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JUVENILE LAW UPDATE

Cases Filed from June 19, 2007, through October 2, 2007

Legislation Enacted by the 2007 General Assembly

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JURISDICTION

- Supreme Court holds that failure to allege the child's address in the petition or to provide the affidavit required by G.S. 50A-209 did not deprive the trial court of subject matter jurisdiction.

In re A.R.G., 361 N.C. 392, 646 S.E.2d 349 (6/28/07).
Facts: DSS filed a petition alleging neglect and dependency, but failed to allege the child's address or to provide the affidavit of status of minor child required by G.S. 50A-209. 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 did not appear in court 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. The court of appeals dismissed the appeal as interlocutory, and respondent appealed based on a dissent in the court of appeals.
Holding: The Supreme Court modified and affirmed the opinion of the court of appeals.

1. The court exercised its supervisory authority to consider the issue of whether the trial court had subject matter jurisdiction, and held that it did, distinguishing the jurisdictional requirement that a petition be verified from the provision of "routine clerical information." The court noted that information in the petition was sufficient to enable the trial court to determine that it had subject matter jurisdiction.
2. The Supreme Court affirmed the court of appeals' dismissal of the appeal as interlocutory, holding that the order did not change custody and was not a final order for purposes of appeal, and that respondent did not assert any substantial right to justify an interlocutory appeal.

- Verification of a neglect petition was not sufficient when a DSS employ signed the director's name "per [the employee's initials or name"].

In re A.J.H-R., ___ N.C. App. ___, 645 S.E.2d 791 (6/19/07).
Facts: DSS filed petitions alleging that respondent's children were neglected. At the place for petitioner's signature, a DSS employee had signed the director's name, followed by "per [the employee's name]," and the block indicating that it was signed by the director (rather than an authorized representative of the director) was checked. The court adjudicated the children neglected and placed them in DSS custody.
Held: Vacated.
The trial court did not have subject matter jurisdiction because the petition and verification were not signed by the director. They were signed by an employee on behalf of the director and not in her own capacity as the director's authorized representative.
Note: The court of appeals in a footnote appeared to question whether the verification would have been sufficient even if signed properly. Quoting from G.S. 10B-3(28), the court stated that "'Verification' . . . means a notarial act where a person certifies under oath or affirmation that the person witnessed the principal either execute, record, or acknowledge the principal's signature on an already-executed record."

- DSS did not have standing to petition for termination of parental rights because orders giving DSS custody were void, when verifications of the underlying petitions were signed by a DSS employ who signed the director's name "per [the employee's initials or name]."

In re S.E.P., ___ N.C. App. ___, 646 S.E.2d 617 (7/3/07).
Facts: One child came into DSS custody in September, 2002, and the other in April, 2004. One child's father relinquished his rights. The mother and the other child's father were incarcerated at various times before and after the children came into care. After numerous review hearings and a change in the permanent plans, DSS filed petitions to terminate the parents' rights in February, 2006. Both parents appealed from the orders terminating their rights.
Held: Vacated.
The court of appeals considered only the issue of subject matter jurisdiction and vacated the trial court's orders. The underlying petitions, filed in 2002 and 2004, were signed by a DSS employee, who signed the director's name followed by "by [social worker's name]," which the court held was neither verification by the director nor verification by an authorized representative of the director. Because the verification was not proper, the trial court never had subject matter jurisdiction and the orders giving DSS custody of the children were void. Without proper legal custody, DSS did not have standing to file for termination.

- Verification of petition was sufficient when it was signed by an identified employee of DSS.

In re Dj.L., ___ N.C. App. ___, 646 S.E.2d 134 (6/19/07).
Facts: On appeal from an order terminating her parental rights, respondent argued that DSS lacked standing to file a termination petition because (1) the verification of the underlying petition included no indication that the person signing was the DSS director or the authorized representative of the director; (2) the court therefore lacked subject matter jurisdiction and had never entered a valid order giving DSS custody; and (3) without legal custody, DSS did not have standing to petition for termination.
Held: Affirmed.
The court of appeals rejected that argument and distinguished the facts of this case from those in In re T.R.P., 360 N.C. 588, 636 S.E.2d 787 (11/17/06), where no one signed or verified the petition. Here, there was a signer, who was identified on the documents as an employee of DSS. Respondent did not assert that the signer was not an authorized representative of the director.

- Failure to attach a custody order to the petition did not deprive the trial court of subject matter jurisdiction.
- Majority holds that child's presence in the state when the petition was filed was not required for the court to have subject matter jurisdiction when the court had exclusive continuing jurisdiction under the UCCJEA.

In re H.L.A.D., ___ N.C. App. ___, 646 S.E.2d 425 (7/3/07).
Facts: The child came into DSS custody in March, 2003, and was adjudicated neglected and dependent in May, 2003. The child was placed initially with the mother, but after she and respondent father reconciled and failed to comply with provisions of a case plan, the child was placed with relatives. In March, 2005, the court entered a consent order placing the child in the custody or guardianship of appellees, other relatives of respondent mother. In April, 2006, the relatives, who had moved with the child to Alabama, filed in North Carolina a petition to terminate both parents' rights. In September the court entered an order terminating both parents' rights on the grounds of neglect and willfully leaving the child in placement outside the home for more than a year without making reasonable progress to correct conditions that led to the child's placement. Only respondent father appealed.

Held: Affirmed, with dissent.

1. The majority rejected respondent's argument that the trial court lacked subject matter jurisdiction because, when the petition was filed, the child did not reside in, was not found in, and was not in the custody of a DSS or child-placing agency in North Carolina The court held that the requirement that one of those three conditions exists applies when the termination is an initial child custody determination, but not when the court already has exclusive continuing jurisdiction under the UCCJEA, which N.C. did in this case.
2. The court also held that petitioners' failure to attach to their petition a copy of the order giving them custody did not deprive the court of jurisdiction, where respondent showed no prejudice and clearly was aware of the child's custody with petitioners.

Dissent: Judge Levinson dissented with respect to subject matter jurisdiction and would have vacated the order. He found the majority's holding contrary to the plain wording of the statute and to earlier holdings of the court.

- After allowing DSS's motion to amend the record on appeal to include the summons, the majority holds that the trial court had subject matter jurisdiction.
- Respondents waived any objection to personal jurisdiction by participating in the proceeding.

In re S.J.M., ___ N.C. App. ___, 645 S.E.2d 798 (6/19/07).

Facts: Respondents' child was adjudicated dependent and placed in DSS custody. At a permanency planning hearing in November, 2005, the trial court ordered that reunification efforts cease and changed the plan from reunification to adoption. Respondents appealed. Initially the record on appeal did not include a copy of the summons issued in the case.

Holding: Affirmed, with dissent.

1. The majority granted DSS's motion to amend the record to include a copy of the summons and an affidavit from the clerk of court stating when the summons had been issued. Based on that amendment the majority rejected respondents' argument that the trial court lacked subject matter jurisdiction because no summons had been issued.
2. The court rejected respondents' argument that the trial court lacked personal jurisdiction, because both respondents and their attorneys appeared and participated in substantive hearings in the case.

Dissent: Judge Wynn dissented with respect to subject matter jurisdiction, on the basis that the court file and record lacked evidence that the summons was issued in a timely manner.

ABUSE, NEGLECT, DEPENDENCY

- In relation to child protective services, the county social services director is agent of DHHS.

In re J.L.H., ___ N.C. App. ___, 645 S.E.2d 833 (6/19/07).
In re Z.D.H., ___ N.C. App. ___, 646 S.E.2d 374 (6/19/07).

Facts: Both children, in the custody of Brunswick County DSS, sued DSS, DHHS, and others, alleging negligence in the provision of services to the children. In an order settling the case, the superior court judge found that the suit had created a conflict between the children and the county DSS, making the children dependent, and ordered DSSs in New Hanover and Onslow Counties, where the children were placed, to file dependency petitions. Neither of those DSSs filed a petition. Brunswick County DSS filed a motion for review in the juvenile case. The trial court found the children dependent, placed one in the custody of New Hanover County DSS and the other in the custody of Onslow County DSS, and transferred venue to those counties. After various motions, the court granted a motion by DHHS to intervene. Onslow County DSS and New Hanover County DSS appealed from the orders finding the

children dependent, giving custody to the respective counties, transferring venue, and allowing state DHHS to intervene. DHHS made a motion to dismiss the appeals, which the court initially denied.
Held: Appeal dismissed.
The court of appeals granted the state DHHS's motion to dismiss the appeals, on the basis that an agency relationship exists between DHHS and individual county DSSs and that the role of the county DSS director in the delivery of protective services is that of an agent.

- Collateral estoppel precluded relitigation of issues decided in an earlier termination case.
- Evidence and findings supported
  a. adjudication that infant was neglected, based on living in an injurious environment,
  b. conclusion that reunification efforts would be futile, and
  c. order ceasing visitation.

In re N.G., ___ N.C. App. ___, ___ S.E.2d ___ (9/18/07).
Facts: Respondents' rights to their first child were terminated, based on serious injuries the child received due to shaken baby syndrome while in respondents' care. Their second child was in DSS custody pursuant to a neglect adjudication based on the home's being an injurious environment. DSS filed a petition with respect to the parents' third child, alleging the history and that the child was not receiving proper medical care because of respondents' attempts to hide his existence from DSS, that respondents had not taken responsibility for or explained the first child's injuries, and that they had not cooperated with DSS or complied with the case plan relating to the second child. The trial court adjudicated the child neglected, in that she lived in an environment injurious to her welfare, awarded custody to DSS, concluded that reunification efforts would be futile, and ceased visitation.
Holding: Affirmed, with dissent.
1. Collateral estoppel precluded respondents from relitigating issues that had been determined in the case terminating their rights to the first child, to the extent those issues were necessary to the determination in that case—including their responsibility for the injuries to the first child.
2. The majority found that the trial court's other findings were supported by clear and convincing evidence, and that the findings were sufficient to support the adjudication of neglect. Findings included that respondents did not cooperate with DSS, discouraged or avoided social worker visits to the home, did not make progress on their case plan, did not participate in the PRIDE program or anger management classes, were tardy for visits, and did not accept responsibility for the first child's injuries.

Dissent: Judge Tyson dissented, noting that respondents did not miss any visits even though they traveled from New Jersey for them; they participated in programs comparable to the ones DSS wanted them to attend; no case plan was ever developed or renewed with respect to the third child, and they had made progress with respect to the existing case plan for the older child.

- When the child is placed outside the home, even if a guardian has been appointed the court may not waive review hearings without first making the findings required by G.S. 7B-906(b).
- The court did not err by incorporating written reports when it also made independent findings.
- "Findings" that merely recite testimony are not findings of relevant facts.

In re L.B., ___ N.C. App. ___, 646 S.E.2d 411 (7/3/07).
Facts: While appellant's appeal from an earlier permanency planning order was pending, the trial court conducted another review and changed the permanent plan from reunification to guardianship with the child's custodians. The trial court found that there was no need for further reviews and left respondent's visitation rights in the guardian's discretion.

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

1. The trial court could not waive further review hearings without making all of the findings required by G.S. 7B-906(b). The court reversed that portion of the order and remanded for additional findings.
2. The trial court did not err by incorporating reports from DSS and the guardian ad litem when the court also made numerous independent findings.
3. Although several of the trial court's findings were improper in that they merely recited testimony or statements of the court, other proper findings were sufficient to support the court's conclusions.
4. The trial court did not abuse its discretion in calling respondent as a witness.
5. Respondent failed to show prejudice resulting from the accidental destruction of the tape recording of the hearing, where she was granted a continuance to construct a record of the hearing, the record was settled and filed without either a transcript or a narrative of the hearing, and respondent asserted no specific instance of resulting prejudice.

- The trial court's findings at the permanency planning hearing were supported by the evidence.

In re S.J.M., ___ N.C. App. ___, 645 S.E.2d 798 (6/19/07).

Facts: Respondents' child was adjudicated dependent and placed in DSS custody. At a permanency planning hearing in November, 2005, the trial court ordered that reunification efforts cease and changed the plan from reunification to adoption. Respondents appealed.

Holding: Affirmed (with dissent on different issue).

The court of appeals considered numerous assertions by respondents that particular findings were not supported by evidence in the record and concluded that the evidence supported the findings and the findings supported the trial court's conclusions.

- Although the evidence would have supported other findings, the trial court's findings were supported by the evidence and sufficient to support the adjudication of neglect and abuse.
- The findings were sufficient to support entry of a civil custody order under G.S. 7B-911(c).
- Majority holds that appellant failed to show prejudice resulting from late entry of the order or failure to hold the hearing that should have been held to inquire into why the order had not been entered.

In re T.H.T., ___ N.C. App. ___, 648 S.E.2d 519 (8/21/07).

Facts: Respondent and her husband shared custody of their 7-month-old child. When the child returned to the father's home after being with respondent, the father noticed that her face was bruised and her head was swollen. He called the police and 911 and took the child to the hospital, where it was determined that she had a skull fracture in addition to the visible injuries. The father filed a civil action seeking custody, and DSS filed a petition alleging that the child was abused and neglected. Respondent offered several possible explanations for the child's injuries, and a doctor testified that in her opinion the skull fracture was not caused by an accident. The court adjudicated the child abused and neglected, awarded custody to the father, and gave respondent unsupervised visitation. The court also ordered that the order would resolve any pending custody claim in the civil action and that jurisdiction in the juvenile matter would terminate. Respondent appealed.

Holding: Affirmed, with dissent.

1. The court of appeals found that some of the findings were not supported by the evidence and that one actually was a conclusion of law, not a finding of fact, but concluded that the uncontested findings and those that were supported by the evidence were sufficient to support the trial court's adjudication and disposition orders.
2. The court of appeals also found that the trial court's findings were sufficient to support its entry of the order in the civil custody action under G.S. 7B-911(c).

3. The court concluded that respondent had not shown prejudice as a result of the fact that
   - the order was entered more than two months after the statutory time limit or
   - the hearing that should have been held after the order was not entered on time was not held.

Dissent: Judge Tyson dissented with respect to the delay in entry of the order and failure to hold the required hearing and would have reversed.

- When the petition was filed after 10/1/05, respondent father did not have a right under G.S. 7B-1001 to immediately appeal an order ceasing reunification efforts.

In re D.K.H., ___ N.C. App. ___, 645 S.E.2d 888 (6/19/07).
Facts: Respondent father appealed from an order ceasing reunification efforts and changing the permanent plan from reunification with him to adoption. The order was entered on 11/6/06 and respondent filed a notice of appeal on 11/8/06.
Held: Appeal dismissed.
Because the petition was filed after 10/1/05, the order from which respondent gave notice of appeal was not an appealable order under G.S. 7B-1001. An order ceasing reunification efforts can be appealed
1. along with an appeal from an order terminating the parent's rights (if the party has given notice of intent to appeal);
2. when an action to terminate respondent's rights has not been initiated within 180 days after entry of the order ceasing reunification efforts; or
3. immediately, if the appellant is the child's guardian or custodian.

The dismissal was without prejudice, since respondent had given written notice sufficient to preserve his right to appeal under the first or second circumstance listed above at the appropriate time.

TERMINATION OF PARENTAL RIGHTS

- The judge who presided over an action to terminate one parent's rights was not precluded from presiding over a later hearing to terminate the other parent's rights.
- The record supported the findings and conclusions that respondent putative father had not taken any of the steps necessary to preserve his rights.

In re M.A.I.B.K., ___ N.C. App. ___, 645 S.E.2d 881 (6/19/07).
Facts: The child came into DSS custody in 2004, and was adjudicated neglected and dependent. DSS was not able to locate the child's father in New York. In 2006, DSS filed a petition to terminate both parents' rights and served respondent father by publication. When he appeared at the hearing, the court appointed counsel for him, continued his hearing, and proceeded with the hearing to terminate the mother's rights. A blood test confirmed that respondent was the child's father, but he took no steps to legitimate the child, provide support, or contact the child. At the later hearing in respondent father's case, the court took judicial notice of the termination of the mother's rights. After hearing evidence the court adjudicated three grounds for termination, including respondent's failure before the filing of the petition to take any of the steps necessary to protect his rights as a putative father. The court concluded that termination of respondent's rights was in the child's best interest and terminated his rights.
Held: Affirmed.
1. The court of appeals rejected respondent's argument that the trial judge was influenced improperly by having presided over the case in which the child's mother's rights were terminated. The court found that findings were supported by the evidence in the record of respondent's case. The court also acknowledged the family-court principle of "one family – one judge."

2. The court found that the record clearly established that respondent failed to take any of the steps required of a putative father and supported the court's determination that termination was in the child's best interest.

- Without evidence to the contrary, court presumed that trial court's oral rendition of a dispositional order included everything that was in the later written order.
- Court rejected respondent's argument that DSS violated ASFA by not providing meaningful reunification services, and held that efforts made by DSS were reasonable and complied with ASFA.

In re A.R.H.B.., ___ N.C. App. ___, ___ S.E.2d ___ (10/2/07).
Facts: Children were taken into custody in March, 2005, while in the grandmother's home, where the mother had left them while she went to Florida to establish a home. (Conditions in the grandmother's home included intoxication, domestic violence, and 14-year-old being allowed to have sex with her boyfriend.) Fathers' whereabouts were unknown. In July, 2005, mother returned and entered into a reunification plan that included substance abuse assessment and treatment, random drug testing, making safe plans for the children when she chose to drink excessively, parenting classes, meet with social worker regularly, obtain employment, and obtain a safe and stable home. The children were adjudicated neglected in August 2005 and the disposition order was not entered until December 2005. In April 2006 DSS filed motions to terminate the parents' rights. Respondent father had been located, incarcerated in another state, and was served with the notice of termination. The trial court terminated the father's rights based on his failure to establish paternity, legitimate the child, or provide support. It terminated the mother's rights after concluding that three grounds had been established – neglect, incapability, and willfully leaving the children in care without making reasonable progress.
Held: Affirmed
1. The court rejected the mother's argument that the trial court's pattern of entering late orders prejudiced her efforts to complete the case plan. In the absence of evidence to the contrary, the court presumed that the trial court's oral rendition of the earlier disposition and review orders contained everything that appeared in the written orders that were entered later.
2. The court also rejected the mother's argument that the trial court violated the Federal Adoption and Safe Families Act (ASFA) by failing to provide meaningful reunification services. The court pointed to a variety of services DSS had provided (foster care, Medicaid, transportation, parenting classes, and substance abuse treatment), and stated that DSS had no duty to provide permanent transportation or housing aid. The court held that DSS made reasonable efforts in compliance with ASFA.
3. The court reviewed the evidence and findings relating to the ground of willfully leaving the children in care and held that they were sufficient to support the trial court's conclusion.
4. The court rejected the father's argument that he had not received proper notice, as he had not challenged the trial court's finding of fact that he was personally served by certified mail on a specific date. The court also reviewed the evidence and findings relating to the grounds for terminating his rights and held that they were sufficient.

- Respondent failed to establish a claim of ineffective assistance of counsel.
- Respondent failed to show prejudice from a delay of almost 6 months between filing of the petition and the hearing.

In re Dj.L., ___ N.C. App. ___, 646 S.E.2d 134 (6/19/07).
Facts: DSS filed a petition to terminate respondent's rights on March 28, 2006, and the hearing was held on September 26, 2006. The record included no indication that continuances had been granted. The court adjudicated three different grounds and entered an order terminating respondent's rights.

Held: Affirmed.

1. The delay of almost six months between filing of the petition and holding the hearing was error, but respondent failed to show that she was prejudiced.
2. The court of appeals also rejected respondent's claim that she did not have effective assistance of counsel. After reviewing the attorney's handling of the case, the court found that representation was not perfect, but that it was vigorous and zealous. The court also suggested that even if the attorney had done all of the things respondent complained about her not doing, there would not have been a different outcome because evidence of one ground was irrefutable. [Respondent had complained about the attorney's waiving the pre-trial hearing; not asserting lack of personal jurisdiction based on insufficient service of process; not making proper objections; and not subpoenaing certain witnesses.]

- The one year in care for establishing termination ground may be any period from initial placement to filing of termination petition.
- Respondent did not show that admission of DSS file into evidence was prejudicial.

In re H.L.A.D., ___ N.C. App. ___, 646 S.E.2d 425 (7/3/07).

Facts: The child came into DSS custody in March, 2003, and was adjudicated neglected and dependent in May, 2003. The child was placed initially with the mother, but after she and respondent father reconciled and failed to comply with provisions of a case plan, the child was placed with relatives. In March, 2005, the court entered a consent order placing the child in the custody or guardianship of appellees, other relatives of respondent mother. In April, 2006, the relatives, who had moved with the child to Alabama, filed in North Carolina a petition to terminate both parents' rights. In September the court entered an order terminating both parents' rights on the grounds of neglect and willfully leaving the child in placement outside the home for more than a year without making reasonable progress to correct conditions that led to the child's placement. Only respondent father appealed.

Held: Affirmed, with dissent (on other issue).

The court also held that

1. the "one year" element of the ground relates to any time period from the initial placement of the child to the filing of the petition to terminate parental rights. The fact that respondent had consented to the petitioners' being named guardian did not preclude the use of this ground based on his failure to make reasonable progress before the consent order.
2. respondent failed to show that he was prejudiced by admission of the DSS file into evidence.

- The Americans with Disabilities Act did not preclude termination of respondent's rights.

In re C.M.S., ___ N.C. App. ___, 646 S.E.2d 592 (7/3/07).

Facts: The child was adjudicated abused and neglected in 2004 and later was adjudicated abused again on the basis of sexual abuse by her mother's boyfriend and her mother's failure to protect her. Respondent mother made some progress but failed to complete mental health treatment, parenting classes, and anger management classes. The trial court terminated her rights on October 27, 2006. On appeal respondent asserted that because she was mentally retarded, the Americans with Disabilities Act precluded the state from terminating her parental rights.

Held: Affirmed.

Considering this issue of first impression, the court of appeals reviewed other courts' treatment of the issue and adopted the rule followed by other states, i.e., termination of parental rights proceedings are not services, programs, or activities within the meaning of title II of the ADA. At the same time, the court found that the requirements for and the trial court's findings about reasonable efforts constituted compliance with the ADA.

- Giving notice of appeal after the court's order is rendered but before it is entered is not a basis for dismissing the appeal.
- Failing to serve notice of appeal on the guardian ad litem was a basis for dismissal of the appeal.

In re J.L., ___ N.C. App. ___, 646 S.E.2d 861 (7/17/07).
Facts: After a hearing on 8/3/05, respondent gave oral notice of appeal from the court's order denying her motion to set aside an earlier order terminating her parental rights. Respondent filed a written notice of appeal on 8/16/05, and the trial court entered its written order on 9/12/05. On 1/20/06 the guardian ad litem filed a motion to dismiss respondent's appeal for failure to file a timely notice of appeal. The trial court granted that motion, and respondent appealed.
Held: Affirmed.

1. On appeal the guardian ad litem conceded that respondent had given timely notice of appeal and that the trial court erred in dismissing the appeal on that basis. Citing *Stachlowski v. Stach*, 328 N.C. 276, 401 S.E.2d 638 (1991), the court held that the notice of appeal was proper under Rule 3 of the Rules of Appellate Procedure, because a party may give written notice of appeal any time between the rendering of the court's judgment and entry of the judgment. Entry of the written judgment begins the period of time within which a party who has not already given notice of appeal must give proper notice of appeal or lose the right to appeal. [Rule 3A of the Rules of Appellate Procedure was not in effect at the time of this appeal.]
2. The trial court's error was harmless, however, because the trial court could have dismissed respondent's appeal on the basis that respondent failed to give notice of appeal to the guardian ad litem.

- Holding the termination hearing 420 days after the petition was filed required reversal when appellant demonstrated prejudice.

In re J.Z.M., ___ N.C. App. ___, 646 S.E.2d 631 (7/3/07).
Facts: DSS filed a petition to terminate respondent's rights in January, 2005. A hearing scheduled for October 27, 2005, was continued to January 27 and then to March 7, 2006, when the hearing was held. In an order entered April 18, 2006, the court terminated respondent's rights. At least one continuance was not the subject of a written order in the file. DSS ceased visitation between respondent and the children and respondent asserted the extended period without contact with the children as prejudice.
Held: Reversed, with dissent.
The opinion states that the delay was egregious and amounted to a *de facto* termination of respondent's rights. It also held that respondent had established sufficient prejudice to require reversal.
Concurrence: Judge Levinson concurred in the result only, stating again his objection to the prejudice analysis the court has adopted in cases dealing with violation of Juvenile Code timelines.
Dissent: Judge Steelman dissented on the basis that respondent had not demonstrated prejudice; that the delay actually gave her time to address the problems that had led to the children's removal, which she did not do; and that the analysis in the main opinion in effect applied a *per se* prejudice rule.

DELINQUENCY

- Trial court lacked subject matter jurisdiction when petition was filed more than 30 days after complaint was received.

In re J,B., ___ N.C. ___, ___ S.E.2d ___ (10/2/07).
Facts: Within 30 days after receiving a complaint from law enforcement, court counselor approved the complaint for filing as a petition, but the petition was not filed until more than 30 days after the complaint was received. The juvenile was adjudicated delinquent for misdemeanor larceny and a disposition was entered.
Holding: Vacated.
The timely filing of the petition is jurisdictional, and where the petition was filed more than 30 days after the complaint was received, the trial court lacked subject matter jurisdiction.

- Juvenile's request during custodial interrogation to telephone an aunt, who was not the juvenile's guardian, was not a request for his "guardian" to be present under G.S. 7B-2101(a)(3) and thus did not require the officers to stop interrogation.

State v. Oglesby, ___ N.C. ___, 648 S.E.2d 819 (8/24/07), *affirming (with respect to this issue)*, 174 N.C. App. 658, 622 S.E.2d 152 (2005).
Facts: During the custodial interrogation of the sixteen-year-old defendant, officers did not stop questioning him when he asked to be allowed to telephone his aunt. The aunt testified that she was a "mother figure" to the defendant. But evidence also showed that she never had custody of him, she never signed any papers for him, and defendant had stayed with her only occasionally and not for any considerable length of time. The trial court refused to exclude the defendant's statement because the aunt was not the defendant's custodian or guardian, and the court of appeals affirmed.
Holding: Affirmed with respect to this issue.
The Supreme Court held that the evidence did not show that the aunt had the legal authority of a guardian or custodian. Thus, the aunt was not a "guardian" for purposes of G.S. 7B-2101(a)(3), and the officers were not required to cease questioning defendant when he asked to call his aunt.

- Alleging that the juvenile falsely reported a bomb at school under the part of a statute that referred to "any building" rather than the subsection that referred to a "public building"
  a. was not plain error and
  b. did not deprive the court of subject matter jurisdiction.
- Although circumstantial, evidence was sufficient to support every essential element of the offense of making a false bomb report.

In re B.D.N., ___ N.C. App. ___, ___ S.E.2d___ (9/18/07).
Facts: A petition alleged that the juvenile was delinquent for typing "Bomb at Lunch" on a school calculator, in violation of G.S. 14-69.1(a) – communicating a report, knowing or having reason to know it was false, that there was located in a school a device designed to destroy or damage the building by explosion. Evidence included testimony by another student who saw the message; a teacher who saw the message and described who had used the calculator, and to whom the student who first saw it tried to report it; another teacher who saw the message and to whom the student who first saw it reported it; and two students who separately heard the juvenile after the incident make statements indicating that she had

typed the message (she "meant it all as a prank" and "thought it would be fun to get out of school"). The court adjudicated the juvenile delinquent and placed her on probation for one year.
Holding: Affirmed.
The juvenile argued that the court erred in denying her motion to dismiss because she was improperly charged under G.S. 14-69.1(a), which refers to "any building," rather than G.S. 14-69.1(c), which refers to public buildings and mentions schools specifically. The court of appeals held that

1. substantial evidence supported every essential element of the offense alleged;
2. basing the allegation on G.S. 14-69.1(a) rather than G.S. 14-69.1(c) was not "plain error," a rule the Supreme Court has applied only to issues relating to jury instructions or the admissibility of evidence;
3. the fact that the allegation was based on the more general subsection of the statute did not deprive the trial court of subject matter jurisdiction, because "any building" clearly includes "public buildings," and the state could have proceeded under either subsection.

- The trial court did not abuse its discretion in finding that the juvenile was competent to stand trial.
- Majority holds that evidence supported the trial court's refusal to suppress evidence resulting from police officers' investigatory seizure and search of the juvenile.
- Evidence of juvenile's possession of one rock of cocaine and $271.00 was not sufficient to support a finding of intent to sell or distribute.

In re I.R.T., ___ N.C. App. ___, 647 S.E.2d 129 (7/17/07).
Facts: Officers approached and conversed with a group of males standing outside a building in an area in which drug arrests had occurred. Police had not received a recent report about drugs at that location. An officer asked the juvenile to spit out whatever was in his mouth, after developing a suspicion based on the juvenile's demeanor, the appearance that he had something in his mouth, and the officer's prior experience. The juvenile spit out a wrapped rock of cocaine and was taken into custody. In court, two psychologists testified and gave conflicting opinions as to whether the juvenile was competent to stand trial. The court made findings and concluded that the juvenile was competent to stand trial. The court adjudicated the juvenile delinquent for possessing crack cocaine with intent to sell or distribute, placed him on probation for a year and required him to complete substance abuse and mental health assessments, complete 200 hours of community service, maintain passing grades in at least four courses, and not associate with any Blood gang member.
Holding: Affirmed in part, with dissent; remanded in part, for disposition based on an adjudication for simple possession.

1. The trial court did not abuse its discretion in determining that the juvenile was competent to stand trial, where the court made findings based on evaluations and testimony by experts. [In a concurring opinion, Judge Jackson expressed concern that only one of the two evaluators had conducted extensive competency testing.]
2. The trial court did not err in denying the juvenile's motion to suppress evidence of the crack cocaine the juvenile spit out.
    a. A juvenile's age is a relevant consideration in determining whether a *seizure* occurred for Fourth Amendment purposes.
    b. In this case, a seizure did occur. The court considered factors such as the presence of two officers in a marked police car, visibility of the officers' guns and gang unit emblems on their shirts, the juvenile's age (15), and the overall show of authority. The court concluded that a reasonable person would not have felt free to leave under these circumstances.
    c. The juvenile's conduct, his presence in a high crime area, and the officer's knowledge, experience and training were sufficient to establish a "reasonable suspicion to justify an investigatory seizure."

d. The same factors were sufficient to give the officer probable cause for the search, and exigent circumstances existed due to the possibility that the juvenile could swallow the drugs and destroy evidence.

3. Evidence that the cocaine was wrapped in cellophane and that the juvenile had $271 in his pocket was not sufficient to establish intent to sell or distribute. The evidence did support the lesser included offense of simple possession.

Dissent: Judge Calabria dissented with respect to the suppression issue and would have remanded the case for a new hearing at which evidence that resulted from the search and seizure would be suppressed.

2007 Legislation: Juvenile Law[1]

Juvenile Contempt

The Juvenile Code (G.S. Chapter 7B) authorizes the court to find an undisciplined juvenile in contempt and impose limited sanctions, after appointing counsel for the juvenile, conducting a hearing, and finding that the juvenile has violated the terms of protective supervision. Otherwise the Juvenile Code and other statutes (including G.S. Chapter 5A, the contempt statute) have been silent with respect to contemptuous behavior by juveniles, leaving judges unsure how to deal appropriately with a juvenile who disrupts court or engages in other conduct for which the court would hold an adult in contempt. S.L. 2007-168 (H 1479) amends both Chapter 5A and Chapter 7B to fill that gap. The act is effective December 1, 2007, and applies to acts occurring or offenses committed on or after that date.

Meaning of Contempt by a Juvenile

New G.S. 5A-31 lists the conduct that constitutes contempt by a juvenile. When done by an unemancipated minor who is at least six years of age, is not yet 16 years of age, and has not been convicted of any crime in superior court, each of the following is contempt by a juvenile:

1. Willful behavior committed during court and directly tending to interrupt the court's proceedings.
2. Willful behavior committed during court, in the court's presence and immediate view, and directly tending to impair the respect due the court's authority.
3. Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.
4. Willful refusal to be sworn or affirmed as a witness, or, when sworn or affirmed, willful refusal to answer any legal and proper question without legal justification.
5. Willful or grossly negligent failure to comply with the court's schedules and practices, resulting in substantial interference with the business of the court.
6. Willful refusal to testify or produce other information upon the order of a judge acting pursuant to Article 61 of G.S. Chapter 15A, Granting of Immunity to Witnesses.
7. Willful communication with a juror in an improper attempt to influence the juror's deliberations.
8. Any other act or omission specified in another Chapter of the General Statutes as grounds for criminal contempt.

This list includes most, but not all, of the conduct listed in G.S. 5A-11, which specifies conduct that may constitute criminal contempt by persons age sixteen or older (or emancipated or previously convicted in superior court). But contempt by a juvenile, for example, does not include willful refusal to comply with a condition of probation, probably because the Juvenile Code already specifies the possible consequences of a violation of probation in a delinquency case.

The act does not provide for the use of contempt to coerce compliance with a court order, as civil contempt is used in cases involving adults who willfully fail to comply with court orders. Contempt by a juvenile is neither civil contempt nor criminal contempt. It is an altogether new category of contempt. Its use is not limited to proceedings in juvenile court. The conduct of a juvenile who is a party, a witness, or an observer in any court action may constitute contempt by a juvenile.

The procedures for responding to contempt by a juvenile and sanctions that are available to the court depend on whether the contempt is direct or indirect.

[1] For more complete summaries, *see* Juvenile Law Bulletin 2007/03, at http://shopping.netsuite.com/sogstore (type "juvenile" in the search space).

Direct Contempt by a Juvenile

Contempt by a juvenile is *direct contempt by a juvenile* when all of the following conditions exist:

1. The act is committed within the sight or hearing of a presiding judicial official.
2. The act is committed in, or in the immediate proximity to, the room where proceedings are being held before the court.
3. The act is likely to interrupt or interfere with matters then before the court.

The procedures for addressing direct contempt by a juvenile are set out in G.S. 5A-32. Because direct contempt by a juvenile often requires an immediate response, the statute provides for summary proceedings similar to those that apply when an adult is in direct criminal contempt. A judicial official may act summarily when necessary to restore order or maintain the court's dignity and authority, and when acting substantially contemporaneously with the juvenile's contempt. Before imposing any sanction summarily, however, the judicial official must

1. give the juvenile summary notice of the contempt allegation and a summary opportunity to respond;
2. appoint an attorney to represent the juvenile and allow time for the juvenile and attorney to confer; and
3. make findings, based on facts established beyond a reasonable doubt, to support the summary imposition of sanctions in response to contempt by a juvenile.

In some situations proceeding summarily will not be necessary, and the court is never required to proceed summarily. Instead, the court may appoint counsel for the juvenile and order the juvenile to appear in juvenile court at a later time and show cause why he or she should not be held in direct contempt.

A judicial official who is alleging that a juvenile is in direct contempt may orally order that the juvenile be taken into custody and restrained sufficiently to assure the juvenile's presence for summary proceedings or for notice of a later show cause hearing.

After the court finds that a juvenile is in direct contempt – regardless of whether the finding is made in a summary proceeding or after issuance of a show cause order and a hearing in juvenile court – the court's response to direct contempt by a juvenile is limited to ordering one or more of the following:

- That the juvenile be detained in a juvenile detention facility for up to five days.
- That the juvenile perform up to 30 hours of supervised community service as arranged by a juvenile court counselor.
- That the juvenile be required to undergo any evaluation necessary for the court to determine the juvenile's needs.

Before ordering any of these, the court must find that the juvenile's conduct was willfully contemptuous or that it was preceded by a clear warning by the court that the conduct was improper. The act amends G.S. 143B-536 to specify that a judicial official imposing sanctions for direct contempt by a juvenile may direct a juvenile court counselor to assist in implementing the court's order. After imposing one or more sanctions for direct contempt, if warranted by the juvenile's conduct and the ends of justice, a judicial official at any time may reduce or terminate a period of detention or eliminate or reduce the number of hours of community service ordered.

Direct contempt by a juvenile is not a delinquent act and is not subject to the procedures that apply to acts of delinquency. When the court chooses not to address direct contempt summarily, but issues a show cause order for a hearing in juvenile court, that hearing is simply a contempt hearing. It does not involve a juvenile petition or summons – just the court's order to show cause. The juvenile is either found in direct contempt or not. The juvenile is not adjudicated delinquent or undisciplined, and the only options available to the court after finding the juvenile in direct contempt are the three listed above. Appeal from an order finding a juvenile in direct contempt is to the court of appeals.

Indirect Contempt by a Juvenile

Any act of contempt by a juvenile that is not direct contempt is *indirect contempt by a juvenile*. Indirect contempt by a juvenile is a delinquent act and is subject to the same intake, diversion, petition, adjudication, disposition, and other procedures that apply in other delinquency cases. Indirect contempt by a juvenile is a minor offense. However, no points are assigned for a prior adjudication for indirect contempt. Dispositions available to the court for a juvenile who is adjudicated delinquent for indirect contempt are the same as for any other minor offense, considering the juvenile's delinquency history level.

Delinquent Juveniles

Impaired Driving Offenses

Section 31 of S.L. 2007-493 (S 999) rewrites G.S. 7B-1903(b) to allow the court to order that a juvenile be placed in secure custody when

1. the juvenile is alleged to be delinquent for violating G.S. 20-138.1 ("Impaired driving") or G.S. 20-138.3 ("Driving by person less than 21 years old after consuming alcohol or drugs"),
2. the court finds a reasonable factual basis to believe the juvenile committed the alleged offense, and
3. the juvenile has demonstrated that he or she is a danger to persons.

This amendment applies to offenses committed on or after December 1, 2007.

Section 32 of S.L. 2007-493 authorizes the Legislative Research Commission to study dispositional alternatives for juveniles who are adjudicated delinquent for violations of G.S. 20-138.1 or G.S. 20-138.3. The act also directs the commission to determine (1) whether these should be classified as violent, serious, or minor offenses and (2) the appropriate delinquency history level points to be assigned to them. The commission may make an interim report to the 2008 regular session and is required to make a final report to the 2009 General Assembly upon its convening.

Restraint of Juveniles in Courtroom

S.L. 2007-100 (H 1243) adds to the Juvenile Code a new section, G.S. 7B-2402.1, which applies to any hearing involving a juvenile who is alleged or has been adjudicated to be delinquent or undisciplined. The judge may require that the juvenile be physically restrained in the courtroom, but only after finding that the restraint is reasonably necessary to

- maintain order,
- prevent the juvenile's escape, or
- provide for the safety of the courtroom.

When possible, the court must give the juvenile and the juvenile's attorney an opportunity to be heard before ordering the use of restraints. The judge must make findings of fact to support any order that a juvenile be restrained. The act is effective October 1, 2007, and applies to hearings conducted on or after that date.

Release of Information about Juveniles Who Escape

S.L. 2007-458 (H 1148) repeals G.S. 7B-2102(d1), which dealt with the release of the photographs of juveniles who escaped from custody or from a juvenile facility. The act adds a new section, G.S. 7B-3102, which requires the Department of Juvenile Justice and Delinquency Prevention (DJJDP) to maintain a photograph of every juvenile in the department's custody and establishes requirements for releasing information about juveniles who escape.

DJJDP must release information to the public within twenty-four hours after a juvenile escapes

- from a detention facility, if the juvenile is alleged to have committed a Class A, B1, B2, C, D, or E felony; or
- from a youth development center, if the juvenile has been adjudicated delinquent for a felony or a Class A1 misdemeanor.

The information DJJDP must release in those cases is the juvenile's first name, last initial, and photograph; the name and location of the institution from which the juvenile escaped; and a statement of the level of concern the department has with respect to the juvenile's threat to himself or herself or others. The department is authorized, but not required, to release the same kind of information to the public when a juvenile who escapes from custody has been adjudicated delinquent for a Class 1, 2, or 3 misdemeanor.

In any case, if the juvenile who escaped is returned to custody before the required or permitted disclosure is made, the department may not make the disclosure.

The act also rewrites G.S. 7B-2102 to require county detention facilities to photograph all juveniles who are committed to the facilities and require county detention facilities and the State Bureau of Investigation to release any photograph generated under that section to DJJDP at the department's request. The act is effective October 1, 2007.

Child Welfare

G.S. 7B-908 requires the juvenile court to conduct post-termination of parental rights review hearings every six months after a child's parents' rights have been terminated, when the child is in the custody of a county department of social services or a licensed child-placing agency. Previously hearings were required only until the juvenile was placed for adoption and an adoption petition was filed. S.L. 2007-276 (H 698) rewrites G.S. 7B-908(b) and (e), to require the court to continue holding these hearings until a final order of adoption is entered. The act makes a comparable change to G.S. 7B-909, for hearings conducted when children have been relinquished to an agency for adoption.

The act also amends

- G.S. 7B-506(b), to state that at hearings on the need for continued nonsecure custody, the guardian ad litem, the juvenile, and the juvenile's parent, guardian, or custodian has a right, rather than just an opportunity, to introduce evidence, be heard , and question witnesses.
- G.S. 7B-901, to provide that at dispositional hearings, the juvenile and the juvenile's parent, guardian, or custodian have a right, rather than just an opportunity, to present evidence.
- G.S. 7B-906(a), 7B-907(a), and 7B-908(b)(1), to state that no foster parent, relative, or preadoptive parent shall be deemed a party to the proceeding based solely on receiving notice and the right (formerly, an opportunity) to be heard at a review, permanency planning, or post-termination of parental rights review hearing.

These changes are effective October 1, 2007.

Termination of Parental Rights and Adoption

Jurisdiction over Out-of-State Parents

The North Carolina Court of Appeals has held that in a civil action to terminate a parent's rights, a court in this state may terminate the rights of an out-of-state parent only if that parent has *minimum contacts* with North Carolina, unless the parent

- submits to the state's jurisdiction, or
- is served with process while physically in the state, or

- is the father of a child born out of wedlock and has not established paternity, legitimated the child, or provided substantial support or care to the child and mother.

See In re Trueman, 99 N.C. App. 579, 393 S.E.2d 569 (1990); In re Finnican, 104 N.C. App. 157, 408 S.E.2d 742 (1991), *cert. denied*, 330 N.C. 612, 413 S.E.2d 800, *overruled in part on other grounds*, Bryson v. Sullivan, 330 N.C. 644, 412 S.E.2d 327 (1992); In re Dixon, 112 N.C. App. 248, 435 S.E.2d 352 (1993); and In re Williams, 149 N.C. App. 951, 563 S.E.2d 202 (2002).

S.L. 2007-152 (H 866) is titled "An Act to Expand the Reach of North Carolina Courts in Proceedings to Terminate the Parental Rights of Nonresident Parents of Resident Children." It amends G.S. 7B-1101 to say that the district court has jurisdiction to terminate the parental rights of a parent, regardless of the parent's state of residence, if (1) the court has non-emergency jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA, G.S. Chapter 50A), and (2) the parent has been served with a summons pursuant to G.S. 7B-1106.

This change makes the termination of parental rights statute more nearly consistent with the UCCJEA, which provides in G.S. 50A-201(c) that personal jurisdiction over a parent is not necessary in order for a court in this state to exercise jurisdiction in a child-custody proceeding, which may include an action to terminate a parent's rights. However, in the decisions cited above, the court of appeals held that "minimum contacts" are required as a matter of constitutional law in order for a North Carolina court to terminate the rights of some out-of-state parents. Some states' courts have applied a *status* exception to the minimum-contacts rule in these circumstances—for example, the Alaska Supreme Court in S.B. v. State of Alaska, 61 P.3d 6 (2002) (holding that personal jurisdiction is not required for *status* determinations under the UCCJEA) and the Wisconsin Supreme Court in In re Thomas J.R., 262 Wis.2d 217, 663 N.W.2d 734 (2003). Whether the legislature's amendment of G.S. 7B-1101 will lead North Carolina's appellate courts to consider such an exception is unpredictable. The amendment is effective October 1, 2007.

Termination Ground to Facilitate Out-of-State Adoptions

S.L. 2007-151 (H 865) addresses cases in which a child is freed for adoption in North Carolina but the adoption proceeding takes place in another state, generally where the adoptive parents reside. Sometimes a parent's consent to adoption or relinquishment of a child to a child-placing agency for adoption under North Carolina law is not sufficient to satisfy the prerequisites for adoption in another state. S.L. 2007-151 creates a new ground for termination of parental rights that applies when the parent's North Carolina consent or relinquishment has become irrevocable, termination of the parent's rights is necessary in order for the adoption to occur in another state, and the parent does not contest the termination of parental rights. The new ground, in G.S. 7B-1111(a)(10), is effective October 1, 2007, and applies to termination petitions and motions filed on or after that date.

Adoption Jurisdiction

S.L. 2007-151 expands North Carolina's jurisdiction in adoption proceedings to include (1) cases in which the child to be adopted has lived in the state either since birth or for the six consecutive months preceding the filing of the adoption petition, regardless of the adoptive parents' domicile, and (2) cases in which a social services department or licensed child-placing agency in the state has legal custody of the child when the adoption petition is filed.

The act also provides that North Carolina may exercise jurisdiction in an adoption proceeding even if another state is properly exercising jurisdiction under the Uniform Child-Custody Jurisdiction and Enforcement Act when the adoption petition is filed, if that state either dismisses its proceeding or releases its exclusive continuing jurisdiction within sixty days after the adoption petition is filed in North Carolina.

These amendments to G.S. 48-2-100 are effective October 1, 2007, and apply to adoption petitions filed on or after that date.

Access to Adoption Information

North Carolina has been slower than many states to offer adult adoptees and the biological parents of adult adoptees assistance in identifying and contacting each other. S.L. 2007-262 (H 445) represents a major change in that respect. It rewrites various sections of the adoption law, G.S. Chapter 48, to allow county social services departments and licensed child-placing agencies in the state to agree to act as *confidential intermediaries* for purposes of obtaining and sharing confidential adoption information and facilitating contact between individuals when there is written consent by all parties to the contact or information sharing. Agencies may charge a reasonable fee for the service. The act does not create an adoption registry or provide details about how the process will work, but it requires the state Division of Social Services to develop guidelines for confidential intermediary services.

Those who may seek and consent to information sharing or contact or both through a confidential intermediary include an adoptee who has reached the age of twenty-one; an adult lineal descendant of a deceased adoptee; and a biological parent of an adoptee. An agency also may act as a confidential intermediary for the adoptive parents of a minor adoptee for purposes of obtaining and sharing non-identifying birth-family health information. The act is effective January 1, 2008.

Safe Surrender Education

S.L. 2007-126 (H 485) amends G.S. 115C-47 to require local boards of education to adopt policies to ensure that students in grades nine through twelve receive information annually on the procedure through which a parent may lawfully abandon a newborn baby with a responsible person. That procedure, set out in G.S. 7B-500, applies only during the first seven days of a child's life. (A parent who follows the procedure is immune from criminal prosecution for child abandonment. However, nothing about the procedure affects a county social services department's duty to respond as it would in the case of any other abandoned child, including filing a juvenile court proceeding and attempting to identify and locate the infant's parents.)

The act amends other statutes to create comparable requirements with respect to other schools:

- G.S. 115C-238.29F(a), to impose the same requirement on the state Department of Public Instruction with respect to charter schools;
- G.S. 115C-548 and -556, to require the Division of Nonpublic Education in the Department of Administration to ensure that information is available to private church schools, schools of religious charter, and qualified nonpublic schools so that they can provide information on the manner in which a parent may lawfully abandon a newborn baby;
- G.S. 115C-565, to require the Division of Nonpublic Education to provide the same information to home schools, and to specify that it may do so electronically or on the Division's Web page.

The act was effective June 27, 2007, and applies beginning with the 2008-2009 school year.