

**District Court Judges' Summer Conference
Wrightsville Beach, NC**

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JUVENILE LAW UPDATE

Cases Filed from October 12, 2007, through May 20, 2008

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ABUSE, NEGLECT, DEPENDENCY

N.C. Supreme Court

- After allowing motion to amend the record on appeal to include the summons and an affidavit from the clerk about its issuance, court of appeals held that the trial court had subject matter jurisdiction.

In re S.J.M., ___ N.C. App. ___, 645 S.E.2d 798 (6/19/07), affirmed per curiam, 362 N.C. 230, 657 S.E.2d 354 (3/7/08).

<http://www.aoc.state.nc.us/www/public/sc/opinions/2008/363-07-1.htm>

<http://www.aoc.state.nc.us/www/public/coa/opinions/2007/060822-1.htm>

- When petition alleged children were neglected and dependent, the trial court did not err
 1. in declining to order the production of or admit into evidence confidential substance abuse records relating to respondent parents, where there was sufficient evidence of respondents' substance abuse without those records; or
 2. in granting respondents' motion to dismiss at the close of DSS's evidence, when DSS failed to present evidence that the children had been harmed or were at substantial risk of harm based on respondents' substance abuse.

In re E.P., 183 N.C. App. 301, 645 S.E.2d 772 (6/5/07), affirmed per curiam, 362 N.C. 82, 653 S.E.2d 143 (12/7/07).

<http://www.aoc.state.nc.us/www/public/sc/opinions/2007/298-07-1.htm>

<http://www.aoc.state.nc.us/www/public/coa/opinions/2007/060687-1.htm>

- Where parties agreed that an adjudication of abuse in relation to one child should not have been in the order, court of appeals remanded for amendment of the order accordingly.
- Trial court did not have authority to order respondent to contact the Child Support Enforcement agency, but did have authority and did not abuse its discretion in ordering respondent to have a psychological evaluation, have a substance abuse assessment, and enroll in parenting classes.

In re A.S., 181 N.C. App. 706, 640 S.E.2d 817 (2/20/07), affirmed per curiam, 361 N.C. 686, 651 S.E.2d 883 (11/9/07).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2007/061028-1.htm>

<http://www.aoc.state.nc.us/www/public/sc/opinions/2007/140-07-1.htm>

- Appellant did not show that she was prejudiced by two-and-a-half month delay in entry of the permanency planning order.
- Changing plan from reunification to guardianship was not error when court found respondent could care for the children only with constant assistance, which was not available or financially feasible.
- Trial court did not err in considering a written DSS report and psychological report even though they were not formally introduced as evidence.

In re J.J., 180 N.C. App. 344, 637 S.E.2d 258 (12/5/06), affirmed per curiam, 362 N.C. 172, 655 S.E.2d 712 (1/25/08).

<http://www.aoc.state.nc.us/www/public/sc/opinions/2008/015-07-1.htm>

<http://www.aoc.state.nc.us/www/public/coa/opinions/2006/051510-1.htm>

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

In re N.G., ___ N.C. App. ___, 650 S.E.2d 45 (9/18/07), affirmed per curiam, 362 N.C. 229, 657 S.E.2d 355 (3/7/08).

<http://www.aoc.state.nc.us/www/public/sc/opinions/2008/510-07-1.htm>

<http://www.aoc.state.nc.us/www/public/coa/opinions/2007/070369-1.htm>

- Failure to attach certificate of service to the notice of appeal was fatal and resulted in dismissal of appeal.

In re C.T., 182 N.C. App. 166, 641 S.E.2d 414 (3/6/07), affirmed per curiam, 361 N.C. 581, 650 S.E.2d 593 (10/12/07).

<http://www.aoc.state.nc.us/www/public/sc/opinions/2007/175-07-1.htm>

<http://www.aoc.state.nc.us/www/public/coa/opinions/2007/061272-1.htm>

North Carolina Court of Appeals

- Evidence in the record must support findings that support a conclusion that the trial court has subject matter jurisdiction under the UCCJEA.
- Service of a summons and petition on the juvenile is not required in an abuse, neglect, or dependency proceeding as it is in a termination proceeding.
- Allowing amendment of the petition to add allegations of sexual abuse was error.
- “Abused” and “neglected” refer to the status of the child, not the culpability of the parent.
- Underage drinking, underage smoking, and marijuana use are not acts involving moral turpitude for purposes of the definition of “abused juvenile.”

In re M.G., ___ N.C. App. ___, 653 S.E.2d 581(12/18/07).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2007/070643-1.htm>

Facts: The petition, listing four children, named the parents of two of them and the parents of the other two as respondents. It alleged that all four children – who lived with the mother of two and the father of two – were abused, neglected, and dependent. The trial court permitted DSS to amend the petition to allege that a second child was sexually abused. The record showed that when the petition was filed both of the custodial father’s children had been in N.C. less than six months. The trial court’s order said, “The juveniles are . . . physically present in this State and District and were so at the time the petition was filed, and this State is the home state of the juveniles and was so at the time of the commencement of these proceedings.” The trial court adjudicated all four children to be abused and neglected after hearing evidence and making findings about domestic violence in the children’s presence; inappropriate discipline; the father’s excessive use of alcohol and driving with the children in the car while intoxicated; the father’s groping and inappropriate touching of one child; the father’s giving the older children beer and offering them marijuana; and the mother’s acquiescence in the father’s conduct.

Held: The court of appeals affirmed in part; reversed in part; and remanded in part.

1. Subject matter jurisdiction under UCCJEA. The court of appeals found that evidence in the record and the absence of any indication as to whether there had been prior custody proceedings, raised questions about whether the trial court had subject matter jurisdiction with respect to the two children who had been in the state less than six months when the petition was filed. The court of appeals held

that neither the findings nor the evidence in the record was sufficient to support the trial court's conclusion that N.C. was the home state and had subject matter jurisdiction. The court of appeals noted that the record did not contain sufficient evidence from which it could determine whether jurisdiction existed, suggesting that if the record had contained such evidence, the fact that the court's findings were insufficient would not have required remand of the case. Although the court remanded the case for findings of fact relating to subject matter jurisdiction under the UCCJEA, the thrust of the case seems to be the need for additional evidence from which the trial court could make findings that would support the conclusion that the court had subject matter jurisdiction.

That reading of the case is consistent with *In re T.J.D.W.*, 182 N.C. App. 394, 642 S.E.2d 471 (4/3/07), *affirmed per curiam*, 362 N.C. 84, 653 S.E.2d 143 (12/7/07), in which the trial court had not made any findings to support its conclusion regarding subject matter jurisdiction. The court of appeals, although noting that making such findings "would be the better practice," held that the statutes require only that certain circumstances exist, not that the trial court make specific findings of fact about them. It was sufficient, the court said, that the trial court's assertion of jurisdiction in its order was supported by evidence in the record. (The dissent in the court of appeals had taken the position that trial courts must make specific findings of fact and conclusions of law as a basis for asserting subject matter jurisdiction under the UCCJEA.)

2. Summons and service – the juvenile. Failure to serve a summons and the petition on the juveniles did not affect the court's jurisdiction. In an abuse, neglect, or dependency proceeding, G.S. 7B-406 requires only that the parent, guardian, custodian, or caretaker be served.
3. Summons and service – the parents. When the petition named all four children, it was sufficient that the summons served on each parent named only that parent's two biological children.
4. Amended petition. Although the original petition alleged that Child #1 was abused, an amendment that added allegations that she was sexually abused changed the conditions on which the petition was based and should not have been allowed.
5. Evidence and findings. The evidence and the trial court's findings were sufficient to support the conclusion that all four children were neglected and were abused under G.S. 7B-101(1)(b) (creating or allowing substantial risk of serious non-accidental physical injury) and that Child #2 was sexually abused.
6. Moral turpitude. Evidence was not sufficient to establish that two of the children were abused under G.S. 7B-101(1)(f) (encouraging, allowing, or approving delinquent acts involving moral turpitude), because the acts the father encouraged – underage drinking, underage smoking, and marijuana use – although illegal, were not acts involving moral turpitude.

- Overcrowded dockets do not constitute extraordinary circumstances for purposes of permitting a continuance under G.S. 7B-803.
- Respondents showed prejudice resulting from egregious violations of statutory timelines.

In re R.L. ___ N.C. App. ___, 652 S.E.2d 327 (11/6/07).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2007/061616-1.htm>

Facts: DSS filed petitions in August 2004 alleging that respondents' children were neglected and dependent. In March 2005 the court adjudicated the children neglected "as to" respondent-mother and, after a disposition hearing, placed the children in the custody of DSS, with a review hearing to be held three months later. The trial court scheduled but continued adjudicatory hearings for the children's fathers, and between August 3, 2005, and February 26, 2006, continued the whole case 11 times, 5 times due to a crowded docket and 6 times due to the absence of one or more parties and/or attorneys. In February 2006 the court adjudicated the children dependent "as to" their respective fathers, and in March 2006 held a disposition and permanency planning hearing. The court found that respondent mother had not made satisfactory progress and changed the plan from reunification to adoption. The court entered an

order seven weeks later but, with respect to one father, entered an order nearly seven months later. All three respondents appealed the court's orders.

Held: Reversed and remanded.

1. The court of appeals considered the trial court's violations of various timelines with respect to each parent, and of the 11 continuances, concluded that only two (attorney's illness and death in respondent's family) involved extraordinary circumstances as contemplated by G.S. 7B-803.
2. While continuances due to overcrowded dockets might satisfy the standard for civil cases generally, they do not satisfy the standard set by G.S. 7B-803 for juvenile cases, and those continuances were an abuse of discretion by the trial court.
3. The court, after analyzing the various timeline violations and the parties' arguments, concluded that all three respondents had shown prejudice as a result of the violations.

Note: The opinion does not address the procedural peculiarities of the case or question the trial court's approach of having an adjudication "as to" each parent, despite earlier opinions of the court disapproving that approach. *See, e.g.,* In re B.M., 183 N.C. App. 84, 643 S.E.2d 644, 647 (5/1/07) ("Respondent-father further contends that the lower court erred in failing to make . . . findings of fact 'as to the respondent-appellant father' regarding the neglect and dependency of B.M. However, this contention is without merit. Our Court has previously stated that the status of the juvenile and not the assignment of culpability is what is at issue at the adjudication and dispositional stage"); In re J.S., 182 N.C. App. 79, 641 S.E.2d 395 (3/6/07).

- Evidence was sufficient to support an adjudication that child was abused and neglected, where infant had multiple rib fractures that were several weeks old and in different stages of healing, parents had not sought medical attention, and the parents were the child's primary caretakers.

In re S.W., ___ N.C. App. ___, 653 S.E.2d 425 (12/4/07).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2007/070707-1.htm>

Facts: Evidence showed that the infant had multiple fractures in different stages of healing; the parents had failed to obtain medical attention for the injuries, which were discovered when they took him to the hospital for a high fever and chest congestion; and respondents were the child's primary caretakers and either did not notice or ignored the child's pain. The trial court adjudicated the child to be abused and neglected and placed custody with DSS.

Held: Affirmed. Court of appeals held that the trial court's findings and conclusions were sufficient.

Note: Although the opinion refers to G.S. 7B-1111(a)(1), the neglect ground for terminating a parent's rights, the case did not involve a claim for termination of parental rights.

- Although medical records were admitted as evidence without a proper foundation, other competent evidence supported the trial court's findings and conclusions.
- Local rules are supplemental and may not conflict with statutory law.
- Holding adjudication hearing 16 months after the petition was filed was not prejudicial error when the court made findings of good cause for continuances, most continuances resulted from requests by respondents, and respondents showed no specific prejudice.

In re T.M., ___ N.C. App. ___, 654 S.E.2d 502 (12/18/07).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2007/070911-1.htm>

Facts: The trial court adjudicated one child to be abused and neglected based on findings that she was the victim of shaken baby syndrome and adjudicated the other child neglected on the basis that she lived in an injurious environment. Local rules set out procedures for the parties to obtain access to confidential medical and other records and included a provision that such records were admissible unless a party

objected within a set time after notice that the records were available. Relying on the rule DSS introduced extensive medical records. DSS also presented testimony by multiple medical experts and witnesses.

Held: Affirmed.

1. The court of appeals held that competent evidence other than the medical records supported the adjudications. The court discussed exceptions to the hearsay rule under which the records could be admitted, but held that the local rule could not substitute for the requirement of a proper foundation.
2. The court noted in a footnote that a local rule is not a rule of evidence and that local rules are designed to promote the efficient administration of justice.
3. The court rejected respondents' argument that holding the hearing 16 months after the petition was filed required reversal, because the trial court made findings that there was good cause for the continuances and the major factors in the delay were respondents' request for a special setting and their difficulty in finding an expert who would review the medical records.

- Trial court did not err when it ordered DSS, as representative payee, to apply the juvenile's Social Security benefits to pay current and overdue mortgage payments on the house the juvenile owned and for repairs to the house.

In re J.G., ___ N.C. App. ___, 652 S.E.2d 266 (11/6/07), rev. denied, ___ N.C. ___, 658 S.E.2d 485 (1/24/08), petition for cert. filed 4/23/08.

<http://www.aoc.state.nc.us/www/public/coa/opinions/2007/060752-1.htm>

Facts: In 1992, when the juvenile was two, he was adopted by his step-father and his parents purchased a home. In 1994 his mother's rights were terminated and his adoptive father died. The juvenile inherited the home and received Social Security survivor's benefits, both handled by a guardian and trustee. After an adjudication of neglect, the juvenile was placed in DSS custody, then lived with a relative in the inherited home on which DSS paid the mortgage. The relative adopted the juvenile but in 2005 relinquished her parental rights. The juvenile had been adjudicated delinquent and also was adjudicated dependent and placed back in DSS custody. The house was not maintained well and was vandalized. DSS, representative payee for the juvenile's Social Security benefits, did not make mortgage payments but applied the benefits to costs of the juvenile's foster care, and foreclosure was initiated. After a motion by the GAL and a hearing, the court ordered DSS to apply the juvenile's benefits to pay the mortgage of \$221/month; to make past-due payments of \$2,800; and to pay \$1,000 for repairs to the house. DSS appealed.

Held: Affirmed.

1. The court of appeals first held that although the appeal was interlocutory, the order affected a substantial right and could be appealed immediately.
2. The court rejected DSS's argument that federal law preempted state law such that the trial court lacked subject matter jurisdiction to enter orders affecting the juvenile's Social Security payments.
 - a. Although the U.S. Supreme Court in *Washington v. Keffeler*, 537 U.S. 371(2003), held that the state's application of a child's Social Security benefits to the cost of his foster care did not violate the part of the Social Security Act that protects benefits from execution, levy, attachment, garnishment or other legal process, the court of appeals found that the decision was narrow and, by itself, did not support DSS's argument.
 - b. While the federal government may prosecute a representative payee for misuse of the beneficiary's funds, it does not resolve disputes between the payee and beneficiary about the proper use of the funds, and both the guardian ad litem and the trial court acted within the scope of the duties imposed on them by the Juvenile Code.
3. The court rejected DSS's argument that the trial court's order violated the anti-alienability provision of the Social Security Act, which provides that the benefits are not assignable or subject to legal process, holding that the trial court's order did not constitute "other legal process" within the meaning of that law, which was designed to protect beneficiaries from creditors and others who might claim the benefits.

- The trial court did not err in concluding at the initial adjudication and disposition hearing that DSS should not make reasonable efforts to reunify.
- It was not error to conduct consolidated adjudication and disposition hearings on both the abuse and neglect petition and a motion to terminate parental rights.
- The trial court should enter two orders or distinguish within an order the components of a hearing when hearings are consolidated.

In re R.B.B., ___ N.C. App. ___, 654 S.E.2d 514 (12/18/07), review denied, ___ N.C. ___, 659 S.E.2d 738 (3/6/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2007/070727-1.htm>

Facts: In August 2006, when the child was 7 months old, DSS filed an abuse and neglect petition and obtained nonsecure custody, alleging that the child had broken ribs and numerous healed fractures, was below normal weight and was losing weight, and had bruises and ulcerated lesions. After one nonsecure custody hearing, respondent waived further custody hearings. After multiple continuances in that case, in December, 2006, DSS filed a motion to terminate respondent's parental rights. In February, 2007, the court held a consolidated hearing after which it made extensive findings and entered an order finding the child to be abused and neglected and terminating respondent's rights.

Held: Affirmed.

1. The trial court did not err in concluding that DSS should not make reasonable efforts to reunify, based on findings about the number and severity of the child's injuries, continuing danger to the child from respondent and her boyfriend, and respondent's reaction to her boyfriend's abuse of the child.
2. It was not error to conduct consolidated adjudication and disposition hearings on both the abuse and neglect petition and the motion to terminate parental rights, where the trial court had made a proper determination under G.S. 7B-507 that reunification efforts would be dangerous or futile.
3. The court of appeals "encouraged" trial courts, when they conduct consolidated hearings, to either (a) enter separate orders for each component of the consolidated hearing or (b) divide a single order into sections addressing each component of the hearing separately. In addition, the court stressed that each section or order should reference the appropriate standard of proof.

TERMINATION OF PARENTAL RIGHTS

North Carolina Supreme Court

- The trial court properly exercised subject matter jurisdiction, despite its failure to make specific findings to support its conclusion that it had jurisdiction under the UCCJEA, where the evidence in the record was sufficient to support that conclusion.
- Evidence of respondent's conviction of felonious child abuse inflicting serious bodily injury on her child was sufficient to support a ground for termination of parental rights.

In re T.J.D.W., 182 N.C. App. 394, 642 S.E.2d 471 (4/3/07), affirmed per curiam, 362 N.C. 84, 653 S.E.2d 143 (12/7/07).

<http://www.aoc.state.nc.us/www/public/sc/opinions/2007/202-07-1.htm>

<http://www.aoc.state.nc.us/www/public/coa/opinions/2007/061323-1.htm>

- DSS's failure to attach a custody order to its petition to terminate parental rights did not deprive the trial court of subject matter jurisdiction and was not reversible error, because
 1. it was clear from the record that DSS had custody of the child and, therefore, had standing to petition for termination of parental rights; and
 2. respondents were not prejudiced by the failure to attach a custody order.
- Respondent failed to show prejudice resulting from the fact that the termination petition was not filed within 60 days after the permanency planning hearing or that the hearing was held more than 90 days after the petition was filed.

In re T.M., 182 N.C. App. 566, 643 S.E.2d 471 (4/17/07), affirmed per curiam, 361 N.C. 683, 651 S.E.2d 884 (11/9/07).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2007/070911-1.htm>

<http://www.aoc.state.nc.us/www/public/sc/opinions/2007/243-07-1.htm>

- The child's presence in the state when the termination petition was filed was not required in order for the court to have subject matter jurisdiction, because the court already had exclusive continuing jurisdiction under the UCCJEA.

In re H.L.A.D., ___ N.C. App. ___, 646 S.E.2d 425 (7/3/07), affirmed per curiam, 362 N.C. 170, 655 S.E.2d 712 (1/25/08).

<http://www.aoc.state.nc.us/www/public/sc/opinions/2008/386-07-1.htm>

<http://www.aoc.state.nc.us/www/public/coa/opinions/2007/070034-1.htm>

- Respondent failed to show prejudice resulting from trial court's holding the termination hearing more than a year after the petition was filed.

In re J.Z.M., 362 N.C. 167, 655 S.E.2d 832 (1/25/08), reversing per curiam, ___ N.C. App. ___, 646 S.E.2d 631 (7/3/07) (for reasons stated in the dissenting opinion in the court of appeals).

<http://www.aoc.state.nc.us/www/public/sc/opinions/2008/366-07-1.htm>

<http://www.aoc.state.nc.us/www/public/coa/opinions/2007/061242-1.htm>

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. 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 on appeal respondent asserted the extended period without contact with the children as prejudice. The court of appeals reversed, holding that the delay was egregious and amounted to a *de facto* termination of respondent's rights and that respondent had established sufficient prejudice to require reversal.

Held: The supreme court reversed, for reasons stated in Judge Steelman's dissent in the court of appeals, which reasoned that respondent had not demonstrated prejudice; that the delay gave her time to address problems that had led to the children's removal, which she did not do; and that the analysis in the majority's opinion in the court of appeals in effect applied a *per se* prejudice rule.

- Failure to appoint guardians ad litem for the children when the initial neglect and dependency petitions were filed and to ensure consistent representation of the children by guardians ad litem throughout those proceedings did not require reversal of the termination of parental rights order in a proceeding in which the children were represented by a guardian ad litem and attorney advocate.

In re J.E., 362 N.C. 168, 655 S.E.2d 831 (1/25/08), *reversing per curiam*, ___ N.C. App. ___, 644 S.E.2d 28 (5/15/07) (for reasons stated in the dissenting opinion in the court of appeals).

<http://www.aoc.state.nc.us/www/public/sc/opinions/2008/297-07-1.htm>

<http://www.aoc.state.nc.us/www/public/coa/opinions/2007/061335-1.htm>

Facts: DSS filed petitions alleging that one child was neglected and dependent in October, 2002, and that another child was neglected and dependent in November, 2003. The record on appeal included no indication that a guardian ad litem was appointed for either child when these petitions were filed. Orders entered following numerous hearings in the children's cases sometimes recited that a guardian ad litem was present and sometimes did not. A guardian ad litem appointed for the children in 2004 never appeared at a hearing. Five different guardians ad litem made appearances at various times, and four of those were not appointed. At the termination hearing the children were represented by a guardian ad litem who was not appointed and who had not represented them previously, and an attorney advocate.

The court of appeals reversed, holding that the children were prejudiced by the trial court's failing to appoint guardians ad litem for them when the initial petitions were filed; allowing a series of guardians ad litem to appear without being appointed; having some hearings with no guardian ad litem present; and not ensuring a permanent guardian ad litem to represent the children throughout the proceeding, including at the termination hearing.

Held: The supreme court reversed, based on Judge Hunter's dissenting opinion in the court of appeals, which reasoned that

1. only the termination of parental rights order was before the appellate court; orders resulting from earlier stages of the case, about which respondent complained, were not properly before the court.
2. the children were represented by a guardian ad litem and attorney advocate in the termination proceeding.

North Carolina Court of Appeals

- Failure to issue summons to the child when a petition to terminate parental rights was filed deprived trial court of subject matter jurisdiction.

In re I.D.G., ___ N.C. App. ___, 655 S.E.2d 858 (2/5/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/071107-1.htm>

Facts: After the court changed the permanent plan for the child to adoption, DSS filed a petition to terminate the rights of the child's biological father. On appeal from an order terminating his rights, the respondent-father asserted that the trial court lacked subject matter jurisdiction because petitioner-DSS did not have a summons issued to the child.

Held: Vacated.

1. Following its earlier holdings in *In re K.A.D.*, ___ N.C. App. ___, 653 S.E.2d 427 (12/4/07) and *In re C.T. & R.S.*, 182 N.C. App. 472, 643 S.E.2d 23 (4/3/07), the court of appeals vacated the termination order for lack of subject matter jurisdiction because no summons was issued to the child.
2. The court pointed out that DSS had the option of initiating the termination case by filing a motion in the cause, rather than a petition. Using that procedure, DSS would have been required to issue a notice (not a summons) and would have been required to serve the notice on the child only if the child were 12 or older. See G.S. 7B-1106 and 7B-1106.1.

- Failure to issue a summons to the child when a petition to terminate parental rights was filed deprived the trial court of subject matter jurisdiction.

In re K.A.D., ___ N.C. App. ___, 653 S.E.2d 427 (12/4/07).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2007/070662-1.htm>

Facts: In a termination of parental rights action initiated by petition, no summons was issued to the child.

Held: The court of appeals vacated the trial court's order terminating parental rights, holding that failure to issue a summons directed to the child, as required by G.S. 7B-1106(a), deprived the trial court of subject matter jurisdiction. The fact that a guardian ad litem was appointed for the child did not matter.

- Issuance of a second or subsequent summons, without an extension or alias and pluries summons, begins a new action as of the date of issuance of the new summons and, if the action was discontinued, reinvoles the court's subject matter jurisdiction.
- The standard for measuring prejudice resulting from errors such as violation of statutory timelines is whether the error had a probable impact on the outcome of the case.

In re D.B. ___ N.C. App. ___, 652 S.E.2d 56 (11/6/07).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2007/061426-2.htm>

Facts: On appeal from orders terminating their parental rights, respondents argued that the trial court lacked subject matter jurisdiction because they were not served with valid summonses.

10/7/04 summonses issued but were never served

10/18/04 second summons issued and served on respondent-mother same day

1/26/05 new summons issued to respondent-father, served 1/30/05

1/31/05 new summons issued to respondent-father and served the same day

There was never an extension noted and no alias and pluries summons was issued.

The hearing was held December 14 and 15, 2005. After hearing evidence, including evidence of domestic violence and failure to complete the case plan, the court terminated both parents' rights.

Held: Affirmed.

1. Issuance of a new summons, regardless of whether the preceding summons has expired, begins a new action. If the action has discontinued because a summons was not served or renewed, issuance of a new summons begins the action anew and reinvoles the trial court's subject matter jurisdiction.
2. Respondents did not show prejudice as a result of the delay in conducting the termination hearing. Adopting the reasoning of Judge Levinson's concurring opinion in *In re J.N.S.*, 180 N.C. App. 573, 637 S.E.2d 914 (12/19/06), the court held that the standard for measuring prejudice is whether the error in question had a probable impact on the outcome of the proceeding.
3. Evidence was sufficient to support adjudication of the neglect ground for termination.

Dissent: Judge Tyson dissented with respect to the first holding above and would have vacated the trial court's order for lack of subject matter jurisdiction.

- Acceptance of service of process by the attorney advocate constituted proper service on the guardian ad litem, and that constituted proper service on the juvenile.
- Respondent failed to show prejudice resulting from entry of the order 82 days after the hearing.
- Findings and the conclusion that the parents had neglected the child were sufficient and were supported by the evidence.

In re J.A.P., ___ N.C. App. ___, 659 S.E.2d 14 (4/15/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/071562-1.htm>

Facts: After DSS filed a petition to terminate respondents' rights, summonses were issued "referencing" the children. The file included certifications by the attorney advocate that she accepted the attached summonses in the action regarding both children. The court made extensive findings about the condition of the home and the likelihood that neglect would be repeated if the children were returned to the home; made additional findings about best interest; and terminated both parents' rights.

Held: Affirmed.

1. Although the parties did not raise subject matter jurisdiction as an issue, the court of appeals considered it and concluded that the trial court did have subject matter jurisdiction. It is difficult to discern, however, the basis for the court's conclusion. The court first distinguished the case from *In re C.T.*, 182 N.C. App. 472 (2007), in which the court of appeals reversed a termination order with regard to one of the two children because that child was not named on the summons. The court then referred to the holding in *In re K.A.D.*, 653 S.E.2d 427 (2007), that "failure to issue a summons to the juvenile deprives the trial court of subject matter jurisdiction." From there, the court shifted to a discussion of *service*, rather than *issuance*, of the summons. It is not clear from the opinion whether either the guardian ad litem or the juveniles were named on the summons as respondents. The court referred to the summons as "referencing" the juveniles, as the summons in *C.T.* failed to do for the one child, but did not talk about what constitutes issuing or directing a summons to the juvenile.
2. The court went on to discuss personal jurisdiction separately, holding that
 - a. service on the attorney advocate was sufficient to accomplish service on the juvenile;
 - b. even if service had not been proper, the guardian ad litem did not object and therefore waived any insufficiency of service; and
 - c. respondents did not show any prejudice and were not "aggrieved" parties for purposes of raising on appeal any insufficiency of service on the child.

- Failure to verify motion to terminate parental rights deprived trial court of subject matter jurisdiction.

In re C.M.H., ___ N.C. App. ___, 653 S.E.2d 929 (12/18/07).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2007/070851-1.htm>

In an appeal by respondent parents from an order terminating their parental rights, the court of appeals, *sua sponte*, noted that the motion to terminate parental rights had not been verified and vacated the order terminating parental rights. The court cited the state supreme court's opinion in *In re T.R.P.*, 360 N.C. 88, 36 S.E.2d 787 (2006), holding that a violation of the verification requirement deprives the trial court of subject matter jurisdiction.

- A claim for termination of parental rights may not be asserted as a counterclaim in a civil district court action for child custody or visitation.

In re S.D.W., ___ N.C. App. ___, 653 S.E.2d 429 (12/4/07).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2007/070650-1.htm>

Facts: Several years after the parents divorced, the father filed a civil action seeking visitation with the children. The mother filed an answer and a counterclaim in which she asked the court to terminate the plaintiff-father's rights. The trial court required the mother to issue a termination of parental rights summons to the father, denied the father's motion to dismiss the counterclaim, and allowed the mother to amend her pleading to assert additional grounds for termination. Plaintiff-father appealed from the trial court's order terminating his parental rights.

Held: Vacated.

1. The court of appeals held that the trial court lacked subject matter jurisdiction because no termination action had been properly commenced.
2. One explicit purpose of the Juvenile Code is to provide procedures for terminating a parent's rights, and the Rules of Civil Procedure apply to actions to terminate parental rights only insofar as the Juvenile Code does not provide procedures.
3. Because the Juvenile Code provides specifically for the initiation of termination of parental rights actions by either filing a petition or filing a motion in a pending abuse, neglect, or dependency case, the court of appeals would not impute a right to seek termination of a parent's rights by filing a counterclaim in a civil action.

- In an action to terminate parental rights, the trial court's jurisdiction in the underlying dependency case had not been affected by the fact that (i) the petition did not state specifically that the social worker who signed it was the director's authorized representative or (ii) the social worker signed only the verification, not the signature line for the petitioner.

In re D.D.F., ___ N.C. App. ___, 654 S.E.2d 1 (12/4/07).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2007/070798-1.htm>

Facts: In 2000 a DSS social worker filed a petition alleging that the child was dependent. On the petition, the signature line was blank, the address line had on it "Youth and Family Services," and the social worker signed her name as petitioner-affiant on the verification, which was properly notarized. She also signed and verified the affidavit of status of minor child, on which her name was followed by the name and address of the DSS agency. The record identified her as the social worker for the case. The court adjudicated the child dependent and placed the child in DSS custody. In 2006 DSS filed a petition to terminate respondent's rights. A DSS attorney signed the petition and a social worker assigned to the case verified it. After a hearing, the court entered an order terminating respondent's rights. On appeal, she argued that the trial court lacked subject matter jurisdiction and that DSS lacked standing because the petitions did not identify the signer as either the DSS director or the authorized representative of the director.

Held: Affirmed.

The court of appeals held that when the record shows that a social worker assigned to the child's case signed the petition and there is absolutely no indication that she is not the DSS director's authorized representative or that she is acting outside her authority, that social worker is an authorized representative for purposes of signing and filing the petition. Because the order giving DSS custody was entered in an action in which the court did have subject matter jurisdiction, there was no issue with respect to standing to bring the termination action.

- Where contents of petition were substantially compliant with the statute and respondent had access to all of the required information, the trial court did not lack subject matter jurisdiction.
- An order terminating parental rights should include conclusions of law regarding specific grounds and, for certain grounds, must include findings of willfulness.

T.M.H., ___ N.C. App. ___, 652 S.E.2d 1 (10/16/07), review denied, 362 N.C. 87, 657 S.E.2d 31 (12/6/07).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2007/070609-1.htm>

Facts: In 2006 petitioner-mother filed a petition to terminate the rights of her child’s father. Respondent father filed an answer admitting paternity but denying substantive allegations. After a hearing the trial court entered an order making a number of specific findings of fact, but concluding only that grounds for termination existed and that termination was in the child’s best interest.

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

1. The court rejected respondent’s argument that the trial court lacked subject matter jurisdiction due to omission of certain information from the petition. The court held that the petition was substantially compliant and that respondent had access to all information the petition was required to contain.
2. Because the order contained no findings of willfulness and did not specify which ground(s) it was adjudicating, the court remanded for appropriate findings.
3. The court of appeals noted that the trial court’s order was on stationery of petitioner’s attorney and “strongly discourage[d]” judges from signing orders on stationery that bears the name of a law firm.

- Majority held that
 1. trial court erred in allowing amendment of the petition to conform to the evidence, and
 2. G.S. 1A-1, Rule 15, does not apply in a termination proceeding to permit amendment of the petition or motion to conform to evidence presented at the adjudication hearing.

In re B.L.H., ___ N.C. App. ___, 660 S.E.2d 255 (5/6/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/071313-2.htm>

Background: This opinion supersedes an opinion the court of appeals issued in the same case on March 4, 2008. In that opinion the court vacated the trial court’s order terminating respondent’s rights after concluding that the trial court lacked subject matter jurisdiction where the record was silent with respect to issuance or service of summonses to the juveniles. After that decision, the court granted petitioner’s petition for rehearing, withdrew the earlier decision, and filed this opinion.

Facts: DSS filed a petition to terminate respondent’s rights on two grounds – neglect and non-payment of child support. At the first of two hearings, after testimony of the social worker, the trial court granted DSS’s motion to amend the petition to conform to the evidence and allege the additional ground of willfully leaving the child in foster care for more than a year without making reasonable progress in correcting the conditions that led to placement. Respondent objected. The court adjudicated only this added ground and entered an order terminating respondent’s rights.

Held: Reversed.

1. The opinion recites that respondent and the children were timely served with copies of the summonses and petitions. It does not discuss subject matter jurisdiction.
2. The majority holds that it was error for the trial court to allow the amendment to conform to the evidence, because Article 11 of G.S. Chapter 7B is silent with regard to such amendments.
3. Because the children had not been in care for a year when the petition was filed, the petition as filed could not have put respondent on notice that the additional ground was being asserted. The court held that notice therefore was not sufficient.

Dissent: Judge Steelman dissented on the basis that because the termination statute is silent, G.S. 1A-1, Rule 15 should control with regard to amendments; respondent had not claimed that she had insufficient time to prepare; and respondent had not shown material prejudice.

- In an appeal from an order terminating parental rights, the signature of an appellant's guardian ad litem on the notice of appeal is not a sufficient signature by the “appellant” as required by Rule 3A(a).
- In an action to terminate parental rights the role of a parent’s guardian ad litem is to provide assistance, not to substitute his or her judgment or decisions for those of the parent.

In re L.B., ___ N.C. App. ___, 653 S.E.2d 240 (12/4/07), *review denied*, ___ N.C. ___, ___ S.E.2d ___ (4/10/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2007/070549-1.htm>

Facts: In an action to terminate the parents’ rights, guardians ad litem were appointed for both parents pursuant to G.S. 7B-1101.1. After the court entered an order terminating both parents’ rights, both parents’ attorneys and guardians ad litem signed notices of appeal. Petitioner made a motion to dismiss the appeal for failure to comply with Rule 3A of the Rules of Appellate Procedure.

Held: Appeal dismissed.

1. In juvenile cases, Rule 3A of the Rules of Appellate Procedure requires that both trial counsel and the appellant sign the notice of appeal. The court held that the signature of the respondent parent’s guardian ad litem did not suffice to satisfy the requirement that the parent sign. Failure of the parents to sign the notice of appeal deprived the court of appeals of jurisdiction to consider the appeal.
2. The court of appeals contrasted standards for appointing a guardian for an adult under G.S. Ch. 35A, which requires an adjudication of incompetence, and appointing a guardian ad litem under G.S. 7B-1101.1, which requires only a reasonable basis to believe the parent is incompetent or has diminished capacity. The court concluded that the role of the guardian ad litem is much more limited than that of a guardian and does not include exercising legal rights in the place of the respondent parent.

Dissent: Judge Steelman dissented and would have denied the motion to dismiss the appeal, opining that the majority misconstrued the nature of a guardian ad litem’s role. He proceeded to consider the appeal on the merits and would have affirmed the order terminating both parents’ rights.

Delinquency

North Carolina Court of Appeals

- An adjudication order must state unequivocally that facts were found beyond a reasonable doubt.

In re B.E., ___ N.C. App. ___, 652 S.E.2d 344 (11/6/07).

Facts: The juvenile appealed from an order adjudicating him delinquent for committing indecent liberties between children, under G.S. 14-202.2, and the disposition order that placed him on probation. The adjudication order was on an AOC form that included the pre-printed wording,

“The following facts have been proven beyond a reasonable doubt:”

Typed in the blank part of the form was a finding of fact that

“on or about July 15, 2005 the juvenile, [B.E.] did unlawfully and willfully commit indecent liberties between children against [the victim], a child who was at least three (3) years younger than the juvenile, being an offense in violation of G.S. 14-202.2, by clear, cogent & convincing evidence.” (emphasis added)

Held: Remanded.

1. The court held that the juvenile’s motion to dismiss for insufficiency of the evidence was properly denied, finding that the state presented substantial evidence to establish each element of the offense.
2. Where the record and order were ambiguous, the court of appeals would not infer that the trial court found facts beyond a reasonable doubt.

The court of appeals remanded the case, for the trial court to clarify the standard of proof it used at adjudication and to enter a new order either stating that facts were found beyond a reasonable doubt or dismissing the petition and vacating the disposition order.

In re C.B., ___ N.C. App. ___, 654 S.E.2d 21(12/18/07).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2007/061546-1.htm>

Facts: An order adjudicating the juvenile delinquent for assault inflicting serious injury recited that the facts were found “beyond a reasonable doubt.” The part of the order specifically finding that the juvenile committed an assault inflicting serious injury, however, stated that the court made the finding by “clear, cogent and convincing evidence.”

Held: Remanded. The court of appeals remanded for clarification of the standard of proof.

- The juvenile’s statements to a law enforcement officer were properly admitted into evidence as statements against the juvenile’s interest.
- Under G.S. 7B-2605, the trial court did not err in denying a juvenile’s release from a youth development center pending appeal.

In re J.J.D.L., ___ N.C. App. ___, 659 S.E.2d 757 (4/15/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/070839-1.htm>

Facts: The juvenile was adjudicated delinquent for first degree sex offenses with a child, for offenses that occurred when the juvenile was fourteen and the child was seven. A law enforcement officer testified, over the juvenile’s objection, to statements the juvenile made when the officer interviewed him in his mother’s presence, after reading to them and having both of them sign the juvenile rights warning.

Held: Affirmed.

1. The court held that the officer’s testimony about the juvenile’s out-of-court statements, in which he made damaging admissions, was admissible under Rule 801(d) – the hearsay exception for admissions by a defendant. [The court also found the testimony admissible under G.S. 7B-2407,

which governs when admissions by a juvenile may be accepted. That section, however, refers to in-court admissions and requires the court to personally address the juvenile with respect to six subjects listed in the statute.]

2. On the appellate entries form, the court stated as a compelling reason for not releasing the juvenile pending the appeal, “first degree sex offenses with a child 14-27.4(a)(1).” Where the juvenile did not challenge the trial court’s findings of fact, that statement was sufficient to support the court’s decision not to release the juvenile.
3. The court held that the juvenile had not preserved for appeal his argument that the trial court erred by proceeding to disposition without a sex offender specific evaluation, because he had made no objection at the trial level. The court said, in addition, that the juvenile had failed to show how the absence of such an evaluation affected the court’s ability to enter a disposition.

- Evidence was insufficient to support a delinquency adjudication for disorderly conduct in a school, and the trial court should have granted respondent’s motion to dismiss.

In re S.M., ___ N.C. App. ___, ___ S.E.2d ___ (5/20/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/071373-1.htm>.

Facts: Evidence showed that (1) the juvenile and a friend were in the hall when they should have been in class; (2) when asked by the school resource officer to stop, the juvenile grinned, giggled, and ran down the hall; (3) after a brief chase the officer stopped her and took her to the office; and (4) few students or teachers in classes noticed the incident. The trial court adjudicated respondent delinquent under G.S. 14-288.4(a)(6) and ordered a disposition.

Held: Reversed.

1. Although respondent did not formally renew her motion to dismiss at the close of all of the evidence, her lawyer’s vigorous argument at that point that the evidence was insufficient to support the charge was sufficient to preserve respondent’s right to appeal.
2. The evidence, viewed in the light most favorable to the state, was not sufficient to support the adjudication for disorderly conduct in school. The court reviewed earlier decisions involving the offense and noted that those upholding adjudications involved substantial disruptions and tended to involve a student’s using vulgar language, acting aggressively or violently, or causing a teacher to leave a class unattended in order to discipline the student. The offense is not committed when a student engages in “ordinary misbehavior or rule-breaking.”

- Evidence supported an adjudication of delinquency for involuntary manslaughter based on culpable negligence in failing to aid another juvenile to whom the juvenile had given drugs.
- Under the totality of the circumstances, the juvenile was not *in custody* for Miranda purposes when his father took him to the police station for an interview.
- Ordering the juvenile to pay restitution must be supported by a finding that doing so is in the juvenile’s best interest.

In re Z.A.K., ___ N.C. App. ___, 657 S.E.2d 894 (3/18/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/070641-1.htm>

Facts: Over a two-day period, at various venues, Z.A.K. and several friends smoked marijuana, drank, and took a variety of drugs. Z.A.K. provided the Ecstasy. One of the friends, E.H., became ill and vomited, but when Z.A.K.’s father checked on the juveniles, he told his father everything was fine. E.W. collapsed, had labored breathing, and foamed at the mouth. Another juvenile called 911 and gave Z.A.K. the telephone to provide his address, but Z.A.K. told the operator nothing was wrong. After Z.A.K. called a friend who told him to get medical help as soon as possible, he went to a neighbor’s and asked him to take E.W. to the hospital, but not to call the police. The neighbor called 911 and emergency services took

E.W., who later died. Cause of death was “mixed toxicity drug overdose” involving Ecstasy, cocaine, and methamphetamine. Z.A.K. was adjudicated delinquent for involuntary manslaughter and was given a Level II disposition that included an order to pay restitution.

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

1. The juvenile argued that the state failed to establish proximate cause because it failed to prove that the Ecstasy, the only drug he provided, caused E.W.’s death. Rather than address that issue, the court of appeals concluded that the juvenile’s actions after E.W. became ill constituted “culpable negligence,” which is sufficient to support an adjudication for involuntary manslaughter.
2. The court of appeals also rejected the juvenile’s argument that his statements to police should have been suppressed. The juvenile’s father took him to the police station for an interview, where he was not handcuffed but was escorted at all times and was not told that he was free to leave or could refuse to talk. Viewing the entire circumstances, the court concluded that when the interview occurred the investigation was exploratory, the juvenile was not a suspect, and a reasonable person would not have believed he was under arrest or significantly restrained.
3. The probation condition that the juvenile pay restitution was not supported by evidence and a finding that requiring the juvenile to pay restitution was in his best interest. The court reversed the restitution order and remanded for findings related to best interest.

- To establish a claim of ineffective assistance of counsel, appellant must show both deficient performance by counsel and resulting prejudice.
- Court of appeals did not have jurisdiction to review the disposition order when notice of appeal was given only from the adjudication order.

In re A.V., ___ N.C. App. ___, 654 S.E.2d 811 (1/15/08).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2008/070360-1.htm>

Facts: The juvenile was adjudicated delinquent for assault on a state employee under G.S. 14-33(c)(4), based on evidence that a teacher had grabbed him to prevent his hitting another student, the teacher and juvenile struggled and fell to the floor, the juvenile dragged the teacher and flung his arms trying to get away from her, and the teacher was hit in the jaw and suffered bruises on her arms and legs and a scratch on her ankle. At disposition the court extended the juvenile’s probation from an earlier case by six months.

Held: Affirmed.

1. Failure of the juvenile’s attorney to renew a motion to dismiss at the close of all the evidence did not constitute ineffective assistance of counsel because substantial evidence supported the allegations in the petition and the juvenile could not show that he was prejudiced by the lawyer’s failure.
2. Because the juvenile gave notice of appeal only from the adjudication order, the court of appeals did not have jurisdiction to consider the juvenile’s argument that the trial court erred by failing to consider a risk and needs assessment or other disposition reports before ordering the disposition.
 - a. If the juvenile had given proper notice of appeal from the disposition order the court of appeals would have considered the argument despite the juvenile’s failure to object at trial.
 - b. Quoting from *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985), the court of appeals said, “when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court’s action is preserved, notwithstanding defendant’s failure to object at trial.”

- The trial court's order directing the juvenile to cooperate with an out of home placement and placing the juvenile in detention until the placement became available was not an impermissible delegation of authority.

In re V.A.L., ___ N.C. App. ___, 652 S.E.2d 726 (11/20/07).

<http://www.aoc.state.nc.us/www/public/coa/opinions/2007/070242-1.htm>.

Facts: After finding that the juvenile had violated the conditions of probation, the trial court continued probation with a new condition that the juvenile cooperate with an out of home placement and be in detention until the placement became available. The probation conditions form indicated that the juvenile was to cooperate with placement for nine months in a residential treatment program as directed by a specific mental health program and indicated where the placement should be. On appeal, the juvenile argued that the order constituted an impermissible delegation of judicial authority.

Held: Affirmed.

The trial court did not leave to the court counselor, mental health program, or anyone else the decision of whether the juvenile should cooperate in a residential treatment program. Rather, the court made that decision and left the details of the arrangements to others. The court did not delegate the determination of which probation conditions were imposed.