

Selected Recent Court Decision

- The trial court could not adjudicate a condition that was not alleged in the petition.
- G.S. 7B-800 prohibited amendment of the petition to allege a different, additional condition.
- **The trial court erred by awarding permanent guardianship to relatives at disposition, without conducting a permanency planning hearing of which respondent had proper notice.**

In re D.C., ___ N.C. App. ___, 644 S.E.2d 640 (6/5/07).

Facts: On 9/14/05, DSS filed a petition alleging that Child 1 was *neglected and dependent*, with factual allegations that referred to a December, 2004, incident in which respondent left the child, then age 16 months, unattended in a motel room; a history of domestic violence and unstable housing; respondent's mental retardation; and respondent's inappropriate use of disability payments. A nonsecure custody order placed the child in DSS custody, and he was placed physically with a maternal aunt and her husband. On 5/22/06, DSS filed a petition alleging that Child 2, born two days earlier, was *dependent*. The court ordered nonsecure custody, and the child was placed in foster care. Adjudication and disposition hearings for both petitions were held in June and August, 2006. In September, 2006, the court entered an order adjudicating both children to be neglected and, with respect to Child 1, ceasing reunification efforts, awarding permanent guardianship to the relatives with whom he was placed, and relieving DSS and the guardian ad litem of further responsibility.

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

1. The trial court erred by adjudicating Child 2 to be neglected when the petition alleged only that he was dependent. The fact that the "neglect" block on the petition was not checked was not determinative, but the allegations in the petition did not give respondent sufficient notice that neglect would be an issue at the hearing.
2. By allowing DSS to proceed on a condition that was not alleged, the trial court effectively amended the petition. G.S. 7B-800 prohibits any amendment that changes the nature of the condition alleged.
3. At disposition, with respect to Child 1, the trial court
 - made sufficient findings to support the conclusion that reunification efforts should cease, but
 - erred in awarding permanent guardianship to relatives without conducting a permanency planning hearing of which respondent had proper notice.

- The burden is on a party claiming that the Indian Child Welfare Act applies to establish that it does.
- **The court may not delegate to DSS or another custodian determination of a parent's visitation rights.**

In re C.P., ___ N.C. App. ___, 641 S.E.2d 13 (2/20/07).

Facts: DSS filed a petition alleging that respondent's three children were neglected. Before the adjudication hearing respondent claimed that she and the children might be members of the Pokagen Band of Potawatomi Indians and that the Indian Child Welfare Act applied. The court granted two continuances. Respondent applied for tribe membership and the tribe was notified of the court proceeding, but at the time of the hearing the tribe had not responded. The trial court ruled that that Act did not apply, adjudicated the children neglected, placed two children with their father in another state, and placed custody of the youngest child with DSS.

Held: Affirmed in part; remanded in part.

1. The trial court did not err in ruling that the Indian Child Welfare Act did not apply, when respondent offered no evidence other than her own statement to support her claim that the Act applied.
2. Evidence was sufficient to support the trial court's findings and adjudication of neglect.

[**Note:** Apparently the adjudication and disposition hearings were combined, because evidence cited

by the court included testimony, the DSS court report, the Guardian ad Litem court report, and the summary of Family Preservation Services.]

3. Because the court made no findings about or provisions for visitation by respondent, the court apparently left visitation in the discretion of the custodian, which the statute does not permit.

- Failure to attach an affidavit of status of minor child did not deprive the court of jurisdiction.
- The court can take judicial notice of files, documents, and orders and is presumed to have ignored any incompetent evidence. The better practice is to give prior notice of an intention to take judicial notice.
- **The court may not delegate to DSS the determination of parents' visitation rights.**

In re D.S.A., ___ N.C. App. ___, 641 S.E.2d 18 (2/20/07).

Facts: The trial court adjudicated the child to be neglected on the basis that she lived in an injurious environment, and placed her in the custody of DSS. The court found that the parents intended to take the child to their home in which a sibling had been sexually abused by the mother's then live-in boyfriend, who pled guilty to various sex offenses; the mother was awaiting trial on felony child abuse charges; and respondents disagreed with each other regarding placing the child with paternal relatives. The court ordered that visitation would be in the discretion of DSS.

Held: Remanded for court-approved visitation plan.

1. DSS's failure to attach to the petition the affidavit required by G.S. 50A-209, by itself, did not deprive the trial court of jurisdiction.
2. The court did not err in taking judicial notice of files, documents, and orders, although it would have been better practice for the court to give the parties express notice that it intended to do so. Evidence was sufficient to support the court's findings, and the court is presumed to have ignored any incompetent evidence.
3. Placing the child in DSS custody, rather than with paternal relatives, was not an abuse of discretion where respondent father's paternity had not been confirmed by testing.
4. The trial court erred in leaving visitation in the discretion of DSS.

- **The trial court did not have authority to order a parent to go to a child support enforcement agency to establish a support obligation.**

In re A.S., ___ N.C. App. ___, 640 S.E.2d 817 (2/20/07).

Facts: Respondent lived with Child 1 and Child 1's mother, KM. Child 2 lived a week with respondent and then a week with Child 2's mother. K.M. admitted to law enforcement, medical personnel, and a social worker that on several occasions she had hurt Child 2, most recently by pushing her to the floor, with a resulting head injury. Respondent father told officials that KM sometimes threw things, did not take her antidepressant medication regularly, or had to be restrained. He had attempted unsuccessfully to have her committed.

The trial court adjudicated both children to be neglected, placed Child 1 in the custody of a paternal relative, and placed Child 2 with her mother. Respondent's visitation with Child 1 was not limited, but his visits with Child 2 were limited to two supervised visits a week. The court ordered respondent to contact the Child Support Enforcement Agency to establish support obligations, to have a psychological evaluation and substance abuse assessment, and to go to parenting classes. The parties agreed that an adjudication of abuse in relation to Child 2 should not have been in the order and the court remanded for amendment of the order accordingly.

Held: Affirmed in part; remanded in part.

1. Evidence supported findings and a conclusion that the children lived in an environment injurious to their welfare and were neglected.

2. The trial court did not have authority to order respondent to contact the child support agency.
3. The trial court did have authority, under G.S. 7B-904, to order respondent to have the evaluation and assessment and to attend parenting classes.

Concurring in part; dissenting in part: Judge Levinson dissented only with respect to the remand to delete the abuse adjudication, arguing that the trial court properly adjudicated Child 2 to be an abused juvenile, even if only KW and not respondent was responsible for the child's being abused.

- When the case was filed before 10/1/05, the petition alleged dependency, and much of the case centered on respondent's mental health and substance abuse issues, a guardian ad litem for the parent should have been appointed for the permanency planning hearing if not before.
- **Leaving a parent's visitation rights in the discretion of a guardian is reversible error.**

In re T.T., ___ N.C. App. ___, 641 S.E.2d 344 (3/6/07).

Facts: In a case filed before October 1, 2005, respondent's children were adjudicated neglected and dependent based on respondent's mental illness and the parents' substance abuse problems and failure to provide a stable home. At a permanency planning hearing almost a year later, the court changed the plan from reunification with one parent to adoption. At another hearing almost a year later, the court changed the plan from adoption to guardianship with a sibling's relatives with whom the children were placed. The order did not address visitation.

Held: Reversed and remanded.

1. Because the case was filed before October 1, 2005, the petition alleged dependency, and the court had heard substantial evidence and made numerous findings about respondent's substance abuse and mental health problems, the trial court erred in not appointing a guardian ad litem for respondent.
2. The trial court erred in failing to include a visitation plan in the order appointing guardians.

- **When granting guardianship, the court must address rights and responsibilities that remain with the parent.**
- The court may waive review hearings only after making the findings required by G.S. 7B-906.

In re R.A.H., ___ N.C. App. ___, 641 S.E.2d 404 (3/6/07).

Facts: After the case was remanded by the court of appeals for a new termination of parental rights hearing, the trial court instead held a new permanency planning hearing and changed the permanent plan from adoption to guardianship. The court appointed a guardian and stated that no more hearings would be held. Respondent appealed from the permanency planning order.

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

1. The trial court erred in ignoring the mandate of the court of appeals to hold a new termination hearing, but the error was not prejudicial.
2. The trial court did not err at the permanency planning hearing by considering findings of fact that had been made before the termination order was reversed.
3. The trial court erred by failing to address rights and responsibilities that would remain with respondent, and the court's oral statement that visitation would be up to the guardian was contrary to law. The court of appeals remanded for the trial court to address visitation.
4. The trial court erred when it relieved all parties and attorneys of further responsibility and stated that there would be no further hearings in the matter. The court, at most, could have waived review hearings under G.S. 7B-906, but here the court did not make the findings necessary to do that.

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

In re J.J., ___ N.C. App. ___, 637 S.E.2d 258 (12/5/06), disc. review allowed, ___ N.C. ___, 645 S.E.2d 770 (5/3/07).

Facts: DSS filed a neglect petition alleging that respondent left the children unattended, missed their medical appointments, allowed people with drugs and alcohol in the home, left dangerous substances within their reach, and failed to keep her hearing aid working properly. DSS amended the petition to allege dependency, to which respondent stipulated, and the trial court placed the children in the legal custody of DSS for physical placement with their grandmother. More than two years later at a permanency planning hearing the court considered a DSS report, a psychological report, and testimony by a social worker that respondent could manage her children with assistance. The court found among other things that respondent could not care for the children without constant assistance and that resources to provide that were not available. Appellant’s assignments of error to various findings were abandoned on appeal so the court of appeals treated the findings as binding.

Held: Affirmed. The majority rejected respondent’s arguments and held that:

1. It was not error for the trial court to consider the cost and availability of services.
2. The trial court did not err in considering a written DSS report and psychological report because the formal rules of evidence do not apply at review hearings.
3. Appellant failed to show that she was prejudiced by a two-and-a-half month delay in entry of the permanency planning order.
4. The trial court was not required to appoint a guardian ad litem for respondent when the petition did not allege that respondent was incapable of caring for the children due to some debilitating condition.

Dissent: Judge Tyson dissented on the bases that the delay in entry of the order was longer than computed by the majority, that respondent had shown prejudice resulting from the delay, and that the trial court had impermissibly changed the permanent plan for reasons of poverty.

- The court may not leave the parent’s visitation rights to the discretion of a custodian.
- Trial court is not required to include a formal list of all the statutory factors considered in a permanency planning hearing.

In re L.B., ___ N.C. App. ___, 639 S.E.2d 23 (1/2/07).

Facts: DSS obtained a nonsecure custody order on August 17, 2004, and filed a verified petition on August 19, 2004, alleging that the child was neglected and dependent. It alleged that the child lived in an injurious environment because a sexual offender lived in the home and made the child uncomfortable, and that the mother overmedicated the child. The child was placed with her grandfather and step-grandmother by order dated December 23, 2004. At a permanency planning hearing in October 2005 evidence showed that respondent had completed parts of the case plan but had failed to obtain a psychological evaluation. Some visits had gone well but sometimes the child did not want to participate. The court ordered that the permanent plan change from reunification to guardianship with the relatives with whom the child was living. Respondent appealed.

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

1. The court of appeals declined to impose sanctions or dismiss the appeal because of the lateness of DSS’s brief. The court, however, did grant respondent’s motion to strike portions of DSS’s brief because it included and made references to an affidavit that was not part of the record.

2. The court of appeals rejected appellant's argument that the trial court lacked subject matter jurisdiction because the petition was filed after issuance of the nonsecure custody order and summons. Because the petition had been signed and verified and filed, after that time the court did have subject matter jurisdiction.
3. Respondent failed to show that prejudice resulted from a two-month delay in holding the permanency planning hearing.
4. The trial court's findings of fact were sufficient; the court is not required to include a formal listing of all the statutory factors.
5. The trial court erred when it ordered that respondent's visitation with the child would be in the discretion of the custodians.
6. Although the trial court should not broadly incorporate written reports from other sources as its findings, the trial court did not err in incorporating DSS and guardian ad litem reports and made proper findings in its order.
7. The trial court had authority to order respondent to undergo a psychological evaluation and did not abuse its discretion in doing so.