. App. ___, 708 S.E.2d 167 (3/15/11)

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDAxLTEucGRm>

Facts: In an earlier appeal [*In re J.M.D.*, 200 N.C. App. 617, 687 S.E.2d 710 (2009) (unpublished)], the court of appeals held that the trial court failed to make sufficient findings under G.S. 7B-907 in a permanency planning order granting custody to the child's biological father, and remanded. Upon remand, the trial court refused to hear additional evidence or to allow the mother to make an offer of proof. The court made findings that primarily reiterated its opinion that the criteria listed in G.S. 7B-907(b) were not applicable because the child had been placed in the custody of a parent.

Held: Reversed and remanded.

1. At the hearing after remand, whether to take additional evidence was in the trial court's discretion, and respondent did not show an abuse of discretion.
2. The court of appeals held that (i) the trial court, by not making findings under G.S. 7B-907(b), failed to carry out the mandate of the court of appeals.
3. The findings that G.S. 7B-907(b) requires “if the juvenile is not returned home,” are required unless the juvenile is returned to the home of the parent from whose home the child was removed. Even though most of the listed factors are inapplicable, the court should have made findings under G.S. 7B-907(b)(6) – “[a]ny other criteria the court deems necessary.”
4. The part of the trial court's order that purported to transfer the case to civil court upon proper motion of a party was invalid, because the court did not make the findings required by G.S. 7B-201 and 7B-911 and did not terminate jurisdiction in the juvenile case.
5. In a footnote, the court pointed to the father's absence and the fact that he was not represented at the hearing on remand, as well as the question of whether the father's attorney had been released from the case. The court directed that on remand the trial court both ensure that the father receive notice and consider whether counsel should be appointed for him.

Parent's protected rights at permanency planning

- The court cannot award permanent custody to a non-parent without finding that the parents are unfit or have acted inconsistently with their constitutionally protected parental rights.

In re D.M., __ N.C. App. __, __ S.E.2d __ (4/19/11).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMjgwLTEucGRm>

Facts: The juvenile was removed from her mother's home, based on a petition alleging neglect and dependency. She was adjudicated dependent and placed in DSS custody, and DSS placed her with the maternal grandmother. After a home study of respondent father's home was reported to be favorable, the court indicted that the father's alcohol use required further assessment. DSS placed the child with the father but retained custody and placement authority. Eight months later DSS moved the child back to the grandmother's home. At a later permanency planning hearing the court awarded permanent custody to the grandmother and visitation for respondent father.

Held: Reversed and remanded.

1. Because the trial court found that neither parent was unfit and made no findings or conclusions as to whether the father had acted inconsistently with his constitutionally protected parental rights, the trial court erred in awarding custody to the grandmother.
2. Because these errors might recur, the court of appeals also noted that
 - a. none of the orders entered before the award of permanent custody included any findings or conclusions about reasonable efforts made by DSS to prevent removal from the father or to reunify the child with the father. Where the child had been removed from the custody of both parents separately, efforts with both parents were required and reasonable efforts findings were required in each order that continued custody with DSS.
 - b. several orders, including the permanent custody order, left the father's visitation in the discretion of a treatment team. The trial court is required to set the parameters – time, place, and conditions – of parental visitation and cannot delegate that obligation.

Permanency planning order; mootness

- Appeal became moot when juvenile reached age eighteen during the appeal.

In re B.G., __ N.C. App. __, 701 S.E.2d 324 (11/2/10).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC0xNjgtMS5wZGY=>

Facts: This is the third appeal in this case from permanency planning orders placing the child (teenager) in the physical custody of relatives and joint legal custody of the relatives and the child's father. In prior opinions the court of appeals reversed because the trial court, in determining custody, applied the "best interest" standard without finding that the father was unfit or had acted inconsistently with his constitutionally protected right to custody. *See In re B.G.*, 191 N.C. App. 399, 663 S.E.2d 12 (2008) (*unpublished*) (*B.G. I*), and *In re B.G.*, 197 N.C. App. 570, 677 S.E.2d 549 (2009) (*B.G. II*). In the third order, on appeal in this case, the trial court found that the father had acted inconsistently with his constitutional rights and ordered the same custody arrangement. While the appeal was pending the juvenile reached age eighteen.

Held: Appeal dismissed.

When the juvenile reached age eighteen, the trial court had no jurisdiction, and the father's arguments were rendered moot.

Transition from juvenile court to civil district court

- Trial court lacked jurisdiction in civil custody action when it did not properly terminate jurisdiction in juvenile case and did not comply with G.S. 7B-911.

Sherrick v. Sherrick, ___ N.C. App. ___, 704 S.E.2d 314 (1/4/11).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0yMzAtMS5wZGY=>

Facts:

- Dec., 2005: Child adjudicated dependent based on parents' drug use and domestic violence.
- Nov., 2006: At review, court ordered permanent plan of custody with grandparents; relieved DSS, the GAL, and the parents' attorneys; and retained jurisdiction.
- Jan., 2008: Consent order gave parents visitation.
- Oct., 2008: Consent order gave all parties "temporary joint legal custody" and directed clerk to treat the order as initiation of a civil custody action.
- **Aug., 2009:** In the civil action, the court awarded sole custody to the parents.

Grandparents appealed only from the August, 2009, order in the civil action.

Held: Vacated. The court of appeals first considered whether the trial court had subject matter jurisdiction to enter the 2009 order, and held that it did not. Because the trial court did not comply with G.S. 7B-911 when it purported to convert the juvenile case into a civil custody case, the court had no jurisdiction in a civil custody action.

1. The court never terminated its jurisdiction in the juvenile matter and did not make the findings necessary to do so, i.e.:
 - a. that continued state intervention through the juvenile court was no longer required, and
 - b. that custody with the person to whom custody was being given had been the permanent plan for the child for at least six months. (This finding could not have been made when the court ordered initiation of the civil action.)
2. The initial civil order did not put into effect a permanent plan but was, instead, a "temporary" order giving all parties joint custody, and it did not include the findings required to enter a custody order under G.S. 50-13.1.
3. Until jurisdiction in the juvenile case was properly terminated, that court had exclusive jurisdiction.

The court vacated the August, 2009, order (the only custody order that was appealed) and remanded, noting that jurisdiction remained in the juvenile court until properly terminated.

Appeal from order in consolidated civil custody and juvenile cases

- Where civil custody and juvenile cases were consolidated, an order for temporary custody that changed custody was interlocutory.

In re N.T.S., ___ N.C. App. ___, 707 S.E.2d 651 (3/1/11).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTU0LTEucGRm>

Facts: A civil custody order gave the parents joint custody of the child. DSS filed a petition alleging that the child was abused, neglected, and dependent. The court granted the father's motion to consolidate the civil custody action and the juvenile action. After a consent adjudication that the child was neglected and dependent, the child remained in DSS custody and

the court conducted several disposition hearings. Eventually the court entered a “temporary order” that (1) awarded legal custody to the father and supervised visitation to the mother, (2) ordered the families to complete a Strengthening Families program, and (3) ordered that the court would review the case approximately four months later. The mother gave notice of appeal from this order and the adjudication order.

Held: Appeal dismissed as interlocutory.

1. The adjudication order was not a final appealable order under G.S. 7B-1001.
2. The mother argued that the temporary order was actually a disposition order that changed custody and therefore was immediately appealable. The court held, however, that the order was “best characterized” as a temporary order entered pursuant to G.S. Chapter 50 and that it was not immediately appealable because the court specified that it would be reviewed within a reasonable time. The court of appeals referred in particular to the trial court’s “change of circumstances” findings, which were necessary to modify a civil custody order but not a juvenile order.

Parent’s protected rights in custody action after dependency adjudication

- Juvenile court’s jurisdiction ended when it returned custody to the parent, relieved the GAL and DSS, and did not indicate that further court action was contemplated.
- Grandparents who alleged unfitness had standing to bring custody action.
- Dependency adjudication was relevant but not determinative on issue of unfitness in later custody action.

Rodriguez v. Rodriguez, __ N.C. App. __, __ S.E.2d __ (4/19/11).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02OTA4MS5wZGY=>

Facts: After the children’s father died, DSS filed a petition and obtained a nonsecure custody order. Plaintiff grandparents filed a Chapter 50 action for custody. The juvenile court adjudicated the children dependent in April, 2008, and in July, 2008, returned them to the mother’s physical custody. The mother filed an answer and motion to dismiss in the custody action. The court denied the motion to dismiss, found that the mother had acted inconsistently with her parental rights, awarded primary custody to her, and awarded secondary custody in the form of visitation to the grandparents.

Held: Affirmed in part; reversed in part.

1. The court of appeals considered two issues related to subject matter jurisdiction and held that
 - a. although no order in the juvenile case explicitly terminated jurisdiction, terms of the last order, including the court’s release of DSS and the GAL, indicated an intent to terminate jurisdiction, thus the court was not precluded from proceeding in the Chapter 50 case.
 - b. because plaintiffs’ action was for custody, not just visitation, and plaintiffs alleged that the mother was unfit, had neglected the children, and had acted inconsistently with her parental status, they had standing to bring a custody action under G.S. 50-13.1(a).
Therefore, the trial court properly denied the motion to dismiss.
2. The trial court properly considered the juvenile adjudication order, but an adjudication of dependency alone was not sufficient to show that the mother had acted inconsistently with her parental status. The trial court’s findings were not sufficient to show that the mother voluntarily engaged in conduct that would trigger forfeiture of her protected parental status.

Her inability to care for the children had been due largely to emotional issues related to her husband's death, and evidence of frequent moving, verbal disagreements, and one instance of bruising on a child was not sufficient to conclude that she should not have custody.

Therefore, the trial court erred in awarding visitation to the grandparents.

- One judge dissented from this portion of the decision and would have found the trial court's findings sufficient to conclude that the mother had acted inconsistently with her parental status.

Permanency planning order; termination of parental rights

- Findings were supported by competent evidence in the record and were sufficient to support conclusion that reunification efforts should cease.
- Trial court lacked subject matter jurisdiction when termination petition was not verified.

In re T.R.M., ___ N.C. App. ___, 702 S.E.2d 108 (11/16/10).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC03MjgtMS5wZGY=>

Facts: In 2/08, the child came into foster care following a consent adjudication of neglect. In 12/09 the court entered a permanency planning order ceasing reunification efforts and changing the plan from reunification to adoption. Findings addressed in part the child's bizarre and disturbing behaviors related to visits with respondents, and improvements in his behavior after visits ceased. DSS filed a petition to terminate appellant-respondent's rights, and an order terminating her rights was entered in 7/09. Respondent appealed from both the permanency planning and the termination orders.

Held: Permanency planning order affirmed; termination order vacated.

1. Because the termination petition was not verified, all parties conceded that the trial court did not have subject matter jurisdiction in the termination proceeding.
2. The court of appeals reviewed the record and trial court's extensive findings relating to ceasing reunification efforts and held that they supported the conclusion that reunification would be inconsistent with the child's health, safety, and need for a safe, permanent home.

Termination of Parental Rights: Jurisdiction under UCCJEA

- Parties cannot stipulate to subject matter jurisdiction or waive UCCJEA requirements.
- Another state's determination that it no longer has jurisdiction or that it relinquishes jurisdiction should be reflected in a court order from that state filed in the N.C. action.

In re K.U.-S.G., ___ N.C. App. ___, 702 S.E.2d 103 (11/16/10).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC02OTUtMS5wZGY=>

Facts: In June 2005, when all parties lived in PA, the court there awarded custody of respondent's three children to petitioners, who then moved to N.C. with the children. The order gave visitation rights to respondent, who remained in PA. Petitioners and respondent later purported to enter a consent order in N.C. returning custody to respondent and giving petitioners visitation rights. Respondent later returned the children to petitioners, who subsequently filed a petition to terminate respondent's rights. Apparently the judge in N.C. contacted the court in PA,

but no order in the record indicated that the PA court had either determined that it no longer had exclusive continuing jurisdiction or relinquished jurisdiction to N.C. as a more convenient forum. The trial court terminated respondent's rights.

Held: Vacated.

1. Because PA entered an initial custody determination, PA had exclusive continuing jurisdiction, and N.C. could exercise jurisdiction to modify the PA order only if
 - PA determined that it no longer had exclusive continuing jurisdiction,
 - PA relinquished jurisdiction to N.C. on basis that N.C. was a more convenient forum, or
 - a court in PA or a court in N.C. determined that the children, the parents, and anyone acting as a parent no longer lived in PA.

Respondent continued to live in PA, and the record included no court order from PA indicating that it relinquished jurisdiction or determined that it no longer had jurisdiction.

2. The determination by another state that it no longer has jurisdiction or that it relinquishes jurisdiction should be reflected in a court order from that state filed in the N.C. action.
3. Parties cannot stipulate to subject matter jurisdiction or waive UCCJEA requirements.

Termination of parental rights: guardian ad litem for respondent

- Court did not abuse its discretion by not holding a hearing to determine whether respondent needed a guardian ad litem.

In re A.R.D., ___ N.C. ___, 704 S.E.2d 510 (12/20/10), *affirming per curiam*, ___ N.C. App. ___, 694 S.E.2d 508 (6/15/10).

Sup.Ct: [http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMC8zMDNBMTAtMS5wZGY=Ct of App.:](http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMC8zMDNBMTAtMS5wZGY=Ct%20of%20App.:) <http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC0xNTMtMS5wZGY=>

The Supreme Court, *per curiam*, affirmed the decision of the court of appeals, which held that the trial court did not abuse its discretion when it did not conduct a hearing to determine whether a respondent parent in a termination of parental rights action needed a guardian ad litem.

Termination of parental rights: error to release respondent's guardian ad litem

- Trial court erred in relieving respondent's guardian ad litem, when there were no findings that anything had changed since her need for a guardian ad litem was determined.

In re A.S.Y., ___ N.C. App. ___, 703 S.E.2d 797 (12/21/10).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC02MzEtMS5wZGY=>

Facts: At a nonsecure custody hearing the court appointed an attorney and a guardian ad litem for respondent mother. The court adjudicated the child to be neglected and dependent, based on respondent's homelessness, lack of a support system, and lack of employment. (That order, which placed the child in DSS custody, was affirmed on appeal.) At a permanency planning hearing the court found that respondent had made no progress, concluded that continued reunification efforts would be futile, and changed the plan to adoption. DSS filed a motion to terminate parental rights, alleging that when the child lived with respondent she was neglected

because of respondent's mental illness, and that the child was dependent because respondent appeared to be mentally ill, engaged in bizarre behaviors, and had other mental impairments that rendered her unable to provide proper care for the child. Respondent did not appear at the termination hearing. After receiving no objection from any counsel, the court granted the request of respondent's guardian ad litem to be relieved.

Held: Vacated and remanded.

Court of appeals reviewed the history and case law related to the appointment of guardians ad litem for respondents in termination cases. When the trial court appointed the guardian ad litem for respondent, it determined that she was not capable of adequately representing her own interest. Nothing in the record indicated a different finding later, and under Rule 17 the court could not proceed to judgment without a guardian ad litem for respondent.

Termination of parental rights: respondent's waiver of counsel

- The standard and procedures for allowing a respondent parent to waive the right to counsel in a termination proceeding are the same as when a defendant waives the right to counsel in a criminal case.

In re P.D.R., __ N.C. App. __, __ S.E.2d __ (June 7, 2011).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNTE5LTEucGRm>

Facts: The petition on which the three children were adjudicated neglected and dependent included allegations of domestic violence and that respondent had ongoing mental health issues and did not seem able to understand questions or respond appropriately. The court appointed a guardian ad litem for respondent. After adjudication and when the children had been in foster care for over a year, the court changed the permanent plan from a concurrent plan of reunification and adoption to adoption only, and DSS filed petitions to terminate respondent's parental rights. The court appointed a guardian ad litem for respondent in that proceeding. Respondent's appointed counsel sought to withdraw, and respondent indicated that she wanted to represent herself. The trial court had questioned respondent about whether she understood that she had a right to appointed counsel and whether she understood that a petition had been filed to terminate her rights. When asked whether she wanted appointed counsel, respondent said 'no,' but refused to sign a waiver form. After a break, but after one witness had testified, the court made further inquiries of respondent and made oral findings about respondent's understanding of her rights. The court adjudicated grounds and terminated respondent's rights. On appeal, the only issue was whether the trial court erred in allowing respondent to waive counsel and represent herself at the termination hearing.

Held: Vacated and remanded.

1. After reviewing U.S. Court cases and North Carolina cases dealing with the waiver of counsel in criminal cases, the court of appeals held that the same rules that apply to waiver in a criminal case apply in a termination of parental rights proceeding.
2. Before allowing a respondent in a termination of parental rights proceeding to proceed pro se, the court must determine that the waiver is knowing, intelligent, and voluntary. To do that, the court must follow a procedure similar to the one set out in G.S. 15A-1242 for criminal cases – determine after a thorough inquiry that respondent
 - a. has been clearly advised of the right to counsel;
 - b. understands and appreciates the consequences of a decision to waive counsel; and

- c. comprehends the nature of the petition, the proceedings, and the meaning of termination of her rights.
3. After determining that a respondent knowingly and voluntarily waived her right to counsel, as described in 2, above, the court's options are to
 - a. allow respondent to proceed pro se because she has the mental fitness to represent herself, or
 - b. deny her request to proceed pro se because she does not have the basic competence required to present a defense without the assistance of counsel.
 This determination must be supported by proper findings of fact.

Termination of parental rights: sufficiency of evidence and findings

- Evidence and findings were sufficient to conclude that ground for termination existed under G.S. 7B-1111(a)(9).
- Terminating respondent's rights was not an abuse of discretion.

In re D.J.E.L., ___ N.C. App. ___, 701 S.E.2d 1 (11/16/10).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC02ODUtMS5wZGY=>

Facts: After being adjudicated neglected and dependent, the child was in foster care for more than two years. The trial court terminated respondent's rights after concluding that three grounds had been established and that termination was in the child's best interest.

Held: Affirmed.

1. Respondent mother did not contest evidence that her rights to another child had been involuntarily terminated. Evidence supported findings related to her pattern of being in violent relationships, and other evidence, including testimony of her therapist, was sufficient to establish that she lacked the ability or willingness to establish a safe home for the child.
2. Having found that one ground was properly established, the court of appeals did not review the other two grounds.
3. The trial court's findings indicated that the court had considered the required dispositional factors, including the child's age, likelihood of adoption, accomplishment of permanent plan, bonding of child with respondent and with foster parents, and child's wish not to return to his mother. The court did not abuse its discretion in terminating respondent's rights.

Termination of parental rights: non-support; willfully leaving child in care

- When respondent's brief argued only two of three adjudicated grounds for termination, the ground not argued in the brief was sufficient to affirm the order.
- The ground of willfully leaving the child in care without making reasonable progress is not contingent on the child's being in DSS custody.

In re D.H.H., ___ N.C. App. ___, 703 S.E.2d 803 (12/21/10).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8xMC03MjItMS5wZGY=>

Facts: After the court appointed the foster parents as the child's guardians, they petitioned to terminate respondent's rights. The trial court adjudicated three grounds for terminating respondent's rights. On appeal, respondent did not challenge the trial court's findings of fact and, in his brief, challenged only the first two grounds.

Held: Affirmed.

1. The third ground (non-support), which respondent did not argue in his brief, was by itself sufficient to affirm the order terminating respondent's rights.
2. The court went on, however, to consider respondent's challenge to the ground of willfully leaving the child in care, and rejected respondent's argument that the trial court should have considered facts only up to the time the trial court awarded guardianship to petitioners. The court held that the ground is not contingent on DSS's having custody of the child and stated that even after an award of guardianship, respondent could have taken steps to correct the conditions that led to the child's placement outside the home.

Termination of parental rights: dependency ground; Rule 60 motion to set aside

- During an appeal, the trial court
 - can conduct a hearing to determine how it *would* rule on a Rule 60 motion;
 - cannot conduct a new disposition hearing.
- A parent does not have an "appropriate alternative child care arrangement" if he merely consents to a placement arranged by DSS.

***In re L.H.*, __ N.C. App. __, 708 S.E.2d 191 (3/15/11)**

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC01MjMtMS5wZGY=>

Facts: The infant was placed with the maternal grandmother pursuant to a safety plan, after the parents admitted they were unable to care for the child. (Both parents were retarded and had mental health issues.) Later the child was adjudicated dependent and the permanent plan became adoption by the grandmother. DSS petitioned to terminate both parents' rights, and the court did so, based on G.S. 7B-1111(a)(6) (the dependency ground) and a determination that termination was in the child's best interest. The father appealed. During the appeal, the father filed a Rule 60(b)(2) motion, asking the trial court to set aside the termination order based on newly discovered evidence relating to abusive conditions in the grandmother's home and the child's removal from the home and placement in foster care. Pursuant to *Bell v. Martin*, 43 N.C. App 134 (1979), *rev'd on other grounds*, 299 N.C. 715 (1980), respondent (i) asked the trial court to indicate how it would rule on the motion if an appeal were not pending, and (ii) filed a motion with the court of appeals to delay consideration of the appeal, which was granted. The trial court conducted a hearing on the Rule 60 motion in combination with a review hearing, but did not consider specific allegations in the motion or whether they would have affected the initial decision. The trial court noted that the placement had disrupted, found that it would terminate parental rights even if the appeal were not pending, and denied the Rule 60 motion.

Held: Affirmed in part, reversed in part, and remanded.

1. The court affirmed the adjudication portion of the termination order, reversed both the ruling on the Rule 60 motion and the disposition portion of the termination order, and remanded for a new hearing on whether termination was in the child's best interest.
2. The trial court did not err in concluding that the father "lacked an appropriate alternative child care arrangement," where the father had taken no action to identify alternatives, but consented to and did not interfere with the placement arranged by DSS.
3. The trial court had jurisdiction, during the appeal, to indicate how it would rule on a Rule 60 motion if an appeal were not pending, and the court of appeals had jurisdiction to review the trial court's decision that the motion should be denied.

4. In considering the Rule 60 motion, the trial court failed to determine
 - a. whether any evidence of abusive conditions in the grandmother’s home existed at the time of the termination hearing, and
 - b. whether respondent, with due diligence, could have discovered information about those conditions.
5. The trial court in effect conducted a new dispositional hearing, for which notice had not been given and which the court had no jurisdiction to conduct unless the prior order were set aside.

Other Cases to Note

Adoption by domestic partner void

- Trial court did not have jurisdiction to grant adoption to unmarried person with retention of rights by biological parent.
- Parent who participated in child’s “adoption” by her unmarried partner and created a family unit with shared parenting responsibilities acted inconsistently with her protected parental status, so application of best interest standard in custody dispute was proper.

***Boseman v. Jarrell*, ___ N.C. ___, 704 S.E.2d 494 (12/20/10).**

<http://appellate.nccourts.org/opinions/?c=1&pdf=MjAxMC80MTZQQT44LTlucGRm>

Facts: The court of appeals, in *Boseman v. Jarrell*, ___ N.C. App. ___, 681 S.E.2d 374 (2009), upheld the trial court’s use of the “best interest” standard in a custody dispute between a biological parent and her domestic partner who had adopted the child, holding that the biological parent could not challenge the validity of the adoption because the time for challenging the adoption had expired.

Held: Reversed in part and modified and affirmed in part.

1. The supreme court held that the adoption was void *ab initio*, because the trial court that granted the adoption lacked subject matter jurisdiction to allow adoption by someone other than a spouse while the biological parent retained his or her parental rights. The trial court did not have authority to waive that aspect of the adoption statute.
2. The supreme court upheld the trial court’s application of the best interest standard and its award of joint custody, however, holding that the biological parent had “acted inconsistently with her paramount parental status” by “intentionally creating a family unit in which defendant permanently shared parental responsibilities with plaintiff.”

Assertion of Fifth Amendment privilege in civil case

***Lovendahl v. Wicker*, ___ N.C. App. ___, 702 S.E.2d 509 (12/7/10).**

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMC8wOS05NTQtMS5wZGY=>

In a motor vehicle accident case, the trial court did not err in striking the defendant’s affirmative defenses, because defendant’s invocation of his Fifth Amendment privilege at a deposition deprived plaintiff of information he needed to respond to those defenses. The court noted that the defendant “has not cited any North Carolina case requiring the trial court to put off a civil case indefinitely — requiring a plaintiff to wait to prosecute his claims — until a criminal case is resolved”

Delinquency

Custodial interrogation

- Twelve-year-old who was interrogated at length by a principal at school, largely in presence of school resource officer, was in custody for purposes of the Miranda warning.
- Although the officer asked no questions, the warning was required when the officer drove the juvenile to principal's office and was present for most of the interrogation.
- Trial court erred in denying juvenile's motion to suppress his confession resulting from the custodial interrogation.

***In re K.D.L.*, __ N.C. App. __, 700 S.E.2d 766 (10/19/10).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/091653-1.pdf>

Facts: After a teacher discovered a plastic bag of marijuana in a classroom and took the juvenile to the assistant principal's office, the principal notified the school resource officer (SRO) and began questioning the juvenile. The SRO took the juvenile to his car, patted him down but did not handcuff him, and drove him to a different building to the head principal's office. The SRO spoke to the juvenile while driving but asked no questions. The juvenile was not given the Miranda warning or told that he could speak with his parents or have them present. The principal questioned the juvenile for 5 or 6 hours, with the SRO present most of the time, and the juvenile confessed. The juvenile was not allowed to go to lunch, and his parents were not contacted until after the juvenile confessed. The trial court denied the juvenile's motion to suppress, adjudicated him delinquent, and entered a disposition.

Held: Reversed, vacated, and remanded. Reversed the denial of juvenile's motion to suppress; vacated the order adjudicating the juvenile delinquent and entering a level 1 disposition; and remanded for further proceedings.

1. The trial court erred by denying the juvenile's motion to suppress.
2. Following *In re J.D.B.*, 363 N.C. 664 (2009), the court concluded that when determining whether in-school questioning amounted to a custodial interrogation, the juvenile's age was not relevant. The court found that that the juvenile was in custody, noting that he knew that he was suspected of a crime, he was questioned by a school official for about six hours, mostly in the presence of an armed police officer, and he was frisked by the officer and driven in the officer's vehicle to the principal's office where he remained alone with the officer until the principal arrived. The juvenile was never told that he was free to leave.
3. Although the principal, not the officer, asked the questions, an interrogation occurred. The officer's conduct significantly increased the likelihood that the juvenile would make an incriminating response to the principal's questioning. The officer's near-constant supervision of the juvenile's interrogation and "active listening" could cause a reasonable person to believe that the principal's interrogation was done in concert with the officer or that the person would endure harsher criminal punishment for failing to answer.

Note: *In re J.D.B.*, cited above, was argued in the U.S. Supreme Court on March 23, 2011.

Waiver of juvenile rights

- After stating that he wanted his mother present during interrogation, the juvenile waived his rights by initiating further communication.

***State v. Williams*, __ N.C. App. __, 705 S.E.2d 409 (2/1/11)**

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC01NzEtMS5wZGY=>

The trial court did not err by denying the defendant's motion to suppress statements made during a police interrogation where no violation of G.S. 7B-2101 occurred. The defendant, a 17-year-old juvenile, was already in custody on unrelated charges at the time he was brought to an interview room for questioning. When the defendant invoked his right to have his mother present during questioning, the detectives ceased all questioning. After the detectives had trouble determining how to contact the defendant's mother, they returned to the room and asked the defendant how to reach her. The defendant then asked them when he would be able to talk to them about the new charges (robbery and murder) and explained that the detectives had "misunderstood" him when he requested the presence of his mother for questioning. He explained that he only wanted his mother present for questioning related to the charges for which he was already in custody, not the new crimes of robbery and murder. Although the defendant initially invoked his right to have his mother present during his custodial interrogation, he thereafter initiated further communication with the detectives; that communication was not the result of any further interrogation by the detectives. The defendant voluntarily and knowingly waived his rights.

Juvenile's privilege against self-incrimination

- Before a juvenile testifies in his/her own delinquency case, the court must inform the juvenile of the privilege against self-incrimination.
- Failure to so inform the juvenile is reversible error unless harmless beyond a reasonable doubt.

***In re J.R.V.*, __ N.C. App. __, __ S.E.2d __ (5/17/11).**

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMTE2LTEucGRm>

Facts: The juvenile was alleged to be delinquent for committing misdemeanor larceny in relation to stolen farm equipment. After the State's evidence at the adjudicatory hearing, the juvenile testified that he was not involved in the larceny and that he had not seen anyone else steal the farm equipment. The juvenile was adjudicated delinquent and placed on probation. He argued on appeal that the trial court erred by failing to inform the juvenile, before he testified, of his privilege against self-incrimination.

Held: Affirmed.

1. Before a juvenile respondent testifies in his or her own delinquency case, the court must inform the juvenile of the privilege against self-incrimination and determine that the juvenile understands the privilege.
2. Failure to so inform the juvenile in this case, however, was not reversible because all of his testimony was either consistent with the State's evidence or favorable to the juvenile, and the error was harmless beyond a reasonable doubt.

Sufficiency of the evidence; right to make closing argument

- Sexual purpose can be shown by evidence of a juvenile’s maturity, intent, experience, and other factors.
- On appeal, to challenge the sufficiency of the evidence, a juvenile must have made a motion to dismiss at the close of all the evidence.
- The juvenile’s attorney must be given an opportunity to make a closing argument.

***In re A. W.*, __ N.C. App. __, 706 S.E.2d 305 (2/15/11).**

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC03MTMtMS5wZGY=>

Facts: Evidence showed that the juvenile, age 13, told his 3-year-old step-sibling that the juvenile’s private parts tasted like candy and that the child should lick them, which the child did in the presence of another sibling. The juvenile testified and denied the allegations. At the close of the evidence the court adjudicated the juvenile delinquent for indecent liberties between children and second-degree sexual offense in violation of G.S. 14-27.5(a)(2). When the juvenile’s attorney indicated a desire to make a closing argument, the court stated that it had already adjudicated the juvenile delinquent. The adjudications were combined for disposition with an adjudication for felonious breaking and entering, to which the juvenile had admitted at a different hearing, and the court entered a Level 3 disposition.

Held: Adjudication and disposition order vacated and remanded.

1. Although the juvenile had not made a motion to dismiss at the close of the evidence, the court of appeals, in its discretion under N.C.R. App. P. 2, considered his argument that the evidence was insufficient.
 - a. With respect to the offense of second-degree sexual offense in violation of G.S. 14-27.5(a)(2), the state conceded that there had been no evidence that the victim was mentally disabled, mentally incapacitated, or physically helpless – an essential element of the alleged offense.
 - b. With respect to the offense of indecent liberties, the court held that evidence of the juvenile’s age and maturity, the disparity in age between him and the victim, the inducement he employed, and his sexual awareness was sufficient to show the required element of “for the purpose of arousing or gratifying sexual desire.”
2. A difference of a week or less in the date of offense alleged in the petition and the date shown by the evidence did not affect the juvenile’s ability to present an adequate defense and did not require dismissal.
3. At adjudication, the juvenile is entitled to all of the rights of an adult defendant except those specifically excluded by statute. The U.S. Supreme Court has held that the denial of a defendant’s right to make a closing argument was a denial of the right to the effective assistance of counsel and the right to present a defense.

Sufficiency of delinquency adjudication order

- Order adjudicating delinquency must include finding that the allegations in the petition have been proved beyond a reasonable doubt.

In re J.V.J., __ N.C. App. __, 707 S.E.2d 636 (3/1/11).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xMDc0LTEucGRm>

Facts: The juvenile was adjudicated delinquent based on a petition alleging that he assaulted a school resource officer. After disposition was continued several times, the juvenile gave notice of appeal from the adjudication order then, because the order was not immediately appealable, petitioned for certiorari, which the court of appeals granted.

Held: Remanded.

1. The adjudication order was insufficient because it failed to address or even refer to the allegations in the petition.
2. The court of appeals acknowledged that G.S. 7B-2411 does not require detailed findings of fact, but stated that at a minimum an adjudication order must find that the allegations in the petition have been proved beyond a reasonable doubt.
3. The statute also requires that the order include the date of offense, the misdemeanor or felony classification of the offense, and the date of adjudication.

Disposition in delinquency case

- When the dispositional chart authorized the court to order a Level 1 or Level 2 disposition, the court could order a Level 2 disposition without first considering a Level 1 disposition, when that choice was not “manifestly unsupported by reason.”

In re K.L.D., __ N.C. App. __, __ S.E.2d __ (4/5/11).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC02NzktMS5wZGY=>

Facts: The juvenile was adjudicated delinquent for simple assault and sexual battery, for conduct on a school bus. He had one prior adjudication for simple assault for similar conduct. The trial court indicated that it was required to enter a Level 2 disposition (and also could enter a Level 1 disposition), and ordered the juvenile to (1) attend wilderness camp, (2) spend 14 days in detention, (3) perform 50 hours of community service, (4) be on probation for one year, (5) abide by a curfew, (6) not associate with anyone deemed inappropriate by the judge, the court counselor, or a parent, (7) not use a computer unless supervised, and (8) have no contact with the complainant. The juvenile argued on appeal that because the disposition chart authorized the court to enter a Level 1 or a Level 2 disposition, the trial court erred by concluding that it was required to enter a Level 2 disposition without first considering a Level 1 disposition.

Held: Affirmed.

1. Because sexual battery is a Class A1 misdemeanor (a serious offense), and because the juvenile had a low history level (one point for one prior adjudication for a minor offense), the court was authorized to enter either a Level 1 or a Level 2 disposition.
2. Because the disposition ordered by the court was authorized by the Juvenile Code’s dispositional provisions, the appellate court would not disturb it unless it was “manifestly unsupported by reason,” and that was not the case here.

Disposition in delinquency case

- A dispositional order in a delinquency case must include findings sufficient to show that the trial court considered the factors set out in G.S. 7B-2501(c).

In re V.M., __ N.C. App. __, __ S.E.2d __ (4/19/11).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC0xNTU4LTEucGRm>

Facts: The juvenile was adjudicated delinquent for felonious larceny and placed on probation. A few months later, a motion for violation of probation and new petitions alleging felonious larceny were filed. The juvenile admitted the probation violation and a new misdemeanor offense. The court entered a Level 3 disposition, “based on the probation violation.” The disposition order noted that the court received, considered, and incorporated by reference the predisposition report and risk and needs assessments.

Held: Reversed and remanded for new disposition hearing.

1. The court failed to make findings of fact sufficient to show that it considered the factors set out in G.S. 7B-2501(c).
2. Because a probation violation proceeding is a dispositional proceeding, the order must comply with requirements for a disposition order.
3. Every disposition order must contain “appropriate findings of fact and conclusions of law.” The court cited *In re Ferrell*, 162 N.C. App. 175 (2004), in which it reversed a disposition order because the findings of fact did not support the trial court's decision to transfer custody from the mother to the father, and evidence in the record did not support a finding that placement with the father was in the juvenile's best interests.

In another delinquency case decided recently, the court of appeals said, “The decision to impose a statutorily permissible disposition is vested in the discretion of the juvenile court and will not be disturbed absent clear evidence that the decision was manifestly unsupported by reason.” *In re K.L.D.*, __ N.C. App. __ (4/5/11) (affirming an order that imposed a Level 2 disposition even though the court did not first consider the option of ordering a Level 1 disposition).

Clearly, despite the language in that case and others indicating great deference to the trial court's discretion, the better practice is to include in every delinquency disposition order findings of fact from which the appellate court can determine that the trial court considered the factors set out in G.S. 7B-2501(c), when more than one dispositional option is available. Those factors are:

- (1) the seriousness of the offense;
- (2) the need to hold the juvenile accountable;
- (3) the importance of protecting the public safety;
- (4) the degree of culpability indicated by the circumstances of the particular case; and
- (5) the juvenile's rehabilitative and treatment needs as shown by a risk and needs assessment.

Delinquent juvenile: violation of probation

- Commitment to a youth development center is not an available disposition for violation of probation when the juvenile was on probation for a minor offense.
- The exception in G.S. 7B-2508(g), allowing commitment as a disposition after adjudication for a minor offense in some instances, applies only to disposition following an adjudication, not after a determination of a violation of probation.

***In re S.B.*, ___ N.C. App. ___, 701 S.E.2d 359 (11/2/10).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2010/pdf/100068-1.pdf>

Facts: A motion for review was filed alleging that the juvenile had violated probation by possessing marijuana, assaulting a program staff member, and damaging property. The juvenile, who had multiple prior adjudications, was on probation for a minor offense. The trial court found that the juvenile had four or more prior offenses when she was adjudicated delinquent for the offense for which she was on probation and ordered a Level 3 disposition, commitment. On appeal, the juvenile argued that the explicit prohibition in G.S. 7B-2510(f) applied, precluding a Level 3 disposition for violation of probation when the juvenile is on probation for a minor offense. The state relied on G.S. 7B-2508(g), which allows a Level 3 disposition for a minor offense when the juvenile has four or more successive “prior offenses” as defined in that subsection. [An offense is counted only if it is both committed and adjudicated before commission of the subsequent offense. It is not clear from the opinion whether the juvenile’s delinquency history satisfied those criteria.]

Held: Reversed and remanded.

1. The explicit prohibition in G.S. 7B-2510(f) applied, and commitment was not an option for violation of probation because the juvenile was on probation for a minor offense.
2. Commitment would have been an option if a new petition (instead of just a motion for review) had been filed and the juvenile had been adjudicated for a minor offense, assuming she had at least four prior offenses as defined in G.S. 7B-2508(g).

Court’s jurisdiction and authority after commitment of a delinquent juvenile

- Commitment of a juvenile to a youth development center does not terminate the trial court’s jurisdiction.
- The trial court can enter orders relating to the terms of the juvenile’s commitment, such as privileges and punishment, without violating the separation of powers doctrine.

***In re J.S.W.*, ___ N.C. App. ___, ___ S.E.2d __ (5/3/11).**

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMS8xMC05ODEtMS5wZGY=>

Facts: Although numerous other offenses were alleged, the juvenile was adjudicated delinquent and committed to the Department of Juvenile Justice and Delinquency Prevention (DJJDP) for placement in a youth development center based on his admission to first-degree rape. The court ordered both that the commitment was for an indefinite period beyond the minimum six months and that the juvenile “[r]emain in YDC for the maximum time allowed by law.” The order also required the juvenile, among other things, to receive a sex-offender specific evaluation and treatment.

Two years later, after a hearing on DJJDP's motion to extend commitment past the juvenile's 18th birthday (see G.S. 7B-2515), the court found that the juvenile had not completed sex-offender treatment, stated that the original order that he remain committed until age 21 should remain in effect, and said the court would consider a request for earlier release if the juvenile completed sex offender treatment. (Neither this order nor the commitment order was before the court of appeals.)

Three months later DJJDP filed a motion seeking clarification as to whether the juvenile could participate in an off-campus work program and have home and overnight visits. At a hearing the court heard witnesses from DJJDP, a minister who knew the juvenile's case, and the juvenile's mother. The State opposed allowing any of the privileges that were the subject of the motion. The trial court ordered that the juvenile (i) could work off campus, but only if he would not be around anyone age twenty-five or younger; (ii) could have no home or overnight visits; and (iii) could participate in YDC outings if there were direct supervision at all times. The juvenile appealed.

Held: No error.

1. The court of appeals rejected the juvenile's argument that after commitment, all decisions about services, privileges, or punishments are to be made by DJJDP, not the court. The court cited *In re Doe*, 329 N.C. 743 (1991), in which the state supreme court discussed the "necessary functional overlap" of the legislative and judicial branches inherent in the Juvenile Code.
2. The court of appeals noted Code provisions that when a juvenile is committed for first-degree rape, jurisdiction continues until the juvenile reaches age 21 or the court terminates jurisdiction, whichever is earlier, and that commitment does not terminate the trial court's jurisdiction.
3. The court of appeals held that the trial court had authority and did not abuse its discretion when it ordered that the juvenile, while committed, could not have home visits and could participate in an off-campus work program only if it involved no contact with persons age 25 or younger.
4. The court also held that the trial court clearly considered the dispositional factors set out in G.S. 7B-2501 and did not abuse its discretion.