

**District Court Judges' Fall Conference
Asheville, NC**

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JUVENILE LAW UPDATE

Cases Filed from June 3 through September 16, 2008

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ABUSE, NEGLECT, DEPENDENCY

Failure to Enter Timely Order

- Appropriate remedy for trial court's failure to enter a timely order is mandamus.

In re T.H.T., ___ N.C. ___, 665 S.E.2d 54 (8/27/08).

<http://www.aoc.state.nc.us/www/public/sc/opinions/2008/469-07-1.htm>

Facts: The trial court completed an adjudication and disposition hearing on July 26, 2006 – adjudicating the child to be abused and neglected, awarding custody to the father, and granting the mother unsupervised visitation. No written order was entered until November 3, 2006, and there was no hearing pursuant to G.S. 7B-807 to determine the reason for delay in entry of the order. The mother appealed, and the court of appeals affirmed, with one judge dissenting on the basis that the delay prejudiced the mother and required reversal.

Held: Modified and affirmed.

1. The supreme court held that “when delayed entry of an otherwise proper order is the sole purported ground for appeal, a new hearing is not the proper remedy. Instead, a party’s remedy lies in mandamus,” an extraordinary court order mandating the performance of a clear official duty imposed by law.
2. In describing the remedy of mandamus, the court specified these required elements:
 - a. Party seeking relief must show a clear legal right to the act requested.
 - b. Defendant must have a clear legal duty to perform the act.
 - c. The duty must relate to a ministerial act, not an act requiring the exercise of discretion. (Mandamus may be used to compel an official to exercise his or her discretion, but not to direct what the result should be.)
 - d. The official must have neglected or refused to perform the act.
 - e. There must not be an alternative legally adequate remedy.

Hearing on Whether Parent Needs Guardian ad Litem; Visitation Rights

- Where evidence and findings indicated a reasonable basis to believe respondent parent was incompetent or had diminished capacity, trial court's failure to conduct a hearing to determine whether respondent needed a guardian ad litem was an abuse of discretion.
- Court may not delegate to DSS discretion to determine parents' visitation rights.

In re M.H.B., ___ N.C. App. ___, 664 S.E.2d 583 (8/19/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/080337-1.htm>

Facts: In a case in which the child was adjudicated abused and neglected, the court made findings

1. that respondent stated he suffered posttraumatic stress disorder, was manic depressive and bipolar, was prescribed lithium but did not like its side effects, and self-medicated with marijuana.
2. that respondent received mental health treatment and that while testifying he was weeping, crying, confounded, agitated, stated he wished someone would take his life, and stated that he did not know why he was present at the adjudicatory hearing.
3. that respondent threatened suicide after the petition was filed.
4. that respondent was mentally and emotionally unstable.

The court ordered respondent to have a psychological evaluation, suspended visitation until DSS had the results of the evaluation, and authorized DSS then to determine what supervised visitation respondent would have.

Held: Reversed and remanded.

1. Although appointment of a guardian ad litem for an adult parent under G.S. 7B-602 is in the court's discretion, given the evidence and findings relating to respondent's condition, the trial court abused its discretion by not conducting a hearing to determine whether a guardian ad litem for respondent should be appointed pursuant to G.S. 1A-1, Rule 17.
2. The court erred in delegating to DSS decisions regarding respondent's visitation rights.

Adjudicatory Evidence

- Trial court erred by failing to give parent an opportunity to present evidence at adjudication.
- The Rules of Evidence apply at adjudication hearings.
- Court's consideration of testimony from earlier probable cause and nonsecure custody hearings was error where the testimony was not introduced into evidence and was hearsay that was not shown to fall within any exception to the hearsay rule.

In re J.M., ___ N.C. App. ___, ___ S.E.2d ___ (5/6/08) (ordered published 6/11/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/071246-1.htm>

Facts: DSS alleged in a petition that respondent's six children were neglected and that one of them was sexually abused by respondent's husband, against whom criminal charges were brought. At a nonsecure custody hearing the trial judge noted that he had found probable cause in the husband's criminal case, found that there was a factual basis to believe the petition's allegations were true, and continued the children in the custody of DSS. At the adjudication hearing the court took judicial notice of the criminal probable cause hearing and the nonsecure custody hearing; refused to let respondent present additional evidence, stating that she had a full opportunity to cross-examine witnesses at the nonsecure custody hearing; adjudicated the conditions alleged in the petition; and entered disposition.

Held: Vacated and remanded for a new hearing.

1. Denying respondent the opportunity to present evidence and confront the evidence against her at adjudication violated G.S. 7B-802, deprived respondent of due process, and was reversible error.
2. Rules of Evidence for civil cases apply at a juvenile adjudication hearing, and the trial court erred by
 - a. considering testimony from the probable cause hearing, which was not a recorded hearing, was not part of the same case, and at which a child testified who did not later testify at the nonsecure or other hearing in the juvenile case; and
 - b. considering testimony from the nonsecure custody hearing, which was never introduced into evidence and was hearsay that did not fall within any exception to the hearsay rule.

Because the trial court relied solely on testimony and reports from the prior hearings, all of which were inadmissible hearsay, the findings and conclusions were not supported by competent evidence.

- The rape shield law, G.S. 8C-1, Rule 412, can apply in civil cases to render most evidence of a victim's sexual history inadmissible.
- Evidence of a false allegation is not excluded by Rule 412, which addresses only sexual activity.
- Rule 12 does not preclude introduction of a victim's inconsistent statements for impeachment.

In re K.W., ___ N.C. App. ___, ___ S.E.2d ___ (9/16/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/080535-1.htm>

Facts: The 13-year-old juvenile reported to a school counselor that her father had been raping her for the past year. After the father violated a protection plan by returning to the home, DSS filed a petition and obtained nonsecure custody. Based on the juvenile's testimony and testimony by a doctor, the court adjudicated the juvenile to be abused, neglected, and dependent. On appeal, the respondent father argued that the trial court erred by excluding from evidence a police report filed by the juvenile's mother five

years earlier, which said “sexual assault,” and on which an officer had written that there was doubt as to whether the juvenile was telling the truth. It included no other information and had become inactive. Respondent also asserted error based on the court’s exclusion from evidence of the juvenile’s Myspace website, which included provocative pictures of the juvenile and indicated that she had “had sex,” which contradicted her statements to police and her testimony.

Held: Affirmed.

1. Although G.S. 8C-1, Rule 412, is written with reference to criminal proceedings, it can be applied in a civil case to exclude evidence of a victim’s sexual conduct that does not fall within an exception to the rule.
2. The five-year-old police report did not involve sexual activity and should not have been excluded based on Rule 412, which does not apply to false allegations. However, the report was properly excluded because it had no probative value – it included no specific information, did not indicate the nature of the alleged assault, and did not indicate who had doubt about the then 8-year-old child’s veracity.
3. Evidence of the Myspace page should have been admitted for impeachment purposes, but not as substantive evidence that someone else caused the physical trauma to the juvenile. Failure to allow it into evidence was harmless, however, because respondent did not show that the outcome would have been different if it had been admitted.
4. In addition to abuse, the evidence supported adjudications of neglect, because the home was an injurious environment, and dependency, because the parents refused to abide by the safety plan.

Sufficiency of Evidence; Signing Notice of Appeal; Clarity of Disposition

- Failure of respondent to sign notice of appeal required dismissal of appeal (but court of appeals granted petition for certiorari).
- Evidence, consisting mainly of DSS and GAL reports relating to abuse of another child, was sufficient to support adjudication that newborn was a neglected juvenile.
- Ambiguity of the trial court’s dispositional findings and the disposition order required remand.

In re A.S., ___ N.C. App. ___, 661 S.E.2d 313 (6/3/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/071242-1.htm>

Facts: The juvenile was born after three siblings had been removed from the home and adjudicated neglected following one child’s suffering non-accidental immersion burns. DSS filed a petition with the magistrate, who signed a nonsecure custody order, while the newborn juvenile was still in the hospital. On the petition, the magistrate wrote “filed with magistrate” and wrote his name and the date and time. The court held hearings at which it continued nonsecure custody and adjudicated the infant to be neglected. Respondent appealed. The GAL filed a motion to dismiss the appeal because respondent herself did not sign the notice as required by Rule 3A of the Rules of Appellate Procedure.

Held: Affirmed in part; remanded in part.

1. The court of appeals granted the GAL’s motion to dismiss the appeal, and then agreed to review the case pursuant to respondent’s petition for a writ of certiorari.
2. The court of appeals rejected respondent’s argument
 - a. that the trial court lacked subject matter jurisdiction because the petition was not filed properly. Even though no filing stamp appeared on the petition, it was clear from the record that the petition was filed with the clerk after it was filed initially with the magistrate.
 - b. that the trial court lacked subject matter jurisdiction because the magistrate lacked authority to issue the nonsecure custody order. Even if the magistrate lacked authority to issue the order, the court entered a proper order at the first nonsecure custody hearing, and there was no effect on the trial court’s jurisdiction at adjudication and disposition.

- c. that the trial court erred by failing to appoint a GAL for the child. The record made clear that a guardian ad litem and attorney advocate represented the juvenile, and the absence of an appointment order in the record on appeal did not require reversal.
3. Evidence was sufficient to support the adjudication of neglect.
 - a. At the hearing, respondents did not object to DSS’s introduction of reports prepared by DSS and the GAL, and those provided substantive evidence, including relevant evidence relating to the other three children. Respondents did not preserve for appeal any argument about the introduction or consideration of that evidence.
 - b. Including the “clear and convincing evidence” language in the conclusion section of the order did not make the order deficient.
4. With respect to disposition, because the court of appeals could not tell from the order what findings the trial court made or what disposition it intended to order, the court remanded the case for further findings and conclusions. The trial court had incorporated whole reports, found that statements in them were “true,” and adopted recommendations in the reports. The order appeared to include inconsistent statements with respect to whether reunification efforts should continue.

Dissent: Judge Tyson dissented from the part of the opinion holding that evidence and findings were sufficient to support a conclusion that the child was neglected. He viewed the trial court’s order as relying solely on evidence of one prior incident of abuse and no evidence of respondents’ subsequent denial of responsibility, failure to comply with a case plan, or other factors indicating a substantial risk of future neglect.

“Aggravated Circumstances”; Ceasing Reunification Efforts

- Dispositional findings were sufficient to conclude that “aggravated circumstances” existed.
- Declining to place child with grandparents was not an abuse of discretion.
- Evidence and findings were sufficient to support conclusion that reunification efforts should cease.

In re B.W., ___ N.C. App. ___, ___ S.E.2d ___ (5/6/08) (ordered published 6/6/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/071579-1.htm>

Facts: Child was born prematurely and when less than eight weeks old was determined to have suffered cuts, bruises, bite marks, a skull fracture, and multiple rib and leg fractures of varying ages. He also was malnourished and suffered from failure to thrive. The child had been living with his parents in the home of a relative. The parties stipulated to adjudicatory facts and the court adjudicated the child to be abused and neglected. After considering further evidence, including psychological evaluations of respondents, the court made findings and concluded that respondents had subjected the child to aggravated circumstances, that reunification efforts should cease, that it was contrary to the child’s best interest to be placed with the maternal grandparents, and that the child should remain in the custody of DSS.

Held: Affirmed.

1. Even if the trial court’s finding that both parents had been indicted was not supported by the evidence (because the facts were in statements made by respondents’ attorneys, which were not evidence), the finding was not necessary to the trial court’s determination and was not reversible error.
2. Findings of serial infliction of the kinds of injuries the child suffered were sufficient to support the conclusion that the parents had subject the child to “aggravated circumstances.”
3. Court’s refusal to place the child with the respondent mother’s parents was not an abuse of discretion.
4. The trial court’s findings were sufficient to support its conclusions that aggravated circumstances existed, that further reunification efforts would be futile and contrary to the child’s welfare, and that reunification efforts should cease.

Appealability of Order

- A nonsecure custody order is not an appealable order.
- DSS had no right to appeal denial of its motion seeking review of an earlier nonsecure custody order that directed DSS to make foster care board payments to kinship care providers.

In re A.T., ___ N.C. App. ___, 662 S.E.2d 917 (7/15/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/080223-1.htm>

Facts:

- 3/06 DSS substantiated neglect and child was placed voluntarily in kinship care
- 7/07 DSS filed petition alleging child was neglected; court held nonsecure custody hearing
- 9/07
 - nonsecure custody order entered, leaving custody with DSS and ordering DSS to pay foster care board rate to the kinship care providers, effective 3/06
 - adjudication and disposition orders entered, continuing requirement that DSS pay foster care board rate to care providers
- 10/07
 - after a review hearing, court ordered that custody remain with DSS
 - DSS filed motion asking court to review the foster care board rate payment provision in the nonsecure custody order, arguing that it improperly ordered payment from 3/06, when children had been in DSS custody only since 7/07

After a hearing the trial court denied DSS's motion, and DSS appealed.

Held: Appeal dismissed.

1. DSS had no right to appeal the earlier nonsecure custody order or the order denying its motion for review of that order.
2. Nonsecure custody orders are excluded from the list of appealable orders in G.S. 7B-1001, and the order denying DSS's motion was neither a final order nor an order finding an absence of jurisdiction, where the court did not rule that it lacked subject matter jurisdiction but only found as a fact that it did not have jurisdiction during a portion of the time for which it had ordered payment of the foster care board rate.
3. The court of appeals did not consider the merits of any claim that the order requiring DSS to pay the foster care board rate or to pay it for a particular period of time was improper.

TERMINATION OF PARENTAL RIGHTS

Jurisdiction

- When action discontinues because summons expires and there is no extension or alias and pluries summons, issuance of a second or subsequent summons begins a new action as of the date of issuance of the new summons and reinvokes the court's subject matter jurisdiction.

In re D.B., ___ N.C. App. ___, 652 S.E.2d 56 (11/6/07), affirmed per curiam, 362 N.C. 345, 661 S.E.2d 734 (6/12/08).

<http://www.aoc.state.nc.us/www/public/sc/opinions/2008/590-07-1.htm>

<http://www.aoc.state.nc.us/www/public/coa/opinions/2007/061426-2.htm>

- Where no valid summons was issued in the underlying neglect and dependency case, the court did not have jurisdiction to terminate respondent's rights.

In re K.J.L., ___ N.C. App. ___, ___ S.E.2d ___ (8/19/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/080284-1.htm>

Facts: The child was adjudicated neglected and dependent and placed in DSS custody in September 2006. In April 2007 DSS filed a petition to terminate respondent's parental rights, and an order terminating her rights was entered in January 2008. The summonses in the record for the original neglect and dependency proceeding were not signed or dated by the clerk and did not contain an official stamp showing that they had been filed.

Held: Vacated.

1. A summons is not issued until it is filled out and dated and is signed by the officer having authority to sign it.
2. Because no valid summons was issued in the underlying juvenile file, the trial court lacked jurisdiction to terminate respondent's parental rights.

Note: The opinion is silent with respect to whether valid summonses were issued upon the filing of the petition to terminate parental rights. The court's lack of jurisdiction in the underlying case meant that the order giving DSS custody of the child was void. And since DSS has standing to petition for termination of parental rights only if the child is in DSS custody, the court lacked subject matter jurisdiction in the termination case because it was filed by a petitioner who did not have standing. *See, e.g.,* In re E.X.J., ___ N.C. App. ___, 662 S.E.2d 24 (2008); In re Miller, 162 N.C. App. 355, 590 S.E.2d 864 (2004).

- An order entered pursuant to temporary emergency jurisdiction under the UCCJEA remains in effect until an order is received from another state that has jurisdiction.
- Failure to serve one of the parents in the underlying juvenile case did not deprive the court of subject matter jurisdiction in a later termination action.
- N.C. became the child's home state when the child and parent had been here more than six months and no action had been filed in another state.

In re E.X.J., ___ N.C. App. ___, 662 S.E.2d 24 (6/17/08) (appeal filed 7/22/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/071235-1.htm>

Facts: In April 2005, the day after arriving in N.C. from Alabama, respondent (mother) took her two children to DSS for placement in foster care, telling the social worker that she was not mentally or financially able to care for them and had left Alabama to escape domestic violence and other marital problems. DSS filed a petition and obtained nonsecure custody. Respondent was served properly but the summons mailed to the father in Alabama was returned "unclaimed." Notice of an August, 2005,

adjudication hearing was sent to the father, who wrote a letter to the clerk stating that he could not attend but had a good job and would have his own home soon. At the hearing the mother stipulated to facts relating to dependency and the court adjudicated the children dependent and left them in DSS custody. At a permanency planning hearing in October, 2006, the court ceased reunification efforts and changed the permanent plan to adoption. In December, 2006, DSS filed motions to terminate the parents' rights. Because the father had never been served in the dependency case, DSS in April, 2007, filed a petition to terminate his rights and had a summons issued to him. Both parents were properly served. Both respondents moved to dismiss for lack of subject matter jurisdiction and the father also moved to dismiss for lack of personal jurisdiction because he was not served in the underlying case. The court denied the motions, heard evidence, and entered an order terminating both parents' rights.

Held: Affirmed.

1. The court rejected respondents' argument that DSS lacked standing to petition for termination because it was not granted custody by a court of competent jurisdiction.
 - a. Although N.C. was not the children's home state when the underlying petition was filed, it was clear from the record that N.C. had jurisdiction to enter the nonsecure custody order pursuant to the temporary emergency custody provisions of the UCCJEA.
 - b. If jurisdiction is clear from the record, the trial court is not required to make specific findings of fact to support a conclusion that it has jurisdiction, although doing so is the better practice.
 - c. Because no action was ever filed in Alabama, the temporary emergency order remained in effect and the N.C. court had jurisdiction when it gave DSS custody.
2. Because the children and mother had been in N.C. more than two years when the termination action was filed and no action had been initiated in Alabama, N.C. had become the children's home state and the N.C. court had jurisdiction to terminate parental rights.
3. The fact that the father was never served with a summons in the underlying case did not deprive the court of subject matter jurisdiction in the termination action.
 - a. In an abuse, neglect, or dependency case failure to serve one of the parents, if the other is properly served, does not deprive the court of subject matter jurisdiction. *In re Poole*, 151 N.C. App. 472, 568 S.E.2d 200 (2002), (Timmons-Goodson, J., dissenting), *adopted per curiam*, 357 N.C. 151, 579 S.E.2d 248 (2003).
 - b. "Motions in the cause and original petitions for termination of parental rights may be sustained irrespective of earlier juvenile court activity," *citing In re O.C.*, 171, N.C. App. 457, 615 S.E.2d 391 (2005).

Dissent: Judge Tyson concurred in part and dissented with respect to termination of respondent father's rights, on the basis that DSS's failure to serve respondent-father with the initial summonses and petitions violated his constitutional right to due process.

- Because no summons was issued to the child or her guardian ad litem after DSS filed a petition to terminate parental rights, the order terminating parental rights was vacated.

In re S.F., ___ N.C. App. ___, 660 S.E.2d 924 (6/3/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/080197-1.htm>

Facts: After the permanent plan was changed from guardianship to adoption, DSS filed a petition to terminate respondent's rights. A summons was issued to respondent, but not to the child or her guardian ad litem. After a hearing the court entered an order terminating respondent's rights.

Held: Vacated.

As in other recent cases, the court held that failure to issue a summons to the juvenile when a petition to terminate parental rights is filed deprives the trial court of subject matter jurisdiction.

- In actions to terminate parental rights, the trial court had subject matter jurisdiction when the juveniles were named in the caption of the summonses and the juveniles' representatives certified that the juveniles were served.

In re N.C.H., ___ N.C. App. ___, ___ S.E.2d ___ (9/2/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/080413-1.htm>

In re S.D.J., ___ N.C. App. ___, ___ S.E.2d ___ (9/2/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/080360-1.htm>

Facts: In both of these termination of parental rights cases the juveniles were named in the caption of properly issued summonses that named only the parents, who were served, as respondents. No summonses naming the juveniles as respondents were directed to the juveniles. In *N.C.H.*, the juveniles' guardian ad litem certified that she was served with a copy of the summonses. In *S.D. J.*, the juvenile's guardians ad litem certified that they accepted service of the petition on the juvenile's behalf. In both cases the respondent mothers appealed from orders terminating their parental rights, asserting that the trial court lacked subject matter jurisdiction because no summonses were issued to the juveniles.

Held: Affirmed.

Relying on the recent case of *In re J.A.P.*, ___ N.C. App. ___, 659 S.E.2d 14 (2008), the court of appeals held in both cases that the trial court had subject matter jurisdiction, even though the juvenile was not named as a respondent and no summons was directed to the juvenile, when the juvenile was named in the caption of the summons issued to the parents and the juvenile's guardian ad litem certified that the juvenile had been served or that the guardian ad litem had accepted service on behalf of the juvenile.

Dissent: Judge Stroud dissented in both cases. After reviewing the line of cases in which the court has addressed similar issues, she concluded that because the statute requires issuing a summons to the juvenile and naming the juvenile as respondent, failure to do those things deprives the trial court of subject matter jurisdiction.

Evidence and Grounds

- The court may not terminate parental rights based solely on documentary evidence and must conduct a proper, independent hearing.
- Summary termination of parental rights is not permitted.

In re A.M., ___ N.C. App. ___, ___ S.E.2d ___ (9/2/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/080484-1.htm>

Facts: Respondents did not appear at the hearing on DSS's motion to terminate their parental rights, and the trial court denied their counsel's request for a continuance. DSS asked the court to take judicial notice of previous findings in the record and to accept and include in its order written reports as evidence to establish grounds to terminate respondents' rights. The court received the reports into evidence over respondents' objections and entered an order terminating rights based on the written reports of DSS and the guardian ad litem, prior court orders, and oral arguments by the attorneys.

Holding: Reversed and remanded.

1. G.S. 1A-1, Rule 43, furthers the purposes of the Juvenile Code and, when read in conjunction with language in the Code, requires that some testimony be taken orally in open court in a hearing to terminate parental rights.
2. Termination of parental rights may not occur through a summary proceeding.
3. It was not improper for the court to consider properly admitted reports, documentary evidence, and prior orders, but a witness or witnesses must be sworn or affirmed and tendered to give some testimony. The court noted that the opinion should not be construed as requiring "extensive oral testimony."

Note: The court of appeals stated that the trial court’s “[c]onsideration of written reports [from DSS and the guardian ad litem] . . . was proper.” It is not clear whether that was because they fell within an exception to the hearsay rule, or because the adjudication and disposition hearings were combined, or for some other reason.

- Competent evidence supported trial court’s findings, which supported conclusion that respondent willfully left the children in foster care for more than a year without making reasonable progress.

In re J.Z.M., ___ N.C. App. ___, 663 S.E.2d 435 (6/17/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/061242-2.htm>

Facts: In an earlier opinion in this case the court of appeals reversed an order terminating parental rights because of violations of statutory timelines. The supreme court reversed that decision and remanded to the court of appeals for consideration of other issues. The only issue the court of appeals considered on remand was whether the trial court’s findings were supported by competent evidence in support of the ground for termination of parental rights in G.S. 7B-1111(a)(2) – willfully leaving the child in foster care for more than a year without making reasonable progress.

Held: Affirmed.

The trial court’s findings were supported by competent evidence and were sufficient to support the ground for termination of parental rights, where the court found that respondent had not completed a case plan or complied with a mediation agreement, had not demonstrated the ability to provide consistent care and supervision for the children, had been terminated from a NOVA program for being dishonest and hiding the fact that she was pregnant, had not addressed the issues that led to the children’s placement, and gave testimony that was contradictory and not credible.

- Reports of drug screen results and letter from Alcohol and Drug Services were admissible under business records exception to the hearsay rule after social worker testimony laid proper foundation.
- The trial court may take judicial notice of prior proceedings and orders in a case and is presumed to disregard any incompetent evidence.

In re S.D.J., ___ N.C. App. ___, ___ S.E.2d ___ (9/2/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/080360-1.htm>

Facts: In addition to the jurisdiction issue described above, respondent argued that the trial court erred in

1. admitting into evidence reports of drug screen results and a letter from Alcohol and Drug Services over the objection of respondent’s attorney and
2. taking judicial notice of and basing findings of fact on prior orders in the case, including those that involved a lesser standard of proof than clear, cogent, and convincing evidence.

Held: Affirmed.

1. The reports and letter were properly admitted as evidence under the business records exception to the hearsay rule, where a social worker testified that she had collected all but one of the samples and sealed them and shipped them to the laboratory for testing, that she relied on the reports in the ordinary course of her business, and that the reports were collected as part of petitioner’s record in the case. A proper foundation did not require authentication by the person who made the records.
2. The court noted that it is “well established” that a trial court may take judicial notice of earlier proceedings in the same case and that the trial court is presumed to disregard any incompetent evidence. The court found that the trial court’s findings were supported by testimony in the case and were not based on the prior orders.

DELINQUENCY

Jurisdiction; Timely Filing of Petition

- Court counselor's failure to file a petition within 15 days after it is received deprives the trial court of subject matter jurisdiction unless the record shows that the chief court counselor granted an extension of up to 15 additional days and filing occurred within that time.

In re K.W., ___ N.C. App. ___, 664 S.E.2d 66 (8/5/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/071472-1.htm>

Facts: On 6/26/07 petitions alleging injury to personal property were prepared by the court counselor, signed and verified by an officer, and received by the court counselor for review. The counselor filed the petitions 16 days later. The court adjudicated the juvenile delinquent and placed him on probation. The juvenile appealed, arguing that the trial court lacked subject matter jurisdiction.

Held: Vacated.

1. Because the record did not show that the chief court counselor had granted an extension, filing of the petition more than 15 days after it was received was not timely, and the trial court lacked subject matter jurisdiction.
2. The court of appeals would not presume that the chief court counselor exercised his or her discretion to extend the time for filing.

Transfer to Superior Court

- Standard of review when transfer decision is appealed to superior court is abuse of discretion.
- Superior court may not substitute its judgment for that of the district court.

In re E.S., ___ N.C. App. ___, 663 S.E.2d 475 (8/5/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/071054-1.htm>

Facts: Petitions alleged the 15-year-old was delinquent for committing first degree rape, first degree kidnapping, felony breaking and entering, and common law conspiracy to commit first degree rape. After finding probable cause the trial court heard testimony from a Department of Juvenile Justice and Delinquency Prevention supervisor, who recommended transfer, and from a former director of a juvenile sex offender treatment program, who believed resources in the juvenile system were available to treat and sanction the juvenile. The trial court's order stated that transfer was necessary to protect the public, that the court had considered the factors in G.S. 7B-2203(b), and that the case should be transferred because the juvenile would be 16 in three months, a co-defendant was charged as an adult, the juvenile had above average cognitive abilities, the offense was aggressive, violent, and premeditated, and the protection of the public required transfer. The juvenile appealed, and the superior court found that the trial court had abused its discretion in transferring the case, citing evidence that the juvenile had no prior record, that he would benefit from treatment and services in the juvenile system, and that he resided in a stable home with supportive parents. The superior court remanded the case to juvenile court, and the state appealed.

Held: Reversed and remanded.

1. The superior court applied the wrong standard of review, giving some evidence more weight than the district court had and, in effect, substituting its judgment for that of the district court.
2. After a transfer hearing the district court must
 - a. determine whether protection of the public and the juvenile's needs will be served by transfer,
 - b. consider the factors listed in G.S. 2603(b), and
 - c. if the court orders transfer, state the reasons for the decision.

Accepting Juvenile's Admission

- The trial court erred in accepting the juvenile's admission to felony larceny when the state failed to establish a factual basis regarding the value of the stolen truck.
- The juvenile petition may not be the source of information for determining that there is a factual basis for accepting a juvenile's admission.

In re D.C., ___ N.C. App. ___, 662 S.E.2d 570 (7/1/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/071186-1.htm>

Facts: The juvenile admitted the alleged offenses of felony larceny and attempted felony larceny, which require proof that the stolen truck was worth more than \$1,000.00. No statement or document in the record, other than the petition, gave any indication that the value of the truck was more than \$1,000.00.

Held: Juvenile's admission and the adjudication, disposition, and commitment orders vacated.

1. G.S. 7B-2407(c) requires the court, before accepting a juvenile's admission, to determine that there is a factual basis for the admission.
2. The state has the burden of establishing the factual basis and can do that through the prosecutor's statement of the facts; a written statement of the juvenile; sworn testimony that may include reliable hearsay; or a statement of facts by the juvenile's attorney. In this case, none of those provided a factual basis as to the value of the truck.

Sufficiency of Evidence

- Trial court erred in not granting juvenile's motion to dismiss at the close of the state's evidence with respect to seven petitions for which the evidence was sufficient only to raise suspicion or conjecture.

In re R.D.L., ___ N.C. App. ___, 664 S.E.2d 71 (8/5/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/071427-1.htm>

Facts: Nine petitions alleged that the juvenile was delinquent for damage to various automobiles and other personal and real property on different occasions. Evidence from one property owner and an officer showed that the juvenile had admitted two of the offenses. The trial court denied the juvenile's motion to dismiss and adjudicated the juvenile delinquent on all of the petitions and placed him on probation as a Level 1 disposition.

Holding: The court of appeals reversed with respect to seven of the petitions and remanded for a new disposition hearing.

1. Given the context of the juvenile's statement that he "did it," the trial court erred in considering the statement a general admission to offenses about which there was no direct evidence and about which the officer did not question the juvenile.
2. With respect to seven of the petitions, the state's evidence was sufficient to raise suspicion or conjecture, but not to support an adjudication.

- Evidence was sufficient to support adjudication for resisting, delaying, and obstructing an officer, and felonious breaking and entering and larceny.

In re S.D.R., ___ N.C. App. ___, 664 S.E.2d 414 (8/5/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/071481-1.htm>

Facts: Evidence showed that the juvenile, a participant in a community service and restitution after school program, was taken to the Cooperative Extension library and told to stay there until the staff person returned in about an hour. The director's office was directly across the hall, and upon returning to her office the director met the juvenile in the doorway of her office. Later she discovered that her pocketbook was unzipped, her wallet had been opened, and over \$100 was missing. The juvenile denied taking the money and consented to a search when an officer arrived. When the officer noticed that the juvenile appeared to be trying to swallow something green, he put his hand on the juvenile's chin to prevent swallowing. A struggle ensued, money came out of the juvenile's mouth, and the juvenile ate the money. The trial court adjudicated the juvenile delinquent for resisting, delaying, and obstructing an officer, and felonious breaking and entering and larceny.

Holding: No error.

1. The officer had reasonable suspicion that criminal activity had occurred and substantial evidence supported the adjudication of resisting, delaying, and obstructing an officer.
2. Although the juvenile was properly in the building, he did not have consent, implied or otherwise, to enter the director's office, which was not a space held out for public use. There was substantial evidence of felonious breaking and entering and larceny, and the trial court correctly denied the juvenile's motion to dismiss.

Authority to Modify Disposition

- A delinquency disposition may be modified upon a change of circumstances.
- Trial court did not err in changing disposition from residential treatment to commitment to youth development center after finding that funding for residential treatment was no longer available.

In re D.G., ___ N.C. App. ___, 663 S.E.2d 458 (8/5/08) (appeal filed 8/28/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/070402-1.htm>

Facts: The juvenile was adjudicated delinquent after admitting a first degree sex offense based on having anal intercourse with a five-year-old child. Both DSS, which apparently had custody of the juvenile, and mental health recommended residential treatment. DSS expressed concern about funding for the placement because the juvenile was an illegal alien. The court counselor assured the court that state funds were available. The court ordered placement in a residential sex offender treatment facility as a Level 2 disposition. Five months later a motion for review was filed asserting that funding for the placement was no longer available and asking that the disposition be modified, and the juvenile filed a motion asking the court to compel the state to provide him with sex offender treatment. Evidence included a letter from the attorney for mental health stating that the juvenile was not a qualified alien and that mental health could not provide funding for custodial sex offender treatment. The letter was based on an opinion from the Office of the N.C. Attorney General. The trial court found that under state and federal law funding for the placement was no longer available. The court denied the juvenile's motion to compel and amended the disposition to commit the juvenile to a youth development center for an indefinite time not to exceed his nineteenth birthday. The juvenile appealed.

Holding: Affirmed.

1. The trial court's finding that funding was not available was supported by competent evidence and therefore conclusive on appeal. Evidence included testimony from mental health and DSS personnel that they had explored all avenues of funding and that funding was not available due to federal law.

2. The court properly ruled that it could not compel the provision of residential treatment in violation of federal law.
3. The facts constituted a change of circumstances and justified modification of the disposition under G.S. 7B-2600.

Dissent: Judge Wynn dissented on the basis that

- the trial court had not been presented any clear administrative or statutory law regarding the funding question;
- the allegations and arguments of mental health and DSS did not constitute competent evidence;
- the “opinion” from the Attorney General’s Office actually was just an advisory letter that had no legal force or effect;
- the court’s “finding” about lack of funding was actually a conclusion of law that was not supported by the evidence or findings;
- there had not been a legal determination that sexual offender treatment is an impermissible “public benefit” within the meaning of the relevant federal law.

Revocation of Post-release Supervision

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| <ul style="list-style-type: none">• Revocation of post-release supervision does not require detailed findings of fact. |
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In re D.M., ___ N.C. App. ___, ___ S.E.2d ___ (9/16/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/080175-1.htm>

Facts: The juvenile, who was on Level 2 probation, was committed to a youth development center (YDC) for a minimum of six months, after a hearing at which the court found that the juvenile had violated the terms of probation. When the juvenile was released from the YDC, the terms of post-release supervision included that he reside at a specified group home and that he not associate with any gang member or engage in gang-related activity. At a hearing on the state’s motion seeking revocation of his post-release supervision, evidence showed that the juvenile consistently violated rules of the group home, used profanity, interrupted group session conversations, and was disrespectful to the staff. The court found that the juvenile had violated the terms of post-release supervision by failing to comply with the rules and regulations of the group home and that the failure was without just cause, then ordered that he be recommitted to the YDC. The juvenile argued on appeal that the trial court made insufficient findings of fact to support the recommitment.

Held: Affirmed.

1. The court of appeals pointed to *In re Baxley*, 74 N.C. App. 527, 328 S.E.2d 831, *disc. rev. denied*, 314 N.C. 330, 333 S.E.2d 483 (1985), which interpreted a very similar predecessor statute, and held that the trial court was required only to find that the juvenile violated the terms of post-release supervision. The findings and conclusions of the original commitment order supported the recommitment.
2. Once post-release supervision is revoked, return of the juvenile to a YDC is mandatory.

On August 27, 2008, the supreme court granted petitions for discretionary review in these cases:

Amendment of Abuse Petition

In re M.G., ___ N.C. App. ___, 653 S.E.2d 581 (12/18/07).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2007/070643-1.htm>

Holding in court of appeals: Although the original petition alleged that the juvenile was abused, the trial court erred in allowing an amendment adding allegations that she was sexually abused, because the amendment changed the “nature of the conditions” on which the petition was based, which is not permitted by G.S. 7B-800.

Failure to Issue Summons to Child in Termination Action

In re J.T., ___ N.C. App. ___, 657 S.E.2d 692 (3/4/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/071372-1.htm>

Holding in court of appeals: Failure to issue a summons to the child in a termination of parental rights case that was initiated by petition deprived the trial court of subject matter jurisdiction.

The following cases have been argued or are scheduled for argument in the supreme court:

In-Custody Interrogation of Juvenile at School

In re W.R., 179 N.C. App. 642, 634 S.E.2d 923 (10/3/06) (argued in supreme court, 2/23/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2006/051602-1.htm>

Holding in court of appeals: Applying the “plain error” rule, the court determined that where juvenile was questioned in principal’s office by the principal, assistant principal, and school resource officer,

1. the juvenile was “in custody” when the questioning took place, and his confession should not have been admitted since he was not given the required warnings; and
2. because the confession was the only evidence about the knife, the juvenile established that he would not have been adjudicated delinquent without that evidence, satisfying the requirement that the plain error resulted in miscarriage of justice or denial of a fair hearing.

Role of Parent’s Guardian ad Litem in Termination Proceeding

In re L.B., ___ N.C. App. ___, 653 S.E.2d 240 (12/4/07) (argued in supreme court, 9/10/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2007/070549-1.htm>

Holding in court of appeals: In an action to terminate parental rights,

1. the signature of respondent parent’s guardian ad litem on the notice of appeal was not sufficient.
2. the role of a parent’s guardian ad litem is to provide assistance, not to substitute his or her judgment or decisions for those of the parent.

Amendment of Pleading to Conform to Evidence

B.L.H., ___ N.C. App. ___, 660 S.E.2d 255 (5/6/08) (scheduled for argument in supreme court on 10/14/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/071313-2.htm>

Holding in court of appeals:

1. The trial court erred in allowing amendment of the petition to conform to the evidence, to add a ground that did not exist when the petition was filed.
2. G.S. 1A-1, Rule 15, does not apply in a termination proceeding to permit amendment of the termination petition or motion to conform to evidence presented at the adjudication hearing.