

Summer Conference for Social Services Attorneys

School of Government

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JUVENILE LAW CASE UPDATE

Cases Decided from April 1, 2014 to July 1, 2014

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Abuse/Neglect/Dependency

Adjudication: Collateral Estoppel and Preservation of Issue for Appeal

In re K.A., ___ N.C. App., ___, ___ S.E. 2d ___ (April 1, 2014).

<http://appellate.nccourts.org/opinions/?c=2&pdf=31396>

Held: Reversed and remanded

- Collateral estoppel does not apply when the two actions require different burdens of proof: preponderance of the evidence in a Chapter 50 action versus clear and convincing evidence in a Chapter 7B abuse, neglect, or dependency adjudication. No exception arises from the best interests of the child analysis that is applied in both types of proceedings.
- Respondent Mother preserved the issue for appeal when counsel argued during an objection to her line of questioning that collateral estoppel and res judicata should not apply. Stating in closing argument that she accepted the court's ruling to the extent she needed to do so to try the case did not waive her preservation of the issue for appeal.
- **Facts:** A G.S. Chapter 50 civil custody action between Respondent Mother and Respondent Father awarded legal custody of the parties' three children to Respondent Father. The Court found that Respondent Mother had perpetuated a false set of beliefs, in alleging the father had molested and/or abused one of the children, and that the children now believed those false beliefs. Physical custody of two of the children was placed with the father, and the father was ordered to participate in counseling with the third child to prepare her for the transition to his home. One week later, DSS filed a petition alleging that all three children were abused, neglected, and dependent, and the child who was not in Respondent Father's physical custody was placed in foster care. At the adjudication hearing, the court determined Respondent Mother was collaterally estopped from re-litigating the issues that were litigated in the Chapter 50 action, specifically the allegations that Respondent Father had abused the children, thereby limiting the evidence Respondent Mother was able to introduce at the hearing. The court adjudicated all three children neglected and the child who was in foster care dependent as well. Respondent Mother appealed.

Adjudication: Substantial Risk of Harm

In re J.C.B., ___ N.C. App ___ (May 6, 2014)

<http://appellate.nccourts.org/opinions/?c=2&pdf=31564>

Held: Adjudication reversed; dismissed in part - STAYED BY NC SUPREME CT, 6/12/14

- Respondent father has no standing to appeal the adjudication of the child named in the companion action as he is not a specified party enumerated in G.S. 7B-1002.
- Respondent mother did not file a timely notice of appeal of the civil custody order. Although a court may infer an intent to appeal, the notice of appeal filed in the abuse, neglect, and dependency action did not reference the chapter 50 order, so no intent could be inferred. Writ of certiorari denied.
- A finding of prior abuse alone is not sufficient to support an adjudication of neglect; there must be evidence of others factor showing the abuse or neglect is likely to be repeated. The findings of fact do not support the conclusion of law that the children were neglected because there was a substantial risk that abuse or neglect might be repeated.
- **Facts:** This action involves three children who were adjudicated neglected when in a companion case (In re R.R.N.) another juvenile was adjudicated abused. The court found that the respondent father in this action sexually abused the child in the companion case when that child was staying overnight at respondent father's home. The court further found the three children in this action were present in the home when the abuse of the other juvenile took place and that created a substantial risk that abuse or neglect of the three children in this action might occur. The respondents are the parents of one of the children and joint custodians with the maternal grandmother of the other two children named in this action. As part of its order, the court initiated a Chapter 50 custody order and awarded custody of the two children who respondents were custodians of to the children's maternal grandmother. Respondent father appeals the adjudication of sexual abuse of the child named in the companion case. Respondent mother appeals the Chapter 50 action. Both respondents appeal the adjudication of neglect of the three children named in this case.

Caretaker

In re R.R.N., ___ N.C. App. ___, (May 6, 2014),

<http://appellate.nccourts.org/opinions/?c=2&pdf=31563>

Held: Reversed - STAYED BY NC SUPREME COURT 6/12/14

- The purpose of the caretaker statute in the Juvenile Code is to protect juveniles from abuse and neglect inflicted by adult members of their household and by adult relatives entrusted with the responsibility of the child's health and welfare.

- A court must apply a totality of the circumstances test when determining if an adult relative is “entrusted with the care of a juvenile’s health and welfare.”
- Unlike a prolonged stay, an overnight sleepover is temporary in nature. A parent does not relinquish his/her responsibility over the health and welfare of his child to the adult supervisor, even if that adult is a relative, but rather, the adult supervisor is responsible for ensuring the visiting child’s safety only.
- **Facts:** R.R.N. spent one night at a sleepover at a relative’s, her step-cousin’s, home. After the sleepover, she disclosed to her mother that she had an inappropriate relationship with the step-cousin (the father in the home), and that he had inappropriately touched her in a sexual manner. Respondent mother made a report to DSS, prohibited contact between R.R.N. and the step-cousins, and arranged for R.R.N. to go to counseling. DSS filed a petition, and R.R.N. was adjudicated abused and neglected. The court concluded the step-cousin was a caretaker. Respondent mother appealed.

Day Care Licensing: Substantiation Determination, Due Process

Nancy’s Korner Care Center v. N.C. Dep’t of Health & Human Services, ___ N.C. App. ___ (May 20, 2014) <http://appellate.nccourts.org/opinions/?c=2&pdf=30694>

Held: Vacated and Remanded to DHHS to conduct its own investigation of substantial evidence of abuse

- The statutes and administrative code found at G.S. 110-88(6B), -105, and -105.2, and 10A N.C.A.C. 09.1904(b) place an affirmative duty on DHHS to independently determine whether abuse or neglect occurred in a child care facility.
- A county DSS substantiation is not dispositive when determining an administrative action to be imposed by DHHS on a licensed child care facility.
- Although a collaborative investigation occurs, and evidence is shared, that collaboration does not relieve DHHS of its affirmative duty to conduct its own investigation and determine if abuse or neglect occurred.
- Because the petitioner’s liberty interests (her livelihood) were impacted by DHHS’ actions, she is entitled to due process, which can only occur if DHHS conducts and determines whether abuse or neglect occurred, rather than rely on a county dss substantiation that cannot be challenged by petitioner.
- **Facts:** After an 8-year old child attending a licensed child care facility alleged she was inappropriately touched by a staff member, the county department of social services (dss) and a consultant from the DHHS Division of Child Development and Early Education worked together to investigate the allegations. The county dss notified DHHS that it “substantiated” the employee as having sexually abused the child. As a result, the DHHS

consultant recommended the center be issued a special provisional license along with the continuation of a protection plan that prohibited the employee from being present at the facility during operational hours. The sanction was reduced by the DHHS Internal Review Panel to a written warning and implementation of the corrective action or protection plan. The petitioner appealed to an administrative hearing, where the child, the child's parent, and the dss worker did not testify. The hearing officer concluded that the substantiation by the county dss allowed DHHS to issue a written warning and corrective action plan. The hearing officer also found that the preponderance of the evidence at the hearing raised serious questions about whether the abuse occurred, but the hearing did not have jurisdiction to revisit the county dss substantiation. Petitioner appealed the administrative decision to the Superior Court, which affirmed the hearing decision concluding DHHS could rely on the county dss substantiation when issuing administrative sanctions. Petitioner appeals the final agency decision issuing a written warning and implementation of a corrective action plan.

TERMINATION OF PARENTAL RIGHTS

UCCJEA: Subject Matter Jurisdiction

In re J.D., ___ N.C. App. ___ (June 17, 2014)
<http://appellate.nccourts.org/opinions/?c=2&pdf=31727>

Held: Vacated and Remanded for Order of Dismissal

- G.S. 7B-1101 requires that the NC court specifically find in a termination of parental rights action involving a nonresident parent that it has subject matter jurisdiction under the UCCJEA pursuant to either an initial child custody proceeding (G.S. 50A-201) or modification jurisdiction (G.S. 50A-203).
- For modification jurisdiction pursuant to G.S. 50A-203, the initial state court's denial of a motion to intervene is not the equivalent of that state determining it no longer has exclusive continuing jurisdiction, or that NC was a more convenient forum to hear the child custody proceeding.
- The NC court lacked subject matter jurisdiction under the UCCJEA because there was nothing in the record demonstrating that the court of the other state determined it no longer had exclusive continuing jurisdiction as required by G.S. 7B-203.
- **Facts:** "Josh" was born in 2006 in Indiana where he resided with both his parents. In 2008, a custody action was filed in Indiana, and in 2009, a custody order was issued by the Indiana court. In 2011, Josh and his mother moved to North Carolina, where they continue to reside. In August 2011, the Indiana court modified its 2009 custody order

twice regarding visitation between Josh and his father, who continued to reside in Indiana. Also in 2011, Josh's paternal grandparents filed a motion to intervene in the Indiana custody action for the sole purpose of obtaining grandparent visitation as established by Indiana statute, and the Indiana court denied the motion. In 2012, Josh's mother filed a petition to terminate father's parental rights, and respondent father included in his answer a motion to dismiss for lack of subject matter jurisdiction, personal jurisdiction, and failure to state a claim upon which relief could be granted. The NC court denied the motions to dismiss concluding that the Indiana court declined continuing jurisdiction in the custody action by denying the paternal grandparents' motion to intervene. After hearing, the NC court terminated father's parental rights, and respondent father timely appealed.

UCCJEA, Ground of Incapable of Providing Proper Care & Supervision

In re N.T.U., ___ N.C. App. ___, (July 1, 2014)

<http://appellate.nccourts.org/opinions/?c=2&pdf=31752>

Held: Affirmed

- Pursuant to G.S. 50A-204(a), NC had temporary emergency jurisdiction because the child was present in NC and abandoned. G.S. 50A-204 does not require the court to make written findings of the circumstances that must exist for the court to exercise temporary emergency jurisdiction.
- At the time DSS filed the petition to terminate respondent mother's parental rights, NC had become the child's home state and no other custody action had been filed in another state, thus giving NC initial child-custody jurisdiction under G.S. 50A-201.
- Although a parent's incarceration is relevant, it is not determinative of a parent's incapability of providing proper care and supervision to his or her child as the parent may provide a viable alternative child care arrangement.
- A reasonable probability that the parent's incapability of providing proper care and supervision will continue for the foreseeable future does not require the court to find the incapability will last until a date certain or for a specific duration.
- **Facts:** In September 2010, N.T.U. was born in South Carolina where he resided with his mother. One year later, respondent mother was arrested in a motel room in North Carolina, where she fled to in an effort to evade the South Carolina police. She was arrested, while N.T.U. was in the motel room, for her alleged connection to a homicide and armed robbery in South Carolina. DSS filed a petition and obtained initial and then continued nonsecure custody after the court found it had temporary emergency jurisdiction under the UCCJEA. N.T.U. was adjudicated neglected and dependent. On April 12, 2013, DSS filed for termination of respondent mother's parental rights. After hearing, the court terminated respondent mother's parental rights on the grounds of (1)

neglect and (2) her inability to provide the proper care and supervision of N.T.U. such that he is dependent and there is a reasonable probability that the incapability will continue for the foreseeable future. Since the time of the initial nonsecure custody order, respondent mother was incarcerated while waiting for her criminal trial date, and no custody action was initiated anywhere. Although respondent mother identified three proposed placements, the court concluded they were all inappropriate: the first due to the adult male's incarceration for sexual abuse of a child and a child protective action in South Carolina, the second due to the NC DSS case worker observing physical discipline and the adult's failure to come to visits to establish a relationship with N.T.U., and the third due to a denied ICPC, unstable housing, and a crack-cocaine addiction by the adult male. Respondent mother appealed arguing the court did not have subject matter jurisdiction over the entire action, and the evidence did not support either ground for termination of parental rights.

Notice of Grounds; Incarceration and Deportation; Findings

In re B.S.O., ___ N.C. App. ___, (July 1, 2014)
<http://appellate.nccourts.org/opinions/?c=2&pdf=31747>

Held: Affirmed

- Although best practice is to state the ground for termination of parental rights specifically, the court may conclude a ground not specifically alleged so long as the facts in the petition are sufficient to put a party on notice of that ground. The facts and the use of the word “abandon” in the petition were sufficient to put the father on notice of the ground of wilful abandonment.
- Although incarceration and/or deportation result in limited opportunities for a parent to care for his or her child, opportunities still exist. A parent may still communicate with the child, pay for the cost of care, and inquire about the child.
- One single event, such as one phone call, does not negate a finding of wilful abandonment.
- The court may consider a parent's conduct toward the child prior to their adjudication so as to assess the likelihood of future neglect for TPR.
- Findings are supported by the evidence, and to the extent there were slight discrepancies between the evidence and findings, they were harmless.
- **Facts:** Years after the children were adjudicated neglected and dependent, DSS petitioned to terminate both parent's parental rights on the grounds of neglect. Respondent father's rights were terminated on the ground of wilful abandonment as the court found the father was deported to Mexico after his incarceration, his whereabouts were unknown, he wilfully failed to pay for the reasonable portion of the cost of the children's care despite having the ability to do so, he did not propose relative placements, and he did not make efforts to be informed about or remain in contact with the children while they were in care. Respondent mother's parental rights were terminated on the

ground of neglect after the court found the likelihood of future neglect was high due to the mother's failure to address her mental health issues and complete the domestic violence program, and her unstable relationships and housing. Respondent parents appeal.

ADOPTION

Notice and Consent by Unwed Father

In re S.D.W., ___ N.C. ___ (July 12, 2014)

<http://appellate.nccourts.org/opinions/?c=1&pdf=31739>

Held: Reversed decision of Court of Appeals (thereby affirming the trial court decision)

- Relying on the reasoning of the U.S. Supreme Court in *Lehr v. Robertson*, the court held an unwed father must grasp the opportunity to develop a relationship with his child for constitutional due process protections to apply.
- The court must determine if an unwed father grasps the opportunity to be on notice of the pregnancy and/or birth, and if that opportunity is beyond the father's control.
- In a fact specific analysis for this case, notice of the birth was not beyond father's control
 - He had knowledge mother was fertile
 - He continued to have intercourse with mother without using a condom, placing the responsibility for birth control solely with mother
 - He did not inquire of mother if she was pregnant
- **Facts:** Unwed mother and father had repeated unprotected intercourse during their May 2009 through February 2010 relationship and on three of four occasions after the relationship ended. Mother had a child previously from another relationship, and early in the relationship with father, she became pregnant despite his belief that she had an IUD. The couple decided she would have an abortion. After the abortion mother informed father that she changed her method of birth control to what he believed was a shot but may have been a patch. Mother eventually cut off contact with father, and she had a baby boy on October 10, 2010. The day after the baby was born, mother signed an Affidavit of Parentage that incorrectly identified father's last name and left the father's address blank. She also signed a relinquishment, and on a birth form provided by the adoption agency, she again incorrectly identified father's last name. A petition for adoption was filed November 2, 2010. Mother saw father on November 26, 2010 and did not notify him that she had had a baby. They did not communicate again until April 2011 after father heard mother had a baby, and in a phone call with father, mother confirmed she had a his child

and placed him for adoption. Afterwards, mother notified the adoption agency of father's correct name. Father took steps to assert his intention to obtain custody of the child, including filing a motion to intervene in the adoption proceeding. Adoption petitioners filed a motion for summary judgment.

Parental Relinquishment; Administration of an Oath

In Re Adoption of "Baby Boy," ___ N.C. App., ___, ___ S.E. 2d ___ (April 14, 2014).
<http://appellate.nccourts.org/opinions/?c=2&pdf=31105>

Held: Reversed

- G.S. 48-3-702(a) requires a relinquishment to be signed and acknowledged under oath. Although the court stressed the seriousness of properly administering oaths and urging notaries to be diligent in performing that duty, it found an oath is a ministerial duty that may be administered by a person without official authority to administer an oath so long as a certifying officer is present and assents to the administration. This means a notary need only certify that he or she witnessed the signor make a vow of truthfulness, which could include any form of the word swear. In this case the notary was present when birth mother was read the relinquishment and signed the document that contained the language "duly sworn."
- The failure to include baby boy's gender in the relinquishment was not fatal as the relinquishment was executed in substantial compliance with the law pursuant to G.S. 48-3-702(a).
- **Facts:** Birth mother signs a relinquishment before an adoption agency worker and a hospital notary the day after her child is born. The adoption agency worker reads the relinquishment aloud, which states: "I, Amy Costin, being duly sworn, declare...." After being read the form, which included a 26 question questionnaire, birth mother signs the relinquishment in the presence of the notary. The notary was present during the reading of the relinquishment and questionnaire and the birth mother's signatures on those forms. The notary signed the acknowledgment. Eight days after signing the relinquishment, the birth mother texted the adoption agency worker that she changed her mind; however the adoption agency did not revoke the birth mother's relinquishment because she did not provide written notice within 7 days as required by statute and specifically included in the relinquishment and questionnaire birth mother signed. The birth mother filed a motion to void her relinquishment, and the trial court determined the relinquishment was not valid because it was not signed under oath and did not specify the infant's gender as required by the statute. As a result, the trial court granted birth mother's petition to declare her relinquishment void. The adoption agency and adoption petitioners appealed.

RELATED CASES

APPEAL: How to Count the Time

Magazian v. Creagh, ___ N.C. App. ___ (July 1, 2014)
<http://appellate.nccourts.org/opinions/?c=2&pdf=31661>

Facts: Order was entered on Friday, September 20, 2013. Plaintiff received actual notice of order by email on Wednesday, September 25, 2013. Plaintiff filed notice of appeal on Friday, October 25, 2013.

Held: Dismissed, Appeal untimely

- Pursuant to N.C.R. App. P. 3(c)(1), a notice of appeal must be filed within 30 days after entry of the judgment if the party was served with the judgment within 3 days. Under G.S. 1A-1, Rule 6(a), the three day period does not include weekends and court holidays.
- Email is not a valid method of service, but actual notice is a substitute for service.
- Plaintiff received actual notice within 3 day period of entry of judgment (weekends do not count); therefore, notice of appeal must have been filed within 30 days of the entry of the judgment, not 30 days from receipt of notice. The time to appeal expired on October 21.

CRIMINAL OPINIONS

Child Witness: Closing the Courtroom in Criminal Trial

State v. Godley, ___ N.C. App. ___, (July 1, 2014)
<http://appellate.nccourts.org/opinions/?c=2&pdf=31461>

Held: No error

- Under the VI Amendment, a criminal defendant has a right to a public trial; however, the court may close the courtroom by applying 4-part test:
 1. The party seeking to close the courtroom must advance an overriding interest that is likely to be prejudiced
 2. The closure must be no broader than necessary to protect this interest
 3. The trial court must consider reasonable alternatives to closing the proceeding, and
 4. The trial court must make findings adequate to support the closure.
- There must be competent evidence to support the finding, and the court's own observations may be a basis for a finding of fact.
- **Facts:** Defendant was charged with three counts of first –degree rape and taking indecent liberties with a child. The victim, who was 12, testified, and over

defendant's objection, the court granted the state's oral motion to close the courtroom during her testimony. Defendant was convicted of taking indecent liberties with a child. Defendant appeals the closing of the courtroom.

Note: Although the VI amendment right to a public trial does not apply to an A/N/D proceeding, Art. 1, Section 18 of the NC Constitution states "All courts shall be open..."
For more information see,
http://www.sog.unc.edu/programs/judicial_authority_administration

See G.S. 7B-801(a) and (b) regarding factors the court must consider before closing the courtroom in a A/N/D or TPR action.

Felony Child Abuse: Definition of Sexual Act Includes Vaginal Intercourse

State v. McClamb, ___ N.C. App. ___, (July 1, 2014)
<http://appellate.nccourts.org/opinions/?c=2&pdf=31218>

Pursuant to G.S. 14-318.4(a2), it is a Class D felony for any parent or legal guardian of a child younger than 16 to commit or allow to be committed any "sexual act" on the child. Defendant, the father of the victim, appeals his conviction of felony child abuse by sexual act based on having vaginal intercourse with his daughter. G.S. 14, Article 7A addresses "Rape and Other Sex Offenses" and defines "sexual act" at G.S. 14-27.1(4) to exclude vaginal intercourse. This allows for a distinction between crimes of rape, which is limited to vaginal intercourse, and sexual offenses, which excludes vaginal intercourse. However, that definition does not apply to G.S. 14, Article 39 "Protection of Minors." The term, "sexual act," found at G.S. 14-318.4(a2) includes vaginal intercourse since a distinction between rape and sexual offenses is not required in Article 39.