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Abuse, Neglect, Dependency

Subject Matter Jurisdiction: Standing

In re A.P., ___ N.C. ___, 812 S.E.2d 840 (May 11, 2018)

Held: reversed decision of Court of Appeals; remanded to Court of Appeals for mother's remaining arguments (challenging adjudication and factual inquiry regarding the applicability of the Indian Child Welfare Act)

- Facts: This case involves three counties. Mother and child, A.P., (at time of A.P.'s birth) resided in Cabarrus County. Cabarrus County DSS opened a child protective case, and mother agreed to a safety plan. Under the safety plan, A.P. lived with a safety placement resource in Rowan County while mother received residential mental health treatment. Upon discharge from her treatment, mother and A.P moved in with mother's grandfather in Mecklenburg County. The case was transferred from Cabarrus County DSS to Mecklenburg County DSS. Later, a new report was made to Mecklenburg County DSS and mother's sister (A.P.'s aunt) brought A.P. back to the placement in Rowan County. Mother agreed A.P. would temporarily remain in the placement in Rowan County while she went to South Carolina, was back in Mecklenburg County when she was in jail and later inpatient treatment, and finally informed Mecklenburg County DSS that she was living in Cabarrus County. The placement resource in Rowan County notified Mecklenburg County DSS that she could no longer care for A.P. Mecklenburg County DSS requested Cabarrus County DSS accept a transfer of the case back, but Cabarrus County DSS declined the transfer. Mecklenburg County DSS filed a neglect and dependency petition. The district court in Mecklenburg County denied mother's motion to dismiss for lack of subject matter jurisdiction due to Mecklenburg County DSS not having standing to file the petition. A.P. was adjudicated neglected and dependent. Mother appealed.
- Court of Appeals Opinion: Mecklenburg County DSS lacked standing under G.S. 7B-401.1(a) as G.S. 7B-101(10) defines director as the director of the DSS in the county where the juvenile resides or is found.
- "Jurisdiction is the legal power and authority of a court to make a decision that binds the parties to any matter properly before it…. [without which] a court has no power to act…. " Sl. Op. at 5 quoting *In re T.R.P.*, 360 N.C. 588, 590 (2006). The Juvenile Code (G.S. Chapter 7B) governs subject matter jurisdiction over abuse, neglect, or dependency (A/N/D) actions. Jurisdiction over all stages of an A/N/D action is established by the filing of a properly verified petition. *In re T.R.P.* Here, the neglect and dependency petition was properly verified and filed by an authorized representative of "a county director of social services." G.S. 7B-401.1(a).
- Judicial interpretation must consider the entire statutory text, read holistically, with consideration of the logical relation of its many parts rather than by a rigid interpretation of isolated provisions in the Juvenile Code. The rigid interpretation of the statutory text creates jurisdictional requirements that exceed legislative intent. Dismissal of the juvenile petition is not mandated by G.S. 7B-401.1 (parties) and 7B-400 (venue) when the Juvenile Code is read holistically.
    - There is no requirement in G.S. 7B-401.1(a) that only one county DSS director has standing since (1) the statute uses "*a* county director," which is an indefinite article, and

(2) the introductory clause to the definitions statute, G.S. 7B-101, states "unless the context clearly requires otherwise." The context does require otherwise. This opinion compares different statutes in the Juvenile Code that show how "the legislature intentionally differentiates between references to *a* director of a department of social services [generally] and *a particular director* of a department of social services." Sl. Op. at 8. There is no reference in the party statute, G.S. 7B-401.1(a), to "the" DSS director, which would single out a particular director, but instead uses "a" director.

  - "Other provisions in the Juvenile Code [G.S. 7B-400(b), 7B-302(a2), 7B-402(d)] suggest that there may be instances when the party filing the juvenile petition is the director of a department of social services for a county that is not the juvenile's county of residence." Sl. Op. at 10.

- A fundamental principle in cases involving child abuse, neglect, or dependency is that the best interests of the child is the polar star. *See* G.S. 7B-100(5); *In re M.A.W.*, 370 N.C. 149 (2017) quoting *In re Montgomery*, 311 N.C. 101, 109 (1984). Respondent's interpretation of G.S. 7B-101(10) and 7B-401.1(a) that ties subject matter jurisdiction with the child's residence or physical location at the time the petition is filed would (1) prevent a district court from exercising subject matter jurisdiction by allowing a parent or caretaker to move between counties with the child and/or (2) " 'subject countless judgments [in juvenile cases] across North Carolina to attack for want of subject matter jurisdiction,' … and needlessly delay permanency for juveniles alleged to be abused, neglected, or dependent." Sl. Op. at 12 quoting *In re T.R.P.* at 595.

Neglect Adjudication: Findings and Standard of Review

In re J.A.M., ___ N.C. ___, 809 S.E.2d 579 (March 2, 2018)

Held: Reverse and remand to court of appeals for reconsideration and proper application of standard of review regarding findings

- Procedural History: The court of appeals reversed a neglect adjudication, after holding the findings of fact did not support the conclusion of law that the child was a neglected juvenile. In reviewing one challenged finding of fact -- that the mother did not acknowledge her role in the termination of her parental rights to her other children -- the court of appeals held that the finding was unsupported by clear and convincing evidence after it looked to the mother's testimony and determined that her testimony contradicted the trial court's finding.
- In an appeal of an abuse, neglect, or dependency adjudication, the standard of review requires the appellate court to "deem conclusive" a trial court's findings of fact that are supported by clear and convincing competent evidence even when some evidence supports a contrary finding. Although respondent mother's testimony "vaguely acknowledged 'making bad decisions' and 'bad choices' in the past," she also testified that she did not have a role in another one of her children's injuries and that she felt that her rights to her other children were unjustly terminated. The trial court's finding that respondent mother failed to acknowledge her role in her other children's placement in DSS custody and subsequent termination of her parental rights to those children was supported by clear and convincing evidence.

In re J.A.M., ___ N.C. App. ___ (June 5, 2018)

Held: Affirmed. There is a dissent.

- Procedural History: The trial court adjudicated J.A.M. neglected based upon an injurious environment. The circumstances of neglect related to the parents' lack of progress to remedy conditions arising from each parent's history of domestic violence with other partners that resulted in the prior involvement of DSS with their other children, including respondent mother's rights being terminated to six of her other children. Respondent mother appealed. The court of appeals reversed the neglect adjudication holding that the findings (1) were not supported by clear, cogent, and convincing evidence and (2) did not support the conclusion of neglect. *See In re J.A.M.*, 795 S.E.2d 262 (2016). The N.C. Supreme Court granted discretionary review, determined the court of appeals misapplied the standard of review, and reversed and remanded the appeal back to the court of appeals for reconsideration with the proper standard of review applied. *See In re J.A.M.*, 809 S.E.2d 579 (2018).
- Standard of Review: "In a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." Sl. Op. at 6 quoting *In re J.A.M.*, 809 S.E.2d at 580. Conclusions of law are reviewable de novo.
- Under G.S. 7B-101(15), evidence of the abuse of another child in the home is relevant in a neglect adjudication. The trial judge has discretion to determine the weight to give that evidence. The trial court's decision is "predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case." Sl. Op. at 7 quoting *In re McLean*, 135 N.C. App. 387, 396 (1999). In a case involving a newborn, the court may consider the parents' failure to correct conditions resulting in their other children's neglect or abuse as evidence of future neglect.
- The trial court found, based on the evidence admitted (including the prior adjudications for the other children and a DSS supervisor's and respondent mother's testimony), that the respondent-mother failed to acknowledge her role in the termination of parental rights to her other six children, refused to work with DSS and engage in services in the current case, and became involved with J.A.M.'s father who had been convicted of domestic violence even though domestic violence was one of the reasons her other children had been removed. The evidence supporting these findings "is consistent with a substantial risk of future injury in the home." Sl. Op. at 11. The weight of the trial court's findings support the neglect adjudication, and the court of appeals may not reweigh the underlying evidence.

In re H.L., ___ N.C. App. ___, 807 S.E.2d 685 (Nov. 21, 2017)

Held: affirmed in part, reversed in part, remanded

- Facts: DSS was involved with the family on multiple occasions because of domestic violence and substance abuse issues that impacted the child. The parents voluntarily entered into a safety plan where they agreed the child would stay with her adult half-sister as a safety resource placement and the parents would engage in clinical assessments, follow recommendations, and submit to random drug screens. Both parents tested positive for methamphetamines. DSS filed a petition. The trial court held a combined adjudication, initial disposition, and permanency planning hearing. The child was adjudicated neglected and dependent. DSS was relieved from providing reunification efforts, and guardianship was awarded to the child's adult half-sister.

Respondent father appeals the adjudication, award of guardianship at initial disposition, holding a concurrent review and permanency planning hearing, and visitation order.

- Neglect Adjudication (affirmed). Citing *In re K.J.D.*, 203 N.C. App. 653, 660 (2010), when a child has been voluntarily removed from the home before a petition is filed, the court considers "the conditions and fitness of the parent to care [for the child] at the time of the adjudication." Although portions of some of the court's findings were not supported by competent evidence and were disregarded on appellate review, the findings that were supported by the evidence support the trial court's conclusion that the juvenile was neglected. The supported findings showed respondent-father and mother had a tug of war with the child while they were having an altercation, they both failed multiple drug tests, the child was placed with a safety resource (her half-sister) because neither parent was able to provide proper care due to their drug use, and respondent father failed to address his substance abuse issues, such that the conditions requiring the child be placed with a safety resource were not remedied.

Adjudication: Neglect; Dependency – Findings; Alternative Placement of Child before Petition Filed

In re B.P., ___ N.C. App. ___, 809 S.E.2d 914 (Jan. 16, 2018)

Held: vacated and remanded

- Standard of review of an adjudication: Whether the findings of fact are supported by clear and convincing evidence and whether the legal conclusions are supported by the findings of fact. Findings are binding if unchallenged or if evidence exists to support the finding, even if there is evidence to support a contrary finding. Conclusions of law are reviewed de novo.
- Findings of fact were unsupported by evidence, such as
    - the finding related to a domestic violence incident involving the child's stroller being knocked over was not supported by clear and convincing evidence when examining the responding officer's testimony that the stroller did not appear to be turned over and other testimony that mother admitted to lying about the stroller being knocked over;
    - the finding that respondent mother was charged with a criminal offense was misleading as it did not include the material fact that the charges were dismissed;
    - the findings that the caretaker had no document or authority to seek medical or other care for the child was unsupported by evidence showing the caregiver was able to obtain medical treatment and vaccinations for the child.
- It was proper for the court to consider prior orders in related proceedings involving respondent's other children when determining whether this child is neglected. In a neglect adjudication, it is relevant whether the juvenile lives in a home where another juvenile has been abused or neglected by an adult who regularly lives in the home. When making findings of prior court orders involving respondent's other children (a TPR and placement in foster care), the court did not merely incorporate those orders but rather employed a process of logical reasoning, which was evidenced by its having made several independent findings of fact.
- The sustained findings of fact do not support an adjudication of neglect – Risk of Harm.
    - An adjudication of neglect requires conditions that cause in juvenile to have some physical, mental, or emotional impairment or substantial risk of such impairment. The evidence and findings related to respondent's mental health, removal of her other

children, and homelessness, and no finding of impairment or risk of impairment to the child do not support the determination of neglect.

- Findings related to alternative placement of child made by mother do not support adjudication of neglect or dependency.
    - Evidence and findings show that before DSS was involved, respondent mother placed the child with caretakers, and the child remained in their care at the time the petition was filed. The caretakers were found by both DSS and the trial court to be appropriate.
    - This case is distinguishing from *In re K.J.D.*, 203 N.C. App. 653, 660 (2010), where child was adjudicated neglected although being placed in a voluntary kinship placement, as "the determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the [adjudication] proceedings"* (emphasis in original). In this case, respondent placed child on her own, without DSS input. Unlike *In re K.J.D.*, the findings in this case did not address mother's continuing inability to care for the child or an ultimate finding that the child would be at substantial risk of harm if removed from the placement and returned to the mother's care.
    - Dependency requires findings of both prongs of G.S. 7B-101(9): (1)the parent's inability to provide care or supervision and (2) the availability to the parent of alternative child care arrangements. The second prong was not satisfied. A parent has an alternative caregiver arrangement when the parent takes some action to identify the arrangements; "it is not enough that the parent merely goes along with a plan created by DSS". *In re L.H.,* 210 N.H. App. 355, 366 (2011). Here, it is undisputed respondent made the placement and did not merely acquiesce to DSS's plan.

Adjudication: Dependency

In re H.L., ___ N.C. App. ___, 807 S.E.2d 685 (Nov. 21, 2017)

Held: affirmed in part, reversed in part, remanded

- Dependency Adjudication (reversed). The court must make findings addressing both prongs of the dependency definition at G.S. 7B-101(9): the parent's ability to provide proper care or supervision and the availability of an alternative child care arrangement. The court's order did not contain findings about either prong. Regarding the first prong, the findings supporting the court's adjudication of neglect was based on the creation of an injurious environment to the juvenile and did not include findings that the parent's "behaviors rendered them wholly unable to parent" to satisfy the dependency prong.

Initial Disposition: Reasonable Efforts

In re G.T., 791 N.C. App. 274 (2016), aff'd per curiam, 370 N.C. 387 (2017)

Held: Reversed in part

- GS 7B-901(c)(1)e. authorizes a court to cease reunification efforts with a parent "if the trial court **makes** a finding that: a court of competent jurisdiction **has determined** that aggravated circumstances exist because the parent has committed or encouraged the commission of, or allowed the continuation of, any of the following upon the juvenile: … chronic or toxic exposure to alcohol or controlled substances that causes impairment of or addiction in the juvenile."

- Statutory interpretation requires a plain and unambiguous reading of the statute to determine legislative intent. Based on the different verb tenses used in the statute, the present perfect tense of "has determined" requires that the court reference a prior order from a previously held hearing rather than make a determination in the current disposition hearing. This previously held hearing could be an adjudicatory or other prior hearing in the same juvenile case or in a collateral proceeding held in a trial court. The prior adjudication order did not contain the ultimate finding of fact that the respondent mother allowed the continuation of chronic or toxic exposure to controlled substances that caused impairment of or addition in the newborn. The findings that toxicology results for the newborn were pending and that the newborn's withdrawal and impairment at birth supported the neglect adjudication but not the ultimate finding of fact needed to cease reasonable efforts with the respondent mother.

Adjudication/Disposition/Permanency Planning: Reunification & Reunification Efforts

In re C.P., ___ N.C. App. ___, 812 S.E.2d 188 (March 6, 2018)

Held: reverse in part, affirm in part, vacate in part, and remanded

- Procedural History: This case originally involved two children who were adjudicated neglected and dependent and that adjudication and following disposition were appealed. The adjudication was reversed and remanded in the published opinion In re K.P., 790 S.E.2d 744 (2016). Since that first appeal, one child (K.P.) reached the age of majority, and the case proceeded for C.P., a juvenile. On remand, the trial court held an "adjudication/disposition and permanency planning hearing" where the child was adjudicated neglected and dependent and guardianship was awarded to the child's adult sibling. The adjudication, dispositional, and permanency planning order was appealed. That appeal was heard and decided in an unpublished opinion dated January 2, 2018. This published opinion results from a petition for rehearing pursuant to Rule 31 of the N.C. Appellate Rules and replaces the unpublished January 2, 2018 opinion.
- An adjudication of dependency under G.S. 7B-101(9) requires the trial court to address both prongs of the definition regarding (1) the parent's ability to provide proper care or supervision and (2) the availability to the parent of alternative child care arrangements. DSS concedes the second prong was not satisfied. Adjudication of dependency reversed.
- The trial court did not err in holding the adjudication, initial dispositional, and permanency planning hearings on the same day as it is not forbidden by the Juvenile Code.
- The court of appeals distinguished reunification as a permanent plan from reunification efforts. In interpreting the language of G.S. 7B-906.2(b) that "reunification shall remain" a primary or secondary plan absent certain findings, the *initial permanency planning order* must include reunification as one of the concurrent permanent plans. Although the trial court found that "reunification efforts… would be futile" and that the mother "presents a risk to the health and safety of the juvenile," which are findings under G.S. 7B-906.2(b) that authorize the elimination of reunification as a concurrent plan, the statutory language "shall remain" requires the trial court include reunification as part of the *initial* permanent plan. Vacate portion of order that fails to include reunification as a permanent plan. However, recognizing that it is bound by a prior published opinion of the court of appeals, *In re H.L.*, 807 S.E.2d 685 (2017), reunification efforts may be ceased at the first permanency planning hearing if certain findings are made. The

findings in this case support the trial court's conclusion that reunification efforts may be ceased. Affirm portion of order ceasing reunification efforts.

  - Author's Note: This opinion does not discuss how to apply the language in G.S. 7B-906.2(b) that requires the trial court to order DSS to make efforts toward finalizing the primary and secondary permanent plans when reunification efforts have been ceased but reunification must be a permanent plan at the initial permanency planning hearing.

- In awarding a permanent plan of guardianship, the GAL and DSS concede the order did not contain a relevant finding under G.S. 7B-906.1(e)(1) of whether it is possible for the child to be returned to the mother within 6 months and if not why placement with the mother is not in the child's best interests. Vacate guardianship order.
- The mother waived her right to appellate review of the guardianship order that did not include findings that she was unfit or acted inconsistently with her constitutionally protected parental rights by failing to raise it when she had the opportunity to do so at the hearing.

In re H.L., ___ N.C. App. ___, 807 S.E.2d 685 (Nov. 21, 2017)

Held: affirmed in part, reversed in part, remanded

- Initial dispositional order – guardianship (affirmed). At disposition, the court has discretion to order a disposition utilizing the prescribed alternatives in G.S. 7B-903(a) based on the child's best interests, and the order is reviewed for an abuse of discretion. A guardian may be appointed at disposition, including initial disposition. G.S. 7B-903(a)(5). Guardianship may be granted without the court making a written finding of a G.S. 7B-901(c) factor regarding reunification efforts because the requirements of G.S. 7B-901(c) only apply when a child is placed in the custody of a county DSS (which is not the case when guardianship is ordered). The court verified the guardian (1) understood the legal significance of the appointment based on the social worker's and proposed guardian's testimony of the duties and responsibilities of a guardian and (2) had adequate resources based on the affidavit by the proposed guardian of her finances and her, along with the DSS social worker's testimony, that she was employed, made child care arrangements while she worked, and was able to financially care for the child.
- Review/Permanency Planning Hearing (affirmed). Respondent father challenges the court's authority to conduct a combined initial disposition, review, and permanency planning hearing as an attempt by DSS to circumvent providing reunification efforts. Respondent father waived appellate review of this issue as he received multiple notices that the hearing would be a combined hearing and did not object when the hearing proceeded. At permanency planning, G.S. 7B-906.2(b) requires the court to make reunification a primary or secondary permanent plan and require reunification efforts until it makes a finding that efforts clearly would be unsuccessful or inconsistent with the juvenile's health or safety, and this finding may be made at the first permanency planning hearing. The court's findings that since the child has been in her safety resource placement the parents tested positive for methamphetamine and failed to complete services or make progress on their case plan support its conclusion that reunification efforts would be unsuccessful. Distinguishing the case from *In re A.G.M,* 241 N.C. App. 426 (2015), the court may consider the respondent's failure to comply with a case plan that he voluntarily entered into before the petition was filed, even though there was no court order for him to participate in that plan, when considering whether reunification efforts would be (un)successful.

Dispositional Order: Parent's Constitutional Rights

In re S.J.T.H., ___ N.C. App. ___, 811 S.E.2d 723 (March 6, 2018)

Held: reversed and remanded as to actions involving respondent father and custody to DSS

- Facts: Child born Feb. 2017 and mother identifies one man as the father. DSS becomes involved because of mother's prior child protective history and drug abuse and putative father's failure to appear at child's discharge from the hospital. In March, a second putative father, Sam, contacts DSS and offers to care for the child. In April, DSS files a petition alleging neglect and dependency and names both putative fathers. In June 2017, Sam is adjudicated the child's father, the child is adjudicated neglected based on circumstances created by mother, and the dispositional order places the child in DSS custody and orders Sam to comply with the same 11 requirements as mother. Evidence regarding Sam is limited to his identity and paternity. Sam appeals, challenging the dispositional order as it applies to him.
- There is no evidence or findings of fact about respondent father other than establishing his paternity. A best interests determination requires evidence about the named respondent father, such as evidence about his ability to parent or provide for the child, his home life, or why the parent cannot care for his child, so that a court may consider whether a respondent parent is unfit or has acted inconsistently with his parental rights when determining custody. Citing In re D.M., 157 N.C. App. 382 (2011), which applied to a permanency planning order awarding permanent custody to a non-parent, there must be clear, cogent, and convincing evidence to demonstrate a parent is unfit or has acted inconsistently with his parental rights to support a disposition that does not grant a parent custody.

In re D.A., ___ N.C. App. ___, 811 S.E.2d 729 (March 6, 2018)

Held: vacate and remand for a new hearing

- Facts: Child is adjudicated abused and neglected. Respondent mother pleads guilty to misdemeanor child abuse related to same incident in the abuse/neglect proceeding. Criminal charges against respondent father are dismissed. At a second permanency planning hearing, custody is ordered to the foster parents and further reviews are waived. Respondent father appeals, challenging findings and conclusion that he acted inconsistently with his constitutionally protected status as a parent.
- Before ordering custody to a non-parent, there must be clear and convincing evidence and a finding that a parent is unfit or has acted inconsistently with his or constitutionally protected status as a parent. This finding applies to a permanent custody order, even when custody is transferred from a non-parent (in this case DSS) to a different non-parent (in this case the foster parents).
- The appellate court reviews de novo whether conduct is inconsistent with the parent's constitutionally protected status. The trial court's findings were insufficient to support the conclusion that respondent father acted inconsistently with his protected status as a parent as the findings do not address how the father is unfit or acted inconsistently with his parental rights. Distinguishing the case from *In re Y.Y.E.T.*, 205 N.C. App. 120 (2010), there were no findings that the child's injuries were non-accidental or that the mother and father were the sole caregivers when the non-accidental injuries were sustained and were jointly and individually responsible. The findings suggest the trial court intended to hold both parents

responsible or that mother caused the injuries and do not explain how father was culpable for the injuries, unfit, or acted inconsistently with his constitutionally protected status.

Visitation

In re J.R.S., ___ N.C. App. ___, 813 S.E.2d 283 (April 3, 2018)

Held: Reversed and remanded

- Facts: In a previous juvenile proceeding, the two children who had been adjudicated neglected and dependent were placed in their grandparents' legal and physical custody pursuant to G.S. 7B-911 (establishing a Chapter 50 custody order and terminating jurisdiction in the juvenile action). Months later, DSS filed a new petition based on domestic violence in the grandparents', who are custodians, home. In this new action, the children were adjudicated neglected and dependent and placed in DSS custody. At a permanency planning hearing, the court concluded that the relinquishments to adoption executed by the children's parents terminated the parental rights of the respondents (custodian grandparents) and the parents, effectively removed the grandparent custodians from the action, did not address visitation, and directed DSS to pursue a permanent plan of adoption. Grandparents separately appealed.
- If on remand, the custodians remain parties, the court must consider appropriate visitation as may be in the children's best interests pursuant to G.S. 7B-905.1 (which applies when an order removes custody of a child from a parent, guardian, or custodian, or continues the child's placement outside the home).

In re H.L., ___ N.C. App. ___, 807 S.E.2d 685 (Nov. 21, 2017)

Held: affirmed in part, reversed in part, remanded

- Visitation (remanded). Inconsistent findings that visitation should be ceased and visitation should be for a minimum of one hour a week supervised must be remanded to reconcile the discrepancy.

Findings

In re J.R.S., ___ N.C. App. ___, 813 S.E.2d 283 (April 3, 2018)

Held: Reversed and remanded

- Facts: In a previous juvenile proceeding, the two children who had been adjudicated neglected and dependent were placed in their grandparents' legal and physical custody pursuant to G.S. 7B-911 (establishing a Chapter 50 custody order and terminating jurisdiction in the juvenile action). Months later, DSS filed a new petition based on domestic violence in the grandparents', who are custodians, home. In this new action, the children were adjudicated neglected and dependent and placed in DSS custody. At a permanency planning hearing, the court concluded that the relinquishments to adoption executed by the children's parents terminated the parental rights of the respondents (custodian grandparents) and the parents, effectively removed the grandparent custodians from the action, did not address visitation, and directed DSS to pursue a permanent plan of adoption. Grandparents separately appealed.
- There were no findings to support the conclusion that it was not in the children's best interests to be returned to the grandparent custodians. The one applicable finding adopted and

incorporated the DSS and GAL reports and is insufficient. "The trial court 'should not broadly incorporate written reports from outside sources as its findings of fact' [and] … delegate its fact-finding duty" (*quoting In re J.S.*, 165 N.C. App. 509, 511 (2004)).

Cease Reunification Efforts: G.S. 7B-906.2(b) and (d) Findings

In re D.A., ___ N.C. App. ___, 811 S.E.2d 729 (March 6, 2018)

Held: vacate and remand for further proceedings

- Facts: Child is adjudicated abused and neglected. Respondent mother pleads guilty to misdemeanor child abuse related to same incident in the abuse/neglect proceeding. At a second permanency planning hearing, custody is ordered to the foster parents and further reviews are waived. Respondent mother appeals, challenging that the findings to cease reunification efforts were not support by clear, cogent, and convincing evidence.
- Standard of review of an order ceasing reunification efforts is whether the trial court made appropriate findings, whether the findings are based on credible evidence and support the conclusions of law, and whether the trial court abused its discretion when ordering the disposition.
- An order effectively ceases reunification efforts when it awards permanent custody to a non-parent (in this case foster parent), eliminates reunification as a permanent plan, waives further review hearings, and releases the attorneys for the parties and the child's GAL.
- The court may cease reunification efforts at permanency planning after making findings under
    - G.S. 7B-906.2(b) that those efforts clearly would be unsuccessful or inconsistent with the child's health and safety and
    - G.S. 7B-906.2(d)(1)–(4), which demonstrate lack of success.
- Here the court failed to make the G.S. 7B-906.2(d)(4) and G.S. 7B-906.2(b) findings. A finding that "the home remains an injurious environment" and "a return home would be contrary to the best interests of the juvenile" are not a finding that reunification efforts would be unsuccessful or inconsistent with the child's health and safety.
- "All findings must be supported by clear, cogent, and convincing evidence."
    - Author's Note: It is unclear to this author whether this statement applies to the findings required under G.S. 7B-906.2(b) and (d) as no statutory or case citation was referenced and *In re L.M.T.,* 367 N.C. 165, 180 (2013) states there is no burden of proof in a permanency planning hearing and "the trial court's findings of fact need only be supported by sufficient competent evidence." This appeal does involve a separate challenge by respondent father on the issue of whether he was unfit or acted inconsistently with his constitutionally protected parental rights such that custody could be awarded to a non-parent. Father's appeal was remanded for findings on that issue, and case law has established clear and convincing evidence as the standard when determining whether a parent's conduct is inconsistent with his/her constitutionally protected status.

In re J.A.K., ___ N.C. App. ___, 812 S.E.2d 716 (March 6, 2018)

Held: Affirm in part

- In an appeal of a permanency planning order that eliminated reunification as a permanent plan, the transcript was not included in the appellate record. It is the appellant's burden to settle the record on appeal by providing a transcript if available or a narrative of the hearing. Without a transcript or narrative, findings of fact are deemed conclusive on appeal, and the review is limited to whether the findings support the decision to cease reunification with the father.
    - Procedural Note: Respondent was ordered to provide the transcript by August 2017 but failed to do so or request an extension. A late transcript was provided in November 2017, and a motion to amend the record was filed in December 2017. That motion was denied, and there is a dissent on the denial of that motion. In a footnote, the court of appeals stated this dissent may provide an appeal of right to the N.C. Supreme Court from the decision to deny that motion. The dissent is included in this published opinion.
- The ultimate finding under G.S. 7B-906.2(b) that reunification efforts clearly would be unsuccessful or inconsistent with the juvenile's health and safety were supported by findings that respondent father had not progressed on his case plan regarding visitation and appropriate housing, which had been concerns for more than a year; missed a CFT meeting; and did not cooperate with DSS.

Removal as Party: Custodian

In re J.R.S., ___ N.C. App. ___, 813 S.E.2d 283 (April 3, 2018)

Held: Reversed and remanded

- Facts: In a previous juvenile proceeding, the two children who had been adjudicated neglected and dependent were placed in their grandparents' legal and physical custody pursuant to G.S. 7B-911 (establishing a Chapter 50 custody order and terminating jurisdiction in the juvenile action). Months later, DSS filed a new petition based on domestic violence in the grandparents', who are custodians, home. In this new action, the children were adjudicated neglected and dependent and placed in DSS custody. At a permanency planning hearing, the court concluded that the relinquishments to adoption executed by the children's parents terminated the parental rights of the respondents (custodian grandparents) and the parents, effectively removed the grandparent custodians from the action, did not address visitation, and directed DSS to pursue a permanent plan of adoption. Grandparents separately appealed.
- G.S. 7B-401.1 sets forth who must be parties to an abuse, neglect, or dependency proceeding, which includes parents, guardians, custodians, and caretakers. Pursuant to G.S. 7B-401.1(d) regarding custodians, the grandparents were named as respondent parties. Before removing the custodians [guardian or caretaker] as parties, the trial court must comply with G.S. 7B-401.1(g), which requires "the court finds (1) that the person does not have legal rights that may be affected by the action and (2) that the person's continuation as a party is not necessary to meet the juvenile's needs." Neither finding was made. The opinion comments that on remand, the trial court may be prevented from making the first finding given the chapter 50 custody order.

Appeal: Order Eliminating Reunification

In re A.A.S., ___ N.C. App. ___, 812 S.E.2d 875 (March 20, 2018)

Held: Affirmed

- G.S. 7B-1001(a) sets forth which final orders may be appealed in an abuse, neglect, or dependency action. A G.S. 7B-906.2 permanency planning order that includes adoption and reunification as the concurrent permanent plans is not an appealable order under G.S. 7B-1001(a)(5), even when a TPR has been commenced by DSS, as reunification has not been eliminated as a permanent plan.
- "G.S. 7B-906.2(b) clearly contemplates the use of multiple, concurrent plans including reunification and adoption. During concurrent planning, DSS is required to continue making reasonable reunification efforts until reunification is eliminated as a permanent plan" as the trial court is required to order DSS to make efforts toward finalizing the primary and secondary plans. The permanency planning order that identified adoption and reunification as the concurrent plans and required DSS to file a TPR petition did not implicitly or explicitly cease reunification. This opinion distinguishes appellate opinions decided before G.S. 7B-906.2 (e.g, *In re A.E.C.*, 239 N.C. App. 36 (2015)), which held a trial court's order that DSS file a TPR petition implicitly ceased reunification efforts.

In re J.A.K., ___ N.C. App. ___, 812 S.E.2d 716 (March 6, 2018)

Held: Affirm in part; dismiss in part

- Facts: Respondent father appeals a TPR order, the prior April 2016 permanency planning order (PPO) that ceased reunification efforts with father and eliminated reunification as a concurrent permanent plan, and the October 2016 PPO that continued the April 2016 PPO.
- G.S. 7B-1001(a) allows for appeal of a TPR order and any prior order eliminating reunification as a permanent plan under G.S. 7B-906.2(b) if all of the criteria under G.S. 7B-1001(a)(5)(a) apply. Written notice preserving the right to appeal the G.S. 7B-906.2(b) order is not required (as it was under the former G.S. 7B-507(c)). The language in G.S. 7B-1001(b) requiring notice to preserve the right to appeal be in writing is surplusage because G.S. 7B-906.2(b) does not require a notice to preserve the appeal (distinguishing it from the former G.S. 7B-507(c) which did require such notice).
    - Legislative Note: Effective January 1, 2019, G.S. 7B-1001(a)(5)a. and 7B-1001(a1)(2) are amended and require that the right to appeal be preserved in writing within 30 days after entry and service of the G.S. 7B-906.2(b) order.
- G.S. 7B-1001 does not authorize an appeal of an order that continues the permanent plan. Respondent has no statutory right to appeal the October PPO; appeal of that order dismissed.

Termination of Parental Rights

Notice Pleading

In re J.S.K., ___ N.C. App. ___, 807 S.E.2d 188 (Dec. 5, 2017)

Held: reversed

- A motion to dismiss under Rule 12(b)(b) of the N.C. Rules of Civil Procedure is reviewed de novo as to whether, as a matter of law, the allegations of the complaint (in this case motion to terminate parental rights (TPR)) is sufficient to state a claim upon which relief may be granted. On review, the allegations in the complaint are considered true and are construed liberally. A denial of a motion to dismiss will only be reversed if the plaintiff is entitled to no relief under any set of facts which could be proven to support the claim.
- Although a denial of a motion to dismiss is not reviewable on appeal when there is a final judgment on the merits, the court of appeals has previously deviated from this rule in TPR proceedings. Here respondent mother made an oral motion to dismiss the TPR motion at the beginning of the adjudicatory hearing such that the final TPR order is the only written order denying the motion to dismiss from which the respondent mother could appeal.
- G.S. 7B-1104(6) requires that a TPR motion or petition allege facts that are sufficient to warrant a determination that one or more of the G.S. 7B-1111(a) grounds to TPR exist. There is no distinction between the facts that must be alleged in a TPR petition as opposed to a TPR motion. The alleged facts must "put a party on notice as to what acts, omissions or conditions are at issue" and a "bare recitation . . . of alleged statutory grounds for termination" is insufficient. *See In re Hardesty*, 150 N.C. App. 380, 384 (2002); *In re Quevedo*, 106 N.C. App. 574, 579 (1992). Here, the TPR motion alleged four grounds: neglect, willfully leaving the child in foster care for more than 12 months without showing reasonable progress, willfully failing to pay a reasonable portion of the cost of care, and dependency. G.S. 7B-1111(a)(1), (2), (3), (6). The allegations consisted of bare recitations of the statutory grounds to TPR. Distinguishing the case from *In re Quevedo*, the TPR motion did not incorporate any prior orders, and the attached custody order did not contain additional facts that support a TPR ground. The TPR motion was insufficient to put respondent mother on notice as to what acts, omissions, or conditions were at issue.

Law of the Case Doctrine

In re K.C., ___ N.C. App. ___, 812 S.E.2d 873 (March 6, 2018)

Held: Affirm

- Procedural History: In 2014, father petitioned to terminate respondent mother's parental rights on the ground of abandonment under G.S. 7B-1111(a)(7). The 2014 petition was granted in a 2015 TPR order. Respondent appealed, and the TPR was reversed (*In re K.C.*, 805 S.E.2d 299 (2016)). Later in 2016, approximately 6 months after the appellate decision, father filed a new petition seeking to terminate respondent mother's parental rights on the ground of abandonment under G.S. 7B-1111(a)(7). The TPR was granted in July 2017. Respondent mother appeals, arguing the law of the case prevented the trial court from concluding respondent abandoned the child.

- "The law of the case doctrine does not apply when the evidence presented at a subsequent proceeding is different from that presented on a former appeal," which in this case is the six months next preceding the filing of the second (2016) petition. (*Quoting Bank of America, N.A., v. Rice*, 780 S.E.2d 873, 880 (2015)). "The prior opinion … does not mean that respondent is immune from termination of her parental rights based upon abandonment for the rest of the child's minority even if [respondent] never seeks to see [the child] or communicate with him again."
- Although some findings related to events that took place prior to the first petition in 2014, the order on appeal included several unchallenged findings of fact about events occurring after the filing of the 2014 petition and made its decision based on the period of at least six consecutive months immediately preceding the filing of the 2016 petition. The unchallenged findings are that respondent did not have even minimal contact with the child after the 2015 TPR order was reversed even though she had a way to contact petitioner and his family, and she failed to appear at the hearing resulting in the 2017 TPR order on appeal.

Due Process; Motions to Continue and Re-open Evidence

In re S.G.V.S. ___ N.C. App. ___, 811 S.E.2d 718 (Feb. 20, 2018)

Held: reversed and remanded

- Facts: DSS filed petitions to terminate respondent mother's parental rights to her two children, who had been adjudicated neglected and dependent. The TPR hearing started on December 13, 2016 and was continued to January 18 and 19, 2017. Respondent mother was previously scheduled to be in a different court in a different county for a pending criminal charge on January 18, 2017. At the start of the January 18, 2017 TPR hearing, counsel for respondent mother requested a continuance to January 19 as respondent was present in the other county court for her criminal matter. The court denied the motion to continue. At the conclusion of the TPR hearing, respondent's counsel requested that matter be left open to allow her client to appear and testify. The court denied the motion. Before a written order was entered, respondent's attorney filed a Rule 59 motion to re-open the evidence, which was denied after finding that respondent had been advised to continue her criminal matter and that she chose to attend the criminal action rather than the TPR hearing. Respondent mother's rights were terminated.
- Due process applies to a parent's liberty interest to care, custody and control of their child. Due process insures fundamental fairness in a judicial proceeding that may adversely affect the individual's protected rights. Although "due process does not provide a parent with an absolute right to be present at a termination hearing… the magnitude of 'the private interests affected by the proceeding, clearly weighs in favor of a parent's presence at the hearing.' " (*citing In re Murphy*, 105 N.C. App. 651, 654 (1992); *In re Quevedo*, 106 N.C. App. 574, 580 (1992)).
- Rule 59 of the N.C. Rules of Civil Procedure allows for a new trial due to "any irregularity by which any party was prevented from having a fair trial," and a trial court has discretion to re-open a case to admit additional testimony after the conclusion of the hearing. An appellant court may disturb an order made under the discretionary power of Rule 59 when the appellate court "is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Worthington v. Bynum*, 305 N.C. 478, 487

(1982). No evidence supports the finding that respondent chose to attend her previously scheduled criminal matter instead of the TPR hearing. In North Carolina, the district attorney controls the calendaring of cases in criminal court, and there was no showing that a motion to continue would have been permitted. Respondent's choice was to attend her previously scheduled criminal matter or attend the TPR hearing and face a new criminal charge of failing to appear at the criminal hearing.

- Based on the record and magnitude of the interests at stake in a TPR, the denial of the motion to continue the hearing and to re-open the evidence to allow respondent mother to participate "results from a misapprehension of the law and is an unreasonable and substantial miscarriage of justice."

Adjudication: Findings

In re A.A.S., ___ N.C. App. ___, 812 S.E.2d 875 (March 20, 2018)

Held: Affirmed

- G.S. 7B-1111(a)(2) authorizes the termination of parental rights when (1) a child has been willfully left by the parent in foster care or placement outside of the home for more than 12 months and (2) the parent has not made reasonable progress under the circumstances to correct the conditions that led to the child's removal.
- Willfulness requires that the parent had the ability to show reasonable progress but was unwilling to make the effort and is not precluded when a parent has made some efforts to regain custody of his or her child. It does not require a showing of fault.
- Although respondent mother made "sporadic efforts," the findings of fact regarding her failed and diluted drug screens, inability to engage in safe and appropriate visits, and lack of progress supported the court's determination that the mother willfully left the children in foster care for more than 12 months and failed to make reasonable progress regarding two of her children.
- Regarding her third child, the findings are supported by clear, cogent, and convincing evidence that there was prior neglect (the child was adjudicated neglected) and a likelihood of repetition of neglect. G.S. 7B-1111(a)(1). Specifically, the court found the mother needed an additional support person to assist her in safely parenting but was unable to identify any such support person, she repeatedly failed drug screens, DSS had to intervene during supervised visitations because of her inappropriate behavior, and she had not complied with her case plan.
- Findings about whether DSS made reasonable efforts toward reunification are required at permanency planning hearings and are not required at a TPR. Even though they are not required, DSS provided reasonable efforts for reunification through the creation and implementation of a case plan, the provision of bus passes, supervising visitation, and arranging for drug screens. Such efforts are not required to be exhaustive.

In re Z.D., ___ N.C. App. ___, 812 S.E.2d 668 (March 20, 2018)

Held: reversed

- Facts: In 2011, the child was adjudicated dependent based on circumstances related to respondent mother's mental health issues, drug use, unsafe home, and choice of unsafe childcare arrangements. Child was placed petitioners in the TPR, as a kinship placement in the underlying dependency action in 2011, and custody was ordered to the petitioners in 2012. Respondent mother has court ordered visitation. Respondent mother is diagnosed with bipolar

disorder and has had multiple psychiatric hospitalizations and involuntary commitments from 2010 – 2015. Respondent mother engages in outpatient treatment. Petitioners filed the TPR in June 2016, and the TPR was granted in May 2017 on the grounds of neglect, failure to make reasonable progress to correct the conditions that led to the child's removal, and dependency. G.S. 7B-1111(a)(1), (2), and (6). Respondent mother appeals.

- Standard of Review is whether the clear, cogent, and convincing evidence supports the findings of fact and whether the findings of fact support the conclusion that a ground exists to terminate parental rights. The appellate court reviews the de novo whether the findings support the conclusions.
- Quoting *Quick v. Quick*, 305 N.C. 446, 452 (1982), "the trial court must make '*specific findings* of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached" (emphasis in original). There must be adequate evidentiary findings to support the ultimate finding.
- The evidentiary findings of fact are insufficient to support the ultimate finding required for each ground alleged and the conclusion that any of the alleged grounds under G.S. 7B-1111(a)(1), (2), and (6) existed. The evidentiary findings lacked specificity.
    - G.S. 7B-1111(a)(2) requires a 2-part analysis: (1) the child has been willfully left in foster care placement or placement outside the home for over 12 months and (2) at the time of the TPR hearing, the parent has not made reasonable progress under the circumstances to correct the conditions that led to the child's removal. There were no findings regarding mother's conduct or circumstances over the 15 months prior to the TPR hearing regarding her mental health, and no findings at all regarding her progress (or lack thereof) in correcting her drug use or the condition of her home at the time of the TPR hearing. Regarding her mental health, the findings of fact lack detail is describing what an "episode" is, how frequently respondent had such episodes, and how the episodes "left her incapable of properly caring for her son." The finding of fact describing respondent's behavior during visits as "consistently concerning" and "disturbing" lacked any particularity in what behavior it was referring to and how that behavior impacted respondent's ability to care for her son. The findings do not address respondent's progress or lack of progress to correct the conditions the resulted in her son's removal. Evidence, through her psychiatrist's testimony, tended to show she made significant progress in addressing her mental health issues, and other evidence showed she had stable housing and income and was not using drugs.
    - A TPR on the ground of neglect under G.S. 7B-1111(a)(1) requires the court to consider evidence of past neglect, changed conditions related to the past neglect, and the probability of the repetition of neglect in those cases where the child has not been in the parent's custody for a significant period of time before the TPR hearing. The findings addressing the likelihood of repetition of neglect that used the terms "concerning" and "disturbing" are subjective and ambiguous and are not sufficiently specific to determine the behaviors exhibited by respondent and how those behaviors negatively impacted her son or her ability to provide proper care and supervision to her son. The likelihood of repetition of neglect is also not shown by clear, cogent, and convincing evidence and

lacked temporal proximity to the TPR hearing as it focused on conduct that occurred at least 6 months before the hearing.

- Dependency under G.S. 7B-1111(a)(6) requires the court to address (1) the parent's ability to provide care or supervision and (2) the availability to the parent of an alternative child care arrangement. The evidentiary findings are insufficient to support the ultimate finding that respondent was incapable of providing care or supervision and that such incapability would continue for the foreseeable future. The findings relate to respondent's history rather than her progress (or lack thereof) for the 15 months before and up to the TPR hearing and fail to address her mental health and alleged incapability at the time of the hearing. Petitioners failed to present clear, cogent, and convincing evidence of respondent's current incapability and that it would continue for the foreseeable future.

In re E.B., ___ N.C. App. ___, 805 S.E.2d 390 (Oct. 17, 2017)

Held: reverse and remand for additional findings

- Facts: In 2014, DSS filed a petition and obtained nonsecure custody of three children who were removed from their parents' home because of severe and ongoing domestic violence. In 2015, the children were adjudicated neglected and dependent. Respondent father was ordered to comply with a case plan that included domestic violence offender treatment and counseling; a mental health assessment; an approved parenting class; and obtaining and maintaining suitable housing, employment, and transportation to provide for the children's needs. In 2016, the primary permanent plan was changed to adoption because of continued domestic violence between the parents, and DSS filed a TPR petition alleging neglect and failure to make reasonable progress on the plan as a result. Both parent' rights were terminated, and respondent father appeals the termination of his rights on both grounds.
- The dispositive question regarding the neglect ground [G.S. 7B-1111(a)(1)] at the TPR is the fitness of the parent to care of the child at the time of the TPR hearing. There's a two-part analysis for the ground under G.S. 7B-1111(a)(2): (1) the child has been willfully left by the parent in foster care or placement outside the home for over twelve months and (2) the parent has not made reasonable progress under the circumstances to correct the conditions that led to the child's removal.
- The findings are vague and insufficient to support the court's conclusions of neglect and failure to make reasonable progress and lack the "specificity necessary 'to enable an appellate court to review the decision and test the correctness of the judgment.'" (*citing Quick v. Quick*, 305 NC 446, 451 (1982)). The court made three findings regarding the domestic violence. The children were removed from the home and adjudicated neglected and dependent due to domestic violence. After a January 2016 incident of domestic violence, the parents entered counseling. Another incident of domestic violence occurred in July 2016. Based on these three findings, the court concluded neglect existed and was likely to be repeated given the continued domestic violence between the parents, and that the father had not made reasonable progress to correct the conditions that resulted in the children's removal in December 2014, as the domestic violence between the parents continued. The two findings of the 2016 domestic violence incidents do not address the circumstances of the domestic violence, its severity, the impact on

the children, or that respondent father was engaged in the domestic violence. The evidence showed mother was the aggressor and only one involved in domestic violence.

- Concurrence: The findings do not support the conclusions as the record does not indicate what role if any the father had in the domestic violence incidents. The mother was the one charged. Additionally, evidence in the record tends to show the father made progress on his case plan when he completed a parenting class; submitted to the mental health assessment; obtained employment, transportation, and stable housing; interacts appropriately with the children; and attends domestic violence counseling services. On remand the court needs to address whether this evidence (or additional evidence) supports a finding that father did or did not make progress on his plan.

Adjudication: Neglect

In re M.J.S.M., ___ N.C. App. ___, 810 S.E.2d 370 (Feb. 6, 2018)

Held: Affirmed

- The standard of review for a TPR adjudication is whether the findings of fact are supported by clear, cogent, and convincing evidence and whether these findings support the conclusions of law.
- Parental rights may be terminated on the ground of neglect pursuant to G.S. 7B-1111(a)(1), and neglect is defined at G.S. 7B-101(15). This ground must be based on evidence showing neglect at the time of the TPR hearing. When a child has been removed from his or her parent's custody, a prior adjudication of neglect may be considered, but "the trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of repetition of neglect" (quoting *In re Ballard*, 311 N.C. 708, 715 (1984)).
- Failure to make progress in completing a case plan is indicative of a likelihood of future neglect. Although respondent mother did not completely fail to work her case plan when she obtained appropriate housing, engaged in some domestic violence counseling, and took prescribed medication for her mental health disorders, the evidence, including social worker testimony, showed respondent's work on the case plan was sporadic and inadequate. Findings that showed mother's progress was limited and that some progress did not occur until after the TPR petition was filed was sufficient to determine the likelihood of future neglect.

In re R.D.H., III, ___ N.C. App. ___, 806 S.E. 706 (2017) (Westlaw still indicates the case is unpublished)

Held: reverse and remand

- The standard of review of a TPR ground is whether the trial court's findings of fact are based on clear, cogent, and convincing evidence and whether the findings support the conclusions of law.
- When the child has been adjudicated neglected and is not in the parent's care, a legal conclusion of neglect for a TPR requires that the trial court determine neglect (as defined by G.S. 7B-101(15)) exists at the time of the TPR proceeding. The trial court must consider evidence of changed conditions and determine there is a likelihood of future neglect.
- Despite several unchallenged findings of fact that are binding on appeal, a challenged finding of fact related to the father's knowledge that the child was exposed to substance abuse and violence in her mother's care, was explicitly relied upon by the court in making its conclusion of neglect. That material finding is unsupported by the evidence. Related to that finding, the circumstances in this case do not present a situation where the man should know he is likely the

father of the child. The man and child's mother had no relationship other than "casual meetings" that were sexual in nature, and the child is named after another man whom the mother identified as the possible father. It seems reasonable in these circumstances that the respondent waited until paternity testing result before beginning to take steps to gain custody of the child.

- The trial court is not required to make a finding of fact on every piece of evidence, but it must address the likelihood of repetition of neglect based on evidence of the respondent's current circumstances. In this case, there was evidence that at the time of the hearing the respondent desired that the child live with him and that he had a safe and stable home for the child to live in. There were no findings (positive or negative) about respondent's home or ability to care for the child at the time of the TPR hearing

Adjudication: Willfully leaving in foster care without making reasonable progress

In re J.A.K., ___ N.C. App. ___, 812 S.E.2d 716 (March 6, 2018)

Held: Affirm in part

- G.S. 7B-1111(a)(2) authorizes a termination of parental rights when the parent willfully leaves the child in foster care for over 12 months and has not made reasonable progress to correct the conditions that led to the child's removal from home.
- The relevant 12 month period starts when the trial court enters a court order requiring that the child be removed from the home, which in this case was the nonsecure custody order, and ends when the TPR petition or motion is filed. This 12-month time period applies even when a respondent in the TPR was the "non-removal parent" and did not appear in the underlying abuse, neglect, or dependency action until after the child's adjudication and almost one year after the nonsecure custody order was issued.
- Willfulness exists when the respondent has an ability to show reasonable progress but was unwilling to make the effort; it does not require a showing of fault. Willfulness may be found even when the respondent has made some efforts to regain custody of his child as limited progress is not reasonable progress.
- The trial court determines the weight to give to evidence and the reasonable inferences to draw and reject from the evidence. The findings made by the trial court are supported by the evidence and are sufficient to support the TPR based on G.S. 7B-1111(a)(2). The findings show the father made limited progress by completing parenting classes but failed to make progress on a major component of his case plan, which was to obtain independent and appropriate housing.

Adjudication: Abandonment, Findings

In re D.E.M., ___ N.C. App. ___, 810 S.E.2d 375 (Feb. 6, 2018)

Held: Vacate and remand

- G.S. 7B-1111(a)(7) authorizes the termination of parental rights when a parent has willfully abandoned the juvenile for at least six months immediately preceding the filing of the TPR petition or motion. Abandonment implies conduct on the part of the parent that manifests a willful determination to forego all parental duties and relinquish all parental claims and requires purpose and deliberation.

- The determinative period for a TPR based on G.S. 7B-1111(a)(7) is the six consecutive months immediately before the filing of the TPR petition or motion, although an earlier time period may be considered by the court in evaluating a parent's credibility and intention. Findings of fact that do not address the relevant time period are inadequate to support the conclusion of law that the ground exists. Here, the findings do not include any dates or refer to whether the action by the parent occurred prior to or during the relevant time period.
- Willfulness is not proved by incarceration alone, and an incarcerated parent is not excused from showing an interest in his or her child's welfare by whatever limited means are available. The court's findings must indicate it considered the limitations placed on the parent when determining whether the parent's actions are willful (e.g., what efforts could have been made; was the parent able but failed to provide contact, love, or affection to the child while incarcerated). Findings that the father was incarcerated during the relevant six-month period and had no contact with and provided no support to the juvenile were insufficient as they did not address what efforts he could have been expected to make.
- Rule 52 of the Rules of Civil Procedure apply to TPR orders. Upon remand, the trial court "must avoid the use of mixed findings of fact [with conclusions of law] and instead, separate the findings of fact from the conclusion of law."
    - *Author's note:* This opinion does not address prior appellate opinions that have held that mischaracterized findings of fact or conclusions of law are not a fatal error and are treated on appellate review as what they are, rather than what they are labelled.

Adjudication: Abandonment and Best Interests Disposition

In re D.E.M., ___N.C. App. ___, 802 S.E.2d 766 (2017), *aff'd per curiam,* ___N.C. ___, 809 N.C. 567 (March, 2, 2018)

Summary of Court of Appeals decision

Held: Affirmed

- Procedural History and Facts: In 2013, the paternal grandparents (petitioners in the TPR) were awarded primary legal and physical custody of the child through a Chapter 50 civil custody order. Respondent mother was awarded visitation in that custody order. In 2014, petitioners filed and obtained a TPR, which was vacated in 2016 by a court of appeals decision that held the petitioners lacked standing. During the pendency of that appeal, the TPR order was not stayed, and respondent mother did not visit with the child. In 2016, a new TPR petition was filed as the child had continuously resided with the petitioners for two years preceding this TPR petition. The TPR was granted, and respondent mother appeals.
- G.S. 7B-1111(a)(7) authorizes a termination of parental rights on the ground that the parent has willfully abandoned the child for at least 6 consecutive months immediately preceding the filing of the TPR petition or motion. The relevant six month time period is September 2015 to March 2016. Abandonment implies conduct by the parent that manifests a willful determination to forego all parental duties and relinquish all parental claims to the child, and a parent's willful intent is a question of fact.
- Although there was a termination of mother's parental rights on appeal during the relevant time period, that order did not prohibit respondent from contacting the child. The order limited her options but did not prevent her from taking whatever measures possible to show an interest in

her child. Respondent mother did not seek a stay of the TPR order that was on appeal, seek visitation with the child, send gifts or letters, or pay support. Similar to an incarcerated parent with limited options, mother's failure to attempt to show affection to her child is evidence of abandonment.

- The court may consider respondent mother's conduct outside the relevant 6 month time period when evaluating the respondent's credibility and intentions. Mother demonstrated almost no interest in the child since she lost custody of him in 2013. She did not contact the petitioners to schedule visitation after her single visit in December 2013 or send any gifts or support for the child despite being employed. Considering this history, the evidence of respondent's ongoing failure to visit, contact, or provide for the child during the relevant time period allows the court to reasonably infer that she acted willfully.
- G.S. 7B-1110(a) requires the court to consider and making findings of relevant best interests of the child factors when determining whether to TPR after a ground has been proved by clear and convincing evidence. One factor is the likelihood of the child's adoption. The child is placed with petitioners as a result of a Chapter 50 civil custody order and not a pre-adoptive placement pursuant to G.S. Chapter 48. However, G.S. 48-2-301(a) allows for the placement requirement set forth in G.S. Chapter 48 to be waived for cause, such that the petitioners would have standing to file a petition to adopt the child. Additionally, they are the child's legal custodians and wish to adopt him. The court did not err in determining it was likely that petitioners will adopt the child.

Appeal: No Merit Brief

In re A.A.S., ___ N.C. App. ___, 812 S.E.2d 875 (March 20, 2018)

Held: Affirmed

- Pursuant to Appellate Rule 3.1(d), respondent father's counsel filed a no-merit brief, notified his client of the right to file a pro se brief within 30 days, and requested that the court of appeals perform an independent review of the record for possible error. Counsel identified two issues: (1) whether the trial court erred in concluding a ground existed to terminate father's rights, and (2) whether the trial court abused its discretion in determining TPR was in the children's best interests.
- The TPR order includes (1) sufficient findings of fact that are supported by clear, cogent, and convincing evidence to conclude at least one ground, specifically G.S. 7B-1111(a)(1) neglect, existed, and (2) appropriate findings on each of the relevant G.S. 7B-1110(a) dispositional factors regarding bests interests.

In re M.J.S.M., ___ N.C. App. ___, 810 S.E.2d 370 (Feb. 6, 2018)

Held: Affirmed

- The standard of review for a TPR adjudication is whether the findings of fact are supported by clear, cogent, and convincing evidence and whether these findings support the conclusions of law.
- Respondent father's counsel filed a no-merit brief pursuant to Appellate Rule 3.1(d) and asked the court to conduct an independent review of the record for possible error. The court of

appeals was unable to find possible prejudicial error with the trial court's TPR order that included sufficient findings of fact supported by clear, cogent, and convincing evidence; a conclusion of at least one ground to TPR existed; and appropriate findings on each relevant dispositional factor in G.S. 7B-1110(a) in exercising discretion when assessing the child's best interests.

Adoption

Consent: Revocation Period

In re Ivey, ___ N.C. App. ___, 810 S.E.2d 740 (Feb. 6, 2018)

Held: Affirm

- Relevant Timeline and Facts:
  - 8/31/2016: infant born
  - 9/1/2016: mother signs Consent to Adoption, which includes language regarding 7-day time period to revoke and to whom the revocation must be sent, and is notarized with the certification "to the best of [the notary's] knowledge and belief…"
  - 9/14/2016: mother's attorney delivers letter to prospective adoptive parents revoking consent and stating she never received a copy of the consent document
  - 9/29/2016: mother received copy of the consent document from her medical file at the hospital
  - 10/3/2016: adoption petition filed
  - 10/4/2016: mother files revocation with the person designated in the consent - the clerk of superior court
  - 11/15/2016: district court enters order in a consolidated declaratory judgment action seeking declaration that the consent is invalid and the adoption proceeding; the order dismisses the adoption proceeding after finding (based on evidence presented) that the mother did not receive a copy of the consent document until 9/29/2016 and concluding the consent statute requires a copy of the document be left with the person consenting and that mother's revocation was timely when she filed it with the designated person within 7 days of receiving her copy of the consent document
- Holding in case of first impression: G.S. 48-3-605 requires that an original or copy of a signed consent to adoption be provided to the parent who has signed the document, and the 7-day time period to revoke the consent under G.S. 48-3-608 does not begin to run until the parent who signed the consent is provided with an original or copy of the written consent.
- In reaching this holding, the court of appeals looked to various statutes governing adoptions and cited various cases to discuss its standard of review. Issues of statutory construction are reviewed de novo. A statute that is clear on its fact must be enforced as written. The plain and definite meaning of clear and unambiguous text must be given, especially in the context of an adoption, which is purely a statutory creation. Every word of a statute is given effect as it is presumed the legislature carefully chose each word used. A fundamental rule of statutory construction requires that statutes in pari materia are construed together and compared with each other.

- The court of appeals looked to four statutes when determining the consent is effectuated when the consenting parent receives an original or copy of the signed consent, which provides the parent with the necessary information to revoke her or her consent:
    - The procedures for consent under G.S. 48-3-605, which requires the consent be signed under oath and includes a certification by a notary with a statement that to the best of the notary's knowledge of belief, the parent executing the consent has been given an original or copy of the fully executed consent.
    - G.S. 48-3-606 requires the consent contain the name of the person and address where the notice of revocation may be sent.
    - G.S. 48-3-608 allows for the revocation of the consent within 7 days of its execution and requires the written revocation be delivered "to the person specified in the consent."
    - The statutory purposes at G.S. 48-1-100 are to protect minors from unnecessary separation from their original parents and to protect biological parents from ill-advised decisions to relinquish a child or consent to the child's adoption.
- The finding by the trial court that mother did not receive an original or copy of the consent at the time it was signed does not contradict the certification by the notary, which was based on the notary's "knowledge and belief." It is possible that the notary believed or to the best of his knowledge thought the consent was left with the mother without any actual knowledge of that fact and that no document had in fact been delivered to mother.

Consent: Unwed Father

In re Adoption of C.H.M., ___ N.C. ___, 812 S.E.2d 804 (May 11, 2018)

Held: reversed court of appeals decision that affirmed trial court's order requiring father's consent

- Facts: Respondent and child's biological mother were in a relationship that ended in November 2012. In January, 2013, mother marries another man. In February she notifies respondent that she is pregnant with his child but wants it kept a secret. Respondent states he intends to set aside money for the child but doesn't provide any support or details of his savings plan. Respondent and mother communicate for several months by Facebook message. Mother refuses respondent's offers of support. In one communication, mother tells respondent that she was sexually assaulted and the child may not be his even though mother was never sexually assaulted. In June, mother stops communicating with respondent and gives birth to the child. Mother and her husband execute relinquishments for the child's adoption, where mother fails to provide information about respondent and states her pregnancy resulted from a sexual assault. Child is placed with prospective adoptive parents who file the adoption petition on July 9, 2013. Respondent contacts mother at the end of July and learns mother gave birth to the child but is not told the child is an adoptive placement until November. The adoption agency is also informed in November of respondent's existence. Paternity testing indicates respondent is the father, and he files an objection to the adoption in December, 2013. At a hearing determining whether respondent's consent is required under G.S. 48-3-601(a)(2)(b)(4)(II), respondent testified he set aside money from ATM withdrawals and cashback purchases from WalMart, which he kept in a lockbox in his room. The lockbox was produced at the 2014 hearing, and it had $3,260. In his testimony, respondent estimated he placed $100-$140/month

in the lockbox although he had no receipts or records indicating when or what amounts were placed in the lockbox. The trial court found respondent credible and that his payments were regular and consistent and a reasonable method of providing support for the minor child and mother, based on his $32,000/year income. The trial court ordered his consent was required, and the Court of Appeals affirmed that order. The Supreme Court granted discretionary review.

- Standard of Review: Conclusions of law, which involve a determination that requires the exercise of judgment or application of legal principles, are reviewable de novo on appeal. "[D]etermining whether sufficient evidence supports a judgment is a conclusion of law and will be reviewed as such." Sl. Op. at 10.
- "To protect the significant interests of the child, biological parents, and adoption parents, Chapter 48 of our General Statutes, governing adoption procedures in North Carolina, establishes clear, objective tests to determine whose consent is required before a court may grant an adoption petition." Sl. Op. at 1. G.S. 48-3-601 enables a putative father to unilaterally protect his parental rights if he complies with the requirements of that statute. One of those requirements is that the putative father has provided, within his financial means, reasonable and consistent payments for the support of the mother and/or child before the adoption petition is filed. G.S. 48-3-601(2)(b)(4)(II).
- At issue in this case is whether respondent (1) provided payments that are real and tangible for the support of the mother and/or child, (2) whether the payments were reasonable in light of respondent's financial means, and (3) whether the payments were made consistently *as shown by an objectively verifiable record*. His consent will not be required if he fails to prove all of the statutory requirements. The relevant time period is before the adoption petition was filed. Any evidence of actions taken after the filing of the petition is irrelevant, and consideration of such evidence is an error of law.
- Respondent has the burden to prove through competent evidence that he complied with each statutory requirement. Looking to *In re Anderson*, 360 N.C. 271 (2006), the Court "emphasized the importance of a *verifiable payment record* to establish that a putative father made reasonable and consistent payments." Sl. Op. at 15 (emphasis added). As a matter of law, respondent's evidence was insufficient to show he made payments during the relevant time period (before the petition was filed) or that each payment was reasonable and consistent with his financial means during the relevant statutory time period. Respondent's testimony was uncorroborated. He conceded that he did not keep records and did not really know how much money was placed in the lockbox during the relevant time period. General bank statements and the lump sum amount presented at the trial in 2014 do not provide an objectively verifiable record showing consistently reasonable payments made during the relevant time period (before the petition was filed). Because respondent failed to prove he complied with the objective statutory requirements, his consent is not required.
- Dissent: Disagreeing with the standard of review employed by the majority, the Court should have deferred to the trial court's findings of fact when those findings of fact are supported by competent evidence. The evidence was sufficient to support the extensive trial court findings, which supported the conclusion of law that the respondent's consent was required. The majority's decision to require record-keeping or a formal accounting of payments is not supported by statute or case law.

- Note: This opinion does not address whether the method of placing money in a special location in respondent's home is a "payment" under the statute. It also does not address the additional statutory requirements of acknowledging paternity and visiting or communicating (or attempting to) with the mother and/or child.

Civil Case Related to Child Welfare

Entry of Order

McKinney v. Duncan, ___ N.C. App. ___, 808 S.E.2d 509 (Dec. 5, 2017)

Held: Dismissal of appeal

- Facts: On July 5, 2016, the court entered two no contact orders (one for each plaintiff), neither of which were appealed. In October 2016, a consent order on a motion to show cause was entered. A second show cause proceeding was initiated and a hearing occurred on December 12, 2016. The trial judge signed orders for each plaintiff, finding the defendant was in civil contempt of the July 2016 and October 2016 orders and ordering the means by which he could purge himself of the contempt. Defendant appealed.
- Rule 58 states a "judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." Although the trial judge rendered her judgment and subsequently reduced it to writing and signed it, "these orders do not bear a file stamp or other indication that they were ever filed with the clerk of court." Citing *In re Thompson*, 232 N.C. App. 224 (2014), the record fails to establish the orders were entered under Rule 58. Relying on *In re Estate of Walker*, 113 N.C. 419 (1994), "a properly entered ordered is essential to vest the Court [of Appeals] with subject matter jurisdiction over an appeal." The orders were not entered and the court of appeals has no jurisdiction to review them.

Time to Appeal

Brown v. Swarn, ___ N.C. App. ___, 810 S.E.2d 237 (Jan. 16, 2018)

- Facts: Court orally rendered its order on August 2, 2016 and entered the order on August 26, 2016. Appellant filed written notice of appeal on March 13, 2017. Respondent argued the appeal should be dismissed as untimely. The record does not contain a certificate of service of the order on appellant or other evidence of when the appellant received actual notice that the order was entered.
- Holding: When there is no certificate in the record showing the appellant was served with the judgment, the appellee (and not the appellant) has the burden of showing the appellant received actual notice more than thirty days before filing notice of appeal to warrant a dismissal of the appeal as untimely.
- Note, there is a line of cases that hold that an appeal is untimely where the evidence in the record shows the appellant received actual notice of the judgment more than thirty days before noticing the appeal.

Chapter 50 Custody: Standing, Acting Inconsistently with Parental Rights

Moriggia v. Castelo, ___ N.C. App. ___, 805 S.E.2d 378 (October 17, 2017)

Held: Vacate and remand for further proceedings

- Facts: Appeal of order granting defendant's motion to dismiss custody action based on plaintiff's lack of standing (Rule 12(b)(1)). The parties were in a committed same-sex relationship and decided to have a child. The couple signed a contract, as the "recipient couple", with Carolina Conceptions acknowledging that any child resulting from artificial insemination will be their legitimate child in all aspects. They each contributed a portion toward the cost of the procedure. The defendant became pregnant via in vitro fertilization by anonymous donor egg and donor sperm. Plaintiff attended the prenatal appointments and parenting classes with defendant, helped prepare the home for the baby, and was present at the birth. Plaintiff's biological daughter (born before the parties were involved) was recognized by both parties as the child's big sister. The child was born in 2013, and defendant changed her mind as to plaintiff's role as a parent insisting that only defendant be treated as the child's mother. The relationship between the parties ended in 2014, and in 2015 plaintiff commenced the custody action. The trial court made numerous findings about the intentions and actions of the parties regarding the child, both before and after the birth, including that after the birth, defendant changed her mind regarding co-parenting and did not voluntarily create a family unit or cede her parental authority to plaintiff. The trial court concluded the plaintiff lacked standing because although she was a loving caretaker for the child with a substantial relationship, defendant did not act inconsistently with her parental rights giving plaintiff a right to claim third party custody.
- Sua sponte, the court of appeals held that the trial court in making its determination about whether a parent's conduct is inconsistent with his or her constitutionally protected status must make findings applying the clear, cogent, and convincing evidence standard. That standard "is integral to the jurisdictional determination".
- "Standing *is* an issue of subject matter jurisdiction... subject matter jurisdiction is *the* basis for motions under Rule 12(b)(1)". (emphasis in original) (citations omitted). Reviews of a standing is de novo. G.S. 50-13.1(a) authorizes "any parent, relative, or the person, agency, organization, or institution claiming the right to custody of a minor child" to initiate a custody proceeding. Federal and state constitutions place limitations on the application of G.S. 50-13.1 when a third party (a non-parent) is in a custody dispute with a parent. The third party must allege facts demonstrating a sufficient relationship with the child and that the legal parent acted inconsistently with his or her constitutionally protected status as a parent.
- There is no bright-line test when determining if a parent acted inconsistently with his or her constitutionally protected status; instead, the decision is made on a case-by-case basis. The acts by the parent need not be "bad acts that would endanger the children". (*citing Heatzig v. MacLean*, 191 N.C. App. 451, 455 (2008). The trial court may consider defendant's actions prior to the child's birth as they are relevant to determining her intention. Those actions alone are not controlling but must be considered with defendant's actions taken after the child's birth. The issue is whether the parent intended for the non-parent partner to have a parental role prior to when they become estranged. Whether the parties marry is not determinative. The facts in this case tend to show defendant's intent to form a family unit with the parties as co-parents even though defendant's intentions changed later.

- Plaintiff also appealed the trial court's limitation plaintiff's presentation of her case to one hour. Plaintiff waived that argument by not requesting additional time (as permitted by the local rule) or objecting. There was no abuse of discretion.

Involuntary Admission of a Minor: Procedural Issues, Subject Matter Jurisdiction

**There are four separate appeals that have been consolidated.*

In re P.S., ___ N.C. App. ___, 807 S.E.2d 631 (Nov. 7, 2017)
In re L.T., ___ N.C. App. ___ (Nov. 7, 2017)
In re N.J., ___ N.C. App. ___ (Nov. 7, 2017)
In re R.J., ___ N.C. App. ___ (Nov. 7, 2017)

Held: Vacated in part (subject matter jurisdiction for one appeal); affirmed in part (three of the appeals)

- This opinion involves four consolidated appeals regarding procedural issues, some of which implicate subject matter jurisdiction, for the readmission of minors who are voluntarily admitted to an inpatient mental health facility.
- **Violation of statutory right to timely judicial review of admission.** In all four cases, the minors were admitted to and denied their right to a judicial review within 15 days of their respective initial admissions as provided for by G.S. 122C-224. The minor respondents filed motions to dismiss based on the failure to comply with the statutory time requirement to hold a judicial review. The motions were denied. Minors who are voluntary committed to an inpatient treatment facility by his or her parent's or guardian's affirmations are entitled to due process protections. *See In re A.N.B.*, 232 N.C. App. 406 (2014). The statutory scheme in G.S. Chapter 122C that governs these admissions attempts to balance the needs of the minor who is mentally ill and in need of treatment with the rights of the parent or guardian and with the minor's rights to due process. *See In re Lynette H.,* 323 N.C. 598 (1988). Although the minors' statutory rights to a timely judicial review were denied, the trial court did not err in denying the motions to dismiss. The review hearings did take place, and the law does not require a dismissal as that result would deny treatment to the minors for an indeterminate period of time regardless of whether they were in need of treatment.
    - *Note***:** Any potential civil remedies for the violation were not an issue in the appeal.
- **Subject matter jurisdiction.** Subject matter jurisdiction is conferred by statute or the North Carolina Constitution and cannot be conferred by consent or waiver. When subject matter jurisdiction is conferred by statute, the Court must follow the manner, procedure, or limitations required by the statute and not act beyond the statutory limits in excess of its jurisdiction. G.S. 122C-221(a) applies to the admissions of minors and states "a written application for evaluation or admission, signed by the individual seeking admission, is required." Additionally, for minors, "the legally responsible person" acts for the minor. The court's subject matter jurisdiction to concur in the minor's admission, therefore, requires the filing of an admission authorization form for a minor in need of treatment that is signed by the minor's legally responsible person.
    - The statute does not require the trial court to make an independent determination that the signatures on the admission authorization forms were from a legally responsible person with authority to admit the minor. When an admission authorization form, on its face, appears to comply with the statute, the court may presume the form was signed

by a legally responsible person; however, this presumption may be rebutted by evidence to the contrary. In three of the appeals, the form contained a signature in the appropriate place on the form that indicated it was signed by a parent or guardian.
    - In the case of *In re N.J.*, the form was not signed by a legally responsible person. Instead, the form unambiguously stated it was signed by a representative of the mental health facility based on the verbal authorization of the minor's parent. Verbal consent is not sufficient under the statute; the court lacked subject matter jurisdiction as a result of the absence of the legally responsible person's signature on the admission authorization form.
- **Consent to Admission by Minor.** In *In re L.T.*, the minor consented to his readmission after a brief colloquy with the court. The applicable statutes do not require that a specific procedure, such as a written waiver, be followed for the court to accept the minor's consent. Although a more detailed colloquy with the minor to ensure his consent was voluntary and fully informed would have been a better practice, the minor's due process rights were not violated when the court accepted his consent.

Criminal Case with Application to Child Welfare

Appellate Mandate and Trial Court Jurisdiction

State v. Singletary, ___ N.C. App. ___, 810 S.E.2d 775 (Feb. 6, 2018)

Held: Affirmed

- "The mandate from the appellate division issues on the day that the appellate court *transmits* the mandate to the lower court, not the day when the lower court actually *receives* it." (Emphasis in original). *See* Appellate Rule 32. In this case, the court of appeals opinion was filed on May 3, 2016, and the mandate issued 20 days later, May 23, 2016. The trial court had jurisdiction to act on the same day the mandate issued, May 23, 2016, even though the clerk did not receive the judgment and mandate until May 25, 2016.

Felony Obstruction of Justice by Parent; Accessory After the Fact; Failing to Report

State v. Ditenhafer, ___ N.C. App. ___, 812 S.E.2d 896 (March 20, 2018)

Held: No Error in part and reversed in part

There is a dissent re: accessory after the fact

- "The elements of felony obstruction of justice are (1) unlawfully and willfully (2) acting to prevent, obstruct, impede, or hinder justice (3) in secret and with malice or with deceit and intent to defraud." A person obstructs justice when he or she "deliberately acts to subvert an adverse party's investigation of wrongdoing."
- The court's denial of defendant's motion to dismiss the obstruction of justice charge related to pressuring her daughter to recant was proper. When viewing the evidence in the light most favorable to the state, there was sufficient evidence, including her daughter's testimony, of the defendant's actions that pressured her daughter to recant the daughter's allegation of repeated sexual abuse by her adoptive father/defendant's husband with the willful intent to hinder the investigation of the abuse. Defendant directed her daughter to state she was not sexually

abused and coached her daughter as to what to say. When her daughter did not recant, Defendant punished her, verbally abused her, and turned her family against her.

- On the second charge of obstruction of justice alleging defendant denied DSS (child protection) and law enforcement access to her daughter, the state presented no evidence that defendant denied a request by either agency to interview her daughter. Several interviews with the daughter occurred, and although Defendant was present during many of those interviews, there was no request for Defendant to leave. If defendant would have refused any such request, DSS or law enforcement could have sought a court order to compel defendant's nonattendance at the daughter's interview. *See* G.S. 7B-303 regarding DSS petition for obstruction/interference. As a parent, she had the right to attend the interviews and unilaterally end the one interview she did end. The court erred in denying the motion to dismiss for insufficient evidence; conviction on this charge vacated.
- The elements of accessory after the fact are "(1) a felony was committed; (2) the accused knew that the person he received, relieved or assisted was the person who committed the felony; and (3) the accused rendered assistance to the felon personally." The Defendant's failure to report the crime, which is a mere act of omission and not an affirmative act, does not render her an accessory after the fact under G.S. 14-7. There were no allegations in the indictment about defendant's affirmative acts, which would support an accessory charge, that involved defendant's destruction of physical evidence and telling the investigators her daughter was lying. The opinion recognizes that defendant could have been but was not charged with a misdemeanor for failing to report suspected abuse as provided for in G.S. 7B-301.

Hearsay Exceptions – Child's Statements

State v. Blankenship, ___ N.C. App. ___ (April 17, 2018)

Held: No reversible error in admitting hearsay statements
temporary stay allowed May 3, 2018; PDR filed

- Facts: Defendant was convicted of rape of a child by an adult offender, taking indecent liberties with a child, and sexual offense with a child by an adult offender. He appealed on various issues, one of which challenges the admission of the child victim's hearsay statements.
- The Child's Hearsay Statements: The state filed an opposed motion to admit the child victim's hearsay statements through the other exceptions clauses of Rules of Evidence 803 and 804. The parties stipulated to the child's unavailability due to lack of memory for the purposes of the hearsay exceptions. The child was picked up from defendant's home by her grandparents. As she was being placed in her car seat, she stated to her grandparents "Daddy put his weiner on my coochie," and when asked what a coochie was, she pointed to her vagina. The child was acting normally when she made the statement, and her grandmother was not concerned about the child's mental or physical condition when she picked her up from the home. The court determined the statements were admissible as a present sense impression, excited utterance, and a residential exception. Rules 803(1), (2) and 804(b)(5). The child was taken to the emergency department, where she made a similar statement to the nurse and added "nothing hurt." Those statements were admitted as statements made for the purpose of medical diagnosis or treatment. Rule 803(4). The child again made a similar statement and stated "I

bleed. I have blood" to a victim advocate/forensic interviewer who interviewed her 12 days later. That statement was admitted under the residual exception in Rule 804(b)(5). Approximately one month later, the child made similar statements to a relative whenever the relative changed her diaper. These statement were admitted as a present sense impression and statement of then existing mental, emotional, or physical condition and the residual exception. Rules 803(1), (3) and 804(b)(5).

- Standard of Review: The appellate court reviews de novo the trial court's determination as to whether an out-of-court statement constitutes hearsay. The statement's admission under any hearsay exception other than the residual exception is reviewed for plain error if no objection was made at trial and for prejudicial error if an objection was made at trial. Admission under the residual exception is reviewed for an abuse of discretion.
- Exited Utterance (Rule 803(2)) are statements related to a startling event or condition made when the declarant was under the stress of the excitement caused by the event or condition and must be spontaneous. Although the statement was spontaneous, there was no evidence that showed the declarant child was under stress when she made the statement. Instead, she was described as "normal" and "happy" when she made the statements. The court erred in admitting the statements.
- Present Sense Impression (Rule 803(1)) is a statement describing an event or condition made while the declarant was perceiving the event or condition or immediately thereafter. Immediately thereafter is not defined by a rigid rule regarding the amount of time that has passed. There was no evidence of exactly when the sexual misconduct occurred but instead the state alleged the acts occurred during the month (versus day the child was picked up and made the statement). Without evidence of the time of the event, the court erred in admitting the statement as a present sense impression.
- Statement of Purpose of Medical Diagnosis or Treatment (Rule 803(4)) involves a two-part inquiry: (1) were the statements made for the purpose of medical diagnosis and treatment and (2) were they reasonably pertinent to diagnosis or treatment. When determining the declarant's intent in making the statements, the trial court must consider all the objective circumstances surrounding those statements *State v. Hinnant*, 351 N.C. 277 (2000). Given the child's young age, it is a close call as to her intent. Rather than address whether there was error in admitting the statement, the defendant did not show prejudicial, reversible error given the proper admission of substantially identical statements under the residual hearsay exception.
- Residual Exception (Rule 804(b)(5)) allows for hearsay and requires a six-part test: "(1) has proper notice been given; (2) is the hearsay covered by any of the exceptions listed in Rule 804(b)(1)-(4); (3) is the hearsay statement trustworthy; (4)is the statement material; (5) is the statement more probative on the issue than any other evidence which the proponent can procure through reasonable efforts; and (6) will the interests of justice be best served by admission." *State v. Triplett*, 316 N.C. 1, 9 (1986). The trial court erred in failing to include the factors (2) (whether the statement was admissible under another exception). When determining trustworthiness (the 3rd factor), the court should consider four factors: "(1) the declarant's personal knowledge of the underlying event, (2) the declarant's motivation to speak the truth; (3) whether the declarant recanted; and (4) the reason, within the meaning of Rule 804(a), for the declarant's unavailability." *State v. Nichols*, 321 N.C. 616, 624 (1988). Although the court

concluded that statement possessed an equivalent circumstantial guarantee of trustworthiness, it failed to include any of the four findings. When the trial court fails to make the proper findings regarding the statement's trustworthiness, the appellate court "can 'review the record and make our own determination.' " State v. Valentine, 357 N.C. 512, 518 (2003). After considering the four factors, the appellate court concluded the statements do have a sufficient guarantee of trustworthiness. There was no abuse of discretion in admitting the statements.

Rule of Evidence 412; STDs

State v. Jacobs, __ N.C. ___, 811 S.E.2d 579 (April 6, 2018)

Held: reverse decision of court of appeals and remand for new trial (there is a dissent)

- Facts: Defendant appeals conviction for first-degree sex offense with a child (Defendant is the father of the 13-year-old victim). The state filed motions in limine under G.S. 8C-1, Rule 412 to prohibit the defense from referencing two STDs that were diagnosed in the victim but were not diagnosed in the defendant. The evidence was ruled inadmissible. During his case-in-chief, Defendant submitted an offer of proof pursuant to Rule 412, which was a medical expert report that previewed potential expert testimony of the implications of the STD evidence. After considering the offer of proof, the trial court reaffirmed its earlier decision to exclude the evidence.
- Rule 412 of the NC Rules of Evidence, referred to as the Rape Shield Statute, makes the complainant's sexual behavior irrelevant because of its low probative value and high prejudicial effect except in four narrow situations, one of which is "evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant." Rule 412(b)(2).
- The excluded STD evidence addressed in Defendant's offer of proof fell within the Rule 412(b)(2) exception. The results and report by a proposed expert who is a certified specialist in infectious diseases "affirmatively permit an inference that defendant did not commit the charged crime [and]… diminishes the likelihood of a three-year period of sexual relations between defendant and [the child]." The state's argument that the defendant offered the evidence that inferred sexual activity by the victim so as to unnecessarily embarrass and humiliate her was rejected by the supreme court, which found the purpose of the evidence appears to be what the defendant purports it to be: support for his claim that he did not commit the crime.