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JUVENILE LAW UPDATE

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Appellate Court Decisions

NEGLECT. Disposition and review; out-of-state placement; waiver of review hearings

- The ICPC applied to a disposition order placing a child with an out-of-state relative.
- Placement with a relative was for "foster care" as the ICPC defines that term.
- The court cannot waive review hearings without making all of the findings required by G.S. 7B-906(b).

In re V.A., ___N.C. App. __, 727 S.E.2d 901 (July 17, 2012).
http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0xNzAtMS5wZGY

Facts: DSS appealed from the adjudication/disposition order and a later review/permanency planning order. After a voluntary placement with the child's grandmother, the child's mother expressed a preference for placement with the child's great-grandmother in South Carolina. After adjudication, at disposition DSS informed the court that S.C. had not approved the placement and that placing the child there would violate the Interstate Compact on the Placement of Children (ICPC). The court left legal custody with DSS, ordered placement with the great-grandmother in S.C., and ordered DSS to obtain the ICPC paperwork or to conduct its own home study and to place the child with the great-grandmother in S.C. within 14 days if appropriate. The court ordered a concurrent plan of reunification and adoption. DSS appealed and the order was stayed.

At a review hearing the court questioned the great-grandmother directly, placed the child in her legal custody, changed the permanent plan to custody with a relative, suspended review hearings, and relieved counsel, DSS, and the child's GAL of responsibility. DSS appealed.
Held: Reversed and remanded.

1. The dispositional order violated the ICPC, which clearly applies at disposition pursuant to G.S. 7B-903(a)(2)c.
2. For purposes of the ICPC, placement with the great-grandmother was "preliminary to a possible adoption or foster care." The court cited to ICPC Regulation 3, as amended effective May 1, 2011, and its definition of "foster care." [http://icpc.aphsa.org/Home/regulations.asp]
3. The trial court erred in waiving review hearings without making findings required by G.S. 7B-906(b), and given the facts in the case, the court could not have made all of the required findings.

TERMINATION OF PARENTAL RIGHTS. Service by publication

- Published notice in a termination case must include notice of respondent's right to appointed counsel if indigent.

In re C.A.C., ___N.C. App. __, __ S.E.2d __ (Sept. 4, 2012).
http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zMDUtMS5wZGY
Facts: In an action brought by the child's mother, the trial court authorized service on the father by publication after attempted personal service was unsuccessful. Petitioner filed an affidavit of service by publication. Respondent made no appearance, although provisional counsel was

present at the hearing, and the court terminated respondent's rights. He appealed, asserting that the trial court lacked personal jurisdiction because service was inadequate.
Held: Vacated.
1. Service by publication in a termination action must include notice of respondent's right to counsel, since notice must comply with both G.S. 1A-1, Rule 4(j1) and G.S. 7B-1106(b). Because the notice in this case said nothing about the right to counsel, service was inadequate.
2. The presence of provisional counsel did not constitute a general appearance by respondent, and respondent did not waive the defect in service.
3. The trial court should have dismissed provisional counsel when respondent failed to appear.

TERMINATION OF PARENTAL RIGHTS. Sufficiency of evidence: neglect; non-support

- Evidence based on sworn testimony that allegations in the motion were true was sufficient to establish neglect and non-support grounds.
- Zero support was not a reasonable portion of the cost of the child's care when respondent was employed from time to time.

In re J.E.M., __ N.C. App. __, 727 S.E.2d 398 (June 19, 2012).
http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi03Mi0xLnBkZg

Facts: At the hearing on DSS's motion to terminate respondent father's rights (after the mother relinquished), respondent's attorney agreed with DSS's statement that respondent did not wish to contest the allegations in the motion. Evidence presented by DSS consisted of sworn testimony of a social worker that the allegations in the motion were true and correct. Neither respondent nor the child's GAL presented evidence. At disposition, the GAL submitted a written report and respondent called three witnesses. The court adjudicated the neglect and nonsupport grounds and terminated respondent's rights.
Held: Affirmed.
1. The court upheld the neglect ground based on evidence of prior neglect and a likely repetition of neglect if the child were returned to respondent. The latter, the court said, was supported by evidence that respondent did not visit the child for 5 months before the hearing; met only once with a parenting class instructor, when meeting with the instructor was part of his case plan; and provided no support.
2. The court rejected respondent's argument that evidence of failure to pay support was not sufficient to support the nonsupport ground. The court held the evidence was sufficient when it showed that respondent paid no child support while the child was in DSS custody and that he was "gainfully employed from time to time." Zero support, the court said, is not sufficient when there was some ability to pay.

Dissent: The dissent would have reversed on the basis that the trial court did not conduct a proper hearing and erred in relying only on testimony that the allegations in the petition were true and on written reports offered for disposition. The majority stated in a footnote that respondent had not raised these issues on appeal and that it was not the court's role to raise them.

DELINQUENCY. Motion to suppress; admissions

- Before denying a motion to suppress, the court must make findings and conclusions and indicate its rationale for doing so.
- Before accepting an admission, the court must personally inform the juvenile of the most serious possible disposition and may not delegate that responsibility.

In re N.J., __ N.C. App. __, 728 S.E.2d 9 (June 19, 2012).
http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMS0xMzY5LTEucGRm

Facts: Officers approached and questioned several teenagers at a housing project. The juvenile consented to be searched for weapons and answered 'yes' when an officer asked whether he had marijuana in his pocket. He also admitted that bags of marijuana the officer found on the ground were his. The juvenile was taken into custody and a petition was filed alleging possession of a controlled substance with intent to manufacture, sell, or deliver. The court denied the juvenile's motion to suppress statements he made to the officers, but did not make findings or state reasons for doing so. The juvenile admitted one offense, retaining his right to appeal denial of the suppression motion. When accepting the admission the court touched on each of the requirements in G.S. 7B-2407(a), including asking the juvenile whether he had discussed with his lawyer the most serious disposition that could result, to which the juvenile said "yes."
Held: Vacated in part, reversed in part, remanded.

1. The trial court erred by failing to make written or oral findings of fact or conclusions of law and failed to state a rationale before denying the suppression motion.
   - Although that conclusion probably could have been reached solely on the basis of the juvenile's Fifth Amendment rights and the need for effective appellate review, the court held that the requirements in G.S. 15A-977(f) applied in the delinquency case and were violated.
   - In *In re D.L.H.* 364 N.C. 214 (2010), the state supreme court cautioned against assuming the applicability of criminal procedures to juvenile cases, and said, "Although this Court applied several criminal procedure protections in *In re Vinson,* a … delinquency case, we reasoned in doing so that those protections were mandated by constitutional guarantees of due process").
2. The court was required to inform the juvenile personally of the most restrictive possible disposition. Relying on a transcript of admission or on the juvenile's consultation with his or her attorney is not sufficient.

2012 Legislation

New Ground for Termination of Parental Rights

S.L. 2012-40 (H 235). The act adds to G.S. 7B-1111(a) this new ground for termination of parental rights: "The parent has been convicted of a sexually related offense under Chapter 14 of the General Statutes that resulted in the conception of the juvenile." As with other grounds, if the court adjudicates that the ground exists, before terminating a parent's rights on this basis the court must determine whether termination of the parent's rights is in the child's best interest.

The act is effective October 1, 2012, but is silent with respect to whether its applicability is determined by the date of the criminal offense, by the date of the conviction, or without regard to either.

Under other statutory provisions, a person who is convicted of one of three specific sexual offenses that results in the conception of a child loses parental rights to that child as a direct result of the conviction, without the necessity of a termination of parental rights action. Those offenses are:

- first-degree rape, under G.S. 14-27.2 (if the offense occurred on or after December 1, 2004);
- second-degree rape, under G.S. 14-27.3 (if the offense occurred on or after December 1, 2004); and
- rape of a child by an adult offender, under G.S. 14-27.2A (if the offense occurred on or after December 1, 2008).

Each of those criminal statutes states that a person convicted under the statute "has no rights to custody of or rights of inheritance from any child [born as a result of] [conceived during] the commission of the rape, nor shall the person have any rights related to the child under Chapter 48 [adoption] or Subchapter 1 of Chapter 7B [abuse, neglect, dependency, and termination of parental rights] of the General Statutes." The session laws enacting these provisions specified that they applied only with respect to offenses committed on or after the legislation's effective date – December 1, 2004, for first- and second-degree rape, and December 1, 2008, for rape of a child by an adult offender. [*See* S.L. 2004-128 and S.L. 2008-117.]

Given the absence from S.L. 2012-40 of language limiting its applicability, is it possible that the ground is available regardless of when the crime or the conviction occurred? That is not likely. North Carolina courts have stated the principle that a statute is presumed to apply only prospectively unless the legislation clearly states or necessarily implies that it should apply retroactively. *See, e.g.*, *Gardner v. Gardner*, 300 N.C. 715 (1980); *In re Protest of Atchison*, 192 N.C. App. 708 (2008); *Springer Eubank Co. v. Four County Elec. Membership Corp.*, 142 N.C. App. 496 (2001); *Wilson Ford Tractor, Inc. v. Massey-Ferguson, Inc.*, 105 N.C. App. 570, *aff'd*, 332 N.C. 662 (1992). The state supreme court, in *Ray v. North Carolina Dept. of Transp.*, ___ N.C. ___, 727 S.E.2d 675 (2012), analyzed the applicability of a statute that amended the State Tort Claims Act in terms of whether the amendment clarified or substantively altered existing law. The court held that the statute applied retroactively because it merely clarified the scope of the State Tort Claims Act. Analyzing retroactivity in *Twaddell v. Anderson*, 136 N.C. App. 56

(1999), the court distinguished substantive amendments, which apply prospectively only, from those that are interpretive, procedural, or remedial.

S.L. 2012-40, enacting the new termination ground, neither expresses nor implies an intent that it apply retroactively. The new ground is substantively different from all of the other grounds, and it can hardly be viewed as a clarifying or procedural amendment. So there is little basis for thinking the law applies retroactively.

The similarity between the new ground for termination and the effect of the rape convictions described above, when the rape results in the conception of the child, might suggest that the new law applies only when the sexually related offense occurs on or after October 1, 2012. However, because the new ground is the conviction, not the criminal act itself, it is possible and seems more likely that prospective application means the ground is available when the conviction occurs on or after October 1, 2012.

If that is the case, would terminating a parent's rights based on a conviction (on or after October 1, 2012) for an offense that occurred before October 1, 2012, violate the *ex post facto* clause because the parent did not have notice of this possible consequence when the offense was committed? (Or, if the legislature had specifically provided for completely retroactive application, would application of the statute to a conviction that occurred before the act's effective date be an *ex post facto* violation?) Probably not. North Carolina courts have held that retroactive civil laws do not violate the *ex post facto* clause. *See, e.g., Pitt County v. Dejavue, Inc.,* 185 N.C. App. 545 (2007). In other states, retroactive application of legislation making a parent's intentional homicide of the child's other parent a ground for termination has withstood challenges based on violation of the prohibition against *ex post facto* laws. Courts in Wisconsin and Texas rejected the challenges because the legislation did not have a punitive intent. *See In re E.M.N*., 221 S.W.3d 815 (Tex. App., 2007); *In Interest of Amanda A.,* 194 Wis.2d 627, 534 N.W.2d 907 (1995).

Apart from any issue relating to its applicability, a more likely challenge to the ground might be based on substantive due process. A court addressing that kind of challenge would be required to identify and "balance[e] the claims of families, children, and those state agencies charged with protecting their welfare." *Doe ex rel. Johnson v. South Carolina Dept. of Social Services*, 597 F.3d 163, 186 (4th Cir, 2010) (Wilkinson, J., concurring in the judgment). A Wisconsin statute making incestuous parenthood a ground for termination of parental rights faced such a challenge twice. In *Interest of Tiffany Nicole M.*, 571 N.W.2d 872, 876 (Wis. App., 1997), the appellate court held that the statute was "narrowly tailored to serve the State's compelling interests in the welfare of children, preservation of family, and maintenance of an ordered society." Distinguishing that case, which involved a brother and sister who were the parents of three children, the same court held several years later that the statute was unconstitutional as applied to a mother whose three children were conceived as the result of sexual abuse by her own father. *In re Termination of Parental Rights to Zachary B*., 662 N.W.2d 360 (Wis. App., 2003). The court held that incestuous parenthood, by itself, was not sufficient to establish the mother's unfitness, and that application of the statute to her violated her right to substantive due process.

North Carolina case law provides little direct guidance. However, in *In re J.L.*, 183 N.C. App. 126 (2007), the court of appeals held that a child could not be adjudicated dependent based on a finding that the child was conceived as a result of the father's commission of statutory rape, when there were no findings that the father could not care for the child and lacked an alternative child care arrangement. The court's holding, based on the precise wording of the statutory

definition of "dependent juvenile," was that the trial court's findings did not support its legal conclusion that the child was a dependent juvenile. With a statute now clearly stating that those facts could establish a ground for terminating the father's rights, it is not clear how our courts will respond to challenges to the statute itself or to its application in particular circumstances.

2012 Legislation – Other Juvenile Law Provisions

Child Welfare

S.L. 2012-153 (S 910). Confidentiality of reporter's name. Ordinarily a county department of social services must hold "in strictest confidence" the identity of a person who makes a report of suspected child abuse, neglect, or dependency. Section 6 of this act creates an exception, in new G.S. 7B-302(a1)(1a), requiring a social services department to disclose the reporter's identity to any federal, state, or local government entity (i) pursuant to a court order or (ii) without a court order if the entity demonstrates a need for the reporter's name in order to carry out its mandated responsibilities. These changes are effective October 1, 2012.

S.L. 2012-16 (H 637). Adoption law changes. Effective October 1, 2012, this act makes the following changes to the adoption laws:

- Repeals G.S. 48-2-302(a), which requires that an adoption petition be filed within 30 days after the child's placement with the petitioner or the state's acquisition of jurisdiction, whichever is later. [Because subsection (b) addresses failure to comply with subsection (a), it should have been repealed as well.]
- Amends G.S. 48-2-304(a)(6) to provide that an adoption petition must include a description and estimate of the value of any property belonging to the adoptee only if the adoptee is a minor or an adult who has been adjudicated incompetent.
- Amends G.S. 48-2-401(a), to provide that the petitioner must initiate service of notice (rather than actually serve notice) of an adoption petition no later than 30 days after the petition is filed.
- Amends G.S. 48-3-205(d) to permit the substitution of forms reasonably equivalent to those provided by the Division of Social Services to collect background information for submission to the prospective adoptive parent.
- Amends G.S. 48-3-303(c)(12) to add the prospective adoptive parent's social security number and income to information that may be redacted from the preplacement assessment provided to a placing parent or guardian.
- Amends G.S. 48-3-602, which requires the appointment of a guardian ad litem for a parent who has been adjudicated incompetent, to provide that if the court determines that proceeding with an adoption is in the child's best interest, the court is to order the parent's guardian ad litem to execute a consent or a relinquishment (was, a consent) for the parent.
- Amends G.S. 48-3-608(b) to require that a preplacement assessment that is prepared after placement occurs in a direct placement adoption be prepared substantially in conformity with the requirements of G.S. 48-3-303.

- Amends G.S. 48-3-707(a) to provide that a relinquishment will become void if, after placement but before entry of the adoption decree, the agency, the person relinquishing the child, and the prospective adoptive parent all agree to rescind the relinquishment.

These changes apply to adoption proceedings filed on or after October 1, 2012.

S.L. 2012-153 (S 910). Unlawful sale, surrender, or purchase of a child. Effective December 1, 2012, this act creates a new criminal offense, in G.S. 14-43.14, making it a Class F felony for a person, when acting with willful or reckless disregard for the life or safety of a child, to participate in the acceptance, solicitation, offer, payment, or transfer of any form of compensation in connection with the unlawful acquisition or transfer of physical custody of a child. The offense does not apply to actions that are ordered by a court, authorized by statute, or otherwise lawful. An amendment to G.S. 14-322.3 also makes the new offense inapplicable to a parent who voluntarily surrenders an infant less than seven days of age as provided in G.S. 7B-500.

For an initial violation a minimum fine of $5,000 must be imposed, and for any subsequent violation a minimum fine of $10,000 is required. In sentencing someone who is convicted under this section the court must consider whether the person is a danger to the community and whether requiring the person to register as a sex offender under Article 27A of G.S. Chapter 14 would further the purpose of the sex offender registration law, and the court may enter an order requiring the person to register. The act amends G.S. 14-208.6(4) to make a conviction under the new section a "reportable conviction" for purposes of the sex offender registration law, but only if the sentencing court specifically orders the person to register.

A child whose parent, guardian, or custodian has sold or attempted to sell the child in violation of the section is an *abused juvenile* for purposes of the Juvenile Code [G.S. 7B-101(1)] and the court may place the child in the custody of a county department of social services or any person, as the court finds to be in the child's best interest. The act makes a conforming amendment to the definition of "abused juvenile" in G.S. 7B-101(1). The act requires the N.C. Conference of District Attorneys to study additional measures that may be taken to stop criminal activities involving the sale of children and to submit a final report of its findings and recommendations to the 2013 General Assembly by January 30, 2013.

Undisciplined and Delinquent Juveniles

S.L. 2012-172 (H 853). Limit secure custody for undisciplined juvenile. The act rewrites G.S. 7B-1903(b)(7) and (8), which describe when a juvenile who is alleged to be undisciplined may be held in secure custody, to limit the time the juvenile may spend in secure custody in all instances to 24 hours, excluding Saturdays, Sundays, and state holidays. Previously, that period could be extended to 72 hours "where circumstances require[d]." The change is effective October 1, 2012.

S.L. 2012-172 (H 853). No contempt for undisciplined juvenile. The act rewrites G.S. 7B-2505, which describes procedures and consequences for finding a juvenile in contempt for violating the terms of protective supervision. Effective October 1, 2012, the section no longer refers to contempt and no longer authorizes the court to order any period of detention as a

consequence of a juvenile's violating the terms of protective supervision. Instead, after notice and a hearing and a finding that the juvenile violated those terms, the court may (i) continue or modify the terms of protective supervision, (ii) order any disposition authorized for undisciplined juveniles under G.S. 7B-2502, or (iii) extend the period of protective supervision for up to three months.

S.L. 2012-83 (H 881). Appointment of chief court counselor. Section 12 of the act amends G.S. 143B-806 to make a Chief Deputy Secretary of the Department of Public Safety the head of the Division of Juvenile Justice in that department. The duties of the Chief Deputy Secretary include appointing the chief court counselor in each district. The act omits language that provided for the appointment of a chief court counselor to be made upon recommendation of the chief district court judge in the district. (The omitted language involving the chief district judge in the selection of the chief court counselor dates back to the pre-1999 organization of juvenile services, in which court counselors were employees of the Administrative Office of the Courts in the judicial branch, rather than an executive agency.) The act, which is effective June 26, 2012, also makes various technical changes relating to the Department of Public Safety and the Division of Juvenile Justice.

S.L. 2012-172 (H 853). Intake procedures. The act rewrites G.S. 7B-1803(a), effective July 12, 2012, to delete language providing that procedures for receiving complaints and drawing petitions must be established by administrative order of the chief district court judge in each district.

S.L. 2012-149 (S 707). Cyber-bullying of school employee. The act creates a new offense in G.S. 14-458.2, cyber-bullying of a school employee by a student, a Class 2 misdemeanor. The new section provides that if a juvenile court counselor receives a complaint based on a student's violation of the section, upon a finding of legal sufficiency the juvenile may enter into a diversion contract pursuant to G.S. 7B-1706. The section applies to offenses committed on or after December 1, 2012.

S.L. 2012-149 (S 707). Principal's duty to report criminal/delinquent acts. The act amends G.S. 115C-288(g), which specifies a school principal's duty to report to law enforcement certain criminal or delinquent acts that occur on school property. The amendments apply with the beginning of the 2012 –2013 school year. As amended, the subdivision

1. requires a principal to report to law enforcement when he or she has personal knowledge or actual notice from school personnel (but no longer when the principal has only a "reasonable belief") that one of the acts specified in the statute has occurred on school property. [The "reasonable belief" provision deleted by this act was added to the statute, effective for the 2011 – 2012 school year, by S.L. 2011-248 (S 394).]
2. no longer provides that a principal who willfully fails to comply with the reporting requirement may be subject to demotion or dismissal pursuant to G.S. 115C-325. [This deleted provision was added to the statute, effective for the 2011 – 2012 school year, by S.L. 2011-248 (S 394), which deleted a provision making a principal's violation of the reporting

duty a Class 3 misdemeanor.] Now the statute is silent with respect to consequences for a principal's failure to make a required report.

Juveniles Tried as Adults

S.L. 2012-148 (S 635). Sentencing of juveniles to life imprisonment. North Carolina law authorizes a juvenile's case to be transferred to superior court and the juvenile to be tried as an adult for a felony allegedly committed when the juvenile was 13, 14, or 15. (If the juvenile court finds probable cause for first degree murder, the transfer is mandatory.) If convicted in superior court, the juvenile is sentenced in the same way that an adult would be sentenced for the same offense, with few exceptions. The U.S. Supreme Court held in *Roper v. Simmons*, 543 U.S. 551 (2005), that imposing the death penalty on someone who was younger than eighteen when he or she committed a capital offense violates the Eighth Amendment. Five years later, in *Graham v. Florida*, ___ U.S. ___, 130 S. Ct. 2011 (2010), the Court held that a sentence of life without the possibility of parole also violates the Eight Amendment when imposed on someone who committed a non-homicide offense when younger than age eighteen. Consistent with those cases, in North Carolina the death penalty can never be imposed on someone for an offense committed before age eighteen, and a sentence of life without the possibility of parole can be imposed only in cases of first-degree murder. *See* G.S. 14-17.

On June 25, 2012, in *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455, the Supreme Court extended its holding in *Graham* and held in a capital murder case involving a juvenile defendant that an automatic sentence of life without the possibility of parole violates the Eighth Amendment when the defendant was a juvenile when the offense was committed. Because North Carolina required such a sentence on a juvenile's conviction for first degree murder, legislative changes were needed. The General Assembly made those changes in S.L. 2012-148, effective July 12, 2012. This act creates a new Article 93, Sentencing for Minors Subject to Life Imprisonment without Parole, in G.S. Chapter 15A. The new article authorizes a sentence of life imprisonment *with* the possibility of parole after 25 years for juvenile defendants convicted of first-degree murder. If the murder conviction is based solely on the felony murder rule, the court must impose this sentence. In other cases involving first-degree murder committed by juveniles, the court must conduct a hearing, pursuant to new G.S. 15A-1477, to determine whether the defendant should be sentenced to life imprisonment with parole or without parole. The new statute identifies mitigating factors the court may consider in making this decision. New G.S. 15A-1479 describes the conditions and procedures for parole for juvenile defendants who receive a sentence of life imprisonment with the possibility of parole.

The act applies to sentencing hearings held on or after July 12, 2012. It also applies to resentencing hearings for defendants who were younger than eighteen at the time of their offense and who were sentenced to life imprisonment without parole. New G.S. 15A-1478 establishes procedures for motions for appropriate relief seeking resentencing in such cases. The act also directs the North Carolina Sentencing and Policy Advisory Commission, in consultation with the Office of the Juvenile Defender, the Conference of District Attorneys, and other organizations and agencies identified by the Sentencing Commission, to study and report to the General Assembly by January 31, 2013, on sentencing of juveniles convicted of first-degree murder.