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**JUVENILE LAW UPDATE**

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## Termination of Parental Rights

- Waiver of counsel. A respondent's waiver of the right to counsel in a termination action is not governed by G.S. 15A-1242, which applies only in criminal cases.
- Role of respondent's GAL. The court of appeals should determine whether the role of respondent's GAL in a termination action is one of assistance or substitution.

### **In re P.D.R., \_\_ N.C. \_\_, 723 S.E.2d 335 (April 13, 2012).**

**Facts:** Respondent mother repeatedly failed to follow through with a mental health evaluation. In both the underlying dependency and neglect proceeding and the termination of parental rights action the trial court appointed a guardian ad litem for respondent. At the termination hearing respondent's attorney made a motion to withdraw, and respondent indicated that she wanted to represent herself. The court made some inquiry about respondent's understanding. When questioned by the court, respondent's guardian ad litem responded that she would leave that question up to the court. Later the GAL questioned the sufficiency of the court's inquiry and the mother's understanding of the waiver, and the court conducted further inquiry. The court then allowed respondent to waive her right to counsel, and after a hearing respondent's rights were terminated.

**Court of Appeals:** Respondent appealed and the court of appeals reversed, holding that the trial court abused its discretion in allowing respondent to waive counsel, erred by not conducting an adequate inquiry consistent with the one required by G.S. 15A-1242 in criminal cases, and erred by failing to determine whether respondent was competent to represent herself.

**Held:** Reversed and remanded.

1. The Supreme Court held, as a matter of statutory interpretation, that the requirements in G.S. 15A-1242 for a criminal defendant's waiver of the right to counsel have no application in a termination of parental rights proceeding. The opinion is silent with respect to the proper procedure and standard for a party's waiver of the right to counsel in a termination action.
2. The Supreme Court remanded to the court of appeals to decide whether the role of respondent's guardian ad litem in a termination of parental rights action is one of assistance or substitution. The court of appeals did not address the role of respondent's guardian ad litem in relation to the waiver of counsel, because both petitioner and respondent took the position that the decision belonged to respondent. In the Supreme Court, however, both petitioner and respondent argued that the GAL's role was one of substitution, not assistance, and that the decision about waiving counsel belonged to the GAL, not the respondent.

- Non-support ground. In a private tpr, the nonsupport ground requires proof of a court order or agreement for the payment of support.
- Abandonment. Abandonment did not exist when, during the relevant 6-month period, respondent was ordered not to contact the children and filed an action seeking visitation.

### **In re D.T.L., \_\_ N.C. App. \_\_, 722 S.E.2d 516 (February 21, 2012).**

**Facts:** After respondent was released from prison, his children's mother obtained a protective order that prohibited him from contacting her or the children. In November 2010 respondent

filed a civil custody action seeking secondary custody and generous visitation. In February 2011 petitioner filed a petition to terminate respondent's rights. The court adjudicated the grounds of willful nonsupport and willful abandonment, and terminated respondent's rights.

**Held:** Reversed.

1. In a private action, the nonsupport ground under G.S. 7B-1111(a)(4) requires proof of either a court order or an agreement between the parties providing for the payment of child support. In this case no agreement or order was alleged, introduced into evidence, or found as a fact.
2. The trial court's findings did not support its conclusion that respondent willfully abandoned the children during the six months immediately preceding the filing of the petition, because
  - a. respondent was under a court order not to have contact with the children, and
  - b. respondent's filing of a civil action seeking visitation with the children established that he did not intend to forego his role as a parent.

- Paternity. When a question of paternity arises in a termination of parental rights case, the court is required to order paternity testing under G.S. 8-50.1.
- Appeal. Respondent's appeal was not moot, because an order terminating his rights could have collateral consequences.

**In re J.S.L., \_\_ N.C. App. \_\_, 723 S.E.2d 542 (February 7, 2012).**

**Facts:** The child's mother filed a petition to terminate the parental rights of both the putative father and any unknown father. The putative father filed an answer denying paternity and moving for DNA paternity testing. The court denied the motion, proceeded with the termination proceeding, adjudicated two grounds, and terminated respondent's rights.

**Held:** Reversed and remanded.

1. The trial court erred when it denied respondent's motion for paternity testing. When respondent denied paternity, a question of paternity arose and the court was required, under G.S. 8-50.1(b1), to order paternity testing. If the court had found after testing that respondent was not the child's father, dismissal of the petition would have been required.
2. The order terminating respondent's rights did not render his appeal moot. Termination has collateral consequences, such as being the partial basis for termination of a parent's rights to another child under G.S. 7B-1111(a)(9).

- Amendment of pleadings. Allowing motion to amend pleadings was not prejudicial error.
- Neglect ground. Evidence was not sufficient to establish neglect by an incarcerated father.

**In re G.B.R., \_\_ N.C. App. \_\_, 725 S.E.2d 387 (May 1, 2012).**

**Facts:** In Nov. 2009 the children were adjudicated neglected based on conditions in the mother's home, when respondent father was incarcerated. The disposition order continued custody with DSS, directed orders to the mother, and did not mention the father. In May 2010 a permanency planning order ceased reunification efforts with respect to both parents. DSS filed termination motions in July 2010 alleging the neglect ground. Respondent filed an answer denying the material allegations and made a Rule 12(b)(6) motion to dismiss, which the court denied. Before the hearing, respondent was released early from prison and became employed. The court allowed

DSS's motion to amend the petition to conform to evidence that respondent was involved in a 2006 adjudication that the children were neglected. The court adjudicated the neglect ground and terminated respondent's rights.

**Held:** Reversed.

1. Allowing the motion to amend to conform to the evidence was error, based on *In re B.L.H.*, 190 N.C. App. 142, *aff'd per curiam* 362 N.C. 674 (2008). However, the petition put respondent on notice that his rights might be terminated on the basis of neglect, and the court made no findings based on the subject matter of the amendment, so the error was not prejudicial.
2. Findings did not support the conclusion that respondent neglected the children. Evidence and findings focused almost solely on respondent's incarceration. There was no evidence of his circumstances since his release or that would show a likelihood of a repetition of neglect. Evidence did show that he wrote many letters to the children while incarcerated; he was fully employed and earlier was on work release; he had insurance and his own apartment; he did not drink alcohol or use any medication; he had no relationship with the mother; and in prison he completed an anger management course, a character education course, a human resource development program, and a 16-week "father accountability" class.

- Sufficiency of evidence - neglect. Evidence based on sworn testimony that allegations in the motion were true was sufficient.
- Sufficiency of findings – nonsupport. Zero support was not a reasonable portion of the cost of the child's care when respondent was employed from time to time.

**In re J.E.M.**, \_\_ N.C. App. \_\_, \_\_ S.E.2d \_\_ (June 19, 2012).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi03Mi0xLnBkZg>

**Facts:** At the hearing on DSS's motion to terminate respondent father's rights (after the mother relinquished), respondent's attorney agreed with DSS's statement that respondent did not wish to contest the allegations in the motion. Evidence presented by DSS consisted of sworn testimony of a social worker that the allegations in the motion were true and correct. Neither respondent nor the child's GAL presented evidence. At disposition, the GAL submitted a written report and respondent called three witnesses. The court adjudicated the neglect and nonsupport grounds and terminated respondent's rights.

**Held:** Affirmed.

1. The court upheld the neglect ground based on evidence of prior neglect and a likely repetition of neglect if the child were returned to respondent. The latter, the court said, was supported by evidence that respondent did not visit the child for 5 months before the hearing; met only once with a parenting class instructor, when meeting with the instructor was part of his case plan; and provided no support.
2. The court rejected respondent's argument that evidence of failure to pay support was not sufficient to support the nonsupport ground. The court held the evidence was sufficient when it showed that respondent paid no child support while the child was in DSS custody and that he was "gainfully employed from time to time." Zero support, the court said, is not sufficient when there was some ability to pay.

**Dissent:** The dissent would have reversed on the basis that the trial court did not conduct a proper hearing and erred in relying only on testimony that the allegations in the petition were true and on written reports offered for disposition. The majority stated that respondent had not raised these issues on appeal and that it was not the court's role to raise them.

## 2012 Legislation

### 1. Termination of Parental Rights Ground. S.L. 2012-40 (H 235).

Effective October 1, 2012, a new ground for termination of parental rights is added to G.S. 7B-1111(a):

“(11) The parent has been convicted of a sexually related offense under Chapter 14 of the General Statutes that resulted in the conception of the juvenile.”

### 2. Adoption Law Changes. S.L. 2012-16 (H 637)

Also effective October 1, 2012, this act makes the following adoption law changes:

- Repeals G.S. 48-2-302(a), which specifies a filing deadline for certain adoption petitions. [Because subsection (b) addresses noncompliance with subsection (a), it should have been repealed as well.]
- Amends G.S. 48-2-304(a)(6) to provide that the original petition for adoption must include a description and estimate of the value of any property belonging to the adoptee if the adoptee is a minor or an adult who has been adjudicated incompetent.
- Amends G.S. 48-2-401(a), clarifying that the petitioner must initiate service of notice (rather than serve notice) of a petition for adoption no later than 30 days after the petition is filed
- Amends G.S. 48-3-205(d) to permit the substitution of forms reasonably equivalent to those provided by the Division of Social Services to collect background information for submission to the prospective adoptive parent.
- Amends G.S. 48-3-303(c)(12) by adding social security numbers and income to the information that may be redacted from the preplacement assessment provided to a placing parent or guardian.
- Amends G.S. 48-3-602, which requires the appointment of a guardian ad litem for a parent who has been adjudicated incompetent, to provide that if the court determines that proceeding with an adoption is in the child's best interest, the court is to order the parent's guardian ad litem to execute a consent or a relinquishment (was, a consent) for the parent.
- Amends G.S. 48-3-608(b) to require that a preplacement assessment prepared after placement occurs in a direct placement adoption be prepared substantially in conformity with the requirements of G.S. 48-3-303.
- Amends G.S. 48-3-707(a) to provide that a relinquishment will become void if, after placement but before entry of the adoption decree, the agency, the person relinquishing the child, and the prospective adoptive parent all agree to rescind the relinquishment.