

District Court Judges' Fall Conference  
Winston-Salem, NC

October 7, 2010

**JUVENILE LAW UPDATE**

Cases Filed from June 15, 2010, through September 21, 2010

and

Responsible Individual List Amendments [S.L. 2010-90 (S 567)]

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## Abuse, Neglect, Dependency, Termination of Parental Rights, Adoption

### Neglect: required findings

- Unless evidence is “so substantial” that an explicit finding of harm or risk to the child is not required, trial court must make a finding that the child was harmed or at substantial risk of harm in order to adjudicate neglect.

### In re H.N.D., \_\_\_ N.C. App. \_\_\_, 696 S.E.2d 783 (7/20/10).

**Facts:** For three to four weeks the infant had lived with an unrelated couple who cared for 10 children in a 3-bedroom mobile home. DSS had received several reports of inadequate supervision of the children. The child’s 17-month-old sibling drowned in the pool at the home, and the next day DSS filed a petition alleging that the infant was neglected and obtained a nonsecure custody order. Evidence and the court’s findings indicated that respondent mother was aware of conditions in the home and had expressed concern about them, was present during one of DSS’s visits to the home, admitted using marijuana, and had lived in five residences in the past few months. The court adjudicated the child neglected, placed him in the custody of DSS, stated that the plan was reunification, and provided for visitation between respondent and the child. Respondent appealed.

**Held:** Reversed and remanded.

1. The court of appeals held that the trial court’s findings were insufficient to support its conclusion that the child was neglected, because the court did not find that the child suffered or was at risk of injury or impairment.
2. In some cases the evidence may be so substantial that a finding of substantial risk is not required, but, the court said, “the evidence here is capable of more than one inference.”

**Dissent:** One judge dissented and would have found the trial court’s findings sufficient.

### Permanency planning: evidence; waiver of further hearings

- Discretion to exclude hearsay. Although hearsay is admissible at review hearings, the court has discretion to exclude hearsay.
- Waiving further hearings. After an award of guardianship, the court must continue to conduct permanency planning hearings at least every six months unless the court makes the findings required by G.S. 7B-906(b) for waiving further review hearings.

### In re P.O., \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (9/7/10).

**Facts:** Because of respondent’s medical, pain, and substance abuse issues the child was in kinship care. DSS filed a petition and the child was adjudicated neglected in May, 2008, and continued in kinship care. Respondent did not comply with various orders that she complete drug treatment programs and follow medical recommendations. After a permanency planning hearing in November, 2009, the court awarded guardianship to a relative and released DSS and the GAL from further responsibility.

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

1. The trial court did not abuse its discretion in refusing to admit into evidence over DSS's objections letters purportedly from three doctors. Although hearsay is admissible at review hearings, the court had discretion to exclude a letter that was not authenticated and two letters from people DSS wanted to cross-examine, when respondent had no explanation about why the authors were not present to testify.
2. The court rejected respondent's challenge to several findings of fact, after reviewing the record and determining that each finding was supported by competent witness testimony.
3. Although the trial court's order did not explicitly appoint the relatives as guardians or refer to guardianship as a "permanent plan," it was reasonable to infer from the findings and other provisions of the order that the court intended to establish guardianship as a permanent plan and to appoint the relatives as guardians.
4. Because the trial court entered a subsequent order, from which respondent did not appeal, providing that respondent would have supervised weekend visits with the child, the court of appeals rejected her argument that the trial court failed to specify the rights and responsibilities she retained.
5. The trial court's dismissal of DSS and the GAL indicated an intent not to conduct further review hearings. However, the court did not make the requisite findings, in G.S. 7B-906(b), that are necessary for such a waiver.

#### **Termination of parental rights: effective assistance of counsel**

- The trial court had an obligation to ensure respondent's right to effective assistance of counsel at trial.
- The court of appeals could not determine from the record what efforts respondent's counsel had made to contact him or to protect his rights.

#### **In re S.N.W., \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (6/15/10).**

**Facts:** After DSS filed a petition to terminate respondent's rights, the court appointed counsel for respondent. The hearing was continued once because the parents needed "time to prepare with counsel." After two more continuances, the case was heard about four months after the original court date. Respondent was not present, and his attorney stated that his only contact with respondent was one phone message that he tried to return. The court said it would not allow the attorney out of the case, but would allow him to not participate in the hearing, and noted that the respondent had not been in communication with the attorney. The hearing lasted about 15 minutes, and the court adjudicated each of the alleged grounds for termination and terminated respondent's rights. Respondent appealed, asserting (i) that he was denied effective assistance of counsel when the court allowed his attorney to not participate in the hearing, and (ii) that the court erred in relying primarily on documentary evidence and deeming allegations in the petition to be admitted because respondent did not file an answer.

**Held:** Remanded.

1. Notice of appeal was filed 31 days after the order was entered, but because of the important issues involved, the court treated the appeal as a petition for certiorari, which it granted.
2. The court stated that it was not able to determine whether respondent received effective assistance of counsel and a fair hearing. The trial court should have made further inquiries about the attorney's efforts to contact respondent, to protect respondent's rights, and to ably

represent respondent. If the court determined that counsel was ineffective, it should have appointed new counsel.

3. The record did not show what steps the attorney took to contact the client, but showed that respondent was incarcerated during part of the relevant time, that respondent continued visitation with the children, and that DSS communicated with him. The attorney's fee application indicated that the attorney spent .55 hours on the case outside of court. Because respondent may not have received a fair hearing, the court of appeals remanded for further findings relating to efforts of respondent's counsel to contact respondent and the attorney's ability to represent respondent.
4. The court did not address respondent's other arguments.

### **Termination of parental rights: effective assistance of counsel and guardian ad litem**

A successful claim of ineffective assistance of counsel requires a showing that the attorney's performance

- "was deficient or fell below an objective standard of reasonableness," and
- "was so deficient" that respondent did not receive a fair hearing.

#### **In re K.J.L., \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (8/17/10).**

**Facts:** Earlier in this case the N.C. Supreme Court reversed a decision of the court of appeals and held that defects in a summons or service of process affected only personal, not subject matter, jurisdiction and had been waived in this case. On remand to consider the remaining issues in the case the court considered respondent's arguments that the findings were insufficient and that she received ineffective assistance of counsel and guardian ad litem because her attorney verbally conceded that grounds for termination existed and her guardian ad litem did not object.

**Held:** Affirmed.

1. The court reviewed the history of the case, evidence that respondent had failed over time to substantially comply with the court's orders, and the trial court's findings, and held that the findings were sufficient to support the conclusion that neglect existed and was likely to recur if the child were returned to respondent.
2. The court rejected respondent's argument that she received inadequate representation, concluding that counsel's representation "while not perfect, was vigorous and zealous;" that the trial court had not treated counsel's statement about the existence of a ground as an admission; and that given the "overwhelming evidence of the existence of grounds," respondent had failed to demonstrate prejudice.

### **Termination of parental rights: requirement that child's GAL attend hearing**

- Trial court erred by conducting termination hearing when GAL was not present.

#### **In re J.H.K., \_\_\_ N.C. App. \_\_\_, 695 S.E.2d 162 (7/6/10).**

**Facts:** Beginning with the filing of a neglect petition, the children were represented by a GAL who provided written reports to the court but did not attend hearings in the case. A new GAL, appointed almost two years into the case, did not attend hearings or file written reports. DSS filed a petition to terminate respondent-father's rights when the children had been in foster care

about 2 ½ years, based on repeated failure to make sustained progress in dealing with substance abuse issues. The children’s GAL filed a 2-page report with the court but did not attend any of the termination hearings. The court adjudicated the neglect and dependency grounds and terminated respondent’s rights.

**Held:** Reversed and remanded.

1. Conducting the termination hearing without the presence of the children’s GAL was error requiring remand for a new hearing.
2. The presence of the child’s GAL at hearings is an essential part of the GAL’s responsibility to “represent” the juvenile’s best interest.
3. Respondent could not waive the right to raise this issue by not objecting at trial, because the right belongs to the child, who is a party to the case, and the court will presume prejudice.
4. The court referred to its holding in *In re R.A.H.*, 171 N.C. App. 427 (2005), in which it reversed a termination order because the child’s GAL was not appointed until three days into the hearing, and in which the court stated that functions of GALs and attorney advocates are not sufficiently similar to allow one to fill in for the other when the child’s best interest is at stake.

#### **Termination of parental rights: neglect by incarcerated parent**

- Incarcerated parent neglected child by never writing to him or sending him anything, never paying support, and never challenging a court order that ceased his visitation

**In re A.J.M.P.**, \_\_\_ N.C. App. \_\_\_, 695 S.E.2d 156 (7/6/10).

**Facts:** The child’s parents divorced. Petitioner-mother was given custody and respondent-father was given visitation rights. Respondent was incarcerated pending trial on federal charges. After release, he visited the child once in April 2006, then was arrested for assaulting his girlfriend and was incarcerated again. In May 2006 the custody order was modified to cease his visitation rights. Respondent made several unsuccessful attempts to contact the child by telephone or through a friend, but he provided no support (although he had income), never wrote to the child, and never sent the child anything beyond registering him to receive a gift through a program for children with incarcerated fathers. He never sought to have the custody order modified to restore his visitation rights. Petitioner-mother alleged and the trial court adjudicated four grounds for termination, including neglect. At disposition, the court made numerous findings about both parents and about petitioner’s new husband who wanted to adopt the child, and terminated respondent’s rights.

**Held:** Affirmed.

1. The court of appeals considered only the neglect ground and concluded that the facts were proved by clear, cogent, and convincing evidence and were sufficient to support the conclusion that respondent neglected the child. The court reiterated that incarceration alone is not sufficient to establish a ground for termination.
2. The court reviewed the trial court’s extensive findings of fact relating to disposition and concluded that the trial court did not abuse its discretion in terminating respondent’s rights.

### **Termination of parental rights: uncertainty about which parent harmed child**

- Where infant suffered serious non-accidental injury, the court properly found that both parents, the child’s sole care providers, were responsible.
- At the best interest stage, the parents’ compliance with the case plan is not one of the factors the trial court is to consider.

#### **In re Y.Y.E.T.**, \_\_\_ N.C. App. \_\_\_, 695 S.E.2d 517 (7/6/10).

**Facts:** Infant was adjudicated to be abused and neglected, based on a non-accidental fracture about which the parents gave conflicting explanations that were inconsistent with the type of injury; evidence of prior injuries; and failure to seek medical treatment right away. Despite extensive efforts, neither DSS nor the trial court was able to determine which parent caused the fracture, but the parents were the child’s sole care providers. DSS filed a petition to terminate parental rights. After a hearing the court adjudicated both the abuse and neglect grounds, finding that both parents were responsible by either causing or failing to prevent the child’s injuries and failing to accept responsibility for the reasons the child was initially removed from the home. The court found that termination was in the child’s best interest and terminated both parents’ rights.

**Held:** Affirmed.

1. The court of appeals held that the trial court properly found the respondents “jointly and individually responsible for their child’s injury” and affirmed the neglect ground for termination. Holding otherwise, the court said, would encourage people to deny responsibility and withhold relevant information.
2. “Compliance with the case plan is not one of the factors the trial court is to consider in making the best interest determination.” Although the parents had completed substantial parts of the case plans, their failure to accept responsibility or explain the child’s injuries supported the conclusion that the child would be at risk if returned to the home. The trial court properly considered the statutory factors related to best interest and did not abuse its discretion in terminating parental rights.

### **Termination of parental rights: sufficiency of notice and record on appeal**

- Court of appeals will not review an order that is not specified in the notice of appeal.
- Where record showed that children were represented by a GAL at the termination hearing, absence from the record of an order appointing a GAL was not error.

#### **In re D.W.C.**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (7/6/10).

**Facts:** Children were adjudicated neglected and placed in foster care after parents stipulated to neglect based on domestic violence and an injurious environment. A year later DSS filed petitions to terminate the parents’ rights, alleging three grounds. The court terminated both parents’ rights and the mother appealed.

**Held:** Affirmed.

1. Respondent’s assertion that the trial court erred in failing to appoint a GAL for the children when the initial neglect petition was filed was not properly before the court, because the notice of appeal referred only to the order terminating the parents’ rights.

2. The court rejected respondent's argument that the trial court erred by failing to enter an order appointing a GAL for the children when respondent filed an answer to the termination petition. Failure of the record to show GAL appointment papers does not require reversal when the record and the trial court's findings show that the children were represented by a GAL who carried out her statutory duties.
3. The court also rejected respondent's argument that the trial court abused its discretion in terminating her rights, holding that the trial court's findings of fact indicated that the court properly considered the statutory best interest factors.

### **Termination of parental rights: appointment of GAL for parent; best interest factors**

- GAL for parent. Respondent's substance abuse, mental health, and anger issues did not automatically require appointment of a guardian ad litem when there was no indication of incompetence.
- Best interest factors. Best practice is to making findings about each statutory best interest factor, but failure to do so is not reversible error when the record shows that court considered each factor.

**In re S.R.**, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (9/7/10).

**Facts:** Respondent's children were adjudicated neglected and dependent based on mediation agreements and stipulations. After a fifth permanency planning hearing and findings that respondent had not complied with her case plan or addressed her substance abuse issues, the court changed the permanent plan from reunification to a concurrent plan of adoption or guardianship with a relative. DSS filed a petition to terminate respondent's rights, and the court adjudicated grounds of (i) neglect, (ii) willfully leaving the child in care without making substantial progress, and (iii) willfully failing to pay support. The court found that no relative placement had been approved and that the foster parents were interested in adoption, and concluded that termination was in the children's best interest.

**Held:** Affirmed.

1. The trial court did not abuse its discretion by failing to appoint a GAL for respondent *sua sponte* because of evidence of respondent's substance abuse, mental health, and anger issues. There were not allegations or evidence that those issues affected her competence; the dependency ground was not alleged; respondent attended hearings, participated in mediation, and testified in court; and she was aware of her problems and what she needed to do.
2. Although the better practice is for the trial court to make specific findings related to the best interest factors the court is required to consider, the absence of some findings does not establish abuse of discretion if the evidence in the record demonstrates that the trial court considered all of the factors in making its dispositional decision.

### **Adoption: consent of putative father**

- Record supported trial court's determination that putative father's consent to adoption was required on basis that he had acknowledged the child and provided reasonable and consistent support in accordance with his means.
- Trial court could not dismiss adoption petition after notice of appeal was given.

### **In re Adoption of K.A.R., \_\_\_ N.C. App. \_\_\_, 696 S.E.2d 757 (7/20/10).**

**Facts:** In a private-placement adoption proceeding, the district court (after transfer from the clerk) found that the putative father's consent to the child's adoption was required, because he had acknowledged the child and provided reasonable and consistent support according to his means before the adoption petition was filed. During the pregnancy he attended pre-natal classes and doctor's visits until the mother asked him to stop. After obtaining employment, he bought a car seat, crib mattress, and other items worth over \$200 for the child. After the petitioners gave notice of appeal from the trial court's order, the court granted the father's motion to dismiss the adoption petition.

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

1. After reviewing relevant case law, the evidence, and the trial court's findings, the court of appeals held that evidence in the record supported the trial court's findings and that the findings were sufficient to support the trial court's determination that the father's consent to the child's adoption was required.
2. Because petitioners had given notice of appeal, the trial court did not have jurisdiction to dismiss the adoption petition, but that error was harmless, and the court remanded the case for entry of a proper order dismissing the petition.

## Delinquency

### **Delinquency: filing timeline; accepting juvenile's admission**

- The statutory timeline for filing petitions is not jurisdictional.
- To properly accept a juvenile's admission, the court must comply with all six requirements in G.S. 7B-2407(a).

### **In re J.A.G., \_\_\_ N.C. App. \_\_\_, 696 S.E.2d 809 (8/3/10).**

**Facts:** The trial court dismissed a petition alleging that the juvenile was delinquent, because it was filed more than 15 days after the court counselor received the complaint. At the request of the court counselor law enforcement filed a second complaint based on the same conduct, and within 15 days the court counselor approved and filed a second petition almost identical to the first. The trial court denied the juvenile's motion to dismiss for lack of jurisdiction, accepted the juvenile's admission, and adjudicated the juvenile delinquent. The court of appeals reversed, holding that the trial court erred in denying the juvenile's motion to dismiss for lack of jurisdiction. The juvenile sought review from the Supreme Court, which granted review for the sole purpose of remanding to the court of appeals for reconsideration in light of *In re D.S.*, 364 N.C. 184, 694 S.E.2d 758 (2010), in which the Supreme Court held that the filing deadlines relating to delinquency petitions are not jurisdictional.

**Held:** Reversed and remanded.

1. The trial court properly denied the juvenile's motion to dismiss for lack of jurisdiction, because, as held by the Supreme Court in *In re D.S.*, 364 N.C. 184, 694 S.E.2d 758 (2010), statutory filing deadlines relating to delinquency petitions are not jurisdictional.
2. In accepting the juvenile's admission, the trial court did not comply with G.S. 7B-2407(a). Of the six requirements in that subsection for accepting a juvenile's admission, the trial court omitted three, in that the court did not inform the juvenile (i) of the most restrictive disposition, (ii) that his admission waived his right to confront the witnesses against him, or (iii) that he had a right to remain silent and anything he said could be used against him.

### **Delinquency: interrogation**

- Interrogation occurs when officer makes a statement the officer knows or should know is likely to elicit an incriminating response.
- Miranda warning violation does not require exclusion of physical evidence resulting from the violation unless actual coercion is shown.

### **In re L.I., \_\_\_ N.C. App. \_\_\_, 695 S.E.2d 793 (7/6/10).**

**Facts:** Officer made a traffic stop. After having the driver and front passenger exit the car and frisking and talking with them, the officer asked the juvenile to get out of the car and asked her for the marijuana he "knew she had." When she said, "What marijuana?" and appeared to reach in her pants, the officer put her in "investigative detention," handcuffed her, and placed her in the backseat of the patrol car. He did not read her any Miranda warning. The officer told her that if she took drugs into the jail, that would be an additional charge. Later she indicated she wanted to

tell him something, and said that she had drugs in her right coat pocket. He got her out of the car and took from her coat pocket a plastic bag containing 9 bags of green leafy material and 2 bags of powdery substance. The trial court denied the juvenile's motions to suppress her statements and the physical evidence, finding that even if she had been in custody, she made the statements to the officer voluntarily, not as the result of interrogation. The court adjudicated her delinquent and ordered a Level 2 disposition.

**Held:** Reversed and remanded.

1. The court of appeals first determined that the juvenile was in custody, applying the objective test set out in *State v. Buchanan*, 353 N.C. 332 (2001).
2. The trial court should have granted the motion to suppress the juvenile's statements. The juvenile's statement about the location of the drugs was the result of interrogation, because the officer's statement that taking drugs into the jail would be another charge was made for the purpose of eliciting an incriminating response. The officer knew or should have known that his statement to the juvenile was likely to elicit an incriminating response.
3. The trial court did not err in admitting the evidence of marijuana. Although the juvenile argued that the marijuana was "fruit of the poisonous tree," the court pointed to cases holding that a Miranda violation does not require exclusion of physical evidence obtained as a result of the violation, unless the record shows actual coercion, not just a violation of the Miranda warning requirement. Here, the court found no indication that the juvenile's statements were coerced.

### **Delinquency: crime against nature; recording problems**

1. Adjudication for crime against nature requires proof of penetration.
2. It was the juvenile/appellant's responsibility to ensure that any error in the transcript due to recording problems was addressed at the trial court level.

### **In re R.N., \_\_\_ N.C. App. \_\_\_, 696 S.E.2d 898 (8/17/10).**

**Facts:** At the close of the evidence the trial court granted the juvenile's motion to dismiss a sexual battery charge but denied his motion to dismiss the allegation of crime against nature for insufficiency of the evidence. The state's evidence showed that the juvenile (age 12) called his 7-year-old female cousin into his bedroom; that while on a top bunk with the girl he "licked her private area," "touched her private parts," and "forced her head down to his private area;" and that after telling him to stop and leaving the room, the girl described the incident in similar terms to her mother, her grandmother, someone at a child advocacy center, and a social worker. The court adjudicated the juvenile delinquent and ordered a Level 2 disposition.

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

1. The trial court should have dismissed the crime against nature charge based on evidence that the juvenile "licked" the girl's private parts, because there was no evidence of penetration, which is an essential element of crime against nature.
2. With respect to the charge based on an allegation that he placed his penis in the girl's mouth, the transcript did not include evidence of penetration. However, one witness testified that during her interview of the child she asked the child whether there had been penetration. The witness's testimony about how the child answered the question was muddled and could not be determined from the transcript.

3. The juvenile was responsible for ensuring that the transcript was adequate and should have requested a hearing to reconstruct the substance of the witness's testimony either by stipulation or by the court. The court of appeals remanded for such a hearing.

**Delinquency: possession of weapon on school property**

- For purposes of a charge of possessing a weapon on school property, the petition's allegation that the juvenile possessed an "other weapon," described as a "steel link from chain," was sufficient.

**In re J.C., \_\_\_ N.C. App. \_\_\_, 695 S.E.2d 168 (7/6/10).**

**Facts:** The juvenile was adjudicated delinquent for possessing a weapon on school property in violation of G.S. 14-269.2(d). The petition described the weapon as a "steel link from chain," and the trial court denied the juvenile's motion to dismiss because the petition did not adequately describe a weapon for purposes of alleging a violation of the statute. Evidence showed that a school counselor observed the juvenile with a steel oval-shaped link, weighing about a pound, through which he slid several fingers and which was held securely over his knuckles. The juvenile was approaching another student with whom the counselor knew the juvenile had had a problem. The counselor confronted the juvenile, took the object, and took the juvenile to the principal's office. The trial court found that the juvenile possessed a "steel link from a chain which is equivalent in appearance and use to metallic knuckles." The statute specifically lists metallic knuckles as weapons, and a box for that type weapon is on the form petition but was not checked.

**Held:** Affirmed.

1. The court of appeals pointed to the statute's focus on the necessity for school safety and held that the seized item was sufficiently equivalent to what the legislature intended to be recognized as metallic knuckles.
2. The court also characterized the juvenile's argument that the box on the petition for "metallic knuckles" was not checked as the type of hyper-technical scrutiny to which petitions and indictments should not be subjected.
3. Because the petition gave the juvenile adequate notice of the offense charged, the trial court had jurisdiction over the case.