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Juvenile Law Issues

Abuse, Neglect, Dependency, Termination of Parental Rights

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1. **Should petitions filed by DSS be signed by the DSS attorney?**

   Answer: Yes, if the attorney prepared the pleading.

   Discussion: G.S. 1A-1, Rule 11, requires that every pleading of a party represented by an attorney be signed by an attorney of record. Reading Rule 11 as a whole, it seems very unlikely that it does not apply to juvenile cases. A number of juvenile cases include references to Rule 11 without addressing the attorney's signature. An unpublished opinion suggests that an attorney's failure to sign a juvenile pleading – in that case, a respondent's answer to a termination petition – would constitute a "defect" in the pleading. In *In re Y.Q.M.*, 177 N.C. App. 148 (2006) (unpublished), the court said: "To the extent respondent relies upon her attorney's failure to sign her answer to challenge the trial court's finding, we conclude that her failure to object to a defect appearing on the face of her own pleading waived any objection thereto."

   An attorney's failure to sign, unlike a party's failure to verify, is not a jurisdictional problem, so it is not surprising that the issue is not addressed in appellate decisions. Under Rule 11, an attorney's failure to sign a pleading can result in the pleading's being stricken, but only if it is not signed promptly after the omission is called to the attorney's attention. So, if someone calls the attorney's attention to the failure to sign a petition the attorney drafted, the problem should be cured. Other Rule 11 sanctions can be imposed only for *improperly* signing a petition.

   When a party, *e.g.*, a social worker acting for the director, drafts, signs, verifies, and files a petition without the attorney's involvement, the attorney's signature would not seem to be appropriate, as the attorney could not attest to what Rule 11 requires.

   Unfortunately, the AOC form petition, AOC-J-130, does not include space for the attorney's signature.

2. **Why would DSS file an abuse, neglect, or dependency petition when it is not seeking custody of the child?**

   Answer: Court intervention may be required to force parents to accept or participate in needed services or treatment when DSS determines that a child is abused, neglected, or dependent, but that it is safe for the child to remain at home. In some cases, grounds for nonsecure custody under G.S. 7B-503 do not exist, even though the allegations and evidence are sufficient to establish abuse, neglect, or dependency.

Discussion:

A. G.S. 7B-302(c) says that if a DSS assessment indicates that abuse, neglect, or dependency has occurred:

- DSS must decide whether immediate removal of the child from the home is necessary for the child's protection.
- If immediate removal does not seem necessary, DSS must immediately provide or arrange for protective services.
- If the parent (or guardian, custodian, or caretaker) refuses to accept the protective services provided or arranged by the director, the director shall sign a petition seeking to invoke the jurisdiction of the court for the protection of the child.

B. In some districts a petition filed without seeking custody is called a "compliance petition." That is not a statutory term, and these petitions are no different from any other petition alleging that a child is abused, neglected, or dependent. Sometimes DSS, when it files a petition, also seeks a nonsecure custody order based on one of the grounds in G.S. 7B-503. Sometimes it does not.

The term "compliance petition" may be misleading, as it suggests that there is something the parent is legally required to do. Unless the narrow grounds for temporary custody under G.S. 7B-500 exist, DSS has no authority to place the child or to impose requirements on parents before a petition is filed and the court enters an order. If DSS and the parent have entered into a case plan or kinship placement arrangement, these should reflect the parent's voluntary agreement to the plan or arrangement. The petition and case are not about compliance, they are about whether the child is an abused, neglected, or dependent juvenile.

C. The purposes of the Juvenile Code include "preventing the unnecessary or inappropriate separation of juveniles from their parents." [G.S. 7B-100(4)] After an adjudication of abuse, neglect, or dependency, the Code state's that "[i]f possible, the initial approach should involve working with the juvenile and the juvenile's family in their own home so that the appropriate community resources may be involved in care, supervision, and treatment according to the needs of the juvenile." And, of course, G.S. 7B-507 sets out requirements for DSS to make reasonable efforts to prevent the need for a child's removal from the home as well as reasonable efforts to return the child home when removal is necessary.

D. Whether a petition alleging neglect can properly be filed when the child is safe in a voluntary kinship placement will depend on the degree to which the parents constitute a risk to the child given the relative's lack of legal authority to maintain custody of the child. *See In re K.J.D.*, 203 N.C. App. 653 (2010), and *In re D.L., Jr.*, ___ N.C. App. ___, 715 S.E.2d 623 (2011). If the child has been safe with the relative for some time and the parents are not threatening to disrupt the placement, it is doubtful that grounds for nonsecure custody would exist when a petition is filed.

3. **If the respondent in an abuse, neglect, or dependency case is a relative who has cared for the child for many years, is the relative entitled to appointed counsel?**

Answer: Probably not.

Discussion: The statute, G.S. 7B-602(a), gives only parents the right to appointed counsel if indigent. N.C. law, like the law in most other states, goes further than the U.S. Constitution requires in bestowing a right to appointed counsel for parents in juvenile cases. *See Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) (holding that whether due process requires the appointment of counsel for an indigent parent in a termination of parental rights action must be determined by the court on a case by case basis).

In 2008 the N.C. Office of Indigent Defense Services adopted a policy that it will pay for counsel for an indigent non-parent in an abuse, neglect, or dependency case, if the court appoints counsel for the non-parent based on a conclusion that due process requires the appointment of counsel. The policy can be found at http://www.ncids.org/Rules%20&%20Procedures/Policies%20By%20Case%20Type/AND-TPR/AbuseNeglectDepTPRLinks.htm.

4. **What are the standards and procedures for appointing a guardian ad litem for a parent in a juvenile case? What is the role of the guardian ad litem?**

Answer:

- The court should appoint a GAL for an adult respondent only after conducting an inquiry to determine whether there is a reasonable basis to believe the parent (i) is incompetent or (ii) has diminished capacity and cannot adequately act in his or her own interest. If the court finds either, appointment of a GAL is discretionary.
- Whether the role of a parent's GAL in a juvenile case is primarily one of "assistance" or one of "substitution" is a question the N.C. Supreme Court has directed the court of appeals to answer. *See In re P.D.R.*, ___ N.C. ___, 723 S.E.2d 335 (2012).

Discussion:

A. Confusion has surrounded the appointment and role of GALs for parents in juvenile cases for a variety of reasons:

   1) the different ways in which the term "guardian ad litem" is used throughout the N.C. General Statutes.

   2) previous Juvenile Code provisions that required GAL appointments for parents in some cases based solely on what was alleged in a petition. (Even after those provisions were repealed, some courts continued to appoint GALs for parents routinely in certain kinds of juvenile cases.)

   3) the initial omission from G.S. 7B-1101.1(c) of a reference to Rule 17 of the Rules of Civil Procedure, leading the court of appeals to decide in *In re L.B.*, 187 N.C.

App. 326 (2007), *aff'd per curiam*, 362 N.C. 507 (2008), that a GAL under that subsection was something different from a Rule 17 GAL, with a role that was unclear. Subsequently the statute was amended to add a reference to Rule 17.

4) case law that has not produced in a clear, consistent articulation of the role of a parent's GAL in a juvenile case.

5) the surprising paucity of guidance and helpful case law regarding the appointment and role of guardians ad litem under Rule 17.

B. Under the current version of the Juvenile Code's guardian ad litem provisions, in G.S. 7B-602 and 7B-1101.1, no case has been reversed for a court's failure to appoint a guardian ad litem for a parent. At least two have been reversed based on holdings that the trial court abused its discretion by failing to conduct an inquiry to determine *whether* the parent needed a guardian ad litem.

- In *In re N.A.L.*, 193 N.C. App. 114 (2008), the petition alleged dependency and included allegations that respondent had trouble controlling anger outbursts, tended to be aggressive, lacked understanding of her neglect of the child, had an IQ score of 74, and was diagnosed with Personality Disorder and Borderline Intellectual Functioning. The trial court found that she had "significant mental health issues" that affected her ability to parent. The court of appeals said, "Given the allegations made by DSS and the diagnosis of respondent-mother, we believe the record indicates the trial court should have 'properly inquired into' respondent-mother's competency pursuant to N.C. Gen.Stat. § 1A–1, Rule 17 and determined whether respondent-mother was in need of a guardian *ad litem."*

- Similarly, in *In re M.H.B.*, 192 N.C. App. 258 (2008), the trial court's findings of fact referred to respondent's mental health issues, bizarre behavior in the courtroom, posttraumatic stress disorder, and diagnosis as being manic depressive and bipolar. Again the court of appeals held that failing to conduct a hearing on whether respondent needed a guardian ad litem was an abuse of discretion.

Those cases can be contrasted with two in which the court of appeals held that the allegations, evidence, and findings were not sufficient to require either a hearing on the need for a guardian ad litem or the appointment of a guardian ad litem.

- In *In re C.G.A.M.*, 193 N.C. App. 386 (2008), the court held that even though a trial judge has a duty to inquire into a party's competence in a civil case when a substantial question arises as to the party's competence, the mere allegation that a parent is incapable of caring for his or her child is not sufficient to raise that question. In this case, the incapability was due primarily to respondent's incarceration, not serious mental health issues.

- In *In re A.R.D.*, 204 N.C. App. 500 (2010), the court of appeals stressed that the standard for reviewing a trial court's failure to conduct a competency inquiry or to appoint a GAL is abuse of discretion. In this case the court upheld the trial court's failure to do either, noting that "none of [the] evidence amount[ed] to a diagnosis

of a mental health issue or indicate[d] that respondent-mother was unable to handle her own affairs."

C. As noted above, the role of a respondent's GAL in a juvenile case has never been altogether clear, and the court of appeals now has been directed to address whether it is primarily one of assistance or one of substitution. [*See P.D.R.*, cited above.] In *P.D.R.*, one issue is whether a party for whom a GAL has been appointed can waive his or her right to counsel.

An attorney representing a party with possible diminished capacity may have questions about how to proceed when a GAL is appointed for the attorney's client. The attorney must be guided by Rule 1.14 of the Revised Rules of Professional Conduct.

Rule 1.14. Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem or guardian.
(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

D. Some things about the role of the GAL are clear. There is no requirement that the GAL be an attorney, and the GAL's role is not to serve as a second attorney for the respondent. G.S. 7B-602(c) makes clear that the same person cannot serve as both the attorney and the GAL for a respondent. The roles of the attorney and GAL are different, even if the role of the GAL is not totally clear.

In some districts the practice has been to allow a respondent's GAL to question witnesses, present evidence, and otherwise participate as an attorney. That seems similar to allowing a party in any civil case to do those things even when the party is represented by counsel. If a GAL's role is determined to be one of assistance rather than substitution, it might be possible to view that kind of participation differently.

A GAL's role by definition is limited to the proceeding in which the GAL is appointed. The GAL has no authority and is not entitled to notice with respect to

matters outside the scope of the proceeding. Occasionally the line between what is and what is not part of the proceeding can get fuzzy. Even if an activity involves only social work and is not part of the juvenile court case, notice might be given to the GAL as a courtesy or as a matter of DSS policy.

5. **If only one parent is responsible for a child's abuse, should the child be adjudicated abused "as to" that parent? Should the action be dismissed "as to" the other parent?**

Answer: No.

Discussion:

In 1984 the N.C. Supreme Court said, "In determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent." *In re Montgomery*, 311 N.C. 101, 109 (1984).

The legal issue in an abuse/neglect/dependency case is whether the Juvenile Code definition of one of those terms describes the child; hence, the notion that an adjudication refers to the status of the child. As a matter of public policy, the issue is whether the state (in the form of DSS and/or the court) is justified in intervening in the parent-child relationship, which the state ordinarily does not do, in order to protect the child. The court adjudicates a status of the child, not action of the parent(s), although those actions are relevant in determining whether the child is an abused, neglected, or dependent juvenile as the Juvenile Code defines those terms.

In a termination of parental rights proceeding based on abuse or neglect, on the other hand, the statute is written in the active voice. The issue is no longer whether the child is an abused or neglected juvenile, but is whether the parent has abused or neglected the child. So, a termination petition against both parents that included allegations only about one parent properly should be dismissed "as to" the other parent.

When a child is adjudicated neglected based solely on evidence relating to one parent's conduct, the fact that the other parent was not responsible for the neglect should be clear in the findings of fact. Then, a parent's involvement or lack of involvement is a significant factor in the dispositional and review stages of the case. If one parent not only was not responsible for the neglect but is an available, fit parent to care for the child, the disposition most likely should be giving that parent custody of the child or even terminating jurisdiction if the child is with that parent. See *In re Dexter*, 147 N.C. App. 110 (2002); *In re J.A.G.*, 172 N.C. App. 708 (holding that findings did not support conclusion that child should remain in DSS custody, when father abused the child but findings did not establish that the mother was unfit or an improper person to care for the child).

In some cases a number of years ago the court of appeals employed "as to" language with regard to adjudications – probably adopting language that was used in trial court orders or the parties' briefs. More recently, the appellate courts have rejected that approach.

- In *In re B.M.*, 183 N.C. App. 84, 87 (2007), the court of appeals said: "[I]t is important to note that a stark distinction must be drawn between the focus of hearings on the adjudication and disposition of a juvenile and hearings on the termination of parental rights. At the adjudication and dispositional stage it is the status of the juvenile that is at issue rather than the status of a parent. By determining that a juvenile is abused, neglected or dependent, the court does not alter the rights, duties and obligations of the parent but rather determines the status of the juvenile so that his or her best interests may be ascertained." *See also In re R.L.*, 186 N.C. App. 529 (2007) (abrogated for unrelated reasons by *In re T.H.T.*, 362 N.C. 446 (2008)) (citing *B.M.* and noting the "important distinction between cases involving termination of parental rights and cases involving adjudication of a juvenile as abused, neglected, or dependent," and stating that the latter determine "the status of the juveniles").
- In *In re A.S.*, 181 N.C. App. 706, *aff'd,* 361 N.C. 686 (2007), Judge Levinson, concurring in part and dissenting in part, said: "The language of this paragraph appropriately concludes that M.J.W. had obtained the status of an abused and neglected juvenile . . . It is nonsensical for trial courts to adjudicate abuse, neglect and/or dependency 'as to' certain parents or caretakers."
- The N.C. Supreme Court, in *In re M.G.* 363 N.C. 570 (2009), referred to the adjudication as the "hearing on the juveniles' statuses."
- Just last year, in *In re S.C.R.*, ___ N.C. App. ___, 718 S.E.2d 709, 713 (2011), the court of appeals held that the trial court erred when it dismissed the petition against the father because he was not involved in any of the actions alleged in the petition. The court said, "'The purpose of abuse, neglect and dependency proceedings is for the court to determine whether the juvenile should be adjudicated as having the status of abused, neglected, or dependent.' Adjudication and disposition proceedings do not involve the 'culpability regarding the conduct of an individual parent.' Thus, the trial court should not have dismissed the petition as to the father, since an adjudication of abuse, neglect, or dependency pertains to the status of the child and not to the identity of any perpetrator of abuse or neglect of the child. We caution trial courts to carefully distinguish between an adjudication proceeding, and termination of parental rights proceedings, which 'focus on whether the parent's individual conduct satisfies one or more of the statutory grounds which permit termination.'" (citations omitted)

6. Does the Interstate Compact on the Placement of Children (ICPC) apply when the court awards custody or guardianship to an out-of-state parent or relative?[1]

Answer: Yes, in almost all instances.

Discussion:

N.C. case law and the ICPC regulations are not entirely consistent with respect to applicability of the ICPC to out-of-state placements with parents or relatives.

A. In *In re Rholetter*, 162 N.C. App 653 (2004), the court of appeals held that the provisions of the ICPC did not apply at a permanency planning hearing when the court awarded custody to an out-of-state mother The child had been removed from her father and stepmother, and custody was eventually given to the mother who lived in South Carolina. The Court held that the award of full custody to a non-removal parent was not a "placement" under 7B-3800, Article III(a), because it was not for purposes of foster care or preliminary to an adoption.

B. *Rholetter* is generally consistent with ICPC Regulation 3, which recognizes "placements made without ICPC protection" to non-removal parents when

1) the court has no evidence that the parent is unfit,

2) the court does not seek any evidence of fitness from the receiving state, and

3) the court relinquishes jurisdiction over the child immediately upon placement with the parent.

Regulation 3 does allow a request for a "courtesy check" of the non-removal parent by the receiving state, without invoking the full ICPC home study process. A "courtesy check" is totally discretionary with the receiving state. A placement with a non-removal parent made without ICPC compliance or with only a courtesy check will receive no monitoring or supervision in the receiving state.

C. The court of appeals has also held that the ICPC does not apply to an award of guardianship (and presumably juvenile court custody as well) to a relative in another state, again reasoning that such an award was not a placement for purposes of foster care or preliminary to an adoption. *In re J.E.*, 182 NC App 612 (2007). The majority distinguished the holding in an earlier case that the ICPC applied to out-of-state relative placements under G.S. 7B-505 (nonsecure custody) and 7B-903 (disposition), noting that those statutes specifically require ICPC compliance for out-of-state placements, while neither G.S. 7B-600 (guardianship) nor G.S. 7B-907 (permanency planning) mentions the ICPC. *See In re L.L.*, 172 N.C. App. 689 (2005), *abrogated on other grou*nds by *In re T.H.T.*, 362 N.C. 446 (2008).

[1] Jane Thompson, Assistant Attorney General and Child Welfare Attorney, wrote most of the response to this question.

D. Like the opinion in *Rholetter*, the *J.E.* opinion did not consider the binding effect of the ICPC Regulations. Regulation 3(2)(a) states that the ICPC covers four types of placement categories:

1) adoptions,

2) licensed foster homes (whether related or unrelated),

3) group homes and residential placements, and

4) placements with parents and relatives.

Regulation (2)(b) then sets out the exception for placement with the non-removal parent discussed above. There is no exception for any other relative placement, no matter the type of placement. Awards of custody or guardianship to out-of-state relatives without ICPC compliance are almost always met with opposition from receiving states who view these placements as requiring ICPC compliance and often call national ICPC staff to complain. The ICPC Regulations can be found at http://icpc.aphsa.org.

7. When the court orders guardianship or awards custody to a relative, as the permanent plan, is it proper to close the case?

Answer: No.

Discussion:

A juvenile court order should never state that the case is "closed." When faced with orders closing juvenile cases, the court of appeals has been forced to try to discern the trial court's intention – holding in some cases that the trial court continued to have jurisdiction and in other cases that it did not. An order should state explicitly whether the court is retaining or terminating jurisdiction.

This issue involves two critical questions:

A. Is the court retaining or terminating jurisdiction? Jurisdiction should be terminated only when the case is completely over. Terminating jurisdiction terminates the effectiveness of any orders entered in the juvenile case. So, an order that terminates jurisdiction after awarding guardianship of a child to a relative nullifies the award of guardianship. *See* G.S. 7B-201(b).

B. If the court is retaining jurisdiction, because a guardianship order needs to remain in effect for example, can review hearings be waived and, if so, should they be waived? Review/permanency planning hearings are required even if DSS no longer has custody and even if the guardianship or custody order accomplishes the permanent plan for the child. The court can waive review hearings only after making each of the findings required by G.S. 7B-906(b):

1) The child has lived with a relative (or relatives) or has been in the custody of another suitable person for at least one year.

2) The child's placement is stable and continuing the placement is in the child's best interests.

3) Neither the child's best interests nor any party's rights require that review hearings be held every 6 months.

4) All parties are aware that the case may be scheduled for review at any time by filing a motion for review or on the court's own motion.

5) The court order has designated the relative or other suitable person as the child's permanent caretaker or guardian of the person.

Unless the court can make *all* of these findings, waiving review hearings is not an option.

8. If the court orders guardianship or awards custody to a relative, as the permanent plan, can the court release or relieve the child's guardian ad litem and attorney advocate, DSS, and the parents' attorneys from the case?

Answer:

- The statute controls when the appointment of the child's GAL ends.
- Parents' attorneys may be allowed to withdraw as long as it is clear that the respondent has a right to be represented at every critical stage of the proceeding and that right is protected.
- It is not clear what it would mean to relieve DSS.

Discussion:

A. Child's guardian ad litem. Termination of the GAL's appointment is dictated by statute. G.S. 7B-601(a) says, "The appointment shall terminate when the permanent plan has been achieved for the juvenile and approved by the court." The same would be true for the attorney advocate if there is one. The statute also makes clear that the court may reappoint the GAL upon a showing of good cause on motion of a party, including the GAL, or the court's own motion.

B. Parents' attorneys. The Juvenile Code is silent about terminating the appointment of a parent's court-appointed attorney. However, G.S. 7A-451(b) states that the parent's right to counsel "continues through any critical stage of the action or proceeding." If the court does release appointed counsel – presumably meaning allow the attorney to withdraw – the parent should be informed that he or she may apply for re-appointment of counsel, and if the matter comes back before the court, the court itself should inquire about the parent's desire to be represented and eligibility for appointed counsel.

C. DSS. Releasing or relieving DSS is in the same category as "closing a case." There is no statutory reference to any such action, and the meaning of an order relieving DSS is unclear.

1) Presumably the court has already addressed relieving DSS of the obligation to make reunification efforts.
2) By awarding guardianship or custody to a relative, the court has already relieved DSS of custodial responsibility for the child.
3) Whether DSS is relieved of its statutory duty to schedule review hearings under G.S. 7B-907 depends on whether the court has properly waived review hearings.
4) If the court wants DSS to supervise the child's placement, make occasional or periodic visits, or maintain contact with the guardian or custodian, the court's order can say that.
5) If there is no action the court is directing or expecting DSS to take, the order can either say that or say nothing.
6) DSS is the party that initiated the action, and it should be clear that if any other party later files a motion in the case, DSS is still a party and must be served.

Nevertheless, it seems to be the practice in many districts for DSS to ask to be relieved and for the court to grant that request. If that is the case, it might be helpful for the local juvenile court rules to address what is and is not meant by an order "relieving" DSS.

9. Can a child be adjudicated abused or neglected based only on evidence of the abuse or neglect of another child in the home?

Answer:

Probably not. There must be some connection between the abuse or neglect of one child and risk to the other children in the home.

Discussion:

The definition of "neglected juvenile" in G.S. 7B-101(15) states that "[i]n determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home." The legislature had the option of defining "neglected juvenile" to include a juvenile who lives in such a home, but chose not to. Relevance falls short of sufficiency to establish neglect.

In cases involving siblings, the court of appeals has stated that the trial court "must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case." That statement was made first in *In re McLean*, 135 N.C. App. 387 (1999) (holding that a newborn was properly adjudicated neglected even though she had never lived in the parents' home). It has been quoted or repeated in 41 other opinions since then (eight of them published). Not all of these cases involve siblings, but they acknowledge the "predictive" nature of the court's decision when a case

involves a risk of future harm. *See In re K.J.D.*, 203 N.C. App. 653 (2010) (holding that a child could be adjudicated neglected even though she had been placed with a relative with whom she was safe, because she would be at substantial risk if her parents removed her from that home).

Like *McLean*, above, *In re Nicholson and Ford*, 114 N.C. App. 91 (1994), involved siblings of a child who died from shaken baby syndrome. The trial court dismissed the petition with respect to the 3 ½-year-old child and adjudicated the infant, born after the death of the deceased child, to be neglected. The court of appeals affirmed the trial court's dismissal of the petition regarding the older child, even though she was living with the stepfather who had been convicted of involuntary manslaughter in connection with the shaken-baby death. There was no evidence that this child had ever been abused, and she was not in danger from shaken-baby syndrome.

More recent cases include the following:

- *In re A.K.*, 178 N.C. App. 727 (2006) (reversing the adjudication in a case in which the parent refused to acknowledge the cause of another child's injuries, but the trial court relied solely on prior orders and there was no evidence of the parents' actions or circumstances since entry of those orders).
- *In re C.B.*, 180 N.C. App. 221 (2006) (reversing adjudication of neglect of siblings, which was based in part on the abuse of another child, after concluding that the adjudication of abuse of that child was not supported by the evidence).
- *In re D.B.J.*, 197 N.C. App. 752 (2009) (affirming the adjudication in a case in which an older sibling had been abused and other indications of risk included domestic violence and substance abuse).
- *In re C.M.*, 198 N.C. App. 53 (2009) (affirming an adjudication where evidence showed the children were substantially at risk due to abuse of another child, unstable and volatile living conditions, and the parents' deceptive nature).

10. Can a relative who wants custody of the child intervene in an abuse, neglect, or dependency case?

Answer: Maybe/probably

Discussion:

Surprisingly little case law addresses intervention in juvenile cases. Some appellate court decisions refer to parties who have intervened, but the intervention itself has not been the issue on appeal in most of those cases.

A. In *Hill v. Hill*, 121 N.C. App. 510 (1996), the court of appeals reversed the trial court's denial of the IV-D child support enforcement program's motion to intervene in a private termination of parental rights action. The court held that the program should have been allowed to intervene of right, because its interest in seeking

continued reimbursement from the father for public assistance the mother received was not protected by the other parties.

In a somewhat unusual case, *In re Scearce*, 81 N.C. App. 531 (1986), the court of appeals held that allowing intervention by foster parents was proper. The case was initiated as an action asking the court to take jurisdiction to terminate the father's rights, but it morphed somehow into a custody case.

B. The little case law there is suggests that G.S. 1A-1, Rule 24, can be applied in juvenile cases to give the court discretion to allow permissive intervention. (*But see* paragraph F below.) No case has said that it cannot. In addition, though, no case has specifically analyzed Rule 24 in light of the appellate courts' holdings about the applicability of the Rules of Civil Procedure in juvenile cases.

   1) If the Juvenile Code states that a specific rule applies, of course it does. The Juvenile Code, although it does not refer specifically to Rule 24(b), provides that anyone who has standing to file a petition to terminate parental rights "may intervene in a pending abuse, neglect, or dependency proceeding for the purpose of filing a motion to terminate parental rights." [G.S. 7B-1103(b)] Otherwise, the code is silent about intervention.

   2) The Rules will apply to fill a procedural gap in the code's provisions, consistent with the code's purposes.

   3) The Rules will not apply if the Juvenile Code provides a different procedure or, even if it does not, if applying the rule would constitute conferring a benefit that is not contemplated by the code.

   See In re B.L.H., 190 N.C. App. 142, *aff'd*, 362 N.C. 674 (2008).

   Those guidelines do not lead to an obvious result in relation to Rule 24 or, at least, the correct answer can be debated.

C. Assuming that discretionary intervention is permissible, the person seeking to intervene cannot rely solely on a statement or motion indicating that he or she wants to intervene. Rule 24 requires that a motion to intervene

   - be timely and not delay or prejudice the rights of existing parties;
   - be in writing, filed with the court, and served on all affected parties; and
   - be accompanied by a pleading that sets forth a claim or defense that has a question of law or fact in common with the juvenile action.

   Two civil custody cases that are helpful in determining whether a motion to intervene is sufficient are *Quesinberry v. Quesinberry*, 196 N.C. App. 118 (2009), and *Smith v. Barbour*, 195 N.C. App. 244 (2009).

D. Because placement, custody, or guardianship with relatives is an option available to the court regardless of whether the relatives are parties, it may be helpful to consider what the persons seeking to intervene are seeking.

- Do they want to be able to present evidence and cross-examine witnesses?
- Do they have evidence, arguments, etc., that are relevant and helpful to the court and that are not likely to be put forward by other parties?
- Do they understand that even if they become parties they will not have a right to appeal any decision in the juvenile case? Only a parent, guardian, or custodian can appeal, and these people should already be parties to the action.

  Note, however, that there may be an issue with respect to someone who is a custodian or guardian only because the court in the juvenile proceeding has given the person custody or guardianship. Language recently added to G.S. 7B-600(b) seems to say that applying the higher standard for removing a guardian appointed in a juvenile case requires not only that the guardianship is the permanent plan for the child, but also that the guardian be a party to the proceeding. It is not clear how the guardian in that situation becomes a party.

E. A person seeking to intervene in order to seek custody of the child might be on more solid footing by filing a civil custody action (or moving to intervene in an existing one) and seeking consolidation of that action and the juvenile action, as allowed by G.S. 7B-200(d). The person still would have to state a cause of action for custody, but as a party in a separate civil custody action the person would have a right to appeal any final order entered in that case.

F. If intervention to pursue a custody claim is permitted in abuse, neglect, and dependency cases, the same may not be true in termination of parental rights cases. If a respondent parent is not permitted to file a counterclaim seeking custody in a termination action, it seems most unlikely that a third party could intervene to seek custody in the same action. The court of appeals has interpreted the Juvenile Code as implicitly prohibiting the filing of counterclaims in termination cases. *See In re Quevedo,* 106 N.C. App. 574 (1992); *In re Peirce,* 53 N.C. App. 373 (1981) (both decided under an earlier, but not substantially different, version of the termination of parental rights statutes).

  The issue has not been addressed recently, and in at least two other termination of parental rights cases appellate court opinions have referred to the filing of a counterclaim by a respondent, without mention of whether the filing was permissible. The trial court in both cases addressed only the termination of parental rights petition. *See In re A.R.D.*, 204 N.C. App. 500, *aff'd,* 364 N.C. 596 (2010); *In re Guynn,* 113 N.C. App. 114 (1993).

10. If the court gives DSS custody in a delinquency case, must DSS file a petition?

Answer: No

Discussion:

Placing the juvenile in the custody of DSS is one dispositional alternative in the case of a delinquent (or undisciplined) juvenile. DSS must be given notice and an opportunity to be heard, however, before the court orders that disposition. In addition, G.S. 7B-2506(1)c. requires that the order giving DSS custody include certain findings and that the child's placement be reviewed pursuant to G.S. 7B-906, as it would be if the child had been placed as a result of an abuse, neglect, or dependency adjudication. In other respects, however, the case is governed only by the statutes that apply to delinquency proceedings.

- The order does not create an abuse, neglect, or dependency case.
- The court is not adjudicating the juvenile to be abused, neglected, or dependent, and does not have jurisdiction to do that in a delinquency case. *See*, e.g., *In re D.C.*, 183 N.C. App. 344 (2007) (holding that the trial court erred by adjudicating a child to be neglected when the petition alleged only that he was dependent).
- DSS is not required to initiate an abuse, neglect, or dependency proceeding although it sometimes chooses to do so.

  It is not unusual for a DSS to file a neglect or dependency petition after being given custody of a child through a delinquency proceeding. But it is not necessary, since the dispositional alternative exists independently in the delinquency statutes. It is appropriate for DSS to file a petition in some instances, especially if a parent is objecting to the placement. When abuse, neglect, or dependency – rather than delinquency – is the true underlying cause of the need to place the child in DSS custody, DSS's filing a petition may be necessary in order to protect the parent's rights and invoke other provisions designed specifically for abused, neglected, and dependent children. In the delinquency case there is no statutory authority to appoint counsel for indigent parents, to appoint a GAL or attorney advocate for the child, or to invoke some of the authority over parents that exists only in an abuse, neglect, or dependency proceeding.

  However, the decision whether to file a petition rests only with DSS. The court may report suspected abuse, neglect, or dependency to DSS, but may not order DSS to file a petition.

  When a delinquent juvenile satisfactorily completes a term of probation, the court often terminates its jurisdiction in the case. If a delinquency disposition places the juvenile in DSS custody and that placement needs to continue, the court should retain jurisdiction beyond the end of the probation period. Terminating jurisdiction will nullify the order giving DSS custody. The form that is used to terminate probation supervision, AOC-J-465, includes the option to retain jurisdiction and space for the court to indicate why it is retaining jurisdiction.
  http://www.nccourts.org/Forms/Documents/537.pdf

11. At adjudication in a termination of parental rights case, can the court take judicial notice of prior orders in the case? the entire case file?

Answer: Yes, but . . .

Discussion:

The court can take judicial notice of prior orders and records. The harder question is, "What does that mean?"

- Is it different from introducing those things into evidence?
- It certainly does not mean that everything in the prior orders or records can be taken as "true" by the trial court.
- If the purpose is having the trial court adopt specific findings of fact, that should be approached as an issue of collateral estoppel and probably can be done only in relation to prior adjudicatory orders, where the same standard of proof and rules of evidence applied.
- If the intent is to show that the court ordered particular things, that a particular party was given notice, that a hearing was held on a certain date, etc., the court should take judicial notice specifically of those facts.
- The court of appeals' broad statements about judicial notice in juvenile cases almost always include reference to the presumption that the trial court "disregarded any incompetent evidence." So, judicially noticing the record or a prior order does not mean that it is safe to base findings of fact on everything in the record or prior order.

For a thorough discussion of this issue, see John Rubin, "Prior Orders and Proceedings and Judicial Notice," Section 11.7 in Child Abuse, Neglect, Dependency, and Termination of Parental Rights Proceedings in North Carolina (School of Government, 2011), available at http://sogpubs.unc.edu/electronicversions/pdfs/andtpr.pdf.