

Social Services Attorneys' Winter Conference
Chapel Hill, NC

February 21 - 22, 2013

JUVENILE LAW UPDATE

Cases Filed from July 17, 2012, through February 5, 2013

GAL for Parent: Role Depends on Basis for Appointment

In re P.D.R., ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 18, 2012).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMC0xNTE5LTIucGRm>

Facts: This case was previously before the Court of Appeals on the question of whether the trial court had erred in allowing the respondent mother to waive her right to counsel in a termination of parental rights action. That court reversed the termination order, and the Supreme Court, after granting discretionary review, reversed the court of appeals, holding that G.S. 15A-1242 does not apply to waivers of counsel in non-criminal cases. In the Supreme Court both parties argued that the waiver decision belonged to the parent’s guardian ad litem, not the parent herself – a position different from the one both had taken in the trial court and Court of Appeals, but they disagreed as to whether the guardian ad litem had waived counsel. The Supreme Court remanded the case to the court of appeals for a determination of whether the role of the parent’s guardian ad litem in a termination action is one of assistance or substitution.

Held: Vacated and remanded.

1. The court first noted the “seeming conflict” between G.S. 7B-1101.1(e), which describes a role of assistance for the guardian ad litem, and the requirement that appointments be made pursuant to Rule 17, which provides for a role of substitution.
2. The court then focused on the two prongs of the statute’s authorization for the appointment of guardians ad litem, i.e., the court has a reasonable basis to believe that the parent
 - a. is incompetent, or
 - b. has diminished capacity and cannot represent his/her own interests.The court held that if the trial court finds the former, the guardian ad litem’s role is one of substitution. If the trial court finds the latter, the role is one of assistance.
3. Before appointing a guardian ad litem for a parent, the court must conduct a hearing and determine which (if either) prong applies and, if the court appoints a guardian ad litem, must specify the prong and the role – substitution or assistance – of the guardian ad litem.

Role of Parent’s GAL; Allowing Party to Act *Pro Se*; Findings Required to Waive Reviews

In re A.Y., ___ N.C. App. ___, ___ S.E.2d ___ (Jan. 15, 2013).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi04MC0xLnBkZg>

Facts: Before adjudication the court appointed a guardian ad litem for respondent mother. When her attorney asked to withdraw and respondent asked to be allowed to proceed pro se, the court ordered her to have a psychological evaluation and appointed another attorney. The psychologist reported that respondent’s poor decision making was due to personality problems, not cognitive limitations. When respondent again asked to be allowed to proceed pro se, the court engaged in an exchange with respondent to assess her understanding of the nature and significance of the proceeding and her awareness of the consequences of representing herself, then allowed her to proceed pro se. After the permanency planning hearing, the court ceased reunification efforts, granted guardianship to the child’s grandparents, and ordered that reviews be held only on motion of a party.

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

1. Appointment of a GAL for respondent did not preclude her from waiving counsel and limit the ability to do that to the GAL. Although the order appointing respondent’s GAL did not

specify whether the GAL's role was one of substitution or assistance, a distinction addressed in *In re P.D.R.* ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 18, 2012), after the trial court acted in this case, the court held that the intention that the GAL's role be one of assistance was clear from the trial court's findings and from the record, including statements by the GAL.

2. The trial court's inquiries of respondent were sufficient for the trial court to determine that respondent's waiver of counsel was voluntary and knowing. The supreme court, in *In re P.D.R.*, ___ N.C. ___, 723 S.E.2d 335 (Apr. 13, 2012), held that the provisions in G.S. 15A-1242 for waivers in criminal cases do not apply in civil cases.
3. After reviewing the trial court's findings, the court held that they were sufficient to support the trial court's decision to cease reunification efforts and grant guardianship. Findings related in part to a pattern of poor parenting, ongoing conflict and domestic violence, and respondent's limited progress toward seven treatment goals.
4. Waiving review hearings without making the findings required by G.S. 7B-906(b) was error.

UCCJEA – Jurisdiction to Modify; Standing to Appeal

In re E.J., ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 5, 2013).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi02NzMtMS5wZGY>

Facts: Teenager was taken into custody when he and his father had a fight while driving back to Tennessee from a trip to North Carolina. DSS filed a petition alleging that the child was neglected and dependent. The mother, who lived in New Hampshire, told DSS she could not care for the child. At a nonsecure custody hearing the court learned of a protective services case in New York, and contacted the judge there. The court found that the N.Y. judge had not determined whether it should retain jurisdiction and would notify the N.C. court before the next hearing, but that did not happen. The father, but not the mother, was served. The court here proceeded to adjudication and disposition, finding the boy to be neglected and dependent. The court stated that it had jurisdiction, but made no reference to the N.Y. court or the action there. The mother appealed.

Held: Vacated and remanded.

1. The court of appeals rejected DSS's argument that the mother lacked standing to appeal, since she had not been served in the action. G.S. 7B-1001 and -1002 provide when and by whom an appeal may be taken, and make clear that a parent may appeal an initial adjudication and disposition order.
2. The trial court did not have jurisdiction to enter the adjudication and disposition order. The court made none of the findings required by G.S. 50A-203 to conclude that it had jurisdiction to modify the New York order. Even if the court had found that no party still resided in New York, it failed to make the findings to support a conclusion that it would have jurisdiction to enter an initial child custody order. While the court had temporary emergency jurisdiction, its order should have provided that it was for a specific limited period of time.

Disposition and Review; Out-of-State Placement; Waiver of Review Hearings

In re V.A., ___ N.C. App. ___, 727 S.E.2d 901 (July 17, 2012).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0xNzAtMS5wZGY>

Facts: DSS appealed from the adjudication/disposition order and a later review/permanency planning order. After a voluntary placement with the child's grandmother, the child's mother expressed a preference for placement with the child's great-grandmother in South Carolina. After adjudication, at disposition DSS informed the court that S.C. had not approved the placement and that placing the child there would violate the Interstate Compact on the Placement of Children (ICPC). The court left legal custody with DSS, ordered placement with the great-grandmother in S.C., and ordered DSS to obtain the ICPC paperwork or to conduct its own home study and to place the child with the great-grandmother in S.C. within 14 days if appropriate. The court ordered a concurrent plan of reunification and adoption. DSS appealed, and the order was stayed.

At another review hearing the court questioned the great-grandmother directly, placed the child in her legal custody, changed the permanent plan to custody with a relative, suspended review hearings, and relieved counsel, DSS, and the child's GAL of responsibility. DSS appealed. The appeals were consolidated.

Held: Reversed and remanded.

1. The dispositional order violated the ICPC, which clearly applies at disposition pursuant to G.S. 7B-903(a)(2)c.
2. For purposes of the ICPC, placement with the great-grandmother was "preliminary to a possible adoption or foster care." The court cited to ICPC Regulation 3, as amended effective May 1, 2011, and its definition of "foster care."
3. The trial court erred in waiving review hearings without making findings required by G.S. 7B-906(b), and given the facts in the case, the court could not have made all of the required findings.

Permanency Planning: Importance of Well-Drafted Orders and Sufficient Findings

In re H.J.A., ___ N.C. App. ___, 735 S.E.2d 359 (Nov. 20, 2012).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi02MzgtMS5wZGY>

Facts: Both children came into DSS custody as dependent juveniles soon after their births, when respondent mother was a minor in DSS custody. The father of only one of the children was identified, and he was incarcerated. At a permanency planning hearing a year and a half after the second child came into custody, the court adopted a concurrent plan of reunification and adoption and ceased reunification efforts with respondent mother. The court's findings included that return home was possible within six months; that DSS had not made reasonable efforts to implement the permanent plan; and that efforts to reunify with respondent mother would be futile. Respondent mother gave notice of her intent to appeal the order. Subsequently the trial court terminated respondent's and the fathers' rights on three grounds, and respondent, but neither father, appealed both orders.

Held: The court of appeals reversed both orders and remanded for additional findings of fact, but discussed only the permanency planning order.

1. The court noted the confusion caused by the order's dealing with both respondent mother and the father of one child without making clear which findings related to which parent. Only after reviewing the transcript did the court fully understand the trial court's intent, including that references to possible reunification related to the father of one child, not to the respondent.
2. The order failed to make the findings required by G.S. 7B-907(b). While the order found that it would be contrary to the child's best interest to be returned to respondent, it did not include evidentiary findings sufficient to support that ultimate finding. Because there was evidence from which the court could have made the required findings, the court remanded for additional findings.
3. Many of the "findings" in the order were merely recitations of witnesses' testimony, which do not constitute findings of fact.
4. Merely incorporating GAL reports or DSS summaries, without making specific findings, is insufficient.

Termination of Parental Rights: Standing; Willfully Leaving Child in Care

In re D.C., ___ N.C. App. ___, ___ S.E.2d ___ (Feb. 5, 2013).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMy8xMi04OTMtMS5wZGY>

Facts: The child was removed from the home in 2004, at age three, after he was severely injured by a dog at the home. He was adjudicated neglected and remained in DSS custody. In 2005 the plan was changed to adoption, but in 2007 it was changed to guardianship, and the court named the foster parents as the child's guardians. In 2011 respondent filed a motion for review and the child's guardians filed a petition to terminate respondent's parental rights. The court consolidated the two for hearing, adjudicated three grounds for termination, denied respondent's motion, and terminated her rights.

Held: Affirmed.

The court of appeals reviewed only the ground of willfully leaving the child in care for more than a year without making reasonable progress to correct conditions that led to the child's removal.

1. The court rejected respondent's argument that the guardians could not file a termination action without the trial court's changing the permanent plan from guardianship to adoption. The court held that the Juvenile Code places no preliminary requirements on a guardian's filing a termination petition.
2. The court rejected respondent's argument that the dog had been killed and that the reason for the removal, therefore, no longer existed. The court characterized the reason for removal as the injurious environment, lack of proper care and supervision, and respondent's failure to appreciate what was a danger to the child's health and safety. For four years after the plan became guardianship respondent did not take the steps she knew she had to take in order to have visits with the child. She made the required appointment only after the termination petition was filed, and she filed no motion for review for a period of more than three years.

Termination of Parental Rights: Service by Publication

In re C.A.C., ___ N.C. App. ___, 731 S.E.2d 544 (Sept. 4, 2012).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0zMDUtMS5wZGY>

Facts: In an action brought by the child’s mother, the trial court authorized service on the father by publication after attempted personal service was unsuccessful. Petitioner filed an affidavit of service by publication. Respondent made no appearance, although provisional counsel was present at the hearing, and the court terminated respondent’s rights. He appealed, asserting that the trial court lacked personal jurisdiction because service was inadequate.

Held: Vacated.

1. Service by publication in a termination action must include notice of respondent’s right to counsel, since notice must comply with both G.S. 1A-1, Rule 4(j1) and G.S. 7B-1106(b). Because the notice in this case said nothing about the right to counsel, service was inadequate.
2. The presence of provisional counsel did not constitute a general appearance by respondent, and respondent did not waive the defect in service.
3. The trial court should have dismissed provisional counsel when respondent failed to appear.

Termination of Parental Rights: Dependency and “Alternative Child Care Arrangement”

In re K.O., ___ N.C. App. ___, 735 S.E.2d 369 (Nov. 20, 2012).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi03MjltMS5wZGY=>

Facts: In a civil custody action in 2008 petitioner (an unrelated acquaintance) was awarded full custody of the child, based on the court’s determination that the mother had abandoned the child “to petitioner’s exclusive care and control” and had not dealt with her drug problem. In 2011, petitioner filed a petition to terminate respondent’s rights based on the dependency ground. The court adjudicated that ground and terminated respondent’s rights.

Held: Affirmed.

1. When petitioner had custody of the child pursuant to a court order, due to respondent’s abandonment and substance abuse problems, respondent could not characterize custody with petitioner as her suitable alternative child care arrangement.
2. Having affirmed termination based on the dependency ground, the court of appeals did not consider two other grounds that were added to the petition by amendment and were also adjudicated.

Termination of Parental Rights: Willfully Leaving Child in Care; Best Interest Findings

In re J.L.H., ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 4, 2012).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi00NTItMS5wZGY>

Facts: After the child had been in DSS custody for over a year, DSS filed a petition to terminate respondent’s rights and the trial court adjudicated three grounds: neglect, willfully leaving the

child in foster care, and willfully failing to pay a reasonable portion of the cost of the child's care. The court of appeals examined only the second of these grounds.

Held: Affirmed in part and remanded in part.

1. The court held that the evidence and the trial court's findings were sufficient to support the adjudication of the ground of willfully leaving the child in foster care. Even though respondent had participated in some services, her failure to participate in her own therapy and inconsistent participation in the child's therapy was not "reasonable progress under the circumstances."
2. With respect to disposition, the court remanded for additional findings because the trial court failed to make the findings required by G.S. 7B-1110.

Adoption: Evidence and Findings; When Putative Father's Consent is Required

In re S.K.N., ___ N.C. App. ___, 735 S.E.2d 382 (Dec. 4, 2012); *petitioners' motion for temporary stay allowed*, ___ N.C. ___, 735 S.E.2d 823 (Jan. 8, 2013).

<http://appellate.nccourts.org/opinions/?c=2&pdf=MjAxMi8xMi0yNzUtMS5wZGY>

Facts: The mother and putative father, although unmarried, had lived together for nine years and were the parents of two other children. While they still lived together, the mother hid this pregnancy from respondent, lied and told him she had a tumor, and went to another county to have the child. She relinquished the child to an agency for adoption and said that respondent was not the father. The father later found pictures making him think the child was his. He talked to his mother, who called DSS to tell the agency that her son thought the child was his and that he did not want the child to be adopted. The following day petitioners filed a petition to adopt the child. The trial court determined that respondent's consent to the adoption was required because, before the petition was filed, he had acknowledged paternity, provided reasonable and consistent support for the mother, and regularly visited or communicated with the mother, for purposes of G.S. 48-3-601. Petitioners appealed.

Held: Affirmed.

1. The court of appeals first held that the order, although interlocutory, was immediately appealable because it affected a substantial right.
2. The court then held that
 - Respondent's statements to his mother and her call to DSS on his behalf were sufficient to constitute "acknowledgement," and his request for a blood test did not void the acknowledgement.
 - Respondent satisfied the support and communication requirements during the pregnancy, while he and the mother were living together, and the fact that he was not aware of the pregnancy during that time was not pertinent.