

Child Welfare Case Update

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Abuse, Neglect, Dependency

Permanency Planning Hearing: Competent Evidence Requires Testimony

In re S.P., ___ N.C. App. ___ (Oct. 1, 2019)

Held: Vacated and remanded

- **Facts:** This case involves an appeal by respondent father of a permanency planning order that (1) awarded guardianship to a nonparent and (2) included a visitation plan that authorized the guardian in her discretion to expand the visitation beyond the ordered minimum of one 2-hour supervised visit per month. At the permanency planning hearing, the court accepted court reports by DSS and the child's GAL and heard arguments by counsel.
- **Standard of review:** Whether there is competent evidence to support the findings and whether the findings support the conclusions of law. Conclusions of law are reviewed de novo.
- **Holding:** There must be testimony at a permanency planning hearing to support a permanency planning order. This case refers to previously published opinions making the same holding – *In re J.T.*, 252 N.C. App. 19 (2017); *In re D.Y.*, 202 N.C. App. 140 (2010); *In re D.L.*, 166 N.C. App. 574 (2004). This case is indistinguishable. The evidentiary portion of the hearing consisted solely of court reports and counsel's arguments. Court reports alone are insufficient to support findings of fact.

A/N/D Jurisdiction under 7B and UCCJEA

In re C.M.B., ___ N.C. App. ___ (Aug. 6, 2019)

Held: reverse and remand for new hearing under UCCJEA

- **Facts and Timeline**
 - 2009: Neglect petition filed and child adjudicated neglected in NC
 - 2011: permanent plan of guardianship achieved; mother's attorney relieved; DSS relieved of reunification efforts; child's GAL discharged; further review hearings waived
 - 2014: upon mother's motion to review, consent order entered addressing mother's visitation; noted that guardians and child had moved to Tennessee; DSS continued to be relieved of reunification efforts and GAL continued to be discharged.
 - Nov. 2017: guardians file motion in TN to register NC custody order and request modification of order to suspend mother's visitation
 - Dec. 2017–Jan. 2018: mother files 3 pro se motions in NC including that NC invoke jurisdiction under the UCCJEA as the more appropriate forum
 - Jan 2018:
 -
 - TN order determining TN has jurisdiction because guardians, child, and mother no longer reside in NC and grants the motion to modify limiting mother's visitation
 - Guardians file unverified motion in NC to stay mother's pending motions or transfer jurisdiction to TN as NC is an inconvenient forum.
 - 2018: NC court appoints attorney for mother, continues hearing, and determines it needs to discuss jurisdiction with TN judge; email then sent to guardians' attorney and

court clerk (not to mother and/or her counsel) that NC judge spoke with TN judge and agreed jurisdiction is in TN so no need for hearing; order entered allowing guardians' stay and "transferring" jurisdiction to TN based on NC being an inconvenient forum. Mother appeals.

- Distinction between 7B and Chapter 50 Proceedings: Although the trial courts, mother, and guardians started treating this case as a Ch. 50 custody proceeding, it is a juvenile neglect proceeding under Ch. 7B, initiated by DSS in 2009 even though DSS has not been directly involved since 2011. The action was not transferred to a Ch. 50 custody matter under G.S. 7B-911.
- Juvenile Court's Continuing Jurisdiction: The trial court has not terminated its jurisdiction "thus, the juvenile court's jurisdiction continues 'until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first.'" G.S. 7B-201(a). Sl. Op. at 11. "Only North Carolina can terminate its own juvenile court jurisdiction; a court in Tennessee cannot." *Id.* The TN order that transferred jurisdiction from NC to TN "has no effect on North Carolina's jurisdiction under Chapter 7B..." Sl. Op. at 17. Except for a transfer to Ch. 50 under G.S. 7B-911, "Chapter 7B does not provide an option for 'transfer' but instead provides for the trial court to ... terminate the juvenile court jurisdiction and return the parents to their pre-petition status..." Sl. Op. at 14. If the juvenile court determines TN is a more appropriate forum under the UCCJEA, it may terminate its jurisdiction under G.S. 7B-201 to allow for TN to address the custody issues.
- UCCJEA Inconvenient Forum: G.S. 50A-207 provides for the procedures and factors a court must consider when determining whether it is an inconvenient forum. G.S. 50A-110 establishes the procedure for communications between the states' courts. It includes a provision where the court may allow the parties to participate in the communication and if not, the court must give the parties an opportunity to present facts and legal arguments before a jurisdiction decision is made. Additionally, a record of the communication between the courts must be made and the parties must be granted access to the record. In this case, the record was the email from the NC judicial assistant, but it was only sent to the guardians' attorney rather than simultaneously to both parties' counsel. At a hearing that consisted of attorney arguments, unverified motions, and no sworn testimony, the court received no evidence regarding the facts of the case. Without an evidentiary hearing upon which to base findings of fact and a decision, the order determining NC is an inconvenient forum is unsupported. Remanded for an evidentiary hearing.

Termination of Juvenile Court Jurisdiction

McMillan v. McMillan, ___ N.C. App. ___ (Oct. 1, 2019)

Held: Affirmed

- Facts: This case involves two jurisdictional issues one of which challenges whether the district court had subject matter jurisdiction in a Chapter 50 custody action based on whether the jurisdiction of a prior juvenile neglect action had been terminated.
 - In 2010, shortly after the child's birth, DSS initiated a neglect proceeding. After DSS filed the neglect petition but before the child's adjudication, mother filed a complaint for custody.

- After the child’s adjudication in 2011, the Chapter 50 custody action was “administratively removed from the active court calendar and ordered closed by the Forsyth County District Court....” Sl.Op. at 2.
- In 2012, a juvenile court order was entered that stated it “ ‘entered an order pursuant to N.C.G.S. 50- 13.1, 50-13, 50-13.5 and 50-13.7, as provided in G.S. 7B-911, awarding joint custody of the child’ to Plaintiff and Defendant” (Sl.Op. at 3), and “the Court terminates juvenile court jurisdiction and there shall be no further scheduled Court reviews” (Sl. Op. at 4). The record does not show a civil custody order was in fact entered.
- In 2014, father (plaintiff) filed a motion to modify the Ch. 50 custody order. From 2014-2016, the parties operated under various memoranda of judgment/orders addressing temporary custody.
- In 2018, the court entered an order awarding permanent primary legal and physical custody to mother (defendant) and secondary custody to father. Father appeals raising subject matter jurisdiction.
- Subject matter jurisdiction may be raised at any time and is a question of law that is reviewed de novo.
- Juvenile Court Jurisdiction: Pursuant to G.S. 7B-200 and -201, the district court had exclusive original jurisdiction over the juvenile neglect proceeding until terminated by court order or the juvenile turns 18 or is emancipated, whichever occurs first. G.S. 7B-911 specifically authorizes the court to transfer a juvenile proceeding to a Chapter 50 custody action and establishes a detailed procedure for how that is accomplished. In this case, the 2012 juvenile order was insufficient to transfer the action to a civil custody action; “[h]owever, a court presiding over a Chapter 7B abuse, neglect, and/or dependency proceeding may terminate jurisdiction under Section 7B-201 without having to comply with the transfer requirements of Section 7B-911.” Sl.Op. at 13. The juvenile court order expressly stated it was terminating its jurisdiction, ended DSS and the child’s GAL involvement, and returned the parents to pre-petition status. See G.S. 7B-201. The trial court, therefore, had subject matter jurisdiction to hear the child custody case under G.S. Chapter 50.

Termination of Parental Rights

UCCJEA – Modification Jurisdiction; Relocation to Another State; Exclusive Continuing Jurisdiction

In re D.A.Y., ___ N.C. App. ___ (June 18, 2019)

Held: Vacated and Remanded for Dismissal of Petition

- Facts and Timeline:
 - 2013: Final custody order entered in California that awarded custody to father and supervised visits to mother. This order terminated jurisdiction in a juvenile action and transferred custody jurisdiction to family court (similar to N.C.G.S. 7B-911).
 - 2016: father and child moved to Stanly County NC (and remain there) and mother temporarily moved to Nevada.

- 2018: Mother returned to California. Sometime after her return to California, father initiated in NC a termination of parental rights (TPR) action against mother and alleged California's jurisdiction terminated when mother relocated to another state (after father and child also left California for NC). The TPR was granted.
- Respondent mother appeals arguing the NC district court lacked subject matter jurisdiction under the UCCJEA as NC did not have modification jurisdiction.
- Standard of review: Subject matter jurisdiction cannot be consented to or waived and can be raised at any time. Whether the court lacked subject matter jurisdiction is a question of law that is reviewed de novo. "To the extent the trial court's findings of fact refer to the legal effect of actions taken by the parties or the court in California, they are reviewed de novo as conclusions of law." Sl. Op. 5-6.
- Modification Jurisdiction: G.S. 50A-203 governs the modification of another state's child-custody determination and states in part that a NC court may not modify another state's child-custody determination unless
 - the NC court has jurisdiction to make an initial determination under G.S. 50A-201(a)(1) or (a)(2) [home state or significant connection/substantial evidence] **and**
 - the other state's court determines it no longer has exclusive continuing jurisdiction under G.S. 50A-202 or a NC court would be a more convenient forum under G.S. 50A-207 **or**
 - the NC court or other state's court determines "the child, the child's parents, and any other person acting as a parent *do not presently reside in the other state.*" Sl. Op. 7 (emphasis in opinion).

The first prong was satisfied as NC was the child's home state; however, neither basis of the second prong was satisfied. The California court did not determine it no longer had exclusive, continuing jurisdiction or that NC would be a more convenient forum. There was no finding by the California or NC court that respondent mother does not presently reside in California; instead, there was a finding by the NC court that the respondent "is a citizen and resident of the State of California." Sl. Op 9.

- Relocation to Another State: Although mother relocated to Nevada for two years, she returned to California and was a resident there before and at the time the TPR petition was filed and served. Although the Official Comment to G.S. 50A-202, the statute governing exclusive, continuing jurisdiction, states "Continuing jurisdiction is lost when the child, the child's parents, and any person acting as a parent no longer reside in the original decree state.... Exclusive continuing jurisdiction is not reestablished if, after the child, the parents, and all persons acting as parents leave the state, the non-custodial parent returns." Sl. Op. at 10. Since mother was presently residing in California (the original decree state) when the TPR was commenced, NC's jurisdiction under G.S. 50A-203 requires a finding by the California court that is not longer has continuing exclusive jurisdiction.
 - Author's Note: The opinion refers to a finding by the out-of-state court. Case law requires that an order from that out-of-state court must be obtained and included in the NC court record.

Ground: Abandonment

In re C.B.C., ___ N.C. ___ (Sept. 27, 2019)

Held: Affirmed

- **Facts:** This is a private TPR initiated by maternal grandparents against respondent father. After mother's death in 2012, a custody dispute between maternal grandparents and father was initiated, with maternal grandparents ultimately obtaining permanent custody in 2015. Respondent father was granted no visitation but was specifically authorized by the court order to petition for visitation after he was released from prison upon demonstrating his addressing his ongoing substance abuse and mental health issues. Respondent father was also permitted the right to write to his daughter. A first TPR was brought and denied. This is a second TPR, where the court concluded there were grounds to TPR based on neglect and willful abandonment and that the TPR was in the child's best interests. Respondent father appeals.
- **Standard:** A TPR involves a two-stage process: adjudication and disposition. At adjudication, the petitioner has the burden of proving a ground by clear, cogent, and convincing evidence. The court reviews the adjudication by determining whether the findings are supported by clear, cogent, and convincing evidence and whether the findings support the conclusions of law. Conclusions of law are reviewed de novo. If there is an adjudication, the court proceeds to the disposition stage, which considers the best interests of the child.
- "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims." Sl. Op. at 5 (citations omitted). Willful is a question of fact. "[I]f a parent withholds [that parent's] presence, [] love, [] care, the opportunity to display filial affection and willfully [sic] neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." Sl. Op. at 5-6 (citations omitted).
- Under G.S. 7B-1111(a)(7) the relevant time period to determine abandonment is the 6-month period preceding the filing of the TPR petition. Respondent was incarcerated half that time, yet "incarceration, standing alone, is neither a sword nor a shield" in a TPR. Respondent, although having limited options to show affection, "*will not be excused from showing interest in [the] child's welfare by whatever means available.*" Sl. Op. at 6 (emphasis added by supreme court, citing quoting In re D.E.M., 810 S.E.2d 375, 378 (N.C. Ct. App. 2018).
- The findings included respondent had regular income during part of the relevant period but did not provide any support for the child, made no effort to communicate with the child except for one birthday card that was sent after he was served with the TPR, made no effort to contact the custodians about the child's well-being despite having their contact information, and made no efforts to modify the existing custody order. These findings support the conclusion of willful abandonment.
- The father's participation in the first TPR hearing "does not preclude the trial court from later finding that he has willfully withheld his love, care, and affection during the determinative six-month period." Sl. Op at 8-9. Although a court may consider a parent's conduct outside of the determinative 6-month period, that goes to evaluating a parent's credibility and intentions and does not preclude a finding of willful abandonment during the determinative 6-month period.

In re E.H.P., ___ N.C. ___ (Aug. 16, 2019)

Held: Affirmed

- **Facts:** In 2013, a temporary custody order was entered awarding mother sole temporary custody and providing that father shall have no contact with the children until allowed by further order of the court. No motions were filed to seek a change in that temporary custody order. In 2018, mother petitioned for and obtained a TPR against respondent father. Father appealed on both the grounds (willful abandonment under G.S. 7B-1111(a)(7) and failure to pay child support) and disposition that is was in the children’s best interests.
- **The standard of review** for a TPR adjudication is whether the findings are supported by clear, cogent, and convincing evidence and the finding support the conclusions of law. The disposition is reviewed for an abuse of discretion.
- **“Abandonment** implies conduct on the part of a parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child.” Sl. Op. at 7 (citations omitted). “It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child.” Sl. Op. at 8 (citations omitted). Here, respondent concedes he had no contact with the children during the determinative 6-month time period under G.S. 7B-1111(a)(7). Although there was a temporary custody order forbidding contact between him and the children, father made no effort to modify the terms of the temporary order to allow contact between him and the children. “A temporary custody order is by definition provisional, and the order at issue here expressly contemplated the possibility that the no-contact provision would be modified in a future order.” Sl. Op. at 9-10. Although father was incarcerated during the relevant time period, he was aware of his ability to seek relief from trial court orders as he filed a motion to suspend his child support. Father’s conduct is sufficient to meet the standard of willful abandonment.
- An adjudication of a **a single ground** under G.S. 7B-1111(a) is sufficient to support a TPR. Having affirmed one ground, the court need not address the appeal on the ground of willful failure to pay child support.
- **At disposition**, the court made detailed findings addressing the criteria of G.S. 7B-1110(a) include the bond with and strong likelihood of adoption by their stepfather and the lack of bond with their father. There was no abuse of discretion in determining the TPR is in the children’s best interests.

Adjudication: Neglect, Failure to Make Reasonable Progress, Conclusions Not Supported

In re C.N., ___ N.C. App. ___ (Aug. 6, 2019)

Held: reversed

- **Facts:** In 2016 DSS filed a petition after law enforcement and EMTs responded to an incident involving injuries to an infant who spilled Mr. Clean on herself. They observed a dirty home that had needles in it, mother’s reported use of marijuana, past incidents of domestic violence, and concerns about mother’s mental health. Based on mother’s stipulations, the children were adjudicated neglected due to improper care, supervision, or discipline and living in an environment injurious to the children’s welfare. Mother’s court ordered case plan included

obtain and maintain stable income and housing, complete a mental health assessment and comply with all recommendations, sign releases for DSS and the GAL, submit to random drug screens, and successfully complete parenting classes and substance abuse treatment. The court ordered weekly supervised visitation for mother. In 2018, the court ultimately changed the permanent plans to a primary plan of adoption and concurrent plan of reunification. DSS filed a TPR petition alleging neglect and willful failure to make reasonable progress under G.S. 7B-1111(a)(1) & (2). The court ordered the TPR based on both grounds and mother appealed. DSS did not file a response or brief in the appeal.

- Standard of review: Whether clear, cogent, and convincing evidence exists to support the court's findings of fact and whether the findings support the conclusions of law. Conclusions of law are reviewed de novo.
- Neglect: Where the juvenile has been removed from the parent's custody, the court must consider evidence of changed conditions in light of the prior neglect and the probability of the repetition of neglect. The court made specific findings that included mother completed the assessments but has not been consistent with treatment, is not compliant with her case plan, lives with and is dependent on her boyfriend, was late to some and did not attend some visits with the children but when she did visit she was appropriate, took 13 of 38 drug screens with mixed results, and just started to re-engage with services on the day of the TPR hearing. DSS has the burden of overcoming the presumption of parental fitness by clear, cogent, and convincing evidence that a ground exists to terminate parental rights. Failure to make reasonable progress on a case plan may indicate a likelihood of future neglect but such failure must be viewed by considering the abilities and means of the parent including their resources and priority for securing basic life necessities. Mother made some progress on her case plan to reduce the likelihood of future neglect by completing parenting classes, the assessments, re-engaging in services, recently submitting to drug testing, being employed, and obtaining stable housing and transportation. "Here, the juveniles were removed from Respondent-mother's care after the youngest child spilled Mr. Clean onto herself and Respondent-mother called for medical assistance. No evidence shows and the trial court made no findings indicated such actions were likely to be repeated." Sl. Op. at 10.
- Failure to Make Reasonable Progress: Mother completed her assessment and sought mental health services. "While evidence tending to show missed therapy sessions may support the trial court's finding that her attending treatment was inconsistent, a parent's inconsistent attendance at therapy sessions does not alone show a lack of reasonable progress, particularly when a parent is working or seeking to comply with other provisions of her plan to meet her and her children's needs." Sl. Op. 12. Reasonable progress does not require perfection but does require more than extremely limited progress. Undisputed evidence shows mother made reasonable progress by reenrolling in substance abuse treatment, continuing therapy, taking medication for her mental health issues, completed parenting classes, improved her housing and transportation, was employed, and maintained better contact with DSS. Although mother's stable housing and transportation were partly attributable to her boyfriend, her "case plan does not and cannot require that she alone be responsible for providing her housing and transportation." Sl. Op. at 14. Additionally, housing and transportation do not relate to the

causes or conditions for the children's removal. See G.S. 7B-904 (court's authority). DSS has not met its burden against the parental presumption of fitness.

Failure to Make Reasonable Progress to Correct the Conditions that Led to the Child's Removal

In re B.O.A., ___ N.C. ___ (Aug. 16, 2019)

Held: Reverse COA decision

- **Facts and Procedural History:** DSS received a report after law enforcement responded to a domestic violence call where both parents were arrested and the infant child presented with a bruise on her arm. A petition alleging neglect was filed by DSS. Mother and DSS entered into a case plan where mother agreed to compete DV counseling and avoid DV situations; complete a mental health assessment and take medication as prescribed; complete parenting classes and utilize the skills during her visits; remain drug-free, submit to random drug screens, and participate in weekly substance abuse therapy; refrain from criminal activity; and maintain stable income for 3 months. The child was adjudicated neglected based on an injurious environment, and at disposition, mother was ordered to comply with the provisions of the case plan that she agreed to. Ultimately, DSS initiated a TPR, which was granted based upon mother's failure to make reasonable progress in correcting the conditions that led to the child's removal from mother's home. Mother appealed, and the court of appeals reversed the TPR based on a lack of evidence to support some findings and the trial court's reliance on portions of her case plan (substance abuse, mental health, and income) that were not relevant to the conditions that led to the child's removal – domestic violence and a bruise on the infant's arm. The supreme court granted discretionary review.
- **Standard of review:** whether the findings of fact are supported by clear, cogent, and convincing evidence and whether those finding support the conclusions of law. A finding of fact that is supported by clear, cogent, and convincing evidence is conclusive even if the record contains evidence that would support a contrary finding.
- **Statutory interpretation of conditions that led to the removal of the juvenile:** "It is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used.... Legislative intent controls the meaning of the statute." Sl. Op. at 13 (citations omitted). "When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute." Sl. Op. at 14 (citations omitted). There is nothing in the language of G.S. 7B-1111(a)(2) that suggests the only "conditions of removal" that are relevant "are limited to those which are explicitly set out in a petition seeking the entry of a nonsecure custody order or a determination that a particular child is an abused, neglected, or dependent juvenile." *Id.* In looking at other related statutes, G.S. 7B-904(d1)(3), a more expansive reading of the language in G.S. 7B-1111(a)(2) is appropriate. "[T]he trial judge in an abuse, neglect, or dependency proceeding has the authority to order a parent to take any step reasonably required to alleviate any condition that directly or indirectly contributed to causing the juvenile's removal from the parental home. In addition, G.S. 7B-904(d1)(3) authorizes the trial judge, as he or she gains a better understanding of the relevant family dynamic, to modify and update a parent's case plan in subsequent review proceedings.... Thus the relevant statutory

provisions appears to contemplate an ongoing examination of the circumstances that surrounded the juvenile's removal from the home and the steps that need to be taken in order to remediate both the direct and indirect underlying causes of the juvenile's removal...." Sl. Op. at 15-16.

- "Parental compliance with a judicially adopted case plan is relevant in determining whether grounds exist pursuant to G.S. 7B-1111(a)(2) even when there is no direct and immediate relationship between the conditions addressed in the case plan and the circumstances that led to the initial governmental intervention into the family's life, as long as the objectives sought to be achieved by the case plan provision in question address issues that contributed to causing the problematic circumstances that led to the juvenile's removal from the parental home." Sl. Op. at 20-21. A more restrictive interpretation would fail to recognize the complex issues that must be resolved in an abuse, neglect, or dependency case and "would unduly handicap our trial courts in their efforts to rectify the effects of abuse, neglect, and dependency." Sl. Op. at 21. "[A] child's removal is rarely the result of a single, specific incident and is, instead, typically caused by the confluence of multiple factors, some of which are immediately apparent and some of which only become apparent in light of further investigation." *Id.* A judge's authority, however, is not unlimited. Reasonable progress does not require full compliance with all the elements of a case plan. The extent to which a parent has reasonably complied with a case plan provision that addresses an issue that directly or indirectly contributed to the child's removal is relevant for a determination of whether the parent failed to make reasonable progress under G.S. 7B-1111(a)(2). In this case, "the necessary nexus between the components of the court-approved case plan with which respondent-mother failed to comply and the 'conditions which led to [Bev's] removal' from the parental home exists." Sl. Op. at 22. Mother's progress was limited and not reasonable as she abused and/or did not take her prescriptions, did not submit to her drug tests and failed some of them, did not demonstrate parenting skills she learned during visits, and did not complete the mental health evaluation and attend therapy.

Prior TPR and Failure to Safe Home

In re T.N.H., ___ N.C. ___ (Aug. 16, 2019)

Held: Affirmed

- Facts: Respondent mother appeals a TPR based on G.S. 7B-1111(a)(9) (prior involuntary TPR and lack of ability or willingness to establish a safe home). Mother has an extensive DSS history dating back to 2000 that resulted in several of her children being removed from her care and not returned to her. Regarding T.N.H., a neglect petition was filed by DSS in 2015 due to domestic violence and threats to the juvenile by the juvenile's father. In 2015, T.N.H. was adjudicated neglected based on stipulations made by the parties, including mother. In 2017, guardianship was awarded with supervised visitation ordered with mother and father. In 2018, a new neglect petition was filed. T.N.H. was adjudicated neglected based on a lack of proper care and supervision. He had been permitted to stay with his parents unsupervised in a motel room, where he left the room and met a man who sexually abused him. His parents never reported the abuse, and his parents (and the man) were charged with felony child abuse. Mom is incarcerated. DSS initiated this TPR, which was granted. The appeal asserts that there was insufficient evidence and insufficient findings of fact for the TPR.

- The court must take evidence, find facts, and adjudicated the (non)existence of a ground under G.S. 7B-1111(a). “While Rule 52(a) does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts, it does require 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 he conclusions of law reached.” Sl. Op. at 8 quoting *Quick v. Quick*, 305 N.C. 446, 451-52 (1982) (emphasis in original).
- Here, the trial court’s reliance in part on evidence from prior proceedings and findings in earlier orders is proper and appropriate. Respondent is collaterally estopped from re-litigating the findings of fact in the 2015 and 2018 neglect adjudications that were based on her stipulations and were not appealed. “We agree with the Court of Appeals’ precedent holding that the trial court may not rely solely on prior court orders and reports but must receive some oral testimony at the hearing and make an independent determination regarding the evidence presented.” Sl. Op. at 12. The trial court took judicial notice of the record. Several of the findings about respondent’s lack of progress were from the 2018 adjudicatory order which applies the clear and convincing evidence standard. The trial court also heard testimony from the social worker about the history and current lack of progress and based its finding in part of that testimony and demonstrates the court’s independent determination of the evidence.
- Regarding G.S. 7B-1111(j)(9), respondent’s rights to another child were terminated by court order. The record supports the court’s finding that respondent lacks the ability or willingness to provide a safe home given her current incarceration with unknown release date, lack of stable home upon her release from prison and history of unstable housing, failure to satisfactorily complete her case plan, sexual abuse of T.N.H. while in her care and failure to believe his disclosure or to report the abuse, and lack of understanding of his trauma and mental health needs.

Disposition- Best Interests Findings

In re A.U.D., ___ N.C. ___ (Sept. 27, 2019)

Held: Affirmed (Newby, J. dissent)

- Facts: This a private TPR initiated by a child-placing agency, BCS, against respondent father. After the twins’ birth, mother placed children in the care of her aunt. Subsequently, she executed a relinquishment to BCS. BCS removed the children from aunt’s home and placed the children with a prospective adoptive family where they continued to reside. BCS filed a TPR petition. In the TPR, respondent father’s paternity was established and after a hearing, the court denied the TPR after determining that although the ground of failure to legitimate/establish paternity existed, the TPR was not in the children’s best interests. BCS appeals. The issue on appeal is the best interests of the children determination.
- Standard of review: The court’s dispositional determination regarding a child’s best interests is reviewed for an abuse of discretion. An “abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” Sl. Op. at 5 (citations omitted).
- G.S. 7B-1110(a) sets forth the statutory criteria for best interests of the children. The trial court must consider all the factors, which the record demonstrates the trial court did. However, written findings are not required of each factor, although a better practice would have been to

make written findings of those factors identified by BCS. Under the circumstances of this case, the failure to do so is not reversible error. There was no conflict in the evidence regarding the likelihood of adoption; it was undisputed that no bond existed between the children and father; and because this was a private TPR, there was no permanent plan for the children.

- Although the GAL recommended TPR, the trial court is not bound by that recommendation; instead the trial court has the authority to weigh all the evidence.
- A stated purpose of the Juvenile Code is to prevent “the unnecessary or inappropriate separation of juveniles from their parents” (G.S. 7B-100(4)) and to place the best interests of the juvenile who is not to be returned home as the paramount consideration for the court (G.S. 7B-1000(5)). Here, the trial court considered the competing purposes of the Juvenile Code and the dispositional factors in G.S. 7B-1110(a). Those considerations also included other relevant circumstances that the mother solely relinquished the children to BCS; father was not afforded an opportunity to care for the children before the relinquishment; he proactively attempted (unsuccessfully) to establish paternity; he sought to have the aunt, who had provided appropriate care for the children, obtain custody of the children until his release from prison when he could care for them; and he engaged in services that would result in self-improvement while he was incarcerated. Although evidence would support a contrary finding, the appellate court lacks authority to reweigh the evidence.
- Rule 58 establishes that a judgement is entered when it is reduced to writing, signed by the judge, and filed with the clerk. As held by the court of appeals, oral findings made by the trial court may change before the final written order is entered. Any differences between the oral findings rendered at the hearing and those established in the written order is not an error.
- Dissent: The adjudicatory stage focuses on the fairness to the parent and safeguards the parent’s interests. The dispositional stage requires that the best interests of the children control and safeguards the children’s best interests. The trial court misapplied the law and abused its discretion when it improperly weighed factors related to the father’s interest at disposition under the catchall provision of G.S. 7B-1110(a)(6). The five specific enumerated factors in G.S. 7B-1111(a)(1)-(5) are all relevant and directed the trial court’s discretion down a specific path which would have been to TPR.

In re Z.L.W., ___ N.C. ___ (Aug. 16, 2019)

Held: Affirmed

- Respondent father’s rights to his 2 children were terminated; both children had previously been adjudicated neglected and had a primary permanent plan of adoption. Father appeals the TPR, arguing the court abused its discretion when determining the TPR was in the children’s best interests despite finding there was a strong bond between the respondent and children.
- After a ground to TPR has been found, the court proceeds to the dispositional phase which considers factors under G.S. 7B-1110(a) when determining if the TPR is in the child’s best interests. The standard of review is an abuse of discretion, which is when “the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” Sl. Op. at 5-6.
- The court made findings about the children’s ages, likelihood of adoption, need to achieve the permanent plan of adoption, bond with the respondent father, quality of relationship with the

prospective adoptive parents, and other factors, none of which were challenged and are therefore binding on appeal.

- Although the court made a finding that the children had a strong bond with respondent father, that factor is just one that must be considered under G.S. 7B-1110(a). The court may give more weight to the other factors, and the “court’s determination that other factors outweighed respondent’s strong bond with [the children] was not manifestly unsupported by reason.” Sl. Op. at 9. In response to father’s argument that other dispositional alternatives should have been considered so that a relationship with father could be maintained, G.S. 7B-100(5) states “the best interests of the juvenile are of paramount consideration by the court and ... when it is not in the juvenile’s best interest to be returned home, the juvenile will be placed in a *safe, permanent home within a reasonable amount of time.*” (emphasis in opinion).

In re T.H., ___ N.C. App. ___ (June 18, 2019)

Held: Affirmed

- Facts: This TPR arises from an underlying action where the two children were adjudicated neglected and dependent related to their parents’ substance use, mental health issues, and criminal charges. The TPR was granted on the grounds of neglect and willful failure to make reasonable progress to correct the conditions that led to the children’s removal. Respondent mother appeals the disposition only, which concluded that the TPR is in the children’s best interests.
- Best Interests and Standard of Review: After an adjudication of at least one ground to terminate parental rights, the court proceeds to disposition, which is based on whether the TPR is in the child’s best interests by considering factors in G.S. 7B-1110. The standard of review is an abuse of discretion, which is when “the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” Sl. Op. 5. Here, there was no abuse of discretion as the court’s order reflects it properly considered the required factors and made a reasoned best interests determination.
- Best Interests Findings:
 - Findings under G.S. 7B-906.2(b) addressing reunification efforts apply to permanency planning hearings and not termination of parental rights proceedings, which are governed by Article 11 of G.S. Chapter 7B. The finding that the TPR is necessary to accomplish the best permanent plan of adoption satisfies G.S. 7B-1110(a)(3).
 - When considering any other relevant factor (G.S. 7B-1110(a)(6)), the trial court exercised its discretion when determining the mother’s claim of recent sobriety was outweighed by her years of unaddressed substance use as it is “the trial judge’s duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefore.” Sl. Op. at 7. Additionally, G.S. 7B-1110 does not require the court to make findings on all of the evidence presented but instead requires written findings of relevant factors. “A factor is relevant if there is conflicting evidence concerning the factor that is placed in issue.” Sl. Op. at 9. Without conflicting evidence concerning DSS’s efforts to contact mother while she was incarcerated, no findings were required.

Proper Order and Appeal

In re C.M.C., ___ N.C. ___ (Sept. 27, 2019)

Held: Affirmed

- **Facts:** Infant was adjudicated abused, neglected, and dependent and at initial disposition, reunification efforts with both parents were ceased. At a permanency planning hearing, the court adopted a primary plan of adoption and secondary plan of guardianship. DSS filed a petition to terminate parental rights. At the end of the TPR hearing, the court rendered a decision, noting findings and conclusions, and asking DSS counsel to draft the order. The order was signed by Judge Leslie, who was not the presiding trial judge. The respondent mother appealed. Two days later, DSS filed a Rule 60 motion seeking that the orders be vacated and the trial court sign a new TPR order. The motion was granted and a new order was signed by the trial court. Respondent mother appealed the new TPR order.
- **Issue:** Did the trial court lack authority to vacate the first TPR order after mother had noted an appeal of that order?
- **Rule 60(b)(4) & (6)** allows the trial judge to grant relief from any order that was entered by mistake or inadvertence or any other reason justifying relief. Adopting reasoning by prior opinions published by the court of appeals, the TPR order signed by Judge Leslie was nullity because Rule 52 requires the judge presiding over a non-jury trial to (1) make findings of fact, (2) state conclusions based on the facts, and (3) enter judgment. Rule 58 provides that “a judgment is entered when it is reduced to writing, signed by *the* judge, and filed with the clerk.” Sl. op. at 7- (emphasis added by supreme court). “A party may not properly appeal from a judgment until it has been entered.” Sl. Op. at 8. Since the first TPR order was not a viable order that was entered, the appeal by respondent mother did not divest the trial court of jurisdiction to make the necessary correction.

No-Merit Brief, App. Rule 3.1

In re L.E.M., ___ N.C. ___ (August 16, 2019)

Held: Vacate court of appeals order of dismissal; affirmed district court TPR order

- **Procedural history:** Respondent father appealed an order terminating his parental rights. Pursuant to Rule 3.1(d) (now Rule 3.1(e), which is substantially similar), Respondent’s attorney filed a no-merit brief and raised 3 issues for review. Respondent did not file a pro se brief. The court of appeals dismissed the appeal based on a previously published opinion, *In re L.V.*, 814 S.E.2d 928 (2018), that held the court lacked authority to consider the appeal because there were no issues raised for review since the respondent had not filed a pro se brief. There was a dissent and a concurrence in result only that both addressed the erroneous holding of *In re L.V.* An appeal by right was made to the NC Supreme Court.
- **Holding:** Appellate “Rule 3.1 mandates an independent review on appeal of the issues contained in a no-merit brief...” Sl. Op. at 1. *In re L.V. is overruled.*
- The origin of the no merit brief stems from the U.S. Supreme Court rule that allows for an *Anders* review in criminal cases. After the court of appeals previously held such a review does not apply to termination of parental rights cases, the N.C. Supreme Court adopted Appellate

Rule 3.1(d), which authorizes a no-merit brief for appeals of TPR and abuse, neglect, or dependency orders. In interpreting Rule 3.1(d), the court is “mindful of the fundamental interests implicated in a proceeding involving a termination of parental rights. The United States Court has recognized that ‘[w]hen the State initiates a parental rights termination proceeding... [a] parent’s interest in the accuracy and justice of the decision to terminate his or her parental status is a commanding one.’ “ Sl. Op. at 8. (citations omitted). Rule 3.1 suggests that briefs will be considered and an independent review will be conducted without stating or implying that the review is contingent on whether a pro se brief is actually filed.

- Rather than remand for an independent review, in the furtherance of the goals of the Juvenile Code to expeditiously resolve cases and obtain permanency for the juvenile, the supreme court conducted its own review of the issues raised in the no-merit brief. After considering those issues and the record, the supreme court affirmed the trial court’s order as being supported by competent evidence and based on proper legal grounds.

In re T.H., ___ N.C. App. ___ (June 18, 2019)

Held: Affirmed

- Facts: Respondent father appeals the TPR ground of neglect. His counsel filed a “no-merit” brief under App. Rule 3.1(e) and requested the appellate court conduct an independent review. Respondent father did not file his own brief. The appellate court exercised its discretion under App. Rule 2 to consider issues that were not raised in the briefs and found no prejudicial error.
- Anders-type Review: There is no statutory or constitutional right to an independent review by the appellate court when no issue has been brought to the court’s attention. App. Rule 3.1(e) does not include the same Anders requirements that are established by the U.S. Supreme Court for criminal appeals. A TPR is not criminal in nature, triggering the requirements of Anders. Although parents have a statutory right to counsel in a TPR, there is no statutory right to the Anders procedures. Until the General Assembly or N.C. Supreme Court (by rule or holding) creates the right to an Anders-type review of issues that are not raised by the parties or their counsel, App. Rule 28 limits the right of review to issues actually raised in the briefs.
 - Author’s Note: The NC Supreme Court heard arguments on May 28, 2019 on this issue in another matter, In re L.E.M., 820 S.E.2d 577 (2018).

Adoptions

Indian Child Welfare Act (ICWA) – Subject Matter Jurisdiction; Tribal Court

In re Adoption of K.L.J., ___ N.C. App. ___ (July 16, 2019)

Held: Affirmed

- Facts: Two children, who are members of the Cheyenne River Sioux Tribe and are “Indian children” under ICWA, are the subject of this adoption proceeding. They had previously been the subject of a child custody action in South Dakota, where their parents’ rights were terminated. The Tribal Court assumed jurisdiction and placed the children in the care of their paternal aunt, the Indian custodian, and then closed and dismissed the case. Months later, the aunt agreed to the appointment of a guardian for the children by the New Hanover County Superior Court Clerk. Two years later, the guardians filed adoption petitions for the children.

After the petitions were filed, the clerk ordered the petitioners to give notice to the Tribe and to the aunt. The Tribal Court did not timely respond, but the aunt did and intervened requesting the children's return. The adoption proceeding was transferred to district court to address the issue of subject matter jurisdiction. Before the district court hearing, the aunt filed an ex parte motion with the Tribal Court asking it to assume jurisdiction and provided to the NC district court a faxed copy of what is purported to be an order of jurisdiction from the Tribal Court. The NC district court concluded it had jurisdiction over the adoption proceedings and granted both adoptions. The aunt appeals arguing the Tribal Court had exclusive subject matter jurisdiction and the NC district court failed to give full faith and credit to the Tribal Court order.

- Standard of Review: Subject matter jurisdiction is reviewed de novo. Whether a trial court has properly provided full faith and credit to a foreign judgment is also reviewed de novo.
- Under 25 U.S.C. 1911(a) of ICWA, a tribal court has exclusive jurisdiction of a child custody proceeding in 3 circumstances: "(1) over an Indian child who resides within the reservation; (2) over an Indian child domiciled within the reservation; and (3) over an Indian child who is a ward of the tribal court." Sl. Op. at 6. In this case, the children did not reside and were not domiciled within an Indian reservation. ICWA does not define a tribal court ward or address who makes the finding as to the child's status. Black's law dictionary definition of "ward of the state" applies – "someone who is housed by, and receives protection and necessities, from the government." Sl. Op. at 7. Under this definition, once a child has stopped being housed by or provided protections or necessities from the tribe, she is no longer the tribal court's ward. Here, the tribe did not provide protections or necessities to the children; instead, guardianship was obtained through the NC courts.
- Under 25 U.S.C. 1911(d) of ICWA, the state court must give full faith and credit to judicial proceedings of any Indian tribe that are applicable to child custody proceedings to the same extent as the state court gives to other entities. The Uniform Enforcement Foreign Judgments Act (UEFJA) applies, and it requires the party seeking to enforce a foreign judgment to file a properly authenticated foreign judgment with the office of a clerk of superior court in any NC county and an accompanying affidavit attesting that the judgment is both final and unsatisfied in whole or part. There was no such filing here but instead the only copy of the Tribal Court's order is an unauthenticated copy. Additionally, the adoption petitioners and children's due process rights were not protected in Tribal Court as there is no record of notice to and a meaningful opportunity to participate in that proceeding by either the adoption petitioners or children (via their GAL). "Due process will not allow the best interests of the children to be silenced." Sl. Op. at 11. The district court did not err in failing to give full faith and credit to the tribal court order.