

Winter Conference for Social Services Attorneys

School of Government

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**CASE LAW UPDATE**

**Abuse, Neglect Dependency, and Termination of Parental Rights**

Cases Decided from August 6, 2013 through February 4, 2014

# Abuse/Neglect/Dependency

## Intervention; Notice of permanency planning hearing

- *Adoption severs all parental rights of a biological parent such that the biological parent does not have a right to intervene in a juvenile proceeding for the adopted child or have standing to appeal an adjudication or disposition order for that child*
- *A party waives formal notice of a permanency planning hearing if she participates in a disposition hearing without objection that results in a permanency planning order*
- *Visitation plan in a court order must contain a minimum outline of time, place and conditions*

**In Re T.H.**, \_\_\_ N.C. App. \_\_\_ (January 21, 2014)

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMy00MzMtMS5wZGY=>

**Facts:** This case involves six juveniles; four of whom had been adopted by their maternal grandmother in 2009 and two of whom were placed in the custody of their maternal grandmother. After their maternal grandmother was murdered, all six juveniles were adjudicated dependent in 2012, and DSS was granted legal custody and placement authority for all the juveniles. Respondent mother of the two juveniles who were not adopted filed a motion to intervene as of right as the children's sister (her mother had adopted her four biological children). Her motion was denied, and she appealed. Respondent mother also appealed the adjudication and disposition orders for all six juveniles.

**Held:** Affirmed in part, remanded in part, dismissed appeal in part

- An adoption divests the biological parent of all rights and relieves her of all legal duties and obligations regarding the child who is adopted. A biological parent whose children have been adopted has no right to intervene in a juvenile proceeding for the child.
- In a juvenile proceeding, permissive intervention allows the intervenor to provide full and accurate information regarding the child's welfare, but this purpose can be accomplished through the indirect participation of that individual as a witness or suggested relative placement rather than through intervenor status.\*
- Standing to appeal a juvenile proceeding is limited to those parties listed at G.S. 7B-1001 and -1002, therefore, the biological mother of the adopted children who had her parental rights severed as a result of the adoption lacked standing to appeal orders entered in the proceedings for those children.
- The findings of fact and conclusions of law were supported by clear and convincing evidence that both required prongs of dependency were proved by dss.

- By participating without objection in a disposition hearing that addressed a permanent plan, any lack of formal notice for a permanency planning hearing was waived.
- The court made sufficient findings of fact to support its conclusions of law when determining a non-relative placement was in the best interests of the juvenile.
- The visitation plan must contain a minimum outline of time, place and conditions.\*\*

\* Prior to S.L. 2013-129, G.S. Chapter 7B, Subchapter 1 (Abuse, Neglect and Dependency) only addressed intervention under the termination of parental rights statute, therefore, allowing the court to look to Rule 24 of the North Carolina Rules of Civil Procedure. As of October 1, 2013, G.S. 7B-401.1 limits who may intervene in a juvenile proceeding.

\*\* S.L. 2013-129 adds G.S. 7B-905.1, which specifically addresses visitation.

### **INDIAN CHILD WELFARE ACT (ICWA): subject matter jurisdiction, timing of expert testimony for permanent plan, and cease reunification**

- *State court must find subject matter exception to tribal court jurisdiction under ICWA applies*
- *Expert testimony regarding serious physical or emotional damage that would result to child if returned to parent must occur at hearing that results in permanency planning order for placement outside of parent's home*
- *"Active efforts" for reunification are required in actions involving ICWA, but those efforts may be ceased when the court finds they would be futile*

In re E.G.M. \_\_\_ N.C.App. \_\_\_ (November 5, 2013)

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMy01ODQtMS5wZGY=>

**Facts:** A three year old Indian child as defined by the Indian Child Welfare Act (ICWA) was removed from her parents' care while they were domiciled on the Cherokee Tribe's Qualla Boundary land trust. Subsequently, the child was adjudicated neglected by the North Carolina district court. At disposition the court awarded legal custody to the respondent mother and placement in kinship care, where respondent mother was also residing. At an April 2012 dispositional hearing, an expert witness on Indian culture testified that continued custody or the return of custody to either parent would likely cause serious physical or emotional damage to the child. A permanency planning hearing was held in January 2013, and the Permanency Planning Order, after referencing the expert testimony from the April hearing, changed legal custody from the respondent mother to DSS with continued placement of the child with the

kinship caregiver. Although the permanent plan continued to be reunification with the mother, the court relieved DSS of further reunification efforts with the respondent father based upon a finding that further efforts would be futile or inconsistent with the juvenile's health, safety and need for a safe, permanent home within a reasonable period of time. Both respondent mother and respondent father appealed, raising three issues under ICWA: subject matter jurisdiction between tribal and state court, the timing of expert testimony when proving by clear and convincing evidence that the child would likely suffer serious emotional or physical damage if the child remained in her parent's custody, and whether ICWA allows for the cessation of "active efforts" to reunify an Indian family prior to a TPR. Noting that the last two issues are issues of first impression in North Carolina, the court of appeals addressed all three issues in the interests of expediting review.

**Held:** vacated and remanded

1) Subject Matter Jurisdiction

- Under 25 U.S.C.A. §1911, the tribal court had exclusive jurisdiction over the child custody proceeding because the child was domiciled on Indian land. Exceptions are found at 25 U.S.C.A. §1919, and one of those exceptions involves an agreement between the state and tribe. Attached to the GAL's appellee brief was a Memorandum of Agreement (MOA) between the Eastern Band of Cherokee Indians, the N.C. Department of Health and Human Services, and four county dss agencies located in judicial district 30. The MOA deferred jurisdiction from tribal court to state court for all child protective cases under G.S. Chapter 7B. The GAL requested the court of appeals take judicial notice of the MOA.
- Judicial notice of adjudicatory facts can be requested at any time; however, the court of appeals could not take judicial notice of the MOA because (1) the MOA is a legislative, not adjudicatory, fact, (2) the attached MOA was unable to be validated since it was uncertified and without a reference source, and (3) nothing exists in the trial court record to determine the state of the general knowledge of MOA within the county of the trial court.
- Remanded to determine subject matter jurisdiction.

2) A determination under 25 U.S.C.A. §1912(e) that continued custody of the child to the parent is likely to result in serious emotional or physical damage to the child must be made contemporaneously with the placement, and the expert must testify at the permanency planning hearing where order for placement is made.

- 3) The provision of 25 U.S.C.A. §1912(d) requires a party seeking foster care placement of or the TPR over an Indian child to prove that “active efforts” were made to provide remedial services and rehabilitative programs and that those efforts were unsuccessful. Although “active efforts,” as opposed to “reasonable efforts” as set forth in G.S. 7B-507(b)(1), are required for ICWA cases, the court may order a cease reunification if it finds such efforts would clearly be futile.
- Remanded for the trial court to make findings that support the conclusion that further efforts would be futile.

## **UCCJEA**

### **Review and Permanency Hearings: Findings**

- *A court may not relinquish jurisdiction and transfer a case to another state when no other action is pending or has been commenced in that other state*
- *Court must make specific findings of fact that support conclusions of law regarding placement of juvenile outside of a parent’s home and an order of no further reviews*
- *Visitation plan in court order must contain a minimum outline of time, place and conditions*

#### **In Re M.M, \_\_\_ N.C. App. \_\_\_ (November 5, 2013)**

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMy02MDAtMS5wZGY=>

**Facts:** Child was adjudicated dependent in 2008. In 2013, a permanency planning order awarded legal custody and guardianship of the child to her paternal grandparents, with whom the child had been living since 2010. The child, respondent father, and paternal grandparents reside in Michigan. Respondent mother was awarded supervised visitation one day per month not to exceed four hours at Safe Place in Michigan with travel costs to be shared between respondent mother and respondent father. The trial court relinquished its jurisdiction and transferred the case to Michigan. Respondent mother appeals.

**Held:** reversed and remanded

- The UCCJEA requires that if a court determines its state is an inconvenient forum, it must make findings of fact and conclusions of law regarding the relevant factors enumerated at G.S. 50A-207(b).
- A court may not transfer jurisdiction to another state when no action is pending or commenced in that other state. The court must stay its proceeding and condition that stay upon the commencement of a child custody proceeding in that other state.

- Recitation of testimony and the incorporation of admitted reports are not findings of fact.
- Incorporating findings from prior orders without specifying portions of the order that identify the prior findings does not allow for proper appellate review.
- The court must make findings of fact and conclusions of law under G.S. 7B-907(b)\* regarding a child's continued placement outside of her parents' home and -906(b)\* regarding an order of no further reviews.
- A visitation plan must specify time, place and conditions and cannot be left to the discretion of a custodian.

\* Note: Effective October 1, 2013, G.S. 7B-906 and -907 were repealed by S.L. 2013-129 and replaced with G.S. 7B-906.1.

## **Findings**

- *Findings of fact must be supported by competent evidence in the record.*

**In the Matter of C.M.** \_\_\_ N.C. App. \_\_ (November 5, 2013)

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMy01NDYtMS5wZGY=>

**Facts:** Child was adjudicated neglected in 2010 and placed in DSS custody. In January 2013, the permanent plan changed from reunification with respondent mother to guardianship with court approved caretakers. In March 2013, the court ordered legal guardianship to non-relatives and found no further reviews were required under the former G.S. 7B-906. Respondent father appealed.

**Held:** Reversed and remanded

- There was no competent evidence in the record to support the court's findings and conclusions. No testimony was taken, no evidence was admitted, and no judicial notice was taken at the hearing.
- On remand, court of appeals cautioned trial court to ensure respondent father's due process rights regarding appearing at the hearing and his right to effective assistance of counsel were protected.

## **Adjudication and Disposition; Notice/Objection; Permanent Plan; Visitation**

- *A party may waive the statutorily required notice of a permanency planning hearing by participating in the hearing without objecting to the lack of notice.*
- *Visitation order must have minimum outline of specificity regarding time, place, and conditions.*

**In Re J.P.**, \_\_\_ N.C.App. \_\_\_, \_\_\_ S.E. 2d \_\_\_ (November 19, 2013)

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMy0zNS0yLnBkZg==>

**Facts:** The parties entered into a consent adjudication order, and the court ordered a temporary concurrent permanent plan of reunification or custody/guardianship and scheduled a disposition hearing. At the disposition hearing, the court ceased reunification efforts; ordered a permanent plan of custody or guardianship; and ordered that DSS offer the father supervised visitation every other week and that visitation be reduced to once a month if the father missed visits without notice or acted inappropriately. Respondent parents appealed.

**Procedural history:** On June 4, 2013, the court of appeals published a decision affirming the adjudication and affirming in part and reversing in part the disposition. That decision was republished on August 6, 2013. A rehearing was granted by the court of appeals on August 9, 2013.

**Held:** Adjudication affirmed; disposition affirmed in part and reversed in part

- If it was error for the court to order a temporary permanent plan at adjudication, respondents showed no prejudice as a result, and any error was corrected by the court's later order of permanent plan at disposition.
- Respondents waived the lack of notice required by former G.S. 7B-907(a)\* by participating in the disposition hearing after the court announced its intention to enter a permanent plan without objection.
- Findings were sufficient to support the cessation of reunification efforts, and the court related those findings to a conclusion of law that reunification efforts would be futile and inconsistent with the juvenile's safety and need for permanent home within a reasonable period of time.
- Visitation plan must contain a minimum outline, such as time, place and conditions of appropriate visitation plan; this portion of the disposition order reversed and remanded.

\*G.S. 7B-907 has been repealed and replaced by G.S. 7B-906.1.

## **Appeal and Mootness**

- *Appeal is moot when issues on appeal will have no practical effect on the existing controversy*
- *There is no bright line rule establishing what conduct by a parent will result in the forfeiture of a parent's constitutionally protected status*

**In The Matter of A.S., III** (August 20, 2013)

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMy00Mi0xLnBkZg==>

**Facts:** Father of A.S. served in the military after A.S.'s birth and was deployed to Afghanistan and stationed in Colorado when he was stateside. During his military service, father maintained contact with A.S. and provided support for A.S. although he was no longer in a relationship with A.S.'s mother. During father's deployment, A.S. was taken into DSS custody and adjudicated neglected. Father was present at the disposition hearing, at which the court found that mother and father had acted inconsistently with their constitutionally protected parental rights. The trial court ordered physical custody of A.S. to her maternal grandmother and legal custody of A.S. to father. Father was ordered to maintain a cell phone to facilitate his making legal decisions, to complete a parenting class, and to have unsupervised visitation with A.S. Father appealed. During the appeal, review hearings were held in the juvenile proceeding based upon new circumstances, and modification orders were entered by the trial court.

**Held:** Appeal dismissed

1. In juvenile cases, adjudication and disposition orders are subject to review and modification. Additional findings made by the court in a subsequent review order support the conclusion that father acted inconsistently with his rights as a parent by failing to maintain contact with A.S. and by disobeying the earlier disposition order regarding being able to be contacted.
2. The issues raised by father on appeal are moot, and none of the exceptions to the mootness doctrine (collateral legal consequences, capable of repetition but evading review, or public interest) apply.
3. The court of appeals declined to establish a minimum standard of care by which service members may fulfill their parental responsibilities.



# Termination of Parental Rights

## Withdrawal of Parent's Attorney

- *Before granting an attorney's motion to withdraw, court must determine whether the attorney gave the client prior notice of intent to withdraw and had justifiable cause to withdraw*

**In the Matter of D.E.G.**, \_\_\_ N.C. App. \_\_ (August 6, 2013)

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMy0yNzktMS5wZGY=>

**Facts:** By consent order, a 3-year-old was adjudicated neglected and dependent. After a hearing at which the father was represented by counsel, the trial court ordered that reunification efforts with the father cease and changed the permanent plan from reunification to adoption. At a later TPR hearing, neither the parents nor their attorneys appeared. The DSS attorney notified the court that both parents' attorneys had informed her that they had had no contact with their clients and that the father's attorney asked the DSS attorney to be excused from representing the father in the TPR hearing. The trial court excused both parents' attorneys' absence and held the termination hearing. The trial court adjudicated three grounds, found that termination was in the child's best interests, and terminated the father's parental rights. Respondent father timely appealed the permanency planning order and the order terminating his parental rights.

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

1. Parents have a right to effective assistance of counsel in termination of parental rights proceedings. The trial court erred by allowing father's appointed counsel to withdraw without first determining
  - a. whether the attorney made reasonable efforts to give his client prior notice of his intent to withdraw, and
  - b. whether the attorney had justifiable cause to withdraw.

Without the attorney's appearance in court to determine these facts, the trial court had no discretion to grant the request but should have either granted a reasonable continuance or denied the motion to withdraw.

2. Undisputed findings of fact by the trial court supported the court's conclusion and order to cease reunification efforts with the father.

## **Subject matter jurisdiction; standing**

- *In determining if a child resides with or lives with someone, the court looks to the number of nights the child spends with that person*
- *A continuous period of time allows for temporary absences*

**In re A.D.N.** \_\_\_ N.C.App. \_\_\_, \_\_\_ S.E. 2d \_\_\_ (December 3, 2013)

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMy03MDktMS5wZGY=>

**Facts:** On January 2, 2013, paternal grandmother petitioned for termination of parental rights. The trial court found the petitioner had standing because the child resided with her for a continuous period of two years or more preceding the filing of the petition. Child was born drug addicted, and after his hospital discharge, petitioner calendared when he stayed overnight with her. Petitioner documented that the child spent a minimum of twenty-four nights per month with her in January, February, March and April 2011. In May, 2011, the child stayed with petitioner sixteen nights prior to her obtaining a custody order on May 19, 2011. The court granted the TPR after finding petitioner had standing, three statutory grounds existed, and it was in the child's best interests. Respondent mother appealed asserting petitioner lacked standing to commence a TPR action, and the court erred by not appointing a guardian *ad litem* (GAL) to the child.

**Held:** Affirmed

- Although the court made the ultimate finding of fact necessary to establish the petitioner had standing, it did not make detailed supporting findings. The record, however, contained competent evidence supporting the ultimate finding that petitioner had standing and, therefore, the court had subject matter jurisdiction.
- Legal custody is not a determinative factor when deciding who the child resides with, which is interpreted to mean "lives with."
- In looking at analogous child support guidelines, "lives with" is determined by the number of nights a child spends with the person per year. The trial court reasonably concluded 85% of the child's time established that the child resided with and was not visiting with petitioner.
- In looking at the UCCJEA for guidance, a continuous period of time allows for the child to spend a limited number of nights (i.e., a temporary absence) away from the person's home.
- Citing previous holdings, respondent mother failed to preserve the issue of the court not appointing a GAL to the child for appeal.

## **Grounds and Best Interests of the Juvenile**

- *If a petition for termination of parental rights alleges a specific statutory ground, an order of TPR based upon a different statutory ground may stand if the petition alleges facts sufficient to place the parent on notice that parental rights could be terminated on that other ground*
- *The court's findings must support its conclusion that termination of parental rights is in the juvenile's best interests*

**In re T.J.F.**, \_\_\_ N.C. App., \_\_\_, \_\_\_ S.E. 2d \_\_\_ (November 19, 2013)

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMy03MDctMS5wZGY=>

**Facts:** Mother filed petition to terminate father's parental rights on the ground of neglect, and a TPR was ordered on the ground of willful abandonment. At disposition, the court concluded that TPR was in the best interests of the juvenile. Respondent father appeals.

**Held:** Affirmed

- Despite grounds of neglect, the petition sufficiently alleged facts, such as his failure to have contact with the child within the six months preceding the petition and his failure to pay for the cost and care of the child, to place the respondent father on notice that his parental rights may be terminated on the basis of abandonment.
- Based upon findings that the respondent father failed to maintain contact with his child, that the child had a close and loving relationship with her mother and maternal grandparents, and that the maternal grandparents desired to adopt the child, the court's conclusion that TPR was in the juvenile's best interests was not an abuse of discretion.
- Although the court found the juvenile would be entitled to financial benefits if adopted by her maternal grandparents, the additional findings that the respondent father failed to satisfy his parental obligations by withholding his presence, affection and support supported the court's conclusion that TPR was in the juvenile's best interests.

## **Findings Addressing the Best Interests of the Juvenile**

- *Although the court must consider all six statutory factors enumerated in G.S. 7B-1110(a), the order must contain written findings on only those factors that are relevant to the court's decision*

**In re D.H.**, \_\_\_ N.C. App., \_\_\_, \_\_\_ S.E. 2d \_\_\_ (February 4, 2014).

<http://appellate.nccourts.org/opinions/?c=2&pdf=31214>

**Facts:** DSS filed a petition to terminate respondent mother's parental rights. The court found four grounds existed for the termination of parental rights, and at disposition, the court further found that termination of respondent mother's parental rights was in each juvenile's best interest. Respondent mother appeals, arguing the disposition portion of the order did not contain written findings for each statutory factor required to be considered as provided for in G.S. 7B-1110(a).

**Held:** Affirmed

- Although age is one of the factors the court must consider, there was no evidence in the record that age was relevant in this case; therefore, the order was sufficient even though there were no written findings addressing each child's age.
- The lack of an adoptive placement at the time of the termination hearing is not a bar to a termination of parental rights. In addition, the factor addressing the quality of the relationship between the juvenile and proposed adoptive parent cannot be addressed and is, therefore, not a relevant factor requiring written findings in the TPR order.
- The findings were sufficient to address two factors that were relevant in this case: the likelihood of adoption and whether termination will aid in the accomplishment of a permanent plan for each juvenile. Those findings were supported by the evidence.
- The court's conclusion that TPR was in the juvenile's best interests was not an abuse of discretion as it was not "manifestly unsupported by reason."