

**District Court Judges' Summer Conference  
Wilmington, NC**

**June 25, 2009**

**JUVENILE LAW UPDATE**

**Cases Filed from October 7, 2008, through June 2, 2009**

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## JURISDICTION

### A. Issuance of summons

- Subject matter jurisdiction attaches when a summons is issued.
- Defects or irregularities in the summons or in service of process relate to personal, not subject matter, jurisdiction and can be waived.

**In re J.T.**, 363 N.C. 1, 672 S.E.2d 17 (2/6/09).

<http://www.aoc.state.nc.us/www/public/sc/opinions/2009/pdf/155-08-1.pdf>

**Facts:** In an action to terminate parental rights, a summons was issued, but it did not name the child as a respondent. The summons was not served on the child, the child's guardian ad litem, or the attorney advocate. Both the GAL and attorney advocate participated fully in the hearing, however, without raising any objection to the summons or service of process. The court of appeals reversed the order terminating parental rights, holding that the failure to name the child as a respondent in the summons deprived the trial court of subject matter jurisdiction.

**Held:** Reversed.

The Supreme Court held:

1. The trial court obtained subject matter jurisdiction when a summons was issued, and any problem with the summons or service of process related only to personal jurisdiction.
2. By participating in the proceeding, the attorney advocate and GAL waived any issue with respect to defects or irregularities in process or service of process.

### Cases affected by J.T.

- On 2/6/09 the Supreme Court also granted DSS's petition for discretionary review in **In re I.D.G.**, 188 N.C. App. 629, 655 S.E.2d 858 (2008), *remanded*, \_\_\_ N.C. \_\_\_, 673 S.E.2d 132 (2009), for the limited purpose of remanding to the court of appeals for reconsideration in light of **J.T.** (In **I.D.G.**, the court of appeals had held that failure to issue a summons to the child deprived the trial court of subject matter jurisdiction in a termination case.)
- **In re N.C.H.**, \_\_\_ N.C. App. \_\_\_, 665 S.E.2d 812 (2008), *affirmed, but criticized, per curiam*, 363 N.C. 116, \_\_\_ S.E.2d \_\_\_ (3/20/09).

<http://www.aoc.state.nc.us/www/public/sc/opinions/2009/pdf/463-08-1.pdf>

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

**Background:** In 2008, the court of appeals affirmed an order terminating parental rights, holding that the trial court had subject matter jurisdiction even though the summons did not name the juvenile as a respondent, when (1) the summons named the child in the caption (but not as a respondent) and (2) it was served on the child's guardian ad litem.

Then, in February, 2009, the Supreme Court decided **J.T.**, *supra*, holding that (1) subject matter jurisdiction attaches when a summons is issued, and (2) any defects or irregularities in the summons or service of process relate to personal, not subject matter, jurisdiction and can be waived.

**Held:** Referring to its decision in **J.T.**, the Supreme Court affirmed the result reached by the court of appeals, but rejected that court's reasoning, which had related service of process to whether the trial court had subject matter jurisdiction. The Supreme Court said, "We reject the notion . . . that service of the summons on any particular party is necessary to invoke the trial court's subject matter jurisdiction."

The Supreme Court's holding in **J.T.** would affect the court's reasoning, but not its conclusion, in the following termination of parental rights cases:

- **In re S.L.T.**, \_\_\_ N.C. App. \_\_\_, 670 S.E.2d 922 (1/20/09) (holding that juvenile need not be named as respondent if the juvenile is named in the caption of the summons and the guardian ad litem certifies that the juvenile was served).
- **In re S.N.**, \_\_\_ N.C. App. \_\_\_, 669 S.E.2d 55 (12/2/08) (holding that trial court had subject matter jurisdiction where the summons named the child in the caption; named the child's guardian ad litem, but not the child, as a respondent; and was served with the petition on the child's guardian ad litem).
- **In re S.D.J.**, \_\_\_ N.C. App. \_\_\_, 665 S.E.2d 818 (9/2/08) (holding that trial court had subject matter jurisdiction when juveniles were named in the caption of the summonses and the juveniles' representatives certified that the juveniles were served).

The Supreme Court's holding in J.T. effectively overrules the following decision:

- **In re K.J.L.**, \_\_\_ N.C. App. \_\_\_, 670 S.E.2d 269 (12/16/08) (trial court did not have subject matter jurisdiction because no summons was issued to the child or served on the child's guardian ad litem). [However, see K.J.L., below, for the court's other holding, which may not be affected by J.T.]

#### 2009 Legislation: Technical and Clarifying Changes to the Juvenile Code

**S.L. 2009-38 (H 1272).** With respect to termination of parental rights proceedings, the act

- rewrites G.S. 7B-1104 to reiterate that the juvenile is a party to the action;
- rewrites G.S. 7B-1106, relating to actions initiated by petition, to delete the requirement that the juvenile be named as a respondent and served with a summons, and to add a requirement that the juvenile's guardian ad litem or attorney advocate be served pursuant to G.S. 1A-1, Rule 5, if the juvenile has a guardian ad litem; and
- rewrites G.S. 7B-1106.1, relating to actions initiated by motion, to delete the requirement that a juvenile who is 12 or older be served with notice, and to allow service on the juvenile's guardian ad litem to be on either that individual or the attorney advocate.

The act became effective May 27, 2009.

#### B. Validity of summons

- The trial court did not have subject matter jurisdiction because, in the underlying case in which DSS was awarded custody, no proper summons was ever issued, because the summons was not signed by a clerk or assistant or deputy clerk.

**Note:** This case was argued in the N.C. Supreme Court on 5/6/09.

**In re K.J.L.**, \_\_\_ N.C. App. \_\_\_, 670 S.E.2d 269 (12/16/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/080284-2.htm>

**Facts:** Parents appealed from an order terminating their parental rights, arguing that the trial court lacked subject matter jurisdiction.

**Held:** Vacated.

1. In the underlying neglect/dependency action, in which DSS obtained custody of the child, no summons was ever properly issued, because the summons was not signed by a clerk or assistant or deputy clerk. Therefore the court lacked subject matter jurisdiction in the underlying case. [Although the opinion does not say this directly, because the order giving DSS custody was void for lack of jurisdiction, DSS did not have standing to petition for termination of parental rights.]
2. [The court's other holding, effectively overruled by J.T., is described above.]

- Trial court lacked subject matter jurisdiction where respondent accepted service of the summons and petition after the summons expired and petitioner had not obtained endorsement, extension, alias and pluries summons, or a new summons.

**In re N.E.L., \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (6/2/09).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2009/081573-1.htm>

**Facts:** DSS filed a petition to terminate respondent's rights on 12/1/06. A summons was issued but was returned unserved on 12/6/06. On 9/12/07 respondent signed an "acceptance of service" of a summons and petition. After a hearing, the court entered an order terminating respondent's rights on 10/30/07.

**Held:** Vacated.

1. The trial court did not have subject matter jurisdiction because when respondent "accepted service," the action had discontinued and it was as if no action had been filed.
2. When the summons was not served within 60 days after issuance, petitioner had 30 additional days within which to obtain an endorsement, an alias and pluries summons, or an extension. Petitioner also could have obtained an endorsement, an alias and pluries summons, or a new summons more than 90 days after issuance of the original summons, with the effect that the action would have been deemed filed on the date of the endorsement or issuance of the alias and pluries or new summons. In this case, petitioner took none of those steps, resulting in the discontinuance of the action and the absence of subject matter jurisdiction.

- In an action to terminate parental rights initiated by motion in a pending case, DSS's failure to serve respondent with notice was error; however,
  - it did not deprive the court of subject matter jurisdiction, and
  - respondent waived any objection by filing a response and participating in the hearing.

**In re C.S.B., \_\_\_ N.C. App. \_\_\_, 669 S.E.2d 15 (12/2/08).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/080881-1.htm>

**Facts:** DSS initiated a termination proceeding by filing a motion in the pending neglect proceeding. DSS served respondent and her attorney with the motion, but not with the notice required by G.S. 7B-1106.1. Respondent filed a response to the motion and participated in the hearing through her attorney, without objecting to the sufficiency of notice. The court terminated respondent's rights.

**Held:** Affirmed.

1. Failure to serve the required notice on respondent did not affect the trial court's subject matter jurisdiction, because the court had already acquired jurisdiction in the underlying proceeding.
2. Respondent did not preserve for appeal any objection to the lack of notice, because she filed a response and participated in the hearing without raising the issue.

### C. UCCJEA

- When a custody order had been entered in another state, the N.C. court had jurisdiction to enter a nonsecure custody order, but erred in proceeding to adjudication when record failed to show that N.C. had jurisdiction under UCCJEA to modify another state's order.

**In re J.W.S., \_\_\_ N.C. App. \_\_\_, 669 S.E.2d 850 (12/16/08).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/080576-1.htm>

**Facts:** In 2000, a Family Court in New York granted the child's mother temporary custody "pending the criminal court action," after which, it said, either party could petition for custody. In 2006 respondent father, who had signed a one-year apartment lease in N.C., filed a divorce action here. A couple who lived with him and the child reported that respondent had assaulted the child. DSS filed a petition and obtained

nonsecure custody. (Two additional petitions were filed on later dates.) The child remained in nonsecure custody, and the court denied respondent's motions to dismiss for lack of jurisdiction and failure to state a claim, ruling that the court had properly exercised temporary emergency jurisdiction under the UCCJEA. After a hearing, in April 2007 the court adjudicated the child to be neglected and dependent. The order stated that New York had opted not to exercise continuing jurisdiction and that the states had agreed that N.C. was the most appropriate forum to exercise jurisdiction. After a combined dispositional and permanency planning hearing, in May 2007 the court changed the permanent plan to adoption. In August 2007 DSS filed a motion to terminate both parents' rights. In December 2007 respondent filed a motion under G.S. 1A-1, Rule 60(b), asking the court to set aside the April adjudication order, asserting that the trial court lacked subject matter jurisdiction under the UCCJEA. The court denied the motion, and respondent appealed.

**Note:** The facts were substantially more complicated, because respondent also sought relief from a federal court and from state courts in Texas and Virginia during the pendency of the matter in N.C.

**Held:** Reversed.

1. The trial court properly exercised temporary emergency jurisdiction under G.S. 50A-204.
2. Because a custody order had been entered in New York, the trial court could not proceed to adjudication without determining that it had jurisdiction to modify another state's order. The record failed to show that N.C. had jurisdiction, because it did not establish
  - a. that New York had determined that it did not have exclusive continuing jurisdiction, or
  - b. that New York had relinquished jurisdiction to N.C. after finding that N.C. was a more appropriate forum, or
  - c. that either New York or North Carolina had determined that no party still resided in New York.

D. UCCJEA; standing

- 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.
- 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.
- 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.

**In re E.X.J.**, \_\_\_ N.C. App. \_\_\_, 662 S.E.2d 24 (6/17/08), *affirmed per curiam*, 363 N.C. 9, 672 S.E.2d 19 (2/6/09).

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

<http://www.aoc.state.nc.us/www/public/sc/opinions/2009/pdf/341-08-1.pdf>

**Facts:** In 2005, a 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 to the clerk stating he could not attend but that he had a good job and would have his own home soon. 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 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 trial 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).

E. Jurisdiction at TPR disposition

- Trial court did not have subject matter jurisdiction to order that the child be placed with a relative following termination of parental rights, because statute gives DSS exclusive placement authority when the child was in DSS custody at the time the termination petition or motion was filed.

**In re I.T.P-L., \_\_\_ N.C. App. \_\_\_, 670 S.E.2d 282 (12/16/08).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/080622-1.htm>

**Facts:** DSS petitioned for termination of parental rights in the case of a child who had been adjudicated neglected and dependent, placed in the custody of DSS, and placed in foster care. After terminating both parents' rights, the trial court granted legal and physical custody of the child to DSS but ordered placement with the maternal grandmother who was the guardian of the mother's four other children, two of whom were also respondent father's children. Both the parents and DSS appealed.

**Held:** Affirmed in part and vacated in part.

1. Trial court did not have jurisdiction to determine child's placement, because G.S. 7B-1112 gives DSS exclusive placement authority following termination of parental rights when the child was in DSS custody when the petition was filed.
2. The court rejected respondents' arguments relating to
  - a. subject matter jurisdiction, holding summons was sufficient when it named child in the caption and was served on the child's guardian ad litem. [*See J.T.*, above, rejecting this reasoning.]
  - b. sufficiency of the evidence, where error had not been assigned to major findings or to the conclusion of law.
  - c. timely appointment of a guardian ad litem for the mother, where the GAL was appointed 17 days after the petition was filed and three months before the hearing.
  - d. best interest.

F. Jurisdiction during appeal

- During appeal from a termination of parental rights order, the trial court’s jurisdiction is limited to entering temporary orders affecting the child’s custody or placement.

**In re K.L., \_\_\_ N.C. App. \_\_\_, 674 S.E.2d 789 (4/7/09).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2009/081353-1.htm>

**Facts:** In an appeal from an order terminating her parental rights, respondent asserted that the trial court lacked subject matter jurisdiction because the summons in the underlying neglect proceeding had not been signed by the clerk. [That issue is pending in the supreme court, on appeal from the court of appeals’ decision vacating the termination order. In re K.J.L., \_\_\_ N.C. App. \_\_\_, 670 S.E.2d 269 (2008).] While the appeal of the termination order was pending, the trial court granted a motion by DSS in the underlying neglect case to amend the summons by allowing the clerk to sign it. After dismissing respondent’s appeal from that order, the court of appeals granted her petition for a writ of certiorari to consider the issue of whether the trial court had jurisdiction to amend the order in the underlying neglect case during the pendency of an appeal in the termination case.

**Held:** Vacated.

Construing G.S. 7B-1003, the court held that

1. subsection © applied because the action was initiated by petition, not motion; and
2. it provides that during the appeal of a termination order, “the trial court has jurisdiction – in both the TPR action and the underlying abuse, neglect, and dependency action – *only* to ‘enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile.’”

The court reasoned that reading the statute to create a broader exception to the general rule restricting a trial court’s jurisdiction during an appeal (G.S. 1-294), would contradict legislative intent, which was to “authorize continued jurisdiction for a limited purpose: protection of the child pending appeal.”

G. Jurisdiction of Court of Appeals

In an action to terminate parental rights,

- signature of respondent parent’s guardian ad litem on the notice of appeal did not satisfy the requirement that the respondent sign the notice.
- the role of a parent’s guardian ad litem in a termination case is to provide assistance, not to substitute his or her judgment or decisions for those of the parent.

**In re L.B., 187 N.C. App. 326, 653 S.E.2d 240 (12/4/07), affirmed per curiam, 362 N.C. 507, 666 S.E.2d 751 (10/10/08).**

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

**Facts:** In an action to terminate the parents’ rights, guardians ad litem were appointed for both parents pursuant to G.S. 7B-1101.1. After the court entered an order terminating both parents’ rights, both parents’ attorneys and guardians ad litem signed notices of appeal. Petitioner moved to dismiss the appeal for failure to comply with Rule 3A of the Rules of Appellate Procedure.

**Held:** Appeal dismissed.

1. In juvenile cases, Rule 3A of the Rules of Appellate Procedure requires that both trial counsel and the appellant sign the notice of appeal. The court held that the signature of the respondent parent’s guardian ad litem did not suffice to satisfy the requirement that the parent sign. Failure of the parents to sign the notice of appeal deprived the court of appeals of jurisdiction to consider the appeal.

2. The court of appeals contrasted standards for appointing a guardian for an adult under G.S. Chapter 35A, which requires an adjudication of incompetence, and those for appointing a guardian ad litem under G.S. 7B-1101.1, which requires only a reasonable basis to believe the parent is incompetent or has diminished capacity. The court also noted that the provision for appointing a GAL for a minor parent, unlike the provision applicable to adult parents, specifically references appointment pursuant to G.S. 1A-1, Rule 17. The court concluded that the role of a guardian ad litem appointed under the termination statute is much more limited than that of a guardian under Chapter 35A or a guardian ad litem under Rule 17 and does not include exercising legal rights in the place of the respondent parent.

## CIVIL PROCEDURE

- Trial court erred in allowing amendment of the petition to conform to the evidence.
- G.S. 1A-1, Rule 15, does not apply in a termination proceeding to permit amendment of the petition or motion to conform to evidence presented at the adjudication hearing.

**In re B.L.H., \_\_\_ N.C. App. \_\_\_, 660 S.E.2d 255 (5/6/08), affirmed per curiam, 362 N.C. 674, 669 S.E.2d 320 (12/12/08).**

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

<http://www.aoc.state.nc.us/www/public/sc/opinions/2008/259-08-1.htm>

**Facts:** DSS filed a termination petition alleging two grounds – neglect and non-payment of child support. After testimony of a social worker, the trial court granted DSS’s motion to amend the petition to conform to the evidence and allege the ground of willfully leaving the child in foster care for more than a year without making reasonable progress in correcting the conditions that led to placement. Respondent objected. The court adjudicated only this ground and entered an order terminating respondent’s rights.

**Held:** Reversed.

1. The court of appeals held that it was error for the trial court to allow the amendment to conform to the evidence, because
  - a. Article 11 of G.S. Chapter 7B is silent with regard to such amendments, and
  - b. applying G.S. 1A-1, Rule 15, to allow the amendment amounted to conferring a new procedural right, which the court has held it will not do in termination cases.
2. The court then held that the petition as filed did not give sufficient notice that the added ground might be litigated, because the children had not been in care for a year when the petition was filed and the ground could not have been alleged at that time.

- The court may not adjudicate a ground for termination that is not alleged in the petition or motion.
- Evidence did not support adjudication of abandonment ground for termination.

**In re S.R.G., \_\_\_ N.C. App. \_\_\_, 671 S.E.2d 47 (1/20/09).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2009/080954-1.htm>

**Facts:** The trial court adjudicated respondent’s child to be neglected and dependent and ordered respondent to take a variety of actions, including obtaining evaluations, receiving treatment for her drug addiction, having regular visits, finding independent housing, etc. After periods of respondent’s only partial compliance with the case plan and continued use of drugs, the court changed the plan from reunification to a concurrent plan of reunification and adoption, and then to adoption. DSS filed a petition to terminate parental rights and after a hearing the trial court terminated respondent’s rights on the sole ground of willful abandonment for a period of six months before the filing of the petition.

**Held:** Reversed and remanded.

1. Much of the language in the trial court's order related to factors that were relevant to the ground of willfully leaving the child in care for more than a year without making reasonable progress, etc. That ground was not alleged in the petition and the court could not adjudicate that ground.
2. Findings about respondent's failure to comply with case plan and continued drug use did not support willful abandonment ground. Evidence showed that during relevant 6-month period respondent attended a court hearing, visited child 11 times, and brought appropriate toys and clothes to the visits.
3. Evidence and findings failed to support a conclusion that respondent demonstrated a "purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims" to the child for a 6-month period – the showing required to establish willful abandonment.

Guardian ad litem for parent

- 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.

**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 and suspended visitation until DSS had the results of the evaluation.

**Held:** Reversed and remanded.

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.

- Trial court abused its discretion by failing to hold a hearing to determine whether respondent needed a guardian ad litem when circumstances raised substantial question as to whether she was competent or had diminished capacity.
- The "willfulness" required to establish the ground of leaving the child in foster care is "less than willful abandonment."

**In re N.A.L., \_\_\_ N.C. App. \_\_\_, 666 S.E.2d 768 (10/7/08).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/080510-1.htm>

**Facts:** In addition to other grounds for termination of parental rights, DSS alleged that both parents were incapable of providing proper care and supervision. The petition alleged that respondent mother had problems controlling her anger, tended to be aggressive, and lacked understanding of the earlier neglect adjudication. Evidence showed that she had an IQ of 74 and was diagnosed as having personality disorder and borderline intellectual functioning. The trial court found that she had significant mental health issues

that affected her ability to parent. No one moved for appointment of a guardian ad litem for respondent mother in the termination proceeding and the court did not appoint one.

Although the court had returned custody of one child to the father at one point, custody had been returned to DSS after respondent father violated the court's order that he allow no contact between the child and the mother. Although he had made some progress, he was unemployed, had not maintained suitable housing, and had not participated in court-ordered counseling.

**Held:** Affirmed in part; reversed and remanded in part.

1. The court of appeals reversed and remanded with respect to respondent mother, holding that the trial court erred by not conducting a hearing to determine whether she needed a guardian ad litem. The error was not in failing to appoint a guardian ad litem, but in failing to conduct a hearing and exercise discretion one way or the other about whether to appoint one.
2. The court of appeals affirmed the portion of the order terminating respondent father's rights on the ground of willfully leaving the children in foster care for more than a year without making reasonable progress. "Willfulness," the court said, may be found even when a parent has made some progress.
3. The court also reviewed the trial court's "best interest" findings and held that the trial court did not abuse its discretion in concluding that termination of father's rights was in the children's best interest.

- Whether to conduct a hearing on the need for a GAL for a parent is in the trial court's discretion.
- Mere allegation of the incapacity ground for termination does not require appointment of a GAL.

**In re C.G.A.M., \_\_\_ N.C. App. \_\_\_, 671 S.E.2d 1 (10/21/08).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/080617-1.htm>

**Facts:** The children came into care based on a stipulation that they were dependent. More than a year later DSS filed a petition to terminate respondent father's rights, alleging that he was incapable of caring for the children, that he had a long criminal record and pending charges, that he had not completed court-ordered substance abuse and domestic violence counseling, that he had not maintained contact with DSS, and that he had provided no child support for the preceding six months. (The mother relinquished the child for adoption.) The court terminated respondent's rights on the grounds of neglect in the form of willful abandonment; willfully leaving the children in foster care for more than a year without making reasonable progress; incapacity to care for the children, which could be expected to last for the foreseeable future; and willfully failing to provide a reasonable portion of the cost of the children's care.

**Held:** Affirmed.

1. The trial court did not abuse its discretion by failing to appoint a guardian ad litem for respondent or to conduct a hearing on whether to appoint a GAL. Allegation of the incapacity ground for termination, by itself, does not require appointment of a GAL for the parent. Contrasting this case with *In re N.A.L.*, \_\_\_ N.C. App. \_\_\_, 666 S.E.2d 768 (10/7/08), the court stated that nothing in respondent's conduct at the hearing in this case raised a question about his competence.
2. The court rejected respondent's argument that there was not clear, cogent, and convincing evidence to support a ground for termination. The court reviewed only the ground of willfully leaving the child in foster care, etc., and affirmed on the basis of that ground.
3. Finding that the trial court addressed the statutory factors relating to be interest, the court rejected respondent's argument that the trial court abused its discretion by terminating his rights.

## Evidence

- At termination hearing, petitioner must present some live testimony.

**In re N.B.**, \_\_\_ N.C. App. \_\_\_, 670 S.E.2d 923 (1/20/09).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2009/081082-1.htm>

**Facts:** DSS filed a motion for termination of parental rights in a pending neglect case. At the hearing, DSS offered as evidence prior court orders and the written reports of DSS and the guardian ad litem. The only live testimony was from respondent mother. The court terminated respondent's rights.

**Held:** Reversed and remanded.

As it did in *In re A.M.*, \_\_\_ N.C. App. \_\_\_, 665 S.E.2d 534 (2008), the court of appeals held that the trial court must hear some testimony at a hearing on termination of parental rights. The court stated that respondent's testimony did not support petitioner's case and that, by relying solely on written evidence and the arguments of counsel, the trial court failed to make an independent determination of whether the neglect ground for termination existed. A.M. relied explicitly on G.S. 1A-1, Rule 43. The court in N.B. does not refer to the rule, but relies on A.M.

- Supreme Court affirms holding that evidence – mainly DSS and GAL reports relating to abuse of another child – was sufficient to support adjudication that newborn was neglected.

**In re A.S.**, \_\_\_ N.C. App. \_\_\_, 661 S.E.2d 313 (6/3/08), *aff'd per curiam*, \_\_\_ N.C. \_\_\_, 675 S.E.2d 361 (5/1/09).

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

**Facts:** The juvenile was born after 3 siblings had been removed from the home and adjudicated neglected after one child's non-accidental immersion burns. DSS filed a petition and obtained nonsecure custody while newborn juvenile was still in the hospital. At adjudication, DSS without objection introduced DSS and GAL reports relating primarily to the older children. The court adjudicated the infant to be neglected.

**Held:** Affirmed with respect to the neglect adjudication.

The court of appeals held that evidence was sufficient to support the adjudication of neglect. Respondents did not object to DSS's introduction of the DSS and GAL reports, which provided substantive evidence, and did not preserve for appeal any argument about the introduction or consideration of that evidence.

**Dissent:** One judge thought it was error for the trial court to rely solely on evidence of a prior incident of abuse, when there was 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.

**Supreme Court:** The Supreme Court affirmed *per curiam*.

**Rule 24. Intervention.**

(a) Intervention of right. – Upon timely application anyone shall be permitted to intervene in an action:

- (1) When a statute confers an unconditional right to intervene; or
- (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive intervention. – Upon timely application anyone may be permitted to intervene in an action.

- (1) When a statute confers a conditional right to intervene; or
- (2) When an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or State governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, such officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. – A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene, except when the statute prescribes a different procedure.

## DELINQUENCY

### Custodial interrogation

- Court of appeals erred in holding that admission of juvenile's confession resulting from questioning at school was "plain error."

**In re W.R., \_\_\_ N.C. \_\_\_, 675 S.E.2d 342 (5/1/09).**

<http://www.aoc.state.nc.us/www/public/sc/opinions/2009/pdf/560-06-1.pdf>.

**Facts:** After receiving a phone call from a concerned parent, the school principal and assistant principal took the 14-year-old juvenile from his class to the principal's office. Both questioned the juvenile about whether he had anything in his possession that he should not have, and he responded that he did not. At some point the school resource officer arrived and also questioned the juvenile. After the juvenile complied with a request to empty his pockets, the officer conducted a "basic search" and found nothing. The questioning lasted off and on for about 30 minutes, and the resource officer was there most of the time, including any time the principal or assistant principal left to question others. When told that other students claimed he had brought a knife to school the day before, the juvenile admitted that he had done that. At adjudication, the only evidence about the knife was the juvenile's confession, which was admitted without objection. The juvenile was adjudicated delinquent and placed on Level 1 probation for six months.

**Court of appeals:** Vacated.

The court of appeals vacated the judgment, based on plain error, after determining that the juvenile was in custody when the questioning took place, and that his confession – the only evidence about the knife – should not have been admitted since he was not given the required warnings.

**Supreme Court:** Reversed.

The supreme court granted the state's petition for discretionary review and reversed.

1. Because the juvenile neither made a motion to suppress nor objected when the statement came into evidence, the trial court had no opportunity to hear evidence about or consider whether the juvenile was in custody and was not required to make findings of fact and conclusions of law about the voluntariness of the juvenile's statement. [In fact, the statement first came in during the defense attorney's cross-examination of the school principal.]
2. The supreme court stated that it was "not prepared based on the limited record before [it] to conclude that the presence and participation of the school resource officer at the request of school administrators conducting the investigation" rendered the juvenile's questioning a custodial interrogation.

### Custodial interrogation

- Thirteen-year-old was not "in custody" when interrogated at school.

**In re J.D.B., \_\_\_ N.C. App. \_\_\_, 674 S.E.2d 795 (4/7/09).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2009/080499-1.htm>

**Facts:** Juvenile was adjudicated delinquent for felonious breaking and entering and larceny. The trial court had denied the juvenile's suppression motion, and in an earlier appeal the court remanded for additional findings on the question of whether the juvenile was in custody when he made inculpatory statements. The trial court made additional findings, including: The juvenile, a 13-year-old 7<sup>th</sup> grader in special education classes, was escorted by uniformed school resource officer (SRO) from class into a conference room to be interviewed. Present were an investigator, an assistant principal, the SRO, and an intern. The door was closed but not locked. Juvenile was not given any Miranda warnings or told that he could contact a parent. The juvenile agreed to answer questions about a recent break-in. After initial

denials and further questioning, the juvenile was encouraged to “do the right thing.” He asked whether he would still be in trouble if he gave the items back. The investigator said it would help but that the matter was going to court and he might seek a custody order. The juvenile then confessed. The investigator told the juvenile he did not have to answer questions and was free to leave. The juvenile continued to provide information and wrote a statement about his involvement. He was allowed to leave when the end-of-school bell rang, after being interviewed for 30 to 45 minutes. Based on these and other findings the trial court concluded that the juvenile was never in custody and again denied the motion to suppress.

**Held:** Affirmed.

1. First the court of appeals restated the objective test for determining whether a person is *in custody*: “whether a reasonable person in the individual’s position would have believed himself to be in custody or deprived of his freedom of action in some significant way.” A subjective belief that one is not free to leave, age, or mental capacity, by itself, is not sufficient to establish custody. (When a person in custody is questioned, that person’s age and mental capacity may be relevant to whether his or her waiver of rights was knowing and intelligent.)
2. The court then concluded that based on the uncontested findings of fact the trial court had properly denied the juvenile’s motion to suppress.

**Concurrence:** Judge Bryant concurred in a separate opinion to emphasize that the objective test has to be “applied on a case-by-case basis based on the totality of the circumstances,” and to distinguish this case from *In re W.R.*, 179 N.C. App. 642, 634 S.E.2d 923 (2006), in which the court of appeals found that a middle school student questioned by several people at school *was* in custody. Distinguishing facts in that case included that the juvenile was searched, was kept in an office for more than an hour and a half, and was never told that he was free to leave.

[**Note:** *W.R.* subsequently was reversed. See summary above.]

**Dissent:** Judge Beasley dissented, concluding that the trial court’s findings clearly showed that the juvenile was in custody. The dissent noted that the fact that the juvenile was a 13-year-old middle school student was part of the “circumstances” that had to be considered; that when the principal encouraged the juvenile to “do the right thing” he may have been acting as an agent of law enforcement; and that the officer told the juvenile that he was not under arrest and did not have to answer questions, only after the juvenile had made incriminating statements.

### Sufficiency of evidence

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| <ul style="list-style-type: none"><li>• Evidence supported adjudication for second-degree trespass.</li><li>• Court of appeals questions use of juvenile court for school discipline problems.</li></ul> |
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**In re S.M.S.**, \_\_\_ N.C. App. \_\_\_, 675 S.E.2d 44 (4/7/09).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2009/080970-1.htm>

**Facts:** Juvenile, age 15, and another student entered and ran through the girls’ high school locker room while girls were changing clothes. They left the room immediately when a coach blew a whistle and asked them to leave. The juvenile was alleged to be delinquent for second-degree trespass. The trial court denied the juvenile’s motion to dismiss and adjudicated the juvenile delinquent.

**Held:** Affirmed.

1. The court of appeals held that although it does not affirm adjudications based only on “ordinary misbehavior or rule-breaking,” the state’s evidence here was sufficient to support an adjudication for second-degree trespassing.
2. The court also stated, however, that it was unclear to the court “why our Courts were involved in this matter when the school, in its administrative capacity, was fully capable of dealing with respondent’s conduct and disciplining him appropriately.”

## Disposition

- Delaying the disposition for more than six months after adjudication, so the juvenile could comply with an agreement to testify truthfully in a co-offender's trial, did not deprive the court of subject matter jurisdiction.

**In re S.S., \_\_\_ N.C. App. \_\_\_, 666 S.E.2d 870 (10/7/08).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/080029-1.htm>

**Facts:** The juvenile was adjudicated delinquent for second-degree kidnapping, crime against nature, and sexual battery. Nine months later the juvenile was placed on probation for one year based on an agreement with the prosecutor that he testify truthfully in a co-offender's trial. Disposition in the juvenile's case was continued several times, until after he testified in the other trial. At disposition the juvenile moved to dismiss, arguing that the court lost jurisdiction when it did not conduct the disposition hearing within six months after adjudication. The trial court denied the motion.

**Held:** Affirmed.

G.S. 7B-2501(d) allows the court, after adjudication, to "continue the case for no more than six months in order to allow the family an opportunity to meet the needs of the juvenile through more adequate home supervision or a plan approved by the court." That provision does not limit the court's jurisdiction. In this case, conducting the disposition hearing within six months would have deprived the juvenile of the benefit of the dispositional agreement with the prosecutor.

- Multiple offenses adjudicated in the same session of court must be consolidated for disposition.
- Failure to object to a work sheet showing a juvenile's delinquency history may be construed as a stipulation to its correctness.

**In re D.R.H., \_\_\_ N.C. App. \_\_\_, 668 S.E.2d 919 (12/2/08).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/080349-1.htm>

**Facts:** After adjudicating the juvenile delinquent for robbery with a dangerous weapon and felony conspiracy, the court found that the juvenile had six delinquency points and a high delinquency history level based on a court counselor's report showing three previous adjudications. At the hearing, the court asked the juvenile's attorney whether he had had an opportunity to view the report. The attorney said "yes," and made no other comment. The court entered two disposition orders, each committing the juvenile to the Department of Juvenile Justice and Delinquency Prevention for an indefinite period.

**Held:** Affirmed in part; vacated and remanded in part.

1. The trial court erred when it entered two disposition orders. G.S. 7B-2508(h) requires that offenses adjudicated in the same session of court be consolidated for disposition based on the most serious offense.
2. Although a work sheet alone is not sufficient proof of a juvenile's delinquency history, the court of appeals concluded that the juvenile stipulated to the history information in the court counselor's report when the juvenile's attorney received and reviewed the report and failed to object. The court noted, in addition, that nothing in the juvenile's brief suggested that any of the listed adjudications did not in fact exist. [Because there was no precedent interpreting G.S. 7B-2507(h), which addresses proof of prior adjudications in juvenile cases, the court of appeals looked to cases decided under the comparable criminal law provision in G.S. 15A-1340.14(f).]

- Judge's comment about preferring a harsher disposition was not prejudicial to the juvenile.
- Plain error doctrine did not permit review of the sufficiency of the evidence when juvenile failed to preserve that issue for appellate review.
- Trial court failed to make findings to support its order that the juvenile pay restitution.

**In re D.M.B., \_\_\_ N.C. App. \_\_\_, 676 S.E.2d 66 (5/5/09).**

<http://www.aoc.state.nc.us/www/public/coa/opinions/2009/080618-1.htm>

**Facts:** Evidence showed that the juvenile assaulted another student, breaking his jaw and fracturing his face, requiring extensive surgery. The juvenile was adjudicated delinquent for assault causing serious bodily injury. The judge stated in court that he would like to impose a harsher disposition than the Juvenile Code permitted, but within the parameters of what the Code allowed (Level 1 or Level 2) the court ordered that the juvenile be on probation for one year, pay restitution of \$1,000, perform 72 hours of community service, and not associate with the victim and two witnesses. The juvenile appealed.

**Held:** Affirmed in part; remanded with instructions in part.

1. The court of appeals rejected the juvenile's argument that the trial court made improper remarks and was not fair and impartial, finding no prejudice to the juvenile from the judge's comments.
2. The court held that the juvenile had not preserved for appellate review his argument that the evidence was insufficient to establish serious bodily injury, because the juvenile did not move dismiss at the end of the state's evidence or the end of all the evidence. The plain error doctrine was not available because (in criminal cases) it applies only to error in jury instructions or error relating to the admissibility of evidence, not the sufficiency of the evidence.
3. The court agreed with the juvenile that the trial court's order for restitution was not supported by findings of fact demonstrating that requiring restitution would be in the juvenile's best interest. The court remanded to the trial court for appropriate findings. The court of appeals cited its identical holding in *In re Z.A.K.*, 189 N.C. App. 354, 657 S.E.2d 894, *disc. review denied*, 362 N.C. 682, 671 S.E.2d 532 (2008).