District Court Judges Fall Conference
Asheville, NC

October 12, 2006

JUVENILE LAW UPDATE

(Cases filed from June 20 through September 19, 2006)

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Abuse, Neglect, Dependency

- Exercise of **jurisdiction** pursuant to temporary emergency jurisdiction provisions of the UCCJEA was proper since only a temporary custody order was entered.

In re M.B., ___ N.C. App. ___, ___ S.E.2d ___ (9/19/06).

Facts:

Nov, 4, 2004	Child is born in New York
2005	
Feb	Respondent/father moves to N.C.
March 28	Respondent/mother and child move to N.C. and live with relative
April 21	Mother makes threats against the relative and says she will leave with the child when told that she can no longer live with the relative; police are called
April 22	DSS files a neglect petition and obtains a nonsecure custody order
April/May	Parents are served and nonsecure custody is continued at several hearings
June 1-2	Adjudication/disposition hearings conducted
June 17	Trial court enters order: 1) denying father's motion to dismiss for lack of subject matter jurisdiction 2) finding that court had temporary emergency jurisdiction per G.S. 50A-204 3) adjudicating the child neglected 4) placing the child in the "temporary legal custody" of DSS 5) ordering all parties to provide information about any custody proceeding or order in New York
July 12	Father files notice of appeal
Sept. 22	GAL makes motion to dismiss appeal as untimely filed
Sept. 30	Trial court grants motion to dismiss appeal
Oct.	DSS receives letter from New York indicating that there is no custody action or order in that state
Oct. 10	Trial court enters order 1) finding that N.C. is the child's home state because she has been in the state for six months 2) ordering that the temporary custody order entered in June is now the final order of custody
Nov. 4	Court of appeals allows father's petition for writ of certiorari

The court of appeals considered only the question of whether the trial court had subject matter jurisdiction.

Holding: Affirmed.

The court of appeals held that the trial court properly exercised temporary emergency jurisdiction because of the danger to the child who was present in the state. The court noted that any issue of temporary jurisdiction was moot, because North Carolina had become the home state, as the trial court properly ordered in its October order, which was not appealed.

Note: Although N.C. had become the child's home state, subject matter jurisdiction must be determined as of the time the action is filed.

It is interesting that in this case the order treated as the "temporary" order was a dispositional order, which the trial court specified was temporary. The court of appeals cites *In re Brode*, 151 N.C. App. 690, 566 S.E.2d 858 (2002), and *In re Van Kooten*, 126 N.C. App. 764, 487 S.E.2d 160 (1997), *appeal dismissed*, 347 N.C. 576, 502 S.E.2d 618 (1998), both of which suggest that when the trial court is acting on the basis of temporary emergency jurisdiction in a juvenile case, it should enter only nonsecure custody orders and should proceed to adjudicate the petition on the merits only after determining that it has another basis for exercising jurisdiction. For example, the court in *Brode* said, "The order [which the court reversed] does not defer adjudication on the merits pending notice from Texas concerning whether it will exercise jurisdiction in the matter. . . . On remand, the trial court is directed to contact the Texas court to determine whether that court desires to exercise jurisdiction in this

matter. Should the Texas court decline to exercise jurisdiction, the trial court may then proceed on the merits of the DSS petition and issue a final custody determination."

In this case, *M.B.,* when the case came before the trial court, it was not clear whether New York had exercised or was exercising jurisdiction in a matter relating to the child's custody. In either event, the risk to the child who was physically present in North Carolina clearly was a basis for the exercise of temporary emergency jurisdiction. However, it does not appear that the court was required to rely on temporary emergency jurisdiction or to enter only a temporary custody order.

1. If no order existed in New York (as turned out to be the case) or anywhere else, the question would be whether North Carolina had jurisdiction to enter an initial child custody determination.
   - G.S. 50A-201(a)(1). N.C. was not the child's home state when the petition was filed and did not have "home state" jurisdiction. New York was no longer the home state, because the child would not have been living there immediately before the filing of an action in N.Y., and although it had been the home state within the previous six months, the child was not there and no parent or person acting as a parent was residing there. No state had jurisdiction under the home state provision.
   - G.S. 50A-201(a)(2). It seems likely that the court here could have found both that the child and the parents had a significant connection with this state and that substantial evidence was available here concerning the child's care, protection, training, and personal relationships. If the court made those findings, North Carolina could exercise initial custody jurisdiction without resorting to temporary emergency jurisdiction.
2. If New York had entered a child custody order (which was not the case here), the issue would be whether North Carolina had jurisdiction to modify another state's order. Under G.S. 50A-203, if it is correct that N.C. could have entered an initial custody order, as described above, then N.C. also could modify another state's order, without even contacting that state, if it determined that neither the child, the child's parents, nor anyone acting as a parent continued to reside in New York.

- Party's failure to object to evidence on basis of privilege constituted **waiver of privilege**.
- Trial court cannot adjudicate **dependency** without evidence and a finding that the parent lacks an appropriate alternative arrangement.

In re K.D., ___ N.C. App. ___, 631 S.E.2d 150 (7/5/06).

Facts: DSS began working with 17-year-old respondent mother in April, 2004. Respondent's problems included her mental health and mental retardation, domestic violence with her boyfriend, her history of leaving the child alone, her unsteady living arrangements, and anger control. She placed the child voluntarily with her mother, where DSS determined the child was neglected. Respondent voluntarily placed the child with an aunt and agreed on a case plan. She failed to comply with provisions of the plan relating to mental health treatment, parenting classes, and stable housing. When living with relatives she was able to meet the child's basic needs, including medical appointments, but she did not recognize the seriousness of domestic violence. The child showed progress while in the aunt's home. DSS filed a petition in November, 2004, alleging that the child was neglected and dependent. After a hearing in January, 2005, the court entered an order March 1, 2005, adjudicating the child neglected and dependent, giving custody of the child to the aunt, and relieving DSS of further reunification efforts.

Holding: Affirmed in part, reversed in part, and remanded.

1. By objecting to the court's admission of testimony and a letter from her therapist only on the grounds of relevance and hearsay, respondent waived any objection on the basis of psychologist-patient privilege. In addition, the evidence was admissible despite the privilege because the case involved neglect, and the court also could have admitted the evidence in the interest of justice.
2. The trial court's findings of fact supported its conclusion that the child was neglected.

3. Because respondent made only a broadside assignment of error relating to sufficiency of the evidence to support the findings, the court of appeals did not consider that issue.
4. The adjudication of dependency was not supported by sufficient findings of fact because the court made no finding that respondent lacked an appropriate alternative child care arrangement. In addition, the evidence showed that she did have such an arrangement – her placement of the child with the aunt.

- At an adjudication hearing, the trial court should have considered only the adjudication order, not review or other **prior orders**, from another child's case.
- Even if consideration of all the orders in the other child's case had been proper, those orders (all at least several months old) were insufficient alone to support trial court's findings and conclusion that the child was neglected.

In re A.K., ___ N.C. App. ___, ___ S.E.2d ___ (8/1/06).

Facts: In 2002 respondents' older child, then an infant, was adjudicated neglected based on findings that she had suffered non-accidental injuries while in the parents' care. At various review hearings respondents' continued to deny any responsibility for the child's injuries, and the child remained in the custody of DSS. The second child, A.K., was born on May 10, 2003, and four days later DSS filed a petition alleging neglect and obtained a nonsecure custody order. At the adjudication hearing in November 2003, DSS asserted that the child was at risk and should be adjudicated neglected based on the adjudication of the older child and the parents' continued denial of responsibility. The trial court took "judicial notice" of all orders in the older child's case and received no other evidence. The trial court adjudicated the infant neglected and ordered that she remain in the custody of DSS. The respondent-father appealed.

Holding: Reversed.

The court of appeals held first that the trial court could rely only on findings in the adjudication order from the older child's case, because that was the only order in which findings were made by clear and convincing evidence. The court went on to hold that even if the trial court had been able to rely on findings from all of the orders in the other case, those were not sufficient to support a conclusion that A.K. was neglected, because of the time lapse between the last review hearing in that case and the petition and hearing in this case and the absence of evidence about what the parents had or had not done during that time. Therefore, the court of appeals said, the evidence and findings were not sufficient to support a conclusion that A.K. was neglected.

- Majority holds that at **review hearing** evidence was insufficient and trial court abrogated its fact-finding responsibility by relying solely on written report from DSS and arguments of counsel.

In re A.P., ___ N.C. App. ___, ___ S.E.2d ___ (9/5/06).

Facts: After adjudicating the child neglected and dependent based on conditions in respondent-mother's home, the trial court placed the child in the custody of DSS, ordered a home study of the child's biological father's home, and left placement decisions in the discretion of DSS. After a review hearing the following month, February 2004, the court continued custody and placement discretion with DSS and authorized DSS to place the child with the biological father. (Respondent-mother's appeal from this order was dismissed. *See* summary below under "Appealable Orders.")

After another review hearing, in September 2004 the court held a review (or initial permanency planning) hearing at which it received a written report from DSS and heard arguments of counsel. No testimony was presented and no other evidence was introduced. The trial court made various findings, concluded that giving custody to the biological father was in the child's best interest, and "closed" the case. Respondent-mother appealed.

Holding: Reversed and remanded.

The majority stated that "no evidence was received and no testimony from any witness was given," and also said that "no testimony or evidence . . . was tendered at the hearing other than DSS's report and the arguments of counsel." The court held that by relying solely the DSS report the trial court abrogated its fact-finding role. The court of appeals remanded for an evidentiary hearing on the question of who should have custody of the child.

Dissent: The dissenting judge expressed the view that because the trial court had "closed" the case, terminating its jurisdiction, it had not entered any meaningful custody order; rather, it had "returned the parties to their pre-petition status. *See In re Dexter*, 147 N.C. App. 110, 553 S.E.2d 922 (2001)."

Note: Several things are not clear from the opinion:

- whether the DSS report was actually entered into evidence or simply handed to the judge and, if the latter, whether that was significant
- whether the court of appeals thought respondent had been denied an opportunity to present evidence or simply that the evidence presented by DSS was insufficient
- whether the court of appeals was holding that the findings of fact were insufficient or only that the evidence was insufficient
- whether the court of appeals was saying that a written report, by itself, never will be sufficient evidence to support the findings and conclusions in a review hearing order

Termination of Parental Rights

- **Findings** were sufficient to support the conclusion that respondent lacked ability or willingness to establish a safe home, when rights to another child had been terminated involuntarily.

In re L.A.B., ___ N.C. App. ___, 631 S.E.2d 61 (7/5/06).

Facts: Respondent's child was born in August 2003, was placed in DSS custody a few days later, was adjudicated dependent in December 2003, and remained in foster care. The court found at review hearings that respondent had failed to comply with most provisions of earlier orders and the case plan. DSS filed a motion for termination of parental rights in September 2004, and the court entered an order terminating respondent's rights in April 2005. The court's findings included that respondent had not attended mental health appointments or parenting classes; had rejected DSS's efforts to help her find housing and develop budgeting and homemaking skills; did not pay appropriate attention to the child during visits; and continued to have serious hygiene problems. Based on these findings and an uncontested finding that respondent's rights to another child had been terminated involuntarily, the trial found that DSS had proved two grounds for termination.

Holding: Affirmed.

The court of appeals held that the trial court's findings were sufficient to support its conclusion that grounds for termination existed under G.S. 7B-1111(a)(9) (rights to another child have been involuntarily terminated and parent lacks the ability or willingness to establish a safe home). The court found no abuse of discretion at the dispositional stage.

- Majority holds that **findings** were not sufficient to support grounds of neglect or willfully leaving child in care without making substantial progress.

In re J.T.W., ___ N.C. App. ___, 632 S.E.2d 237 (8/1/06).

Facts: Respondent's child was adjudicated neglected in 2001 after the parents stipulated that the allegations in the petition were true. These included that three of respondent's older children had been placed in the guardianship of relatives, respondent had a history of instability, and she was not able to establish and maintain a residence or to maintain steady

employment. The court conducted review hearings and in late 2002 changed the plan to adoption. In May 2003, DSS and the child's guardian ad litem jointly filed a motion for termination of parental rights. After conducting hearings on several days the trial court made extensive findings that included: Respondent lived with her two younger children in an acceptable home that she had maintained for a year; before that she lived in a residential treatment facility and benefited from the programs there; since 1999 she had lived in more than 25 residences; she had been employed sporadically, most recently full time at a personal care facility earning $8.50 per hour; respondent had transportation problems, including a long-suspended license; she had made regular child support payments only since May 2003; she had no visits with any of her children who were in custody since December 2002 and they had no observable bond with her; she had been incarcerated on several occasions during the children's placements. In May, 2004, the court entered an order terminating respondent's rights on the grounds of neglect and willfully leaving the child in foster care for more than a year without making reasonable progress to correct the conditions that led to placement.

Holding: Reversed, one judge dissenting.
The majority found that none of the trial court's findings supported a conclusion that respondent had not made reasonable progress in correcting conditions that led to the child's placement – instability in housing and employment – or that the child would be exposed to an injurious environment with respondent. Likewise, the court found that the evidence did not indicate that neglect was likely to reoccur if respondent regained custody of the child.

Dissent: Dissenting judge would have affirmed on basis of neglect, finding that respondent abandoned the child by not visiting him, but also concluding that the findings were sufficient to support a conclusion of a likely repetition of neglect if the child were returned to respondent.

- Majority holds that trial court erred in its **conclusion** that agency did not establish grounds to terminate putative father's rights.

A Child's Hope, LLC v. Doe, ___ N.C. App. ___, 630 S.E.2d 673 (6/20/06).

Facts: After his girlfriend told him she was pregnant, respondent returned home from college, sought employment, planned with his girlfriend for the child's birth, kept her other children while she attended medical appointments, attended one prenatal appointment with her, and purchased a vehicle suitable for transporting the baby and the girlfriend's other two children. When he expressed that he was not ready to get married, the relationship ended. Respondent continued to try to get information about the girlfriend and child, even after the girlfriend led him and his mother to believe that she had miscarried.

The girlfriend hid the pregnancy from her family. After the baby's birth she surrendered the child to a private adoption agency and lied about paternity, saying that her pregnancy resulted from a rape by someone she could not identify. Respondent contacted a newspaper that had reported an abandoned baby, the mother's physician, a hospital, and DSS trying to determine whether the girlfriend had given birth. He was given no information due to confidentiality concerns. Because DSS conducted an investigation based on respondent's statements, his identity was made known to the petitioning adoption agency and the termination petition that had been filed against an unknown father was amended to name him as a respondent. Service of the petition on him was the first indication respondent had that the child had in fact been born.

The trial court made lengthy findings and concluded that petitioner had failed to prove a ground for termination of parental rights by clear, cogent, and convincing evidence.

Holding: Reversed and remanded, one judge dissenting.
The majority disagreed with the trial court and held that uncontroverted evidence showed that respondent had not met the requirements of G.S. 7B-1111(a)(5) – that is, that before the filing of the termination petition respondent had not

1. established paternity judicially or by affidavit filed in a central registry maintained by DHHS; or

2. legitimated the child, filed a petition to legitimate, or legitimated the child by marrying the mother; or
3. provided substantial financial support with respect to the child and mother; or
4. provided consistent care with respect to the child and mother.

The court of appeals relied on the "bright line rules" regarding the rights of putative fathers established by the state supreme court in *In re Adoption of Byrd*, 354 N.C. 188, 552 S.E.2d 142 (2001) and *In re Adoption of Anderson*, 360 N.C. 271, 624 S.E.2d 626 (2006).

Dissent:
The dissenting judge would have affirmed the trial court's order on the basis that respondent's conduct after learning of the pregnancy amounted to "consistent care," a term the appellate courts have not heretofore interpreted.

Note: Both *Byrd* and *Anderson* were decided under G.S. 48-3-601(2)b., which governs whether a putative father's consent to an adoption is required.

1. Unlike the termination statute, the adoption provision does not specify either a burden of proof or a standard of proof, but the cases suggest that the burden is on the putative father to establish that he has taken steps required to preserve his right to object to an adoption. In a termination proceeding, the burden is on the petitioner to establish by clear, cogent, and convincing evidence that he has not taken any of those steps.
2. With facts comparable to those in this case, in an adoption proceeding the putative father would have to show that before the filing of the adoption petition he
   a. acknowledged paternity of the child, regardless of the form of the acknowledgement; and
   b. provided, consistent with his financial means, reasonable and consistent payments for the support of the mother or the child or both; and
   c. regularly visited or communicated with, or attempted to visit or communicate with, the mother during or after the pregnancy, or with the child, or with both.

   Or, if another party proved that he had not done any one of those, the clerk could find that his consent was not required.

Guardian ad Litem

- Issue of failure to appoint a guardian ad litem in underlying proceeding cannot be raised in appeal from a later termination order.
- Court-appointed guardian ad litem is not a "social worker" for the parent.

In re L.A.B., ___ N.C. App. ___, 631 S.E.2d 61 (7/5/06).

Facts: On appeal from an order terminating her parental rights, respondent argued that the trial court's failure to appoint a guardian ad litem for her until the motion for termination was filed tainted the termination. She argued specifically that a guardian ad litem could have helped her get her mental health problems under control and helped her navigate through the legal proceedings.

Holding:

1. As in *In re J.S.L*, ___ N.C. App. ___, 628 S.E.2d 387 (4/18/06) and *In re O.C*., 171 N.C. App. 457, 615 S.E.2d 391*, disc. rev. denied*, 360 N.C. 64, 623 S.E. 2d 587 (11/3/05), the court of appeals held that failure to appoint a guardian ad litem in the underlying abuse, neglect, or dependency proceeding cannot be asserted as error on appeal from a subsequent order terminating parental rights.
2. The court of appeals also indicated that respondent misapprehended the role of a guardian ad litem appointed for a parent. The court said that there is no authority "suggesting that a GAL serves as a type of social worker for the parent." Referring to earlier opinions, the court said the role of the guardian ad litem is to protect procedural due process rights of a party who later may be adjudicated as incapable.

Note: The case was decided under guardian ad litem provisions applicable only to cases filed before 10/1/05. It seems unlikely that the court would have held differently under current law.

Statutory Timelines

- After remand, court may not hold new hearing under opinion is certified.
- Majority holds that respondent failed to show prejudice from 5-month delay in entry of order.

In re T.S., III, ___ N.C. App. ___, 631 S.E.2d 19 (6/20/06).

Facts: In January 2002 the court adjudicated respondent's children neglected and dependent and placed them in DSS custody. In an unpublished opinion filed 4/20/04 and certified 5/10/04, the court of appeals remanded the case with instructions to make ultimate findings of fact and clear and specific conclusions of law. After the opinion was filed but before it was certified, the district court set the case for hearing and sent respondent a notice of hearing. The hearing was held on 5/13/04. DSS submitted a proposed order, to which respondent objected, and the court held the matter open for the parties to submit proposed findings or objections on or before 6/14/04. No submissions were made, and the court entered its order on 10/18/04 adjudicating the children neglected and dependent and placing them in DSS custody.

Holding: Affirmed, with one judge dissenting.

1. The trial court was not "exercising jurisdiction" when it set the case for hearing and sent notice to respondent, and the court had jurisdiction because it did not actually hold the hearing until after the court of appeals opinion had been certified.
2. Respondent failed to show that she was prejudiced by the late entry of the order. Her assertion that she had been kept away from her children without just cause and that the delay was very hard for her, without more, was not sufficient. The court of appeals stated that the delay "did not preclude the reunification of the children and respondent," and noted that the trial court had jurisdiction during the appeal to review the case and change the child's placement pursuant to G.S. 7B-1103(b)(2), and that respondent could have asked for a review at any time.

Dissent:

After reviewing the holdings in earlier cases addressing delays and pointing out that the trial court took no new evidence and that neither the court nor DSS offered any excuse for the long delay, the dissenting judge would have found that respondent made a sufficient showing of prejudice and reversed the trial court's order. The dissent stated that it was "incredulous and inexcusable for six more months to elapse after [the court of appeals opinion] in the earlier appeal, to simply revise and enter an order."

- Scheduling of hearing on a motion for termination of parental rights for less than a month after the mandatory time limit, followed by several written continuances, was not reversible error where respondent did not show prejudice.

In re J.T.W., ___ N.C. App. ___, 632 S.E.2d 237 (8/1/06).

Facts: Respondent's child was adjudicated neglected in 2001 and placed in DSS custody. On May 30, 2003, DSS and the child's guardian ad litem jointly filed a motion for termination of parental rights. The hearing originally was scheduled for September 23, 2003. The judge presiding on that date recused herself and filed a written continuance until October 28, 2003. The parties then agreed to another continuance, which was put into writing. The hearing began on November 13, 2003, and was completed in March 2004. The order was entered in May 2004. Respondent argued on appeal that the trial court failed to protect her due process rights by not holding a timely hearing or entering a timely order.

Holding: The court of appeals rejected the argument, noting that the Juvenile Code's time limitations are not jurisdictional and finding that respondent failed to show how the initial scheduling of the hearing 23 days past the time limit had prejudiced her. The court apparently considered the continuances after that date to be proper.

Note: Because the court of appeals reversed on other grounds (*see* above, under Termination of Parental Rights) its consideration of this issue was unnecessary and may be dicta.

- Holding termination hearing more than a year after petition was filed and entering order 7 months after the hearing were prejudicial and required reversal.

In re D.M.M., ___ N.C. App. ___, 633 S.E.2d 715 (9/5/06).

Facts: Respondent's children were adjudicated dependent in June, 2003, and placed in DSS custody. In January 2004 DSS filed a petition to terminate respondent's rights. The hearing on the petition was held over a year later, and the order terminating respondent's rights on the grounds of neglect and abandonment was entered seven months after the hearing. Respondent argued on appeal that the delay in both the hearing and the entry of the order prejudiced her and the other parties.

Holding: Reversed.
The court of appeals agreed, and after reviewing its holdings in other cases involving delay, found that the delays in this case were "egregious" and prejudicial. Specific forms of prejudice to which the court referred include precluding the parties from reaching closure and depriving respondent of a timely right to appeal. Prejudice also occurred in relation to the presentation of evidence since the ground of abandonment relates to the six-month period before the filing of the petition and respondent was not allowed to introduce evidence of what she had done after the petition was filed.

Appealable Orders

- Majority holds that appeal from a permanency planning order that did not affect the status of the child or change custody of the child was interlocutory. *(Applying law applicable only to cases filed before 10/1/05.)*

In re A.R.G., ___ N.C. App. ___, 631 S.E.2d 146 (6/20/06).

Facts: The child was adjudicated neglected and dependent in July, 2003, and was placed in DSS custody with a plan of reunification with the mother. That plan was continued at review hearings until September, 2004, when the court entered an order allowing DSS to "pursue permanency" for the child with another family. The mother was killed in an automobile accident in November, 2004. Respondent father attended the first nonsecure custody hearing in May, 2003, and did not appear in court again until November, 2004, and January, 2005, when hearings were continued, and then in February and May, 2005, for permanency planning review hearings. In an order entered in May, 2005, the court changed the plan to adoption and authorized DSS to pursue termination of respondent's parental rights. Respondent father appealed from that permanency planning order.

Holding: Appeal dismissed.
Relying on *In re B.N.H.*, 170 N.C. App. 157, 611 S.E.2d 888, *disc. rev. denied*, 359 N.C. 632, 615 S.E.2d 865 (2005), the court of appeals held that the permanency planning order was not a final order for purposes of appeal because it did not change custody or change respondent's status in relation to the child. Respondent did not assert any substantial right to justify an interlocutory appeal.

Dissent: One judge would have considered the appeal on the merits, on the basis that the order was a change in custody. The judge would have reversed on the basis that the trial court lacked subject matter jurisdiction because DSS, when it first filed the petition, failed to comply with the requirements of G.S. 7B-402 regarding the contents of a petition and with G.S. 50A-209 regarding the affidavit of status of minor child.

- Review hearing order that continued custody and placement authority with DSS was not appealable. *(Applying law applicable only to cases filed before 10/1/05.)*

In re A.P., ___ N.C. App. ___, ___ S.E.2d ___ (9/5/06).

Facts: After adjudicating the child neglected and dependent based on conditions in respondent-mother's home, the trial court placed the child in the custody of DSS, ordered a home study of the child's biological father's home, and left placement decisions in the discretion of DSS. After a review hearing the following month, the court continued custody and placement discretion with DSS and authorized DSS to place the child with the biological father. Respondent-mother appealed.

Holding: Appeal dismissed.
Citing its earlier decisions the court of appeals dismissed the appeal because the order appealed from did not change the status quo of the relationship between the parents and the child and therefore was not a dispositional order for purposes of appeal.

Concurrence: One judge filed a separate concurring opinion elaborating on earlier cases and expressing the view that under the applicable (pre-October 2005) law, no review hearing order was a dispositional order for purposes of appeal and the only permanency planning orders that were dispositional orders and therefore appealable were those that changed an existing permanency plan from reunification to adoption, as held in *In re Weiler*,158 N.C. App. 473, 581 S.E.2d 134 (2003), which the court strictly limited to its facts in *In re B.N.H.*, 170 N.C. App 157, 611 S.E.2d 888, *disc. review denied*, 359N.C. 632, 615 S.E.2d 865 (2005).

Evidence [Criminal Cases]

- No *Crawford v. Washington* violation occurred when foster parents testified about statements made by non-testifying children and pediatrician testified about statement made by young child.
- Children's statements to foster parents were properly admitted under residual hearsay exception, Rule 804(b)(5).
- Trial judge erred in allowing state's expert to offer opinion that children were sexually abused by defendant.

State v. Richard Brigman, ___ N.C. App. ___, 632 S.E.2d 498 (6/20/06).

The defendant was convicted of eighteen counts of first-degree sexual offense and twenty-seven counts of indecent liberties involving three child victims.

1. During the investigation of the offenses, the children were removed from their home and placed with foster parents. The three children, who did not testify at trial, told the foster parents about the offenses, and the foster parents testified at trial about these statements. The court ruled, relying on *State v. Kimberly Brigman*, 171 N.C. App. 305, 615 S.E.2d 21 (2005), that the children's statements were not testimonial and that there was no violation of the ruling in *Crawford v. Washington*, 541 U.S. 36 (2004).
2. The court of appeals analyzed the requirements of the residual hearsay exception, Rule 804(b)(5), and ruled that the foster children's statements to their foster parents were properly admitted under the exception.
3. The court ruled, relying on *State v. Kimberly Brigman*, 171 N.C. App. 305, 615 S.E.2d 21 (2005), that there was no *Crawford v. Washington* violation when a pediatrician testified about a statement made to the pediatrician by a child who was not quite three years old. The court stated that it could not conclude that a reasonable child under three years of age would know or should know that his statements might later be used at a trial. The child's statement was not testimonial under *Crawford*.
4. The court ruled, relying on *State v. Figured*, 116 N.C. App. 1, 446 S.E.2d 838 (1994), that the trial judge erred in allowing the state's expert, a pediatrician, to offer her opinion that the children suffered sexual abuse by the defendant.

Delinquency

- The court properly exercised **personal jurisdiction** where juvenile waived any defect in service of process by making a general appearance.
- The **Rules of Civil Procedure** apply in delinquency cases.

In re D.S.B., ___ N.C. App. ___, ___ S.E.2d ___ (9/19/06).

Facts: On 4/10/05 a petition was filed alleging that the juvenile was delinquent for committing second-degree forcible rape, and a secure custody order was issued. He and his mother and step-father were served with the petition, order, and notice of hearing on 4/15/05, the day of the juvenile's first appearance and hearing on the need for continued secure custody. The juvenile and his parent and attorney participated in that hearing and subsequent proceedings relating to discovery, probable cause, adjudication, and disposition without objecting to the sufficiency of service of process.

On appeal, the juvenile argued that the trial court lacked personal jurisdiction when it conducted the initial hearing on the same day he was served with the petition and summons.

Holding: Affirmed.

The court of appeals rejected that argument, holding that the juvenile made a general appearance by participating in the proceedings without contesting service of process or personal jurisdiction. The court reiterated its earlier holding that the Rules of Civil Procedure apply in delinquency proceedings.

- Majority holds that **crime against nature** statute properly formed the basis for delinquency adjudication when juvenile had consensual sexual contact with a minor less than three years younger than he.

In re R.L.C., ___ N.C. App. ___, ___ S.E.2d ___ (9/5/06).

Facts: Juvenile was adjudicated delinquent for violating G.S. 14-177, the crime against nature statute. His former girlfriend, not quite three years younger than the juvenile, testified that when they were dating they would have intercourse in a car in the parking lot of a bowling alley while her parents bowled. She also testified that on two occasions she performed fellatio on the juvenile in the same location. The latter incidents formed the basis of the juvenile petitions.

On appeal, the juvenile argued that G.S. 14-177 was unconstitutional as applied to him and that the legislature could not have intended to criminalize, as a felony, the act of fellatio, when the act of intercourse between these two minors did not constitute a sex offense.

Holding: No error, one judge dissenting.

The majority held that the plain wording of the statute controlled, noting that after the U.S. Supreme Court's decision in *Lawrence v. Texas*, the crime against nature statute still applies to conduct that involves minors, physical force, or a public setting. Both the majority and the dissenting opinions review the historical development of sex offense statutes in N.C. as they relate to minors.

- A **stayed commitment** can be ordered only when commitment is an available disposition.
- A juvenile's "points" are used to determine the juvenile's delinquency history level for purposes of disposition. Points are not relevant at **probation violation** hearings.

In re T.B., ___ N.C. App. ___, 631 S.E.2d 857 (7/18/06).

Facts: The juvenile was adjudicated delinquent after admitting allegations of misdemeanor possession of stolen goods and assault inflicting serious injury. The court placed him on supervised probation for one year. [Level 1 disposition]

Just under a year later the court held a review hearing at which the juvenile admitted violating various conditions of his probation. After receiving information and concluding that the juvenile had enough (delinquency history) points to qualify for commitment, the trial court extended his probation for one year with new conditions, including that (1) he was on a "stayed commitment to training school;" (2) he have twenty-eight 24-hour periods of secure custody, to be used at the court counselor's discretion; (3) he remain on intensive probation until released by the court counselor; and (4) he have no unexcused absences, tardies, or suspensions. [Level 2 disposition]

The court scheduled another hearing to be held several weeks later for a report on the juvenile's conduct. At that hearing the court counselor reported and testified that the juvenile was out of control, violating probation conditions, using alcohol and drugs, and affiliating with gang members. Without making additional findings of fact, the trial court ordered an indefinite period of commitment based on the stayed commitment that was ordered at the previous hearing. [Level 3 disposition] The juvenile appealed.

Holding: Reversed and remanded.

Because commitment is not an authorized Level 2 disposition, the trial court did not have authority at the probation violation hearing to order the stayed commitment. At Level 2, the court may suspend imposition of a more severe "statutorily permissible" disposition. Because commitment was not available as a disposition at that point, the court lacked authority to order a stayed commitment or later impose commitment based on the earlier probation violation order.

The juvenile's points, or delinquency history level, were not relevant at the probation violation hearing.

§ 7B-2510. Conditions of probation; violation of probation.

(a) In any case where a juvenile is placed on probation pursuant to G.S. 7B-2506(8), the juvenile court counselor shall have the authority to visit the juvenile where the juvenile resides. The court may impose conditions of probation that are related to the needs of the juvenile and that are reasonably necessary to ensure that the juvenile will lead a law-abiding life, including:

(1) That the juvenile shall remain on good behavior.
(2) That the juvenile shall not violate any laws.
(3) That the juvenile shall not violate any reasonable and lawful rules of a parent, guardian, or custodian.
(4) That the juvenile attend school regularly.
(5) That the juvenile maintain passing grades in up to four courses during each grading period and meet with the juvenile court counselor and a representative of the school to make a plan for how to maintain those passing grades.
(6) That the juvenile not associate with specified persons or be in specified places.
(7) That the juvenile:
    a. Refrain from use or possession of any controlled substance included in any schedule of Article 5 of Chapter 90 of the General Statutes, the Controlled Substances Act;
    b. Refrain from use or possession of any alcoholic beverage regulated under Chapter 18B of the General Statutes; and
    c. Submit to random drug testing.
(8) That the juvenile abide by a prescribed curfew.
(9) That the juvenile submit to a warrantless search at reasonable times.
(10) That the juvenile possess no firearm, explosive device, or other deadly weapon.
(11) That the juvenile report to a juvenile court counselor as often as required by the juvenile court counselor.
(12) That the juvenile make specified financial restitution or pay a fine in accordance with G.S. 7B-2506(4), (5), and (22).
(13) That the juvenile be employed regularly if not attending school.
(14) That the juvenile satisfy any other conditions determined appropriate by the court.

(b) In addition to the regular conditions of probation specified in subsection (a) of this section, the court may, at a dispositional hearing or any subsequent hearing, order the juvenile to comply, if directed to comply by the chief court counselor, with one or more of the following conditions:

(1) Perform up to 20 hours of community service;
(2) Submit to substance abuse monitoring and treatment;
(3) Participate in a life skills or an educational skills program administered by the Department;
(4) Cooperate with electronic monitoring; and
(5) Cooperate with intensive supervision.

However, the court shall not give the chief court counselor discretion to impose the conditions of either subsection (4) or (5) of this section unless the juvenile is subject to Level 2 dispositions pursuant to G.S. 7B-2508 or subsection (d) of this section.

(c) An order of probation shall remain in force for a period not to exceed one year from the date entered. Prior to expiration of an order of probation, the court may extend it for an additional period of one year after a hearing, if the court finds that the extension is necessary to protect the community or to safeguard the welfare of the juvenile.

(d) On motion of the juvenile court counselor or the juvenile, or on the court's own motion, the court may review the progress of any juvenile on probation at any time during the period of probation or at the end of probation. The conditions or duration of probation may be modified only as provided in this Subchapter and only after notice and a hearing.

(e) If the court, after notice and a hearing, finds by the greater weight of the evidence that the juvenile has violated the conditions of probation set by the court, the court may continue the original conditions of probation, modify the conditions of probation, or, except as provided in subsection (f) of this section, order a new disposition at the next higher level on the disposition chart in G.S. 7B-2508. In the court's discretion, part of the new disposition may include an order of confinement in a secure juvenile detention facility for up to twice the term authorized by G.S. 7B-2508.

(f) A court shall not order a Level 3 disposition for violation of the conditions of probation by a juvenile adjudicated delinquent for an offense classified as minor under G.S. 7B-2508.

Addendum – Cases Filed October 3, 2006

Neglect

- A child need not be physically in the home in order for the abuse or neglect of another child in the home to be relevant to a neglect determination.
- Evidence of events occurring after the filing of the petition is not proper at adjudication.

In re A.B., ___ N.C. App. ___, ___ S.E.2d ___ (10/3/06).

Facts: Before the juvenile was born, two of her siblings were adjudicated to be neglected, one of those was adjudicated to be abused as well, and both were placed in the legal custody of DSS and placed in the home of a grandmother. The court ordered both parents to receive psychological evaluations and take other steps. When the juvenile was born medical complications required that she remain hospitalized for several weeks. During that time DSS met with the parents, who agreed to let DSS take the child into custody and place her with the grandmother and siblings. DSS filed a petition alleging neglect, and the court adjudicated the child to be neglected and placed her in the legal custody of DSS for placement with the grandmother. The father was convicted of abusing one of the children and did not appeal the juvenile order. The mother appealed.

Holding: Affirmed.

1. The court of appeals rejected DSS's argument that the appeal was moot since subsequent orders had changed guardianship and ceased reunification efforts. While an order terminating parental rights would have rendered the appeal moot, no such order had been entered and the mother had not relinquished her rights.
2. The trial court did not err in finding that the child lived in a home in which another child had been abused and neglected, even though the child had not left the hospital when the petition was filed. The child need not physically live in the home in order for the abuse or neglect of another child in the home to be relevant when the child was in the parents' care, although hospitalized.
3. Trial court did not err in considering evidence only for the period up to filing of the petition. At adjudication evidence is limited to determining facts alleged in the petition. Events occurring after the filing of the petition may be considered at the disposition hearing.
4. The trial court did not err in concluding that the child was neglected, in that she was at substantial risk of neglect. The court properly based that conclusion on findings about the abuse and neglect of the other children and the parents' failure to take steps to comply with the orders entered in the cases of those children.

Delinquency

- Admission of juvenile's confession resulting from interrogation at school was "plain error."

In re W.R. ___ N.C. App. ___, ___ S.E.2d ___ (10/3/06).

Facts: The school principal and assistant principal took the 14-year-old juvenile from his class to the principal's office after receiving a phone call from a parent. Both questioned the juvenile about whether he had anything in his possession that he should not have, and he responded that he did not. At some point the school resource officer arrived, also questioned the juvenile, and, after the juvenile emptied his pockets, conducted a "basic search." The questioning lasted off and on for about 30 minutes, and the resource officer was there most of the time, including any time the principal or assistant principal left to question others. When told that others claimed that he had brought a knife to school the day before, the juvenile admitted that he had done that. At adjudication, the only evidence about the knife was the juvenile's confession, which was admitted without objection. The juvenile was adjudicated delinquent and placed on Level 1 probation for six months.

Holdings: Vacated. The court of appeals applied the "plain error" rule and determined that

1. juvenile was "in custody" when the questioning took place, and his confession should not have been admitted since he was not given the required warnings; and
2. because the confession was the only evidence about the knife, the juvenile established that he would not have been adjudicated delinquent without that evidence, satisfying the requirement that the plain error resulted in miscarriage of justice or denial of a fair hearing.