

Child Welfare Case Update

For District Court Judges, Fall 2015 Conference
Cases Decided from June 18 – September 30, 2015

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Abuse, Neglect, Dependency

Caretaker

In re R.R.N., ___ N.C. ___ (August 21, 2015)

Held: Affirmed COA (reversed trial court)

- The trial court must apply a totality of the circumstances test to determine if an adult relative is “entrusted with the juvenile’s care” such that the adult is a caretaker as defined by G.S. 7B-101(3). Factors include the duration, frequency, and location of the care provided by the adult relative as well as the decision-making authority that is given to the adult relative. The adult relative must have a significant degree of parental-type responsibility for the child. A temporary arrangement for supervision is not the equivalent of entrusting an adult relative with the care of a juvenile such that the adult relative is a caretaker.
- The Juvenile Code requires a balance between protecting children and parents’ fundamental rights to parent their children. When applying the purpose of the Juvenile Code, “ultimately, the best interest of the child is the lodestar, but if parents act appropriately to protect their child, their constitutional right to rear that child is paramount,” and DSS may not intervene in the private realm of the family.
- The adult relative who acted as the child’s supervisor for one night on one occasion (a sleepover) while the child’s mother retained the ultimate responsibility for the child’s overall health and welfare is not a caretaker.

Adjudication: Hearsay Statements of the Child

In re M.A.E., K.M.E., and E.G.H., ___ N.C. App. ___ (July 21, 2015)

Held: Affirmed

- Rule 803(24) of the NC Rules of Evidence allows for the admission of hearsay that is not specifically identified in Rule 803 if the statement
 - has the equivalent circumstantial guarantees of trustworthiness,
 - is offered as evidence of a material fact, and
 - is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable effortsand
 - the general purposes of the rules of evidence and the interests of justice will be best served by the statement’s admission.
- A party must give notice to the adverse party of his/her intent to use the statement.
- Admission of a hearsay statement pursuant to Rule 803(24) is reviewed for an abuse of discretion. The court did not abuse its discretion when it admitted the 8-year old child’s statements to the DSS social worker that were made at school or to a forensic interviewer made the next day at the children’s advocacy center (this was videotaped).
- The child’s statements were more probative than other evidence that was reasonably available to DSS even though the court did not rule specifically on whether the child was

available to testify. The record showed the child's testimony would be detrimental to her welfare.

- When determining if the statement has a circumstantial guarantee of trustworthiness, the court must consider four factors ("the Valentine factors"):
 - Whether the declarant had personal knowledge of the underlying events,
 - Whether the declarant is motivated to speak the truth,
 - Whether the declarant has ever recanted the statement, and
 - Whether the declarant is available at trial for meaningful cross-examination.
- Failure to make findings of all four Valentine factors is not fatal, for an appellate court will look to the entire record to determine if the statement is admissible.
 - The record contains evidence that the child was unavailable at trial due to the detrimental affect testifying would have on her welfare.
 - The record contains evidence that the child was motivated to speak the truth when she made the statements. She was in a comfortable and safe setting, used age-appropriate language, was asked open ended questions, and did not appear afraid or upset.
- When determining the guarantee of trustworthiness of the statement, a court will look at whether the witness is capable of expressing herself about the matter so as to be understood and of understanding the duty to tell the truth. The court did not abuse its discretion when determining the statement had a guarantee of trustworthiness when the court found the child understood the difference between the truth and a lie but would be unlikely to understand the concept of swearing on a bible.
- The court declined to review the admission of the 12-year old child's hearsay statements because the respondents were not prejudiced by the admission of these statements. There was sufficient independent evidence that supported the trial court's findings and conclusions.

Abuse: Sexual Acts By and Upon a Juvenile

In re M.A.E., K.M.E., and E.G.H., ___ N.C. App. ___ (July 21, 2015)

Held: Affirmed

- The definition of abuse at G.S. 7B-101(1)(d) includes a parent who has permitted or encouraged the commission of certain sex crimes by, with, or upon the child. The evidence supported the court's findings that the older sibling repeatedly sexually abused the younger sibling and the respondent parents were aware of the abuse based on the younger sibling's disclosures of her victimization. The evidence also showed the older sibling was adjudicated delinquent after admitting to multiple counts of second degree statutory rape and second degree statutory sexual offences against his younger sisters. The evidence further supports the finding that the respondent parents did not take appropriate remedial measures to prevent the sexual abuse from recurring. Based on the definition of abuse, the older sibling who committed the acts and the younger sibling victim are abused juveniles.

Appeal of Adjudication After Temporary Disposition Order

In re P.S., ___ N.C. App. ___ (August 4, 2015)

Held: Appeal Dismissed

- **Procedural history:** After a child was adjudicated neglected, the action was transferred to another judicial district for the initial dispositional hearing. At adjudication, the court entered a *temporary* disposition order that granted custody of the child to DSS and approved the child’s current placement with a relative pending the dispositional hearing and order. Respondent mother appealed the adjudication and change of venue.
- G.S. 7B-1001(a) authorizes an appeal of a “final order.” An adjudication is not a “final order” until there is a final disposition order after the dispositional hearing. Citing prior cases, G.S. 7B-1001(a)(3) does not authorize an appeal of a temporary disposition order. Appeal of the adjudication must be made after the dispositional hearing is held and a “final” initial dispositional order is entered.
- A change in custody made in a temporary disposition order prior to the initial dispositional hearing is similar to a nonsecure custody order or an interlocutory temporary custody order in a G.S. Chapter 50 civil custody action, neither of which may be appealed. A temporary dispositional order is not “an order that changes legal custody of a juvenile” that may be appealed pursuant to G.S. 7B-1001(a)(4).

Adjudication: GAL for Respondent Parent

In re D.L.P. and H.L.P., ___ N.C. App. ___ (August 18, 2015)

Held: Vacated and Remanded

- When a court determines a respondent parent is incompetent and requires a Rule 17 GAL, the court may not proceed with a hearing if the appointed substitute GAL is not present.
- In this case, the record does not reflect when the court determined the respondent mother required a substitute GAL. The respondent mother was not present at the adjudication hearing and had not communicated with her attorney. It appears a GAL was appointed to the mother because of her erratic and harmful behavior at the disposition hearing along with evidence of her difficulties that resulted from a traumatic brain injury. Because the timing of the court’s determination of the mother’s need for a GAL is unknown, and the GAL appointed for the respondent mother was not present at the adjudication or disposition hearings, the orders adjudicating the juveniles neglected and dependent and the disposition orders are vacated. Case is remanded for further proceedings.

Termination of Parental Rights

Standing

In re J.A.U. and S.A.U., ___ N.C. App. ___ (August 18, 2015)

Held: Vacated

- Maternal grandmother who had custody of child pursuant to a G.S. Chapter 50 custody order is not a “judicially appointed guardian of the person of the juvenile,” and therefore, does not have standing to initiate a TPR pursuant to G.S. 7B-1103(a)(2). Despite the 2013 change in the definition of “custodian” under the Juvenile Code, the Code still recognizes a distinction between guardian and custodian. Only a guardian has standing to initiate a TPR.
- The evidence does not support the court’s finding that the child lived with the petitioner for most of the child’s life and instead supports a finding that the child lived with the petitioner for less than one year before the TPR petition was filed. G.S. 7B-1103(a)(5) requires a child to have continuously resided with the petitioner for two years preceding the filing of the TPR petition. The statutory standard is not based on the relationship between the child and petitioner but is instead based on the time the child resided with the petitioner prior to filing the petition.
- Standing is a threshold issue and without proper standing by a petitioner for TPR, a court does not have subject matter jurisdiction over the action.

Neglect

In re M.P.M., ___ N.C. App. ___ (September 1, 2015)

Affirmed *There is a dissent

- A parent’s rights may be terminated on the grounds of neglect when there is evidence of neglect at the time of the adjudication hearing and of a probability that the neglect will be repeated if the child is returned to the parent’s care. A court may look to the historical facts of the case when predicting the probability that neglect will occur in the future.
- Completion of a case plan by a parent does not preclude a court’s conclusion that the grounds of neglect exist for termination of that parent’s rights. In this case, the respondent father participated in a psychological evaluation, attended ten therapy sessions, and interacted appropriately during his supervised visits with his daughter. Attendance alone is not sufficient. The court’s conclusion that he failed to learn in therapy how to protect his daughter, particularly from her abusive mother, and therefore, was likely to result in a future neglect was supported by findings of fact.
- The findings of fact were supported by competent, clear, cogent, and convincing evidence, including the DSS social worker’s testimony. The court found that respondent father failed to acknowledge his participation in the abuse of the children that were in the home, lied about his continued contact with the children’s mother, and was unable to protect his daughter from her abusive mother.
- A trial court may consider a respondent’s in-court demeanor. The court’s findings of fact of a “respondent’s in-court demeanor, attitude, and credibility...are left to the trial judge’s discretion.”

Failure to Make Reasonable Progress to Correct the Conditions

In re S.D., ___ N.C. App. ___ (September 1, 2015)

Reversed and Remanded

- Pivotal findings of fact are not supported by the evidence, and the findings of fact do not support the conclusion of law that the respondent mother failed to make reasonable progress to correct the conditions that led to the child's removal.
- Respondent mother was ordered to:
 - consistently visit with her child, and the court found the mother consistently and punctually attended the visits;
 - obtain and maintain suitable housing, and the court stated (there were not findings in the order) the housing was suitable (mother had been living in a friend's home for 9 months);
 - submit to a substance abuse evaluation and follow recommendations, and the court found she completed an evaluation, which had no treatment recommendations, and she had one drug screen that was negative;
 - complete a parenting class and demonstrate knowledge of what she learned, and the court found she attended a program; and
 - maintain regular contact with the DSS social worker, and the court found that she did.
- Respondent mother was also ordered to resolve all pending criminal charges. The court found the mother's charges were unresolved and there was no indication as to when a resolution would occur. However, the evidence showed that respondent's criminal charges may have been resolved in a week's time. Although it is not reasonable to wait years for the criminal process to conclude, the potential for an imminent resolution should have been considered.
- Respondent mother was ordered to obtain and maintain legal employment sufficient to meet both her and her child's needs. The court found the mother obtained a part time job, earning \$435/month, and that she applied for SSI. Although the social worker indicated \$435/month was insufficient to meet the needs of a household of two, parental rights may not be terminated on the sole basis of poverty. G.S. 7B-1111(a)(2).
- Mother was ordered to complete a psychological evaluation and follow recommendations. The finding of fact that the evaluation recommended "intensive individual counseling" was not supported by evidence that showed the mother complete "individual counseling services." The court found the mother attended therapy as recommended by her therapist.
- "While 'extremely limited progress is not reasonable,' ... certainly perfection is not required to reach the 'reasonable' standard."

Related Criminal Cases

Parental Kidnapping

State v. Pender, ___ N.C. App. ___ (September 1, 2015)

Vacated (convictions of 2nd degree kidnapping of defendant's sons)

(no error as to remaining convictions: violating DVPO, possession of firearm by a felon; first degree burglary, assault by pointing a gun, second degree kidnapping)

- **Facts:** Defendant confined twelve people, several of whom were younger than 16 years old, in a bedroom for 30 – 45 minutes and held them at gunpoint. Two of the minors were defendant's children.
- G.S. 14-39(a) includes in the definition of kidnapping the unlawful confinement of any person under 16 years of age without the consent of *a* parent or legal custodian of the child. There is no kidnapping when a parent or legal custodian consents to the unlawful confinement of his own minor child, even if the child does not consent. Only one parent is required to consent. A legislative change would be needed to charge a parent with kidnapping of his own minor child.
- A victim's age is not an essential element of the crime of kidnapping, but is a factor that relates to the state's burden of proof in showing consent was not provided by the parent or guardian of a child younger than 16. An indictment that alleges a child younger than 16 (versus the child's parent or legal custodian) did not consent is adequate.

Confrontation Clause and Child's Statement Regarding Abuse to Teacher (Non-Law Enforcement)

Ohio v. Clark, ___ S.Ct. ___ (June 18, 2015)

- In response to his preschool teacher asking him how he got his bruises, a 3 year old child identified the criminal defendant (his mother's boyfriend) as the person who caused his injuries. In the criminal trial, the teacher testified about the child's statement. The child did not testify. The child's statement was not a testimonial statement that violated the VI Amendment Confrontation Clause.
- Testimonial statements are excluded by the Confrontation Clause. In determining if a statement is testimonial, a court will apply the "primary purpose test:" was the statement made with the primary purpose of being an out-of-court substitute for trial testimony. Here, the child's statement to his teacher was not testimonial.
 - The "statements occurred in the context of an ongoing emergency involving suspected child abuse." The teacher was trying to determine if the child was in immediate harm and if actions were needed to protect the child.

- The questioning was informal and spontaneous. There was no indication the child was informed that the questioning was to obtain evidence to prosecute a criminal case.
- The child's young age (3 y.o.) indicate he was too young to understand the implications of the questioning and its relationship to the criminal justice system.
- The Supreme Court did not adopt a categorical rule that testimonial statements made to non-law enforcement officers are excluded from the VI Amendment Confrontation Clause
- A law mandating the report of suspected child abuse to government authorities does not convert the conversation between the child and mandated reporter into an interview that has a primary purpose of obtaining evidence for criminal prosecution.

- Author's Note
 - VI Amendment confrontation clause applies to criminal trials.
 - The statements were not challenged on hearsay grounds based on the Ohio Rules of Evidence, which address child witnesses:
 - “Children younger than 10 years old are incompetent to testify if they ‘appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.’ Ohio Rule Evid. 601(A)”
 - Ohio Rule Evid 807 “allows the admission of reliable hearsay by child abuse victims.”
 - NC Rules of Evidence do not have similar provisions. The challenge was based on the VI Amendment Confrontation Clause.